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The Developing Recognition of the Juridic Autonomy of the Eastern Catholic Churches: From the Pamphilian Jurisprudence to the *CCEO*

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Sean T. Doyle

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The Developing Recognition of the Juridic Autonomy of the Eastern Catholic Churches: From the Pamphilian Jurisprudence to the *CCEO*

Sean T. Doyle, J.C.D.

Director: John D. Faris, J.C.O.D.

The juridic autonomy of the Eastern Churches was affirmed in article five of the decree *Orientalium Ecclesiarum* of the Second Vatican Council. Such an affirmation, and the codified law that followed and built on this conciliar affirmation, is the result of a centuries-long development in the Catholic Church concerning the recognition of Eastern juridic autonomy. This development was a complex process, involving differing concepts of how Eastern communities were constituted juridically, and calls for explanation and analysis.

This dissertation reviews the development of recognition of Eastern juridic autonomy in the Catholic Church, focusing particularly on the period from the Council of Trent to today. It examines pertinent papal, conciliar, and curial documents, as well as relevant canonical commentary on the question, in tracing this development over the centuries.

After a brief review of events up to the Union of Brest in 1595–1596, the first chapter considers the jurisprudence on the juridic autonomy of the Eastern communities in the sixteenth and seventeenth centuries, particularly an unpromulgated decision of a particular congregation of the Sacred Congregation for the Propagation of the Faith of June 4, 1631 that would be rendered as a general rule of interpretation by the canonist Angelo Maria Verricelli. The second chapter analyzes the jurisprudence of Pope Benedict XIV on this rule and how his understanding of autonomy was affected by his particular concepts of "Eastern Church," "rite," and "*natio*." The

third chapter reviews the pontificate of Pius IX and the First Vatican Council, when divergent ideas of Eastern juridic autonomy led to clashes between Roman authorities and Eastern hierarchs. The fourth chapter looks at how the understanding of Eastern juridic autonomy developed during the period from the pontificate of Pope Leo XIII through that of Pope Pius XII, focusing on the reestablishment of the jurisprudence surrounding the 1631 decision as a rule of praxis, the norms of the 1917 *Codex Iuris Canonici* impacting the understanding of Eastern juridic autonomy, and the first attempt to render an Eastern code of law. Finally, the fifth chapter examines how the understanding of Eastern juridic autonomy developed in the Second Vatican Council and the second process to codify Eastern law, ending with a review of relevant norms of current canonical legislation.

This study contributes to canonical studies in two ways. First, it indicates the significance that the jurisprudence surrounding the June 4, 1631 decision had on how the understanding of Eastern juridic autonomy developed in the Catholic Church. Second, the current canonical norms impacting autonomy can be better understood in light of the historical development, and any future alterations to these norms can be better formulated through such understanding.

This dissertation by Sean T. Doyle fulfills the dissertation requirement for the doctoral degree in canon law approved by John D. Faris, J.C.O.D., as Director, and by Kurt Martens, J.C.D., and Thomas J. Green, J.C.D., as Readers.

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John D. Faris, J.C.O.D., Director

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Kurt Martens, J.C.D., Reader

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Thomas J. Green, J.C.D., Reader

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ABBREVIATIONS

1917 *CIC* = 1917 code = *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (Rome: Typis Polyglottis Vaticanis, 1917).

1983 *CIC* = 1983 Latin code = *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983).

AAS = *Acta Apostolicae Sedis* (1909–).

Acta Leonis XIII = *Leonis XIII. Pont. Max. Acta*, 23 vols. (Rome: Typographia Vaticana, 1881–1905).

Acta Synodalia = *Acta et Documenta Concilio Oecumenico Vaticano II Apparando*, Series III: Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, 6 vols. in 32 tomes, 2 appendices, index (Rome: Typis Polyglottis Vaticanis, 1970–2000).

Antepraeparatoria = *Acta et Documenta Concilio Oecumenico Vaticano II Apparando*, Series I: Antepraeparatoria, 5 vols. in 16 tomes (Rome: Typis Polyglottis Vaticanis, 1960–1961).

ASS = *Acta Sanctae Sedis* (1865–1908).

Bullarium Benedicti XIV = *Sanctissimi Domini Nostri Benedicti Papae XIV Bullarium*, 4 vols. (Venice: Bartholomew Occhi, 1768).

Bullpont = *Bullarium Pontificium Sacrae Congregationis de Propaganda Fide*, 5 vols., 2 appendices, index (Rome: Typis Collegii Urbani/Typis S. Congregationis de Propaganda Fide, 1839–1858).

c./cc. = canon/canons.

CA = Pius XII, *motu proprio Crebrae allatae*, February 22, 1949: *AAS* 41 (1949) 89–119.

CCEO = 1990 Eastern code = *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1990).

CD = Second Vatican Council, decree *Christus Dominus*, October 28, 1965: *AAS* 58 (1966) 673–696.

CS = Pius XII, *motu proprio Cleri sanctitati*, June 2, 1957: *AAS* 49 (1957) 433–603.

Fontes = *Codicis Iuris Canonici Fontes*, 9 vols., ed. Pietro Cardinal Gasparri and Justinián Cardinal Serédi (Rome: Typis Polyglottis Vaticanis, 1923–1939).

Fonti = Codificazione Canonica Orientale Fonti, Series I: 13 vols. in 17 tomes; Series II: 19 vols. in 32 tomes; Series III: 14 vols. in 20 tomes (1930–1980).

Iuspont = Ius Pontificium de Propaganda Fide, Part 1: 7 vols. in 8 tomes; Part 2: 1 vol., ed. Raffaele de Martinis (Rome: Typis Polyglottis S.C. de Propaganda Fide, 1888–1909).

LEF = Lex Ecclesiae Fundamentalis.

Leges Ecclesiae = Leges Ecclesiae post Codicem Iuris Canonici editae, 8 vols., ed. Xaverius Ochoa and Andrés Gutiérrez (Rome: Commentarium pro Religiosis/Ediurcla, 1966–1998).

LG = Second Vatican Council, dogmatic constitution *Lumen gentium*, November 21, 1964: *AAS* 57 (1965) 5–67.

Mansi = *Sacrorum Conciliorum Nova et Amplissima Collectio*, 53 vols. in 58 tomes, ed. Giovanni Domenico Mansi et al. (Hubert Welter, 1901–1927).

OE = Second Vatican Council, decree *Orientalium Ecclesiarum*, November 21, 1964: *AAS* 57 (1965) 76–85.

Opera Omnia = Benedicti XIV. Pont. Opt. Max. Opera Omnia in Tomos XVII. Distributa, 17 vols. in 18 tomes (Prati: Typographia Aldina, 1839–1847).

PAL = Pius XII, *motu proprio Postquam Apostolicis Litteris*, February 9, 1952: *AAS* 44 (1952) 65–152.

PB = John Paul II, apostolic constitution *Pastor bonus*, June 28, 1988: *AAS* 80 (1988) 842–934.

PIO = Pontificio Istituto Orientale.

Praeparatoria = Acta et Documenta Concilio Oecumenico Vaticano II Apparando, Series II: Praeparatoria, 4 vols. in 11 tomes (Rome: Typis Polyglottis Vaticanis, 1964–1995).

REU = Paul VI, apostolic constitution *Regimini Ecclesiae Universae*, August 15, 1967: *AAS* 59 (1967) 885–928.

SN = Pius XII, *motu proprio Sollicitudinem Nostram*, January 6, 1950: *AAS* 42 (1950) 5–120.

Tanner = *Decrees of the Ecumenical Councils*, 2 vols., ed. Norman P. Tanner (London and Washington, D.C.: Sheed & Ward and Georgetown University Press, 1990).

UR = Second Vatican Council, decree *Unitatis redintegratio*, November 21, 1964: *AAS* 57 (1965) 90–112.

NOTE ON TERMINOLOGY

When dealing with the relationship between the Roman pontiff and the Eastern Christian communities, the question of terminology is necessarily involved. These communities have been called "rites," "*nationes*," and "Churches." Unfortunately, each of these terms entails a different understanding of the underlying reality. For example, many communities formerly called "*nationes*" are now called "Churches *sui iuris*" under canon 27 of the 1990 *Codex Canonum Ecclesiarum Orientalium*, yet the former term implies a much more limited autonomy than the latter.

To alleviate possible confusion, this dissertation has made the effort to use "Eastern communities" to refer to the underlying communal entity. The other terms shall be employed only when the documents being analyzed use those terms, and with the specific implications of such terms. While every attempt has been made to be consistent in this regard, there may nevertheless be instances where the other terms are employed outside the specific context of textual analysis. Any such lapses are entirely the fault of the author.

In addition, the word "Catholic" has been generally omitted from the phrase "Eastern communities." Likewise, the terms "Eastern faithful," used in the body of the dissertation, and "Easterners," used when translating *Orientales*, generally omit "Catholic." While this dissertation does focus on those Eastern communities in Catholic communion, one must keep in mind that for much of Church history, separated Eastern Christians were still considered legally Catholic but in schism. Hence, the use of the term "Catholic" could imply that Eastern communities not in communion with the Roman Church were considered distinct legal entities,

when no such understanding was present until relatively recently. "Catholic" will be used when it is clear that only communities in Catholic communion are intended.

INTRODUCTION

The Catholic Church is not a monolithic Latin institution. Rather, it is a communion of various Eastern and Western communities of Christian faithful, called *Ecclesiae particulares* in the decree *Orientalium Ecclesiarum* of the Second Vatican Council. According to the teaching of this decree, these Churches are of equal dignity, despite differences in liturgy, discipline, and spiritual patrimony.[1] The decree continues:

> The history, traditions, and many ecclesiastical institutes brightly testify to how greatly the Eastern Churches are valued in the whole Church. Therefore, this holy synod not only offers this ecclesiastical and spiritual patrimony due esteem and just praise, but also firmly considers it as the patrimony of the whole Church of Christ. On account of this, it solemnly declares that the Churches of the East and of the West enjoy the right and are bound by the duty to rule themselves according to their own proper disciplines, as commended by their venerable antiquity, being more congruous to the habits of their faithful, and appearing more apt for fostering the good of souls.[2]

The conciliar decree pronounces the right and the obligation of each particular Church to rule itself according to its own discipline—to govern itself. That a particular Church is recognized as having a right to self-governance does not indicate that it is entirely independent from the oversight of the Roman pontiff or an ecumenical council. This right of self-governance is relative; the supreme authority of the Church may intervene in any case, and the authorities of

[1] *OE* 3.

[2] *OE* 5: "Historia, traditiones et plurima ecclesiastica instituta praeclare testantur quantopere de universa Ecclesia Orientales Ecclesiae meritae sint. Quapropter Sancta Synodus patrimonium hoc ecclesiasticum et spirituale non solum aestimatione debita et iusta laude prosequitur, sed etiam tamquam patrimonium universae Christi Ecclesiae firmiter considerat. Quamobrem sollemniter declarat, Ecclesias Orientis sicut et Occidentis iure pollere et officio teneri se secundum proprias disciplinas peculiares regendi, utpote quae veneranda antiquitate commendentur, moribus suorum fidelium magis sint congruae atque ad bonum animarum consulendum aptiores videantur."

the particular Churches cannot restrict this ability to intervene.[3] The capacity for such relative self-governance can be termed "autonomy."[4]

Such autonomy was not always esteemed in the Catholic Church. Because of the near-constant tensions between the Roman pontiff and the bishop of Constantinople, Latin churchmen have looked with suspicion on things associated with the "Greeks." The Great Schism and the failure of lasting communion after the "reunion" councils of Second Lyons (1272–1274) and Florence (1431–1449) reinforced their general belief that use of Eastern discipline indicated a separatist mentality and a rejection of the legitimate authority of the Roman pontiff. This belief, combined with the increasing centralization of governmental authority in the Roman pontiff—a Latin bishop—led to the perception that "Catholic" meant "Latin," despite the continued communion of the Church of Rome with certain Eastern communities, most notably the Italo-Greeks and Maronites. As a result, the Eastern communities were viewed as oddities rather than as Churches, their autonomy as a threat rather than as something beneficial. The Eastern faithful followed their rites and customs only through the "toleration" or "permission" of the popes.

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[3] Cf. Luis Okulik, "Significato e Limiti della Definizione di Chiesa *sui iuris*," *Folia Canonica* 12 (2009) 75–76.

[4] On the ability to use "autonomy" or "autonomous" to refer to the capacity for such self-governance, see John D. Faris, "Synodal Governance in the Eastern Catholic Churches," *CLSA Proceedings* 49 (1987) 214–215; Frederick R. McManus, "The Code of Canons of the Eastern Catholic Churches," *The Jurist* 53 (1993) 43–44; Victor J. Pospishil, *Eastern Catholic Church Law*, 2nd ed. (New York: Saint Maron Publications, 1996) 110; Antony Valiyavilayil, "The Notion of *sui iuris* Church," in *The Code of Canons of the Eastern Church: A Study and Interpretation—Essays in Honour of Joseph Cardinal Parecattil*, ed. Jose Chiramel and Kuriakose Bharanikulangara (Alwaye: St. Thomas Academy for Research, 1992) 87–88, 90. On the other hand, Georgică Grigoriță, *L'Autonomie Ecclésiastique selon la Législation Canonique Actuelle de l'Église Orthodoxe et de l'Église Catholique: Étude canonique comparative*, Tesi Gregoriana, Serie Diritto Canonico 86 (Rome: Pontificia Università Gregoriana, 2011) 415–416 objects to translating *sui iuris* as "autonomous" for linguistic reasons (the Greek root for "autonomous" would be translated into Latin as *sui legis*), and at 455 argues that the Eastern Catholic Churches enjoy only a form of autonomy that could diminish to non-existence. Further, John D. Faris, "The Latin Church *Sui Iuris*," *The Jurist* 62 (2002) 284 note 22 offers some caution on translating *sui iuris* as "autonomous" due to the possible impression that such autonomy is absolute, and due to possible confusion with Orthodox legal terminology, which uses that term to mean something different (cf. Dimitri Salachas, "Le «status» ecclésologique et canonique des Églises catholiques orientales «sui iuris» et des Églises orthodoxes autocéphales," *L'année canonique* 33 [1990] 48, stating that "autonomous" Orthodox Churches are those that possess a right to elect their own bishops, but whose metropolitan is confirmed by the patriarch or elected by the patriarch and synod of the Church on which the relevant autonomous Church depends).

Over several centuries, beginning around the time of the Council of Trent (1545–1563), recognition of Eastern juridic autonomy began to emerge again in the Catholic Church. Such recognition initially appeared in jurisprudence holding Eastern faithful not to be bound to most papal legislation. Further considerations led to differing juridic conceptions of the Christian East: a single "Eastern Church," a few Eastern "rites" (what are now considered "liturgical traditions"[5]), and several Eastern "*nationes*" ("nations"). Each of these terms carried with it implications for Eastern juridic autonomy. Use of "Eastern Church" suggested one juridic unit, and therefore one law; use of Eastern "rites" identified communities with their liturgies, suggesting that only liturgical discipline should distinguish West and East; use of Eastern "*nationes*" suggested that the communities were defined by territory, and thereby limited any exercise of autonomy to that territory.

The law of the 1990 *Codex Canonum Ecclesiarum Orientalium* has adopted the term "Churches *sui iuris*" in its consideration of the juridic structure of the East, in an attempt to recognize the existence of the plurality of Churches that had been declared in *Orientalium Ecclesiarum*. Yet this modern law still is affected by the earlier conceptions of the Christian East. That there is a single common Eastern code still suggests that there is a single juridic unit—Eastern *Church*—rather than a multiplicity of such units—Eastern *Churches*. That each Church *sui iuris* has both territorial and personal aspects results from an attempt to merge the older conceptions of "rite" (a personal aspect) and "*natio*" (a territorial aspect). Such a merger has important effects in the current structuring of autonomy. In addition to the administrative power of the patriarch or major archbishop as a rule being limited to the territory of the relevant Church *sui iuris*, the disciplinary laws of patriarchal and archiepiscopal synods have force only

[5] Cf. *CCEO* c. 28 §2: "Ritus, de quibus in Codice agitur, sunt, nisi aliud constat, illi, qui oriuntur ex traditionibus Alexandrina, Antiochena, Armena, Chaldaea et Constantinopolitana."

in the territory of the relevant Church *sui iuris*; on the other hand, liturgical laws (those connected with "rite") issued by the same authorities have force everywhere in the world.[6] The exercise of autonomy by such Churches is thus bisected, with the legislative organ of such a Church incapable of exercising full authority outside of the relevant territory. An understanding of how recognition of Eastern juridic autonomy developed over the centuries would both elucidate why the current law is structured as it is and, perhaps, point the way towards possible future revisions of the law that could better express the underlying ecclesiological realities.

The main research of this dissertation concerns the following question: How did the juridic autonomy of Eastern Catholic Churches, specifically its legislative aspect, develop to its current expression in the *Codex Canonum Ecclesiarum Orientalium*? In examining this question, this dissertation will consider how the Roman pontiff, ecumenical councils, and curial officials understood Eastern juridic autonomy over the period from roughly the Council of Trent to today. Such an examination will be based heavily on documents issued by the aforementioned authorities, often viewed in light of the reflections of contemporary canonical commentators. This examination will be limited to the legislative aspect—how Eastern communities were bound by laws issued by the Roman pontiff or an ecumenical council, as well as the exercise of legislative authority within these communities. Thus, the administrative/executive and judicial aspects of governance will not be considered specifically here. In this examination, this review of the historical development of the recognition of the juridic autonomy of Eastern communities will be divided into five chapters, each concerning a specific timeframe.

After briefly reviewing how Eastern communities and their governance models were viewed in the Catholic Church up to the time of the Union of Brest in 1595–1596, the first

[6] See *CCEO* cc. 78 §2 (power of the patriarch) and 150 §§2–3 (binding force of laws of the patriarchal synod), all applicable to major archiepiscopal Churches by *CCEO* c. 152.

chapter will consider how canonical jurisprudence in the sixteenth and seventeenth centuries developed an understanding of Eastern "negative" autonomy—the non-applicability to Eastern faithful of papal legislation. Of particular note is an unpromulgated decision made in 1631 at the residence of Giovanni Battista Cardinal Pamphili (later elected as pope in1644, taking the name Innocent X) concerning the general non-application to Eastern faithful of apostolic constitutions reserving censures to the Roman pontiff and the Apostolic See.[7] This "Pamphilian" decision, concerning a very specific area (penal law), would be rendered by the canonist Angelo Maria Verricelli into a general rule of interpretation for any apostolic constitution.

The second chapter will review the jurisprudence of Pope Benedict XIV (reigned 1740–1758) related to Eastern autonomy. This pope favorably cited Verricelli's rendition of the Pamphilian decision, but additionally sketched out a model of an "Eastern Church" consisting of "rites" and including "*nationes*." The exact nature of these concepts and their impact on both the internal governance structures of the Eastern communities and the exercise of autonomy by these structures will be considered in detail.

The third chapter will concern the pontificate of Pope Bl. Pius IX (reigned 1846–1878), particularly the First Vatican Council called by him. While the council took no direct action concerning the Eastern communities due to its sudden suspension, the debates in the preparatory sessions and at the council itself demonstrate a changed perception of disciplinary diversity of the Eastern communities in comparison with the previous three centuries, resulting in a rejection of the jurisprudence of the Pamphilian decision and desires to suppress the extant diversity between the East and the West. Such desires, and papal legislation based on them, provoked opposition from Eastern faithful both at the council and in their dioceses. It will be shown how

[7] A new transcription of this decision is included as an appendix to this dissertation.

the diverse understandings of the nature of Eastern communities and their autonomy influenced these events.

The fourth chapter will focus on the period from the pontificate of Pope Leo XIII through that of Pope Pius XII (1878–1958). The jurisprudence surrounding the Pamphilian decision once again became a rule of praxis in the Roman Curia. This jurisprudence consequently influenced the codification project resulting in the 1917 *Codex Iuris Canonici*, as well as the project to formulate a code of law for Eastern communities, which would only see partial promulgation. The ability of Eastern communities to govern themselves was increasingly recognized over this period, but came into conflict with previously-established conceptions of their ecclesial and juridic nature.

The fifth and final chapter will examine the development in recognizing the juridic autonomy of the Eastern communities from the Second Vatican Council to today. The Second Vatican Council made important advances in this regard, recognizing that the Eastern communities are true Churches and have a right and duty to govern themselves in accord with their own discipline. The second Eastern codification project launched in 1972 was intended to codify these and other conciliar principles. The council and the codification process will be reviewed, along with the current canon law impacting the exercise of autonomy by the Eastern Catholic Churches.

Key in all of this discussion is the jurisprudence surrounding the 1631 decision made at the residence of Cardinal Pamphili. This jurisprudence was discussed at nearly every point where the autonomy of Eastern communities came into question. This jurisprudence established a juridic distinction between Eastern communities and the rest of the Catholic Church, the former not bound to laws binding the latter. Such jurisprudence led to further questions: How does one

become a member of such an Eastern community? To what laws are Eastern communities bound? Who is competent to make, alter, or abolish such laws? This dissertation contends that the modern understanding of Eastern juridic autonomy finds its source in the Pamphilian decision and the jurisprudence surrounding it. We hope that this dissertation promotes recognition of this important decision and jurisprudence.

CHAPTER 1

The Beginnings of the Modern Recognition of the Autonomy of Eastern Communities

1.1. Introduction

The purpose of this chapter is to review the canonical foundation of the juridic autonomy of Eastern communities as recognized in current law. This foundation was laid in the period during and following the Council of Trent. Due to increased contacts with Eastern faithful at this time, canonists debated the exact juridic relationship between them and the Roman pontiff. Through the evolution of jurisprudence on this matter, certain rules came to be established that determined the instances when Eastern faithful were subject to apostolic constitutions issued by the Roman pontiff.

This chapter begins with a brief examination of relations between the Roman pontiff and Eastern communities up to 1595–1596, when the Union of Brest formally restored communion between Eastern faithful subject to the Metropolitan of Kiev and the Church of Rome. The chapter will then review the commentaries of several canonists of the Trent and post-Trent period concerning the applicability of laws of the Roman pontiff to Eastern faithful. A detailed discussion of an important 1631 curial decision made at the residence of Giovanni Battista Cardinal Pamphili will follow. After reviewing another curial decision made eight years later, this chapter will end with an examination of the work of the canonist Angelo Maria Verricelli on the question.

1.2. Brief Review of the Relations between the Roman Church and Eastern Faithful up to the Union of Brest

Early in the history of the Christian Church, the bishops of certain prominent sees acquired authority over neighboring sees, often mirroring the civil provincial structure.[1] This structure was in place by the time of the First Council of Nicaea in 325, which in its sixth canon recognized as legitimate the already-existing authority of the bishop of Alexandria over neighboring sees, describing it as based on "ancient customs."[2] The bishop of Rome was said to have a "similar custom,"[3] and "in Antioch and other provinces the ancient prerogatives of the churches" were to be preserved.[4] The three sees explicitly mentioned in this canon—Alexandria, Rome, Antioch—eventually came to be considered "patriarchal" sees, their bishops exercising authority over metropolitan provinces within their respective jurisdictions, the patriarchates.[5] To

[1] Emmanuel Lanne, *Tradition et Communion des Églises: Recueil d'Études*, Bibliotheca Ephemeridum Theologicarum Lovaniensium 129 (Leuven: University Press, 1997) 391. For reviews of this entire development, see ibid., 387–402; Pietro Loiacono, "Il Pontefice Patriarca d'Occidente," in *Atti del Congresso Internazionale: Incontro fra canoni d'oriente e d'occidente*, ed. Raffaele Coppola (Bari: Cacucci, 1994) 1:135–156; Lorenzo Lorusso, "Il territorio canonico," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010)*, ed. Pontificio Consiglio per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 396–398; Francesco Sollazzo, "I Patriarchi nel Diritto Canonico Orientale e Occidentale," in *Atti del Congresso Internazionale: Incontro fra canoni d'oriente e d'occidente*, ed. Raffaele Coppola (Bari: Cacucci, 1994) 1:239–243.

[2] First Council of Nicaea, canon 6: text and translation in Tanner, 1:8–9: "Τά ἀρχαῖα ἔθη κρατείτω τὰ ἐν Αἰγύπτῳ καὶ Λιβύῃ καὶ Πενταπόλει ὥστε τὸν ἐν Ἀλεξανδρείας ἐπίσκοπον πάντων τούτων ἔχειν τὴν ἐξουσίαν [...]."

[3] Ibid., 1:9: "[...] ἐπειδὴ καὶ τῷ ἐν Ῥώμῃ ἐπισκόπῳ τὸ τοιοῦτον σύνηθές ἐστιν." Note that James F. Loughlin, "The Sixth Nicene Canon and the Papacy," *The American Catholic Quarterly Review* 5 (1880) 220–239 argues (following St. Robert Bellarmine) that what was customary (σύνηθές) to the Bishop of Rome was the recognition of Alexandrian authority over Egypt, Libya, and Pentapolis, not the exercise of authority by the Roman bishop over neighboring bishops.

[4] First Council of Nicaea, canon 6: text and translation in Tanner, 1:9: "Ὁμοίως δὲ καὶ κατὰ τὴν Ἀντιόχειαν καὶ ἐν ταῖς ἄλλαις ἐπαρχίαις τὰ πρεσβεῖα σῴζεσθαι ταῖς ἐκκλησίαις." Cf. Thomas A. Kane, *The Jurisdiction of the Patriarchs of the Major Sees in Antiquity and in the Middle Ages: A Historical Commentary*, Canon Law Studies 276 (Washington, D.C.: Catholic University of America, 1949) 6, stating that "other provinces" likely refers to Pontus, Asia, and Thrace.

[5] The exact manner that those bishops who would eventually become patriarchs came to obtain authority has been the subject of some debate. Wilhelm de Vries, "The 'College of Patriarchs,'" in *Canon Law: Pastoral Reform in*

these three sees were later joined Jerusalem and Constantinople, the bishop of each exercising authority within his respective sphere.[6]

During this early period in the history of the Church, there were relatively few instances of intervention on the part of the Roman pontiff in the life of these Eastern jurisdictions. Wilhelm de Vries writes:

> That prior to the schism the Eastern patriarchates, in fact, were less strictly dependent on Rome than the West, which formed the Roman patriarchate, is already clear from a review of the noted collection of the registers of the popes published by Jaffé-Wattenbach. For the period preceding the Byzantine schism of 1054, there are 4335 total documents reported, of which only about 300 refer to the Eastern patriarchates. Already from these figures it appears clear that the Roman pontiff, in his role as head of the universal Church, intervened in the affairs of the Eastern patriarchates much less often than he did, in his role as patriarch of the West, in the affairs of his Roman patriarchate, more immediately subject to his care.[7]

Church Government, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 65 argues that their authority came as the result of the cession of rights on the part of the subject bishops. Adriano Garuti, *Il Papa Patriarca d'Occidente? Studio storico dottrinale* (Bologna: Edizioni Francescane, 1990) 236–237 argues that this position is not fully convincing, as it does not account for the existence of a power that, he argues, cannot be derived from the sum of ceded episcopal rights but only from a superior authority. Ivan Žužek, "The Authority and Jurisdiction in the Oriental Catholic Tradition," in idem, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 465–468 also offers comments against de Vries' position in light of the *CCEO*.

[6] The clear listing of these five sees as distinct from all others seems to have first occurred with Novella 123, chapter 3: "Iubemus igitur, ut beatissimi archiepiscopi et patriarchae, hoc est antiquae Romae, et Constantinopolis, et Alexandriae, et Theopolis [Antioch] et Hierosolymarum, si quidem ea consuetudo est, ut episcopis aut clericis in eorum creatione minus quam viginti auri librae dentur, ea sola praebeant, quae consuetudo agnoscit" (*Corpus Iuris Civilis, Pars Tertia: Novellas et Reliqua Continens*, ed. Eduardus Osenbrüggen [Leipzig: Baumgärtner, 1840] 542); see Lanne, 407.

[7] Wilhelm de Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," *Orientalia Christiana Periodica* 27 (1961) 313–314: "Che i patriarcati orientali difatti prima dello scisma fossero meno strettamente dipendenti da Roma che l'occidente, che formava il patriarcato romano, risulta già da uno sguardo sulla nota collezione dei regesti dei papi, pubblicato da Jaffé-Wattenbach. Per il periodo precedente lo scisma bizantino del 1054 sono riportati in totale 4335 documenti, dei quali solo circa 300 si riferiscono ai patriarcati orientali. Già da queste cifre appare chiaro che il Pontefice Romano nella sua qualità di capo della Chiesa universale interveniva negli affari dei patriarcati orientali molto meno spesso che come patriarca dell'occidente negli affari del suo patriarcato romano, più immediatamente soggetto alla sua cura." Cf. Aemilius Herman, "De «Ritu» in Iure Canonico," *Orientalia Christiana Periodica* 32 (1933) 117: "Antequam schisma saeculi XI Ecclesiam Orientalem ab Occidentali separaret, ius Romani Pontificis ordinandi res ecclesiasticas legibus suis etiam in Oriente agnitum erat. Cuius rei argumentum praebent appellationes ab Orientalibus ad Apostolicam Sedem directae, necnon interventus Romanorum Pontificum praesertim pro vera fide tuenda. Sed generatim S. Sedes praeter casum necessitatis raro tantummodo in Oriente interveniebat. Utraque pars Ecclesiae vivebat secundum leges et consuetudines proprias"; Meletius M. Wojnar, "Decree on the Oriental Catholic Churches," *The Jurist* 25 (1965) 200: "It is evident that in the first millennium of the Church's history the interventions of the Roman Pontiffs in Oriental affairs were very rare."

De Vries considers the state of the patriarchates at this time to be a particular form of autonomy—a canonical autonomy in disciplinary affairs.[8]

Controversies between the Church of Rome and the Church of Constantinople led to a distancing between the two sees, eventually resulting in the severing of communion in the eleventh century.[9] At the same time, a fundamental transformation of the role of the Roman Church and the Roman pontiff in ecclesiastical affairs was taking place.[10] With the efforts to reform the Church throughout Europe, particularly those undertaken by Pope St. Gregory VII, ecclesiastical authority was increasingly concentrated in Rome.[11] The *Dictatus papae*, sometimes attributed to this pope, stated that *causae maiores* throughout the Church had to be referred to the Apostolic See.[12] Western canon law was increasingly based on papal decisions, resulting in the idea of a common universal law for all Churches, and a different conception of the juridic interventions of the Roman pontiff in various Churches—all sees were immediately

[8] De Vries, "La S. Sede ed i patriarcati cattolici d'Oriente,"316–318. He states that Rome did have (and did exercise) authority in matters concerning faith or *communio*, and did sometimes intervene in specific disciplinary matters. At 318–326, he analyzes what he judges are the three elements of Eastern canonical autonomy in the first millennium: election of patriarchs and bishops and creating and altering dioceses; governance of the liturgy and its canonical legislation; ordering of discipline for clergy and laity. Cf. Sunny Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO*, Kanonika 15 (Rome: PIO, 2003) 302–303, speaking of a "three-tier communion" existing at this time, with dioceses being "in communion with the universal Church through their communion with their" patriarchal sees.

[9] Evidence of burgeoning separation could be said to start with the attempt to elevate the status of the see of Constantinople at the First Council of Constantinople (381) and the arguments over the matter in the aftermath of the Council of Chalcedon (451). See the comments of Michel Jalakh, *Ecclesiological Identity of the Eastern Catholic Churches:* Orientalium Ecclesiarum *30 and Beyond*, Orientalia Christiana Analecta 297 (Rome: PIO, 2014) 196–198.

[10] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 303.

[11] Cf. Antoine Joubeir, *La Notion Canonique de Rite: Essai historico-canonique*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 14 (Rome: Basilian Fathers, 1961) 46–48, arguing that the Gregorian reform should not be considered sudden, but part of a continual centralization process stretching back into the history of the Church (metropolitans gaining authority, patriarchs gaining authority).

[12] A transcription of the Latin text is found in *Fontes Iuris Canonici Selecti*, ed. Andreas Galante (Innsbruck [Oenipons]: Libraria Academica Wagneriana, 1906) 168 (attributed there to Cardinal Deusdedit). The *dictatus* in question is #21: "Quod maiores causae cuiuscumque ecclesiae ad eam referri debeant."

subject to the Roman pontiff, regardless of the existence of any intermediate structures, such as patriarchates.[13]

With this evolution, the notion of "patriarchate" changed in the Catholic Church, and much of the autonomy formerly enjoyed by patriarchates was reduced.[14] Patriarchs were simply the height of the ecclesiastical-law hierarchy existing between pope and bishop, to whom the Fourth Lateran Council attributed several privileges: conferring the pallium on their suffragans; receiving from their subjects the canonical profession for themselves and the oath of fidelity for the Roman Church; having a standard of the Lord's cross carried before them (except in Rome or in the presence of the pope or his legate wearing the proper insignia); and constituting an instance of appeal.[15] However, it appears that they could not exercise an authority of a nature distinct from that exercised by ecclesiastics presiding over lower supra-diocesan jurisdictions, such as metropolitans within their ecclesiastical provinces or primates over their particular

[13] Herman, "De «Ritu» in Iure Canonico," 117: "Scientia vero iuris canonici ab saeculo XII in Universitate Bononiensi aliisque scholis summopere florescens, totam hanc legum, decretorum, responsionum, massam in uno ordine componere et in unum corpus redigere staegit. Unde ortum est aliquod ius pontificium universale, ordinatum, omnibus Ecclesiis commune et auctoritate sua omnes tenens. Idcirco cum praesertim ex saec. XIII de unione restabilienda cum Orientalibus actum est, non iam idem status rerum aderat atque ante separationem." For modern considerations on whether hierarchical communion can/ought to be mediated through structures like patriarchates, see Francis Aloor, *The Territoriality of «Ecclesia Sui Iuris»: A Historical, Ecclesiological and Juridical Study*, Thesis ad Doctoratum in Iure Canonico partim edita (Rome: Pontificia Università della Santa Croce, 2006) 59–60.

[14] Cf. Wojnar, "Decree on the Oriental Catholic Churches," 205: "The new patriarchates of the Orientals, who were in communion with Rome, were erected with the same understanding, as the inheritors and successors of those old Oriental patriarchates and as a requirement of the traditional form of government according to the Oriental discipline. The latter, however, could not and cannot be compared with the ancient patriarchates, because of the growth of another conception in the Catholic Church, that is, the centralization and fullness of power of the Roman Pontiff." De Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," 329–330 also argues that the Roman pontiffs did not view those Eastern patriarchs entering into communion as their own creations, but continuations of the pre-schism line of patriarchs.

[15] Fourth Lateran Council, constitution 5: text in Tanner, 1:236; de Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," 345; Ivan Žužek, "La 'professio fidei' e il Codex Canonum Ecclesiarum Orientalium," in *Ius Canonicum in Oriente et Occidente: Festschrift für Carl Gerold Fürst zum 70. Geburtstag*, Adnotationes in Ius Canonicum 25, ed. Hartmut Zapp et al. (Frankfurt am Main: Peter Lang, 2003) 644–645. This constitution of Lateran IV specified that patriarchs enjoyed these privileges only after they themselves received the pallium from the Roman pontiff and made an oath of obedience and fidelity to him.

territories.[16] Thus, when the Council of Florence spoke of not prejudicing the rights and privileges of patriarchs,[17] Rome understood such rights and privileges to be those enumerated at Lateran IV[18] and those connected with liturgical rites.[19]

The reform undertaken by the Council of Trent further reduced the recognition of any special status of Eastern communities.[20] These entities were not fully taken into account in the conciliar decrees,[21] and the Roman-centric focus of the assembly (a reaction against the rejection

[16] John D. Faris, *The Eastern Catholic Churches: Constitution and Governance* (New York: Saint Maron Publications, 1992) 195: "Inasmuch as the Western Church was familiar with metropolitan structures throughout Europe, the patriarchs were not perceived by Rome to be a threat and were for the most part treated as if they were metropolitans"; Žužek, "La 'professio fidei' e il Codex Canonum Ecclesiarum Orientalium," 644: "Gli occidentali invece prendevano le stesse parole ["autonomia"] nel senso del can. 5 del concilio Lateranense IV (del 1215), che considerava i patriarchi orientali piuttosto come metropoliti di una provincia ecclesiastica [...]." See also de Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," 341–352, discussing the different ways that East and West understood the nature of the patriarchate. One notes that the pope, until rather recently, granted to patriarchs the pallium, which is properly a symbol of metropolitan authority; see Dimitri Salachas, "Le *status* d'autonomie des Églises Catholiques Orientales et leur communion avec le Siège Apostolique de Rome," *L'année canonique* 38 (1996) 86: "Le *Palium* est le signe du pouvoir métropolitain que l'évêque de Rome confère à ses métropolites, ce qui n'a rien à voir avec les patriarches orientaux, qui, entre autres, comme tous les évêques orientaux, au moins dans les Églises qui conservent ce rite, reçoivent déjà le *Pallium* au moment de l'ordination épiscopale sous forme de *Omophorion*." The same author offers similar comments in *Orient et Institutions: Théologie et Discipline des Institutions des Églises Orientales Catholiques selon le Nouveau Codex Canonum Ecclesiarum Orientalium* (Paris: Cerf, 2012) 121–122. Note also the address of Pope St. John Paul II to the new Patriarch of Antioch for Syrians, December 19, 1998, §2: online: http://w2.vatican.va/content/john-paul-ii/en/speeches/1998/december/documents/hf_jp-ii_spe_19981219_patriarca.pdf (accessed February 22, 2017): "I wanted full communion no longer to be expressed by conferral of the pallium, but in a way better suited to acknowledging the dignity of the patriarchal office."

[17] Council of Florence, session 6, July 6, 1439, constitution *Letentur caeli*: text in Tanner, 1:528.

[18] Ivan Žužek, "Common Canons and Ecclesial Experience in the Oriental Catholic Churches," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 209; cf. de Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," 345, Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 143, and Michael K. Magee, *The Patriarchal Institution in the Church: Ecclesiological Perspectives in the Light of the Second Vatican Council* (Rome: Herder, 2006) 177–183, all citing the work of Giovanni Cardinal Torquemada, *Apparatus Super Decreto Unionis Graecorum, in Sacrosancto Oecumenico Concilio Florentiae Celebrato, ab Eugenio Papa IIII Promulgato* (Venice: Michael Tramezinus, 1560) 40v–41r.

[19] Fourth Lateran Council, constitution 4: text in Tanner, 1:235–236; cf. the excerpt from Paul V, *Solet circumspecta*, December 10, 1615: *Fonti*, 1/1:469–471.

[20] Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 139–140, on the "trend towards disciplinary uniformity [...] consolidated by the Tridentine reforms" affecting the legislation of Eastern communities, rendering their laws more Latin.

[21] Aloysius Tăutu, "Introductio," in *Fonti*, 3/6:xii note 4: "Tridentinum, oecumenicum XVIII, quamvis decreta disciplinaria pro integra Ecclesiae vita sananda tulerit et etiam de argumento Ecclesiae Orientali communi decreverit (e. gr. de communione sub utraque specie et parvulorum in Sess. XXI cap. 1 et 4, de missa in lingua vulgari non celebranda in Sess. XXII *de Sacrif. Missae* can. 8), tamen haec decreta sine dubio non ad Orientales sed ad Protestantes referre intendebat; ita ut, praeter dogmatica et cetera decreta quae ex rei natura etiam Orientales

of papal authority by Protestants)[22] further reduced any concept of legitimate ecclesiastical autonomy existing within the Church.[23] However, at this time there was a new impetus, based on the counter-reformation mentality, to go out and bring people into the Catholic Church.[24]

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respiciunt, nihil ex hoc maximi momenti concilii decretorum Orientales respiciebat." For a review of the few times the Council of Trent dealt with issues of the "Greek Church" see Vittorio Peri, "Il Concilio di Trento e la Chiesa Greca," in *Il Concilio di Trento nella Prospettiva del Terzo Millennio: Atti del convegno tenuto a Trento il 25–28 settembre 1995*, Religione e Cultura 10, ed. Giuseppe Alberigo and Iginio Rogger (Brescia: Morcelliana, 1997) 403–441. Émilio Eid, "La révision du Code de droit canonique oriental: histoire et principes," *L'année canonique* 33 (1990) 16 notes that the declarations and dispositions of this council "opéré un révision complète de la discipline de l'Église latine," but came to be applied to Eastern communities either through papal imposition or synodal adoption. Cf. Michael Vattappalam, *The Congregation for the Eastern Churches: Origins and Competence* (Vatican City: Libreria Editrice Vaticana, 1999) 32, stating that the decisions of the *Congregationes super Reformatione Graecorum* (extant during the pontificate of Clement VIII) responded to questions "on the basis of the Council of Trent, because after this Council there was an ever increasing tendency towards a uniformity of worship, discipline and administration." Similar comments are made by Cirillo Korolevskij, "Introduzione agli studi storici delle fonti," in *Fonti*, 1/8:10.

[22] Lanne, 576: "Dans la logique des options romaines une telle volonté de forte centralisation s'imposait. Pour lutter contre l'effritement provoqué par la Réforme protestante, l'unité ecclésiale allait s'identifier avec l'unité non seulement de la foi, mais de la théologie et de l'organisation uniforme du droit et des rites. D'une théologie des «Églises sœurs» il n'était plus guère question." See also Constantin G. Patelos, *Vatican I et les évêques uniates: Une étape éclairante de la politique romaine a l'égard des Orientaux (1867–1870)*, Bibliothéque de la Revue d'Histoire Ecclésiastique 65 (Louvain: Éditions Nauwelaerts, 1981) v, connecting the counter-reform, centralization, and uniformization of Trent with the acts of the First Vatican Council concerning the Eastern communities as well as the idea of the Gregorian reform that only the Church of Rome was "fully Church" ("pleinement Église").

[23] Eleuterio Fortino and George Gallaro, "The Byzantine Church in Italy: Tensions and Communion," *Eastern Churches Journal* 7/3 (2000) 58: "In the period following the Council of Trent, during the Counter-Reformation, the Catholic Church, with a series of remarkable Popes, decisively engaged in a vast and demanding process of strengthening its interior unity. The crisis provoked by the Protestants led to a strong emphasis on the demand for unity in a doctrine professed in its full disciplinary uniformity, for a centralized organization, and for its efficacy both in the administration *ad intra* (within) and in its mission *ad extra* (outward)." Note the translated quotation of Wilhelm de Vries, *Rom und die Patriarchate des Ostens*, Orbis Academicus 3/4 (Fribourg-Munich: K. Alber, 1963) 3–4, in John Madey, *Orientalium Ecclesiarum: More Than Twenty Years After* (Paderborn: Eastern Churches Service, 1987) 90–91: "In the East, however, the catholic patriarchates which got their shape since the 16th century had to face suddenly and abruptly a situation which they never had known, namely the strong central authority of Rome which wished to rule over the East in the same way as it ruled over the West. This is quite understandable from the Roman point of view, and there is no conscious injury of the East." While centralization was taking place during this period, as Faris, *The Eastern Catholic Churches*, 195 notes, it "was not yet complete." Thus, while reduced in status, patriarchs still retained a wide scope of authority (as did metropolitans and diocesan bishops). The strong push to complete centralization in the nineteenth century would alter this situation.

[24] Faris, *The Eastern Catholic Churches*, 10. Cf. Vattappalam, 25: "The Churches not recognizing the authority of the Pope were considered objects of missionary work in order to bring them into communion with the Roman Catholic Church." This is considered the beginning of the era of "uniatism"; see George Nedungatt, *The Spirit of the Eastern Code* (Rome/Bangalore: Centre for Indian and Inter-religious Studies/Dharmaram Publications, 1993) 34 note 5; María Cruz Musoles Cubedo, "Evolución histórica del proceso de reunificación de la Iglesia en Oriente," *Revista Española de Derecho Canónico* 60 (2003) 599. For considerations of the process of "uniatism," see Taras Khomych, "Eastern Catholic Churches and the Question of 'Uniatism': Problems from the Past, Challenges for the Present and Hopes for the Future," *Louvain Studies* 31 (2006) 214–237; Cyril Vasil', "Chiese Orientali Cattoliche nella Ecclesiologica e nel Diritto della Chiesa Cattolica: Il cammino del CCEO," *Folia Canonica* 10 (2007) 136–141.

Notable success from this effort came with the Union of Brest of 1595–1596,[25] restoring communion between Rome and those subject to the Metropolitan See of Kiev; other unions would follow afterwards.[26]

The ecclesial nature of these newly-Catholic communities was almost entirely unrecognized.[27] George Nedungatt notes:

> After the failure of the reunion councils of Lyons [II] in 1274 and of Florence in 1439, efforts at Church unity were canalized through missionary activity by the Western Church. Western ecclesiology stressed the need to be directly subject to the jurisdiction of the pope in order to be saved in the one Church outside of which there was no salvation. [...] Those individuals or groups or ethni[cit]es which were "conquered" for Christ's kingdom were incorporated or absorbed in the one Church, though the general official policy was to allow them to retain their "rite," chiefly in liturgy. However, since the overarching idea was that of one Church—and not yet the communion of many Churches and the equality of rites of Vatican II ecclesiology—usage shied away from speaking of Eastern Churches.[28]

This avoidance of ecclesial terminology reflected the changed conception of these communities; as they were not considered as sister Churches, "the Eastern Catholic groups were, after reunion,

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[25] Clement VIII, constitution *Magnus Dominus*, December 23, 1595: *Bullpont,* 1:15–23. For a consideration of this union, see Wacław Hryniewicz, "The 'Union' of Brest and The Ecclesiology of Sister Churches," *Eastern Churches Journal* 4/1 (1997) 107–124.

[26] Herman, "De «Ritu» in Iure Canonico," 119: "Ab fine saeculi XVI vero numerus Orientalium catholicorum in omnibus partibus augeri coepit."

[27] Victor J. Pospishil, *Eastern Catholic Church Law*, 2nd ed. (New York: Saint Maron Publications, 1996) 112. Sviatolslav Shevchuk, "Le Chiese orientali cattoliche e il loro ruolo nel dialogo ecumenico con gli ortodossi," *Ephemerides Iuris Canonici* 51 (2011) 261 argues that the Church of Kiev entering into communion with Rome was understood by the Ukrainians/Ruthenians as communion being established between sister Churches, while it was held by Rome to be a submission. Even prior to the Council of Trent, there appears to have been a tendency not to view certain Eastern communities as ecclesial in nature; note the comments of Georgius Hofmann, "Notae historicae de terminologia theologica Concilii Florentini," *Gregorianum* 20 (1939) 260: "In concilio Florentino ecclesiam graecam, ecclesiam armenam, ecclesiam copticam (et aethiopicam), ecclesiam syriacam cum ecclesia romana fuisse unitas constat. Sed mirum est, quod documenta Concilii unice ecclesiae graecae titulum ecclesiae orientalis tribuerint."

[28] Nedungatt, *The Spirit of the Eastern Code*, 63–64. Vittorio Peri, *Orientalis Varietas: Roma e le Chiese d'Oriente—Storia e Diritto canonico*, Kanonika 4 (Rome: PIO, 1994) 232 notes that the bull of union with the Ruthenians in 1595 made no reference to "Church," only to Ruthenian bishops and the Ruthenian nation.

treated more or less not differently from Latin rite ecclesiastical provinces and dioceses, and the ecclesiastical autonomy which they possessed at the time of reunion was disregarded."[29]

Along side this lack of recognizing the ecclesial nature of Eastern communities, there was still some understanding that they were distinct in liturgical matters, considered under the term "rite," and that "rite" was attached to persons, not territory.[30] Thus, the Fourth Lateran Council established that "suitable men" were to be provided for "peoples of different languages [...] having one faith but different rites and customs," who lived mixed together in one city or diocese; however, separate bishops for each group in the same city or diocese was forbidden, since it would create something like a many-headed monster in the city or diocese.[31] This rule was soon disregarded (albeit for a short time) by Innocent IV in dealing with the Latin and Greek hierarchies of Cyprus.[32] It was later ignored after the Council of Florence while the union

[29] Victor J. Pospishil, *Ex Occidente Lex* (Carteret: St. Mary's Religious Action Fund, 1979) 109. Cf. Serge Descy, *Introduction a l'Histoire et l'Ecclésiologie de l'Église Melkite*, Histoire de l'Église en Orient: II. Antioche 1 (Beriut/Jouneih: Editions Saint Paul, 1986) 62–63, and Herman, "De «Ritu» in Iure Canonico," 130, both noting that the section of the apostolic constitution *Immensa* of Sixtus V (January 22, 1588) requiring the acts of provincial synods to be reviewed by the Congregation *pro executione et interpretatione concilii Tridentini* (*Bullarum Diplomatum et Privilegiorum Sanctorum Romanorum Pontificum Taurinensis Editio* [Turin: Seb. Francus and Henricus Dalmazzus, 1863] 8:991) was applied to Eastern patriarchal synods.

[30] On the development from considering "rites" as pertaining to place to being tied to a person, see William W. Bassett, *The Determination of Rite*, Analecta Gregoriana 157 (Rome: Gregorian University Press, 1967) 16–18.

[31] Fourth Lateran Council, constitution 9: text and translation in Tanner, 1:239: "Quoniam in plerisque partibus infra eandem civitatem atque dioecesim permixti sunt populi diversarum linguarum, habentes sub una fide varios ritus et mores, districte praecipimus ut pontifices huiusmodi civitatum sive dioecesum, provideant viros idoneos, qui secundum diversitates rituum et linguarum divina officia illis celebrent et ecclesiastica sacramenta ministrent, instruendo eos verbo pariter et exemplo. Prohibemus autem omnino, ne una eademque civitas sive dioecesis diversos pontifices habeat, tanquam unum corpus diversa capita, quasi monstrum; sed si propter praedictas causas urgens necessitas postulaverit, pontifex loci catholicum praesulem, nationibus illis conformem, provida deliberatione constituat sibi vicarium in praedictis, qui ei per omnia sit obediens et subiectus, unde, si quis aliter se ingesserit, excommunicationis se noverit mucrone percussum, et si nec sic resipuerit, ab omni ecclesiastico ministerio deponatur, adhibito, si necesse fuerit, brachio saeculari ad tantam insolentiam compescendam." For commentary on this canon, see Michael F. Diederichs, *The Jurisdiction of the Latin Ordinaries over Their Oriental Subjects: A Historical Synopsis and a Commentary*, Canon Law Studies 229 (Washington, D.C.: Catholic University of America, 1946) 1–4.

[32] Joseph Gill, "The Tribulations of the Greek Church in Cyprus 1196–c. 1280," in Joseph Gill, *Church Union: Rome and Byzantium (1204–1453)* (London: Variorum Reprints, 1979) article IV, especially 87–88; the document authorizing the papal legate in Cyprus to act as he deemed prudent, *Paternae pietatis* of July 21, 1250, can be found in *Fonti*, 3/4 volume 1:130–132. Ivan Žužek, "Canons concerning the Authority of Patriarchs over the Faithful of their own Rite who Live outside the Limits of Patriarchal Territory," *Nuntia* 6 (1978) 10 also notes that Innocent IV

established at that council lasted,[33] during the sixteenth century for the Italo-Greeks and some islands in the Mediterranean (although, at least for the Italo-Greeks, this also was temporary),[34] and after the Council of Trent with the reestablishment of communion with Eastern communities in places where Latin jurisdictions already existed.[35] These instances indicate that there was recognition of some practical advantage in having "ritual" jurisdictions, even if the ecclesiological implications were not consciously worked out.

1.3. Canonical Reflections on the Applicability of Canon Law to Eastern Faithful

Although in this period there was a lack of recognition of the ecclesiality of Eastern communities entering communion with the Roman Church, some canonists realized that

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proposed a similar distinction in jurisdiction between Greeks and Latins of the same place when hearing that a "Greek patriarch" (perhaps that of Antioch) was interested in restoring communion; see Innocent IV, *Iuxta desiderium*, August 7, 1247: *Fonti*, 3/4 volume 1:82–83. It does not appear that any such union was effected.

[33] Hervé-Marie Legrand, "Nature de l'Église Particulière et Rôle de l'Évêque dans l'Église (n^{os} 11–24)," in *La Charge Pastorale des Évêques: Décret «Christus Dominus»* (Paris: Cerf, 1969) 204; idem, "'One Bishop per City': Tensions around the Expression of Catholicity of the Local Church since Vatican II," *The Jurist* 52 (1992) 378; Natale Loda, "Delimitazione territoriale della Chiesa sui iuris: ragioni e questioni attuali," in *Le Chiese* sui iuris*: Criteri di individuazione e delimitazione*, ed. Luis Okulik (Venice: Marcianum, 2005) 119 note 45.

[34] This state of affairs was ended for the Italo-Greeks with *Romanus Pontifex* of Pius IV of February 16, 1564 (*Magnum Bullarium Romanum*, editio novissima [Lyons: Philip Borde, Laurence Arnaud, and Claudius Rigyad, 1655] 2:105–106), which subjected them to Latin bishops; see Bassett, 36. Extensive work on the situation of the Italo-Greeks has been done by Vittorio Peri; see his analysis in *Orientalis Varietas*, 70–141; idem, "I metropoliti orientali di Agrigento: La loro giurisdizione in Italia nel XVI secolo," in *Bisanzio e l'Italia: Raccolta di Studi in memoria di Agostino Pertusi*, ed. Università Cattolica del Sacro Cuore (Milan: Vita e Pensiero, 1982) 275–321. On this matter, see also Ignazio Ceffalia, "La Chiesa italo-albanense, Chiesa *sui iuris*?" in *Le Chiese* sui iuris*: Criteri di individuazione e delimitazione*, ed. Luis Okulik (Venice: Marcianum, 2005) 193–199; Fortino and Gallaro, 47–54. As for Greeks on certain Mediterranean islands, it seems that even in 1742 there were Greek bishops exercising jurisdiction over the same territory as Latin bishops; note Benedict XIV, constitution *Etsi pastoralis*, May 26, 1742, §9, n. 20: *Bullarium Benedicti XIV*, 1:82: "Ubi vero duo essent Episcopi eiusdem Loci a Sancta Sede Apostolica deputati, unus Latinus, alter Graecus, (quemadmodum in Calabriae partibus, et in Sicilia olim fuisse perhibentur, et nunc in quibusdam Graeciae insulis existunt) [...]."

[35] Aemilius Herman, "Adnotationes," *Monitor Ecclesiasticus* 77 (1952) 426: "Cum autem saeculis XVI et XVII multitudines Orientalium cum suis pastoribus ad Ecclesiam redirent, fieri non potuit quin his ius habendi proprium Episcopum conservaretur ideooque in regionibus ubi Rutheni cum Polonis, vel Rumaeni cum Hungaris una vivebant, conservatae sunt praeter dioeceses latinas etiam dioeceses orientales."

problems could arise if Eastern faithful[36] were treated juridically in exactly the same way as Latins were. The popes had issued numerous pieces of legislation, much of which did not take into account Eastern faithful, and some of which was even opposed to their already-existing customs. Did such legislation nevertheless apply to Eastern faithful, particularly clerics, in the same way that it applied to Latins? If it did not, what was the reason? Canonists' jurisprudence as it developed at this time would have a significant impact on the unpromulgated decision that would be made by curial officials in 1631.

1.3.1. Agostino Berò (1474–1554)[37]

Agostino Berò appears to have been the first major commentator to take up the question of juridic autonomy in the era of Trent. In his commentary on the first part of Book I of the Decretals, completed in 1550,[38] he wrote:

> Further, I ask after Abbas whether Greeks—that is, Eastern clerics—are subject to canon law. The gloss on the chapter *De libellis* at the end of Distinction 20,[39] to which Abbas

[36] See the "Note on Terminology" at the beginning of this dissertation, as well as Aemilius Herman, "Regunturne Orientales dissidentes legibus matrimonialibus Ecclesiae latinae?" *Periodica* 27 (1938) 13, who notes that at this time "dissidents" and Catholics were not fully separated, and were under the same bishops who had different leanings towards communion with the Roman Church.

[37] Franca Sinatti d'Amico, "Berò, Agostino," *Dizionario Biografico degli Italiani* (Rome: Istituto della Enciclopedia Italiana, 1967) 9:379–380.

[38] See the date of his statement to the College of Cardinals in Agostino Berò, *In Primam Partem Libri I. Decretalium Commentarii* (Venice: Dominicus Nicholinus, 1580) 2.

[39] *Decretum Gratiani, Emendatum et Notationibus Illustratum una cum Glossis, Gregorii XIII. Pont. Max. Iussu Editum* (Rome: Aedes Populi Romani, 1582) 113–116 (D. 20, c. 1): "De libellis et commentariis aliorum non convenit aliquos iudicare, et sanctorum conciliorum canones relinquere vel decretalium regulas, quae habentur apud nos simul cum canonibus. Quibus in omnibus ecclesiasticis utimur iudiciis, sunt canones Apostolorum, Nicaenorum, Ancyranorum, Neocaesariensium, Gangrensium, Antiochensium, Laodicensium, Constantinop. Ephes. Chalcedonensium, Sardicensium, Africanensium, Carthaginensium, et cum illis regulae praesulum Romanorum, Silvestri, Syricii, Innocentii, Zosimi, Caelestini, Leonis, Gelasii, Hilarii, Symmachi, Hormisdae, Simplicii, et Gregorii iunioris. Isti omnino sunt et per quos iudicant episcopi, et per quos episcopi simul iudicantur, et clerici. Nam si tale emerserit, vel contigerit inusitatum negotium, quod minime possit per istos definiri; tunc si illorum, quorum meministis, dicta, Hieronymi, Augustini, Isidori, vel ceterorum similiter sanctorum doctorum similium reperta fuerint; magnanimiter sunt retinenda, ac promulganda, vel ad Apostolicam sedem referendum de talibus. Quam ob causam luculentius, et magna voce pronuntiare non timeo; quia, qui illa, quae diximus, sanctorum patrum

remits himself,[40] states that the Eastern Church has not received the canons, because although according to canon law clerics constituted in sacred orders, from the subdiaconate onward, cannot contract marriage, as is said in the chapter *Si quis eorum* in Distinction 32,[41] the chapter *Cum in praeterito* in Distinction 84,[42] and the chapter *Praesbyteri* in Distinction 34,[43] nevertheless Eastern clerics constituted in sacred orders contract marriage, as is said in the chapter *De libellis*, with the glosses through the text in the chapter *Aliter* in Distinction 31.[44]

The rules established in the Quinisext Council[45] (about which reference is made in the chapter *Nicaea* of Distinction 31[46] and in the aforementioned chapter *Si quis eorum*) offer

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statuta, quae apud nos canonum nomine praetitulantur, (sive sit ille episcopus, sive clericus, sive laicus) non indifferenter recipere convincitur; nec catholicam, et Apostolicam fidem, nec sancta quattuor Evangelia, et efficaciter ad effectum suum retinere, vel credere probatur." The gloss to "convincitur" (at 115) reads: "Sed nonne Orientalis ecclesia recipit canones? Videtur, quod non, ut 31. distin. aliter. Numquid ergo ipsa est haeretica? Sed dic, quod licet ipsa non recipiat istos canones, non tamen contemnit eos. Vel dic, quod Papa approbat consuetudinem ipsorum. Sic dist. proxi. si Romanorum."

[40] Nicolò de Tudeschi (Abbas Panormitanus), *Partis Primae in Primum Decretalium Librum Commentaria* (Venice: Bernardinus Maiorinus, 1569) 19v: "An autem Graeci teneantur ad observationem canonum. vide gl.20.dist.c.de libellis in fi."

[41] *Decretum Gratiani*, 211–212 (D. 32, c. 7): "Si quis eorum, qui ad clerum accedunt, voluerit nuptiali iure mulieri copulari, hoc ante ordinem subdiaconatus faciat." The gloss to "Si quis eorum" (at 211) reads: "Istud c. evidenter est contra illos qui dicunt quod Graeci possunt contrahere in sacris ordinibus, cum hoc c. sit sextae synodi, et sexta synodus praefixit eis regulam vivendi, ut 31. dist. Nicaena, et ca. quorum § hoc autem. patet et quod apud eos in sacris ordinibus non contrahitur matrimonium, nec et tempore Apostolorum licitum fuit contrahere in subdiaconatu, ut 84. dist. cum in praeterito."

[42] Ibid., 535–538 (D. 84, c. 3): "Cum in praeterito concilio de continentiae, et castitatis moderamine tractaretur, gradus isti tres conscriptione quadam castitati per consecrationes annexi sunt. Episcopos, inquam, presbyteros, et diaconos ita placuit, ut condecet sacrosanctos antistites, et Dei sacerdotes, necnon et levitas, vel qui sacramentis divinis inserviunt, continentes esse in omnibus; quo possint simpliciter, quod a Deo postulant, impetrare: ut quod Apostoli docuerunt, et ipsa servavit antiquitas, nos quoque custodiamus. Ab universis episcopis dictum est. Omnibus placet, ut episcopi, presbyteri, et diaconi, vel qui sacramenta contrectant, pudicitiae custodes, etiam ab uxoribus abstineant. Ab omnibus dictum est; Placet, ut in omnibus, et ab omnibus pudicitia custodiatur, qui altario deserviunt." The gloss to "Cum in praeterito" (at 536) reads: "Haec duo cap. intelligit H. et B. de matrimonio non contrahendo in tribus sacris ordinibus, et in ecclesia orientali. Est ergo casus."

[43] Ibid., 229–230 (D. 34, c. 19): "Presbyteri, diaconi, subdiaconi, vel deinceps, quibus ducendi uxores licentia non est, etiam alienarum nuptiarum evitent convivia; nec his coetibus misceantur, ubi amatoria cantantur, et turpia; aut obscoeni motus corporum choreis, et saltationibus efferunt; ne auditus, aut obtutus sacris mysteriis deputati turpium spectaculorum, atque verborum contagione polluantur."

[44] Ibid., 203–204 (D. 31, c. 14): "Aliter se orientalium traditio habet ecclesiarum, aliter huius sanctae Romanae ecclesiae. Nam earum sacerdotes diaconi, atque subdiaconi matrimonio copulantur: istius autem ecclesia, vel occidentalium nullus sacerdotum a subdiacono usque ad episcopum licentiam habet coniugium sortiendi." The gloss to "Aliter" (at 203) reads: "Dicitur in hoc cap. quod alia est traditio orientalis ecclesiae, et alia occidentalis. Nam in orientali ecclesia omnes clerici indistincte possunt uti matrimonio contracto. In occidentali vero ecclesia aliter servatur." The gloss to "copulantur" (ibid.) reads: "Id est, copulatio utuntur. Multi ex hac littera dixerunt, quod orientales possunt contrahere in sacris ordinibus. Sed eis obstat infra dist. proxi. si quis eorum. Sed ipsi dicunt quod ibi sexta synodus nobis praefixit regulam."

[45] The use of "Nicena" after "synodo. vi." in Berò's commentary seems to be an error.

[46] Ibid., 201–202 (D. 31, c. 12): "Nicaea synodus corrigere volens hominum vitam in ecclesiis commorantium, posuit leges, quas canones vocamus, in quorum tractatu videbatur aliquibus introducere legem, ut episcopi,

no opposition, because Eastern clerics respond to them that the law was imposed not on themselves but on such Western clerics, as the gloss at *Aliter* states.

And although the Eastern Church did not receive the canons, nevertheless they do not have contempt for them, and so they cannot be imputed with heresy. For they use their own custom, which the Roman Church has known of, and has tolerated, and therefore they must be tolerated in this matter, as it has been tacitly confirmed by the pope (argument at the chapter *Si Romanorum* in Distinction 19[47]), as what the pope approves must not be rejected by anyone, and in a similar way he does what the gloss on the chapter *Gratia* in *De Rescriptis* in the Liber Sextus (speaking of the custom by which two simple benefices can be retained without dispensation[48]) considered—because the pope has known of and has tolerated such a custom, therefore it must generally be observed (as is stated by Innocent both in the chapter *Dudum* in *De Electione* and in *Cum iam dudum* in *De Praebendis*[49]).

This conclusion, so simply and generally posited, seems not to be true. Rather, Eastern clerics are regularly bound by canon law; otherwise, if they should condemn it, they would have to be considered heretics, as is the understanding in the gloss on the chapter *De libellis* and the argument of the text with the gloss in the chapter *Nulli fas* in Distinction 19,[50] the gloss on the chapter *Generali* in *De Electione* in the Liber Sextus,[51] and in the chapter *Violatores* through that text in Causa 25 question 1[52] and in the chapter *Si quis dogmata* in Causa 25 question 2,[53] and this is proven from the generality of this

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presbyteri, diaconi, et subdiaconi cum coniugibus, quas ante consecrationem duxerant, non dormirent. Surgens autem in medio Paphnutius confessor contradixit, honorabiles confessus nuptias, et castitatem esse dicens, cum propria coniuge concubitum: suasitque; concilio, ne talem poneret legem, gravem esse asserens causam, quae in ipsis, aut eorum coniugibus occasio fornicationis existeret. Et haec quidem Paphnutius (licet nuptiarum esset inexpertus) exposuit: synodusque laudavit sententiam eius, et nihil ex hac parte sancivit: sed hoc in uniuscuiusque voluntate, non in necessitate dimisit." Berò's reference, however, appears to pertain to the statement of Gratian after the following chapter, D. 31 c. 13, *Quoniam* (note the similar-looking reference in the gloss to "Si quis eorum" [at 211]: "Istud c. evidenter est contra illos qui dicunt quod Graeci possunt contrahere in sacris ordinibus, cum hoc c. sit sextae synodi, et sexta synodus praefixit eis regulam vivendi, ut 31. dist. Nicaena, et ca. quorum § hoc autem. [...]"). This statement of Gratian (at 201–202), reads: "Hoc autem ex loco intelligendum est (orientalis enim ecclesiae cui sexta synodus regulam vivendi praescripsit) votum castitatis in ministris altaris non suscepit."

[47] Ibid., 103–106 (D. 19, c. 1), especially the gloss to "reprobantur" (at 104): "Arg. quod illud quod Papa approbat, vel reprobat, nos approbare vel reprobare debemus [...]."

[48] *Liber Sextus Decretalium D. Bonifacii Papae VIII. Suae Integritati VI cum Clementinis et Extravagantibus, earumque Glossis Restitutus* (Rome: Aedes Populi Romani, 1582) 28 (VI 1.3.7, gloss to "De iure teneri"): "Unde dici posset, opinionem Innocen. veram esse: quam sequitur consuetudo, quam Papa scit et tolerat."

[49] *Decretales D. Gregorii Papae IX. Suae Integritati una cum Glossis Restitutae* (Venice: 1591) 141–146 (*Dudum*, X 1.6.44); 734–735 (*Cum iam dudum*, X 3.5.10). The references to the commentary of Innocent IV (as explained in the gloss to "De iure teneri" in *Liber Sextus*, 28 [VI 1.3.7]) argue that the possession of many non-curate benefices not requiring residence through custom or statute is not a sin or contrary to law.

[50] *Decretum Gratiani*, 107–108 (D. 19, c. 5).

[51] *Liber Sextus*, 102–104 (VI 1.6.13).

[52] *Decretum Gratiani*, 1897–1900 (C. 25, q. 1, c. 6).

[53] Ibid., 1913–1914 (C. 25, q. 2, c. 18).

> letter, which says that the statutes of its canons must be maintained by all, excepting no one. Likewise, since the Nicene Synod established a rule of living for all generally, it is said also to include Greeks, as is said in the gloss on *Si quis eorum*, and is proven at *Cum in praeterito*, where the law is established for all clerics.
>
> What is found in *Aliter* is no argument against this, because it understands this only as pertains to contracting marriage, rather than any particular custom that the pope knows of and tolerates as being of the common law (as is also in the gloss in the aforementioned chapter *De libellis*).
>
> Nor is there a problem that Eastern clerics do not want to receive these laws, since laws are given to unwilling subjects, just as jurisdiction is (argument at *Inter stipulantem*, §1 in *De Verborum Obligatione* of Justinian's *Digest*[54]) and, as is often said, persons equally establish laws and exercise jurisdiction (Bartolo at *Omnes populi* in *De Iustita et iuribus*[55] and in the second chapter of *De Constitutionibus* in the Liber Sextus[56]), and these words now suffice for this point.[57]

Berò analyzed the general question of applicability of canon law to Eastern faithful, particularly their clerics. He noted what appeared to be the strongest case against such applicability, namely

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[54] *Digestum Novum, seu Pandectarum Iuris Civilis Tomus Tertius* (Lyons: Ioannes Pillehotte, 1618) 981 (45.1.83.1).

[55] Bartolus a Saxo Ferrato, *In Primam ff. Veteris Partem* (Venice: Iuntae, 1570) 9.

[56] *Liber Sextus*, 13–14 (VI 1.2.2).

[57] Berò, 22r (#197–198): "Ulterius quaero post Abb. utrum Graeci, hoc est clerici orientales sint iuri canonico subiecti, glo. in capit. de libellis. in fin. xx. distinction. ad quam Abb. se remittit, dicit, ecclesiam orientalem canones non recepisse: quia licet secundum ius canonicum clerici constituti in ordinibus sacris a subdiaconatu. supra matrimonium contrahere non possint, ut in c. si quis eorum. xxxii. dist. c. cum in praeterito. lxxxiiii. dist. capit. praesbyteri. xxxiiii. dist. tamen clerici orientales in sacris constituti matrimonia contrahunt, ut in d. c. de libellis. cum gl. per text. in c. aliter. xxxi. dist. Nec obstant constituta in sinodo. vi. Nicena [*sic*], de qua in c. Nicena. xxxi. dist. et in d. c. si quis eorum, qua clerici orientales illis respondent, quia non ipsis, sed occidentalibus lex imposita fuit, ut dicit gloss. in d. c. aliter. Et quamvis ecclesia orientalis canones non receperit, non tamen illos contempsit, et ideo de haeresi imputari non possunt: quia sua consuetudine usi fuerunt, quam Romana ecclesia scivit, et toleravit, ergo in illa tolerandi sunt, tanquam ea a Papa tacite fuerit confirmata, argumen. c. si Romanorum. xix. distin. ubi quod Papa approbat, a nemine reprobandum est, et in simili facit, quod voluit gl. in c. gratia. de rescri. in vi. loquens de consuetudine, qua duo beneficia simplicia absque dispensatione retineri possunt: quia talem consuetudinem Papa scivit, et toleravit, ergo generaliter servanda est, ut per Innocen. etiam in c. dudum. de electio. et in c. iam dudum. de praebend. Haec conclusio sic simpliciter, et generaliter posita vera non videtur, quin imo orientales clerici regulariter ligantur iure canonico, alioquin si illud contemnerent, haeretici censendi essent, ut est de mente glo. in d. c. de libellis. et argu. tex. cum gl. in c. nulli fas. xix. distin. gl. in c. generali. de ele. in vi. et in c. violatores. per illum text. xxv. q. i. et in c. si quis dogmata. xxv. q. ii. et hoc probatur ex generalitate huius literae, quae dicit, ab omnibus statuta canonum custodienda esse, et sic neminem excipit: et ideo cum Nicena synodus regulam vivendi generaliter omnibus praefixerit, comprehendere etiam graecos dicitur, ut dicit gl. in d. c. si quis eorum. et probatur in d. c. cum in praeterito, ubi omnibus clericis lex est praefixa. Nec obstat, quod habetur in d. c. aliter. quia illud duntaxat quo ad matrimonium contrahendum intelligit potius ex quadam consuetudine particulari, quam scit, et tolerat Papa, quam de iure communi, ut per glo. etiam in dicto c. de libellis. Nec refragatur, quod orientales clerici canones recipere noluerunt, quia iura in subditos invitos redduntur, sicut iurisdictio, argumen. l. inter stipulantem. §.i. ff. de verborum oblig. et (ut saepe dictum fuit) a pari procedunt statuere, et iurisdictionem exercere. Bar. in l. omnes populi. de iust. et iur. et in c. secundo de constit. lib. vi. et haec pro nunc quo ad hunc articulum sufficiant."

that Eastern faithful did not follow the norms concerning clerical marriage; since this had not been condemned by the Roman pontiff, despite him being aware of it, it must have been licit for them not to follow these norms. Berò admitted the validity of this argument within the limits provided—norms on clerical marriage—but rejected it as a general conclusion. Eastern faithful, as a rule, had to be bound to canon law—otherwise, it would not seem to matter whether or not they held the law in contempt. The non-application of canon law to Eastern faithful could occur only in specific points (such as clerical marriage) with at least the tacit approval of the Roman pontiff, regardless of the attitude of the Eastern faithful themselves concerning the matter.

Berò was in favor of the universal applicability of canon law as the general rule; exceptional cases where Eastern faithful were not bound by canon law were just that—exceptions. Thus, he did not admit that Eastern communities were generally not bound by papal legislation—that is, he did not hold that they possessed a "negative" autonomy.

1.3.2. Juan Azor (1535–1603)[58]

The question of Eastern autonomy was not settled by Berò, however. Another canonist, Juan Azor, took up the question in first part of his *Institutionum Moralium*, published in 1600:

> Seventh, it is asked: Whether Greek and Eastern clerics living according to the manner of Greeks are bound by the canonical constitutions of the Latins. Abbas, in the chapter *Canonum* in *De Constitutionibus*, proposes this question, and sends the reader to a gloss in Distinction 20, at the chapter *De Libellis*, but certainly in this place the gloss treated the question strictly and in a cursory manner. Agostino Berò, in his commentary on the chapter *Canonum* in *De Constitutionibus* (number 197), raises this question as well, and finally concludes that they are so bound. He proves it from the fact that the Church constitutes one body, whose head is Christ the Lord, and supreme Vicar of Christ, who is the Roman pontiff, whose duty is to preside over all, and by whose authority and power

[58] Arthur J. McCaffray, "Juan Azor," *The Catholic Encyclopedia*, special edition, ed. Charles G. Herbermann et al. (New York: The Encyclopedia Press, 1913) 2:167–168.

all are ruled and governed as the sheep of Christ and the canons and the decrees of the Church are confirmed.

But, indeed, in this matter we ought to make distinctions; for it is not the same thing to ask whether Greek and Eastern clerics are bound by constitutions of the Latins, as it is to ask whether they are subject to the power of the Roman pontiff by divine law—that is, by the institution of Christ they are subject to the power of the Roman pontiff as the supreme Vicar of Christ on Earth, as I will speak of further down. Rather, we ask whether the canons and decrees generally constituted in the Latin and Western Church also bind Greek and Eastern clerics. For although there is only one fold of Christ, and one supreme Vicar of Christ Himself—namely the Roman Pontiff, who has the care of the whole fold committed to him—nevertheless canons can be determined and constituted, and laws established, only for Latin and Western clerics, not Eastern ones, because when these laws or those canons are established and constituted, the pontiff desires, expressly or tacitly, that they bind the Western clerics, not the Eastern ones.

First of all, then, in the common canon law that the Churches of the Latins use, there are contained many ancient canons that general councils issued at the time when the Greek and Eastern clerics were not yet separated and divided from the Latins; both Greeks and Latins are bound by such canons *per se*. Yet it can happen by circumstance that Greeks and Easterners were loosened [of them], since many canons, at least in part, have been abrogated with them through use and custom, while the Latins retain them as yet in their use and custom.

Then, it cannot be doubted that there are many things among the Greeks and Easterners that have been received by use or even introduced by ancient common law that are very contrary to the things that are observed by law or ancient custom with the Latins. Hence the Greeks from the very times of the Apostles also honor piously and religiously Saturday the same way as Sunday; some of them who are bound by the bond of matrimony are promoted to orders; the children of presbyters are also initiated to orders; three or four times yearly they observe the Lenten fast; on the vigils of the Apostles they do not take up a fast; before sacred orders they have only clerical lectors, not porters, exorcists, or acolytes; they recite the divine office differently; they carry out the obligation of the divine office differently; they confect the sacred Body of Christ in fermented bread; presbyters minister the Sacrament of Confirmation to those whom they wash with the water of sacred baptism; they offer the Eucharist even to small infants; finally, they observe many other things, in carrying out and offering the sacrifice of the Mass, in conferring sacraments, and even in receiving them, which are very different from the other rites, customs, and institutes that we [Latins] use.

Finally, it cannot be denied that after the separation of the Greek and Eastern Church from the Latin Church there have been many canons issued in the Church of the Latins, canons that have been constituted only for protecting and maintaining the common good of the Latins, namely to conserve the laws, decrees, customs, institutes, and rites of the Latin Church. Greeks are not bound by such canonical constitutions; such are a great deal of the canons issued on election, presentation, promotion, and ordination of clerics;

> on the concession, institution, erection, and union of Churches and benefices; on simony; on the sentence of excommunication; on suspension, interdict, and irregularity.
>
> Therefore, as I have said, Greeks and Easterners are subject to the Roman pontiff as the supreme Vicar of Christ by divine law, through which he has the power and authority to make law, to issue legislation, constitutions, and precepts for them; however, he does not always use this right and power, nor is he presumed to make laws for them.[59]

In his response, Azor refined the question raised by Berò. He, with Berò, admitted that the power of the Roman pontiff was such that it extended even to Eastern faithful, and particularly

[59] Juan Azor, *Institutionum Moralium in quibus Universae Quaestiones Ad Conscientiam recte, aut prave factorum pertinentes, breviter tractantur Pars Prima* (Rome: Aloysius Zanetto, 1600) 499–500 (5.11.7): "Septimo Quaeritur, An Graeci, et Orientales clerici more Graecorum viventes, teneantur Canonicis Latinorum Constitutionibus? Abbas in cap. Canonum, de Constitutionibus, hanc quaestionem proponit, et lectorem mittit ad Glossam in distinct. 20. cap. de libellis, sed certe eo loco Glossa strictim, et cursim quaestionem tractavit. Augustinus Beroius cap. Canonum, De constitutionibus. nu. 197. hanc quoque quaestionem movet, et tandem concludit, eos teneri. Idque probat ex eo, quod Ecclesia unum corpus constituit, cuius caput est Christus Dominus, et summus Christi Vicarius, qui est Romanus Pontifex, cuius est praeesse cunctis, et cuius auctoritate, et potestate omnes tanquam Christi oves reguntur, atque gubernantur, Canones et decreta Ecclesiae confirmantur. Sed profecto in hac re distinguere nos oportet; non enim idem est, quaerere, an Graeci, et Orientales clerici latinorum constitutionibus teneantur: quod an Romani Pontificis potestati subiecti sintinam [*sic*] iure divino, hoc est, institutione Christi, Romani Pontificis tanquam supremi in terra Christi Vicarii potestati subduntur, ut suo in loco dicam inferius; sed quaerimus, an Canones in Latina, et Occidentali Ecclesia generatim constituti, et decreti, Graecos etiam, et Orientales clericos teneant: nam etsi unum tantum sit Christi ovile, et unus supremus ipsius Christi Vicarius, nempe Romanus Pontifex, qui totius ovilis sibi commissi curam habet, nihilominus tamen decerni, et constitui Canones, et ferri leges possunt ad Latinos tantum, et Occidentales clericos, non ad Orientales, quia cum feruntur, et constituuntur hi, aut illi Canones, vult Pontifex expresse, vel tacite, ut Occidentales, non Orientales clericos teneant. In primis igitur, Iure Canonico communi, quo Ecclesiae Latinorum utuntur, multi Canones antiqui continentur, quos ediderunt generalia Concilia eo tempore, quo Graeci, et Orientales clerici nondum erant a Latinis separati, et disiuncti; et huiusmodi Canonibus, tum Graeci, tum Latini tenentur per se: nam ex accidenti fieri potest, ut Graeci, et Orientales soluti sint, quoniam apud ipsos usu, et consuetudine multi Canones sunt, vel ex parte abrogati, cum tamen eos Latini adhuc more, et usu retineant. Deinde, dubitari non potest, quin apud Graecos, et Orientales multa sint, vel usu recepta, vel etiam iure antiquo communi introducta longe contraria his, quae apud latinos iure, vel usu antiquo servantur. Hinc etiam Graeci ab ipsis usque Apostolorum temporibus sabbatum perinde ac Dominicam diem pie, ac religiose colunt: ex iis, qui sunt matrimonii vinculo adstricti, aliqui ad ordines promoventur: filii presbyterorum ordinibus quoque initiantur: ter aut quater quotannis quadragenarium ieiunium servant: in pervigiliis Apostolorum ieiunium non suscipiunt: ante sacros ordines Lectores tantum Clericos praeficiunt, non Ostiarios, non Exorcistas, non Acolythos: aliter divinas preces recitant, aliter divini officii pensum exoluunt: in fermentato pane sacrum Christi corpus conficiunt: iis, quos presbyteri sacri baptismatis aqua proluunt, confirmationis sacramentum ministrant: Eucharistiam parvulis etiam infantibus praebent: multa denique alia, tum in Missarum sacrificiis faciendis, et offerendis, tum in sacramentis conferendis, vel etiam suscipiendis observant, cum tamen longe aliis ritibus, moribus, et institutis utamur. Demum negari non potest, post divisionem Graecae Ecclesiae, et Orientalis a Latina plures extare in Latinorum Ecclesia Canones editos, qui duntaxat ad commune Latinorum bonum tuendum, et retinendum constituti sunt, nimirum de conservandis Latinae Ecclesiae legibus, decretis, moribus, institutis, ac ritibus: et huiusmodi canonicis constitutionibus Graeci minime tenentur: tales sunt plerique Canones editi de electione, praesentatione, promotione, et ordinatione Clericorum, de concessione, institutione, erectione, unione Ecclesiarum, et beneficiorum, de simonia, de sententia excommunicationis, de suspensione, interdicto, irregularitate. Sunt ergo, ut dixi, Graeci et Orientales Romano Pontifici, ut summo Christi Vicario iure divino subiecti, unde eis ius dicendi, leges, et constitutiones, ac praecepta dandi, potestatem, et auctoritatem habet, sed eo iure, et potestate non semper utitur, nec ad eos leges ferre creditur."

their clerics. Thus, the pope was at least capable of establishing laws for them. The same could be said of an ecumenical council, which could (and did) establish norms binding both Latin and Eastern faithful. However, one had to take into account the ability of individual communities to loosen themselves of the law, the independent introduction of norms, and the intent of the one issuing the law. In the first case, some canons of ecumenical councils were abrogated in the East by contrary use and custom. In the second case, certain things were introduced by ancient law or use of the Eastern faithful, rendering their usages quite distinct from those of the Latins. Finally, and perhaps most important for future jurisprudence, Azor stated that many laws issued by popes after the schism were intended only for the Latins; they did not bind Eastern faithful, nor even took their situation into account.[60] Thus, while the Roman pontiff possessed the authority to enact laws for the Eastern faithful, "he does not always use this right and power, nor is he presumed to make laws for them."

Azor argued that there was a negative autonomy on the part of Eastern communities vis-à-vis the Roman pontiff and even, one could argue, a form of positive autonomy. In terms of the former, while the pope could issue canon law that applied to Eastern faithful, he usually did not intend to do so, restricting his legislation to the Latin Church. In terms of the latter, Eastern faithful possessed their own customs and ancient laws, which rendered their discipline distinct from that of their Latin brethren. However, one notes that Azor never mentions contemporary Eastern law as a distinguishing factor; he only identified "ancient common law" as such. Laws issued more recently in particular Eastern jurisdictions such as patriarchates would not appear to

[60] H. A. Ayrinhac, *General Legislation in the New Code of Canon Law* (London/New York/Toronto: Longmans, Green and Co., 1930) 98: "The theory that pontifical disciplinary laws are not meant to bind Eastern Catholics was explicitly set forth at the beginning of the seventeenth century by a theologian of great renown, Azor (Institutiones Morales, P. I, Lib. V, c. 11, sec. 7) and maintained by many others after him."

equivalent in nature to "ancient common law," at least in terms of acting as a distinguishing factor in comparison with the Latin Church.

1.3.3. Juan de Salas (1553–1612)[61]

Writing soon afterward Azor, the commentator Juan de Salas supported the general non-application of papal law to Eastern faithful in his *Tractatus de Legibus* (published in 1611), offering a summary of statements in favor of it:

> Whether Greek and Eastern clerics living in the manner of the Greeks are bound to the canonical constitutions of the Latins: Panormitanus, in the chapter *Canonum* in *De Constitutionibus,* sends the reader to the gloss on the chapter *De libellis* in Distinction 20, which nevertheless treats the question strictly and cursorily. Berò, at the said chapter *Canonum,* number 197, concludes that they are bound, as the Roman pontiff also rules the Greeks. Azor however, in tome 1, book 5, chapter 11, question 7, says first that there are many ancient canons contained in the common canon law, by which the Latins are ruled, which general councils issued at the time when the Greek and Eastern clerics were not separated from the Latins, and Greeks and Latins are bound by such canons *per se*, although *ex accidenti* it can happen that Greeks and Easterners are loosened of them, since with them many canons in whole or in part have been abrogated by custom and use. Second, he says that it cannot be doubted that with the Greeks and Easterners there are many things that have been received by use or even introduced by ancient common law, very contrary to the things that are observed by the Latins by law or ancient custom. For, from the times of the Apostles, Greeks have piously and religiously observed Saturday like Sunday; some of the married are promoted to orders; the children of presbyters are initiated to orders; three or four times a year they observe the Lenten fast; they do not fast on the vigils of the Apostles; before holy orders they confer no minor order except lector; they pray the divine office differently; they fulfill the obligation of the divine office differently; presbyters confer the Sacrament of Confirmation on those whom they baptize; they offer the Eucharist even to children and infants; they observe many other things in the sacrifices and the sacraments different from the customs and institutes of the Latin Church. Finally, it cannot be denied that after the division of the Greek and Eastern Church from the Latin Church, many canons have been issued for only the Latin Church, such as those concerning election, presentation, promotion, and ordination of clerics; concerning constitution, erection, and union of Churches and benefices; concerning simony; concerning a sentence of excommunication; concerning suspension, interdict,

[61] Javier Alvarado Planas, "Juan de Salas (1553–1612)," *Glossae: European Journal of Legal History* 9 (2012) 62–81. Available online: http://www.glossae.eu/wp-content/uploads/2012/12/02.9Alvarado-Juan-de-Salas.pdf (accessed January 2, 2017).

> and irregularity. Greeks and Easterners are subject to the Roman pontiff by divine law, whereby he can issue laws for them, and impose precepts, but he does not always use this power, nor is he presumed to issue laws for them. Azor holds these opinions with almost the same words.[62]

Juan de Salas offers little adding to Azor's actual argument. However, his commentary would be cited alongside that of Azor in the later curial decision of 1631.

1.3.4. Nicholas Baldelli (1573–1655)[63]

Nicholas Baldelli, another canonical commentator, also lent his support to the argument of Juan Azor and Juan de Salas in his *Disputationum ex morali Theologia, Libri Quinque*, published in 1637:[64]

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[62] Juan de Salas, *Tractatus de Legibus, in Secundam Secundae S. Thomae* (Lyons: Ioannes de Gabiano, 1611) 362 (96.14.15): "An Graeci et Orientales clerici more Graecorum viventes, teneantur canonicis Latinorum constitutionibus. Panormitanus cap. canonum de const. mittit ad gloss. cap. de libellis. d. 20. quae tamen strictim, et cursim quaestionem tractat. Beroius dict. cap. canonum, num. 197. concludit, teneri: quia Rom. Pontifex etiam Graecos regit. Azor autem to. 1. lib. 5. c. 11. q. 7. primo ait, iure communi canonico, quo Latini utuntur, multi canones antiqui continentur, quos edidere generalia Concilia eo tempore, quo Graeci, et Orientales clerici nondum erant a Latinis separati, et huiusmodi canonibus tum Graeci, tum Latini tenentur per se: nam ex accidenti fieri potest, ut Graeci, et Orientales soluti sint: quoniam apud ipsos usu, et consuetudine multi canones sunt in totum, vel ex parte abrogati, cum tamen eos Latini adhuc more et usu retineant. Secundo ait, dubitari non potest, quin apud Graecos et Orientales multa sint, vel usu recepta, vel etiam iure antiquo communi introducta longe contraria his, quae apud Latinos iure, vel usu antiquo servantur. Nam Graeci a temporibus Apostolorum sabbatum perinde ac dominicam diem pie, ac religiose colunt: ex coniugatis aliqui ad ordines promoventur: filii Presbyterorum ordinibus initiantur: ter aut quater quotannis quadragenarium ieiunium servant: in pervigiliis Apostolorum non ieiunant: ante sacros ordines nullum minorem conferunt nisi lectoris: aliter divinas preces recitant; aliter divini officii pensum exoluunt: in fermentato consecrant: iis quos Presbyteri baptizant, Sacramentum confirmationis ministrant: Eucharistiam pueris etiam infantibus praebent: multa alia in sacrificiis et Sacramentis observant diversa a moribus et institutis latinae Ecclesiae. Denique negari non potest [post] divisionem Graecae, et Orientalis Ecclesiae a Latina plures extenuare canones, pro sola Ecclesia Latina editos, ut de electione, praesentatione, promotione, et ordinatione clericorum, de constitutione, erectione, unione Ecclesiarum, et beneficiorum, de simonia, de sent. excommunicationis, de suspensione, interdicto et irregularitate. Sunt Graeci et Orientales iure divino Romano Pontifici subiecti, unde eis potest leges dare, et praecepta imponere: sed non semper utitur hac potestate, nec ad eos leges ferre creditur. Haec fere tenens eisdem verbis Azor."

[63] Henrik Wels, *Die* Disputatio de anima rationali secundam substantiam *des Nicolaus Baldelli S.J. nach dem Pariser Codex B.N. lat. 16627: Eine Studie zur Ablehnung des Averroismus und Alexandrismus am Collegium Romanum zu Anfang des 17. Jahrhunderts*, Bochumer Studien zur Philosophie 30 (Amsterdam/Philadelphia: B. R. Grüner, 2000) 15–16.

> It must be said briefly that all are subject to ecclesiastical power *per se* and directly by divine law itself. However, after the completed separation of the Eastern Church from the Western Church, only those who are of the Western Church are considered to be bound by laws that emanate from the Supreme Pontiff for ecclesiastical persons. [...] The fact that, after the completed separation of the Eastern Church from the Western Church, and after the empire was transferred from the Greeks to the Germans under Leo III, Eastern and Greek clerics are commonly not bound by pontifical laws, which [popes] newly issue for ecclesiastics, can be seen in [the commentaries of] Azor and Salas. And it is proven from the fact that the intention of the pontiff does not extend itself to them, as is clearly known, for, since they differ from the Latins in many things, yet none of the pontiffs reprehends or condemns them, even when they are among Latins. [...] From [such cases] it can be clearly conjectured concerning other cases, that the intention of the pontiff is commonly not to oblige Easterners when he orders something for ecclesiastics absolutely and universally. And the same is the case for those laws that are contained in canon law, unless perhaps some of them were established by general councils before the completed separation. To these latter they are entirely bound, speaking *per se*, because the intention of the legislator was extended even to them by a reason contrary [to that posited above, namely the intent not to oblige Easterners]. I say, however, *speaking per se*, since it can happen *ex accidenti* that they are not bound even by these, e.g., if the laws have been abrogated with them by a contrary use and custom.[65]

While Baldelli followed the lines of Azor's argument, he reversed the order, speaking first of papal laws issued after the schism. Like Azor, he based his argument for non-application of papal law to Eastern clerics on the intention of the pope, known from the fact that he did not condemn them for following their usages despite their non-conformity with (Latin) canon law. While Baldelli admitted that Eastern clerics would also be bound to laws issued by general

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[64] While his *Theologia Moralis* was published in 1637, and therefore after the important curial decision of 1631, he shows no knowledge of the decision, and his work should be considered as part of the general jurisprudential milieu of that era.

[65] Nicholas Baldelli, *Disputationum ex morali Theologia, Libri Quinque* (Lyons: Gabriel Boissat, 1637) 573–574 (5.41) : "Et breviter dicendum est, quod potestati ecclesiasticae per se, et directe iure ipso divino omnes subduntur: sed post factam separationem Ecclesiae orientalis ab occidentali, legibus, quae emanant a Summo Pontifice pro personis ecclesiastcis, non censentur teneri, nisi illi, qui sunt de Ecclesia occidentali. [...] [Q]uod post factam separationem Ecclesiae orientalis ab occidentali, et post translatum imperium a Graecis ad Germanos, sub Leone III. communiter Clerici orientales, et Graeci non teneantur legibus pontificiis, quae de novo emanant pro Ecclesiasticis, videri potest apud Azor. *part.* 1. *lib.* 5. *cap.* 11. *quaest.* 7. et apud Salas *disp.* 14. *de legibus, sect.* 15. Et probatur ex eo: quia intentio Pontificis non se extendit ad illos, ut manifeste colligitur: quia, cum in plurimis discrepent a Latinis; nullus tamen ex Pontificibus eos reprehendit, aut damnat, etiam quando sunt inter Latinos: [examples of differences follow, similar to those given by Azor and Salas]; et ex his recte potest fieri coniectura etiam de aliis, quod communiter intentio Pontificis non sit de obligandis orientalibus, quando aliquid praecipit absolute, et universaliter pro Ecclesiasticis. Et idem est etiam de iis legibus, quae continentur in iure canonico, nisi forte earum aliquae conditae sint a Conciliis generalibus ante factam separationem: illis enim, per se loquendo, omnino tenentur; quia contraria ratione intentio legislatoris fuit extensa etiam ad illos. Dico autem, *per se loquendo*: quia ex accidente [*sic*] fortasse etiam his non tenentur: ut, v.g. si apud illos contrario usu, et consuetudine sunt abrogatae."

councils prior to the schism, he limited the applicability of this rule, stating that such laws could have been abrogated through contrary use and custom.

1.4. The Pamphilian Decision[66]

1.4.1. The *Dubium*

The question of whether Eastern faithful were subject to pontifical legislation and, if so, in what cases, was not limited to canonical commentators. Indeed, it touched on practical matters, as missionaries in the East had to know to which laws Eastern faithful were bound in order to absolve them from any censures incurred from not following or violating those laws. Further, the application of censures itself was subject to the same question—if censures were established by the Roman pontiff, did they apply to Eastern faithful?

On March 27, 1631, a meeting of seven cardinals (along with a priest and an assessor of the Holy Office) was held at the palace of Luigi Cardinal Capponi. Giovanni Battista Cardinal Pamphili brought to the meeting several questions and petitions of Capuchin missionaries in the East concerning faculties conceded to them by the Holy Office, and others they considered necessary. Cardinal Pamphili was deputized to examine these matters himself, along with some theologians to be named by him.[67]

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[66] The use of the phrase "Pamphilian decision" is derived from Joseph F. Marbach, "Some Marriage Questions Concerning Orientals in This Country and in Canada," *The Jurist* 9 (1949) 37.

[67] Transcript of congregation of March 23, 1631 of the Sacred Congregation for the Propagation of the Faith, in Mansi, 50:36* note 1: "Die 27 martii 1631.—Fuit congregatio in palatio eminentissimi domini cardinalis Capponii, cui interfuerunt septem cardinales, videlicet ipsemet dominus cardinalis Capponius, Bentivolus, Caetanus, Sancti-Sixti, Pamphylius, Ginettus et Trivultius, et reverendissimi domini Raymundus Torniellus et assessor Sancti Officii. *Omissis* etc. Referente eminentissimo domino cardinale Pamphylio dubia et petitiones missionariorum cappucinorum Orientis circa facultates eis a Sancto Officio concessas et alias eisdem, ut dicunt, necessarias; sacra congregatio considerans praedicta dubia discussione indigere, eumdem dominum cardinalem Pamphylium deputavit ad illa, petitionesque praedictas examinandas *cum aliquot theologis ab eo nominandis et coram se convocandis*."

In a meeting of May 7 of the same year, Cardinal Pamphili, with master of the sacred palace Father Nicholas Riccardi,[68] Father Orazio Giustiniani, and Theatine Father Thomas de Afflicto, came to a question of the Capuchin missionaries related to absolution of censures in cases reserved to the pope: could Greek and Armenian priests united with Rome validly absolve in such cases, since they did not have such reservations?[69] The members, however, decided that a more fundamental question had to be answered before the one concerning absolutions:

> Whether the Supreme Pontiff intends to encompass Greeks and others subject to the sees of the schismatic patriarchs in the bull *In Coena Domini* and other apostolic constitutions, in which he reserves cases to himself and the Apostolic See.[70]

The bull *In Coena Domini* (so called not because of its *incipit* but because of its traditional date of promulgation) was

> a collection of censures of excommunication against the perpetrators of various offences, absolution from which was reserved to the pope. [...] The main heads of the offences struck with excommunication in the Bull are as follows:
>
> - (1) Apostasy, heresy, and schism.
> - (2) Appeals from the pope to a general council.
> - (3) Piracy in the papal seas.
> - (4) Plundering shipwrecked vessels, and seizure of flotsam and jetsam.
> - (5) The imposition of new tolls and taxes, or the increase of old ones in cases where such was not allowed by law or by permission of the Holy See.
> - (6) The falsification of Apostolic Briefs and Bulls.
> - (7) The supply of arms, ammunition or War-material to Saracens, Turks, or other enemies of Christendom.
> - (8) The hindering of the exportation of food and other commodities to the seat of the Roman court.
> - (9) Violence done to travellers on their way to and from the Roman court.
> - (10) Violence done to cardinals.
> - (11) Violence done to legates, nuncios, etc.

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[68] This name is added here and in a later quote on the basis of the comments of Angelo Maria Verricelli, *Quaestiones Morales, seu Tractatus De Apostolicis Missionibus* (Venice: Francesco Baba, 1656) 204 (3.83).

[69] Transcript of particular congregation of May 7, 1631 of the Sacred Congregation for the Propagation of the Faith, in Mansi, 50:36* note 1: "Ad secundum dubium de sacerdotibus armenis et graecis cum sancta Romana ecclesia unitis, an possint absolvere a casibus reservatis, cum apud eos talis reservatio non existat."

[70] Ibid.: "[C]ongregatio dixit discutiendum esse infrascriptum articulum in alia congregatione, videlicet: An summus pontifex intendat graecos et alios *sedibus patriarcharum schismaticorum subditos* comprehendere in bulla Coenae Domini, aliisque constitutionibus apostolicis, in quibus casus sibi et sedi apostolicae reservat."

- (12) Violence done to those who were treating matters with the Roman court.
- (13) Appeals from ecclesiastical to secular courts.
- (14) The avocation of spiritual causes from ecclesiastical to lay courts.
- (15) The subjection of ecclesiastics to lay courts.
- (16) The molestation of ecclesiastical judges.
- (17) The usurpation of church goods, or the sequestration of the same without leave of the proper ecclesiastical authorities.
- (18) The imposition of tithes and taxes on ecclesiastics without special leave of the pope.
- (19) The interference of lay judges in capital or criminal causes of ecclesiastics.
- (20) The invasion, occupation, or usurpation of any part of the Pontifical States.[71]

It was unclear to the members of the meeting whether these censures applied to those Eastern faithful among whom the Capuchin missionaries were working.

1.4.2. The Decision

On June 4, 1631, a particular congregation of the Sacred Congregation for the Propagation of the Faith rendered their decision:

> There was a particular congregation regarding questions of missionaries of the East in the palace of the most eminent lord Cardinal Pamphili, at which his eminence was present along with the most reverend Father [Nicholas Riccardi] master of the sacred palace, Father Orazio Giustiniani, and Theatine Father Thomas de Afflicto. [...] This point was very extensively discussed: Whether the Supreme Pontiff intends to encompass Greeks and others subject to the sees of the schismatic patriarchs in the bull *In Coena Domini* and other apostolic constitutions, in which he reserves cases to himself and the Apostolic See.
>
> Afterwards there were brought forward and pondered: the sixth canon of Nicaea I; chapter 17, session 10 of Constantinople IV; likewise, the Council of Chalcedon regarding the letter of Pope St. Leo and the same canon 6; the first letter of Pope Marcellus to the Antiochenes; the second letter of Pope Anacletus; the chapter *Licet* in *De Baptismo*; the chapter *Antiqua* in *De Privilegiis*; Gregory of Cyzicus; the Eastern Canons; Azor, part 1, book 5, chapter 11, question 7; Salas; Saint Gregory concerning

[71] John Prior, "In Coena Domini," *The Catholic Encyclopedia*, special edition, ed. Charles G. Herbermann et al. (New York: The Encyclopedia Press, 1913) 7:718. For the version of this bull issued under Urban VIII (the pope reigning at the time the Pamphilian decision was made), see Urban VIII, bull *Pastoralis Rom. Pont. vigilantia*, April 1, 1627: *Magnum Bullarium Romanum*, editio novissima (Lyons: Philip Borde, Laurence Arnaud, and Claudius Rigyad, 1655) 4:113–116.

> the three patriarchs; the act of the Egyptian bishops who did not want to subscribe to the said letter of Pope St. Leo, since at that time their patriarchal see was vacant; the synodal letter of the Council of Chalcedon; canon 2 of Constantinople I, and the objection of the Roman pontiffs Saints Leo and Damasus to this. In these are widely discussed the power of the pope and patriarchs, the division of the provinces among the patriarchs, and from these are deduced diverse arguments for and against the said power of the pope.
>
> Regarding this point, the aforesaid fathers agreed on a negative opinion, which they nevertheless limited in three ways:
>
> 1º in matter of the dogmas of faith;
> 2º if the pope explicitly makes mention of the said subjects of the patriarchal sees in his constitutions and makes determinations concerning them, as in the case of schismatics in the bull *In Coena Domini*;
> 3º if he makes determinations concerning them in the same constitutions implicitly, as in the cases of appeal to a future council, and providing arms to infidels, and in other similar matters.[72]

It was also discussed whether the reservations related to such censures[73] applied to such subjects.

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[72] The following transcription (including punctuation) is based on the transcription of the particular congregation of June 4, 1631 of the Sacred Congregation for the Propagation of the Faith, in Mansi, 50:36* (which helpfully expands many of the abbreviations), with corrections added in from the original text in the archives of the Sacred Congregation for the Propagation of the Faith, *Atti* for 1631, 80r–81r: "Die 4 iunii 1631.—Fuit Congregatio particularis super dubiis missionariorum Orientis in palatio eminentissimi domini cardinalis Pamphylii, cui sua eminentia interfuit cum reverendissimis patre magistro Sacri Palatii, et patre Horatio Iustiniano, ac patre Thoma de Afflictis theatino. *Omissis* etc. II. Fuit latissime discussus articulus: 'An Summus Pontifex intendat graecos et alios sedibus *patriarcharum schismaticorum* subditos compr[a]ehendere in bulla Coenae Domini, aliisque Constitutionibus Apostolicis, *in quibus casus sibi et Sedi Apostolicae reservat*.' Et post allegatum et ponderatum canonem 6 Nicaenae I synodi, cap[ut] 17, sess[ione] X, synodi VIII, et simul synodum Chalcedonensem circa epistolam sancti Leonis papae et eundem canonem 6, epistolam primam Marcelli papae ad Antiochenos, Anacleti epistolam secundam, [caput] *Licet* de Baptismo, [caput] *Antiqua* de privilegis, Gregorium Cyzic[a]enum, canones orientales, Azorium, par[te] [prima] lib[ro] 5, cap[ite] 11, [§]. 7, et Salas: sanctum Gregorium de tribus patriarchis [f]actum episcoporum Aegyptiorum, qui noluerunt subscribere praefatae epistolae sancti Leonis papae, quia tunc vacabat eorum Sedes patriarchalis, epistolam synodicam eiusdem concilii Chalcedonensis, canonem 2, Constantinopolitani concilii primi et ad hoc sanctorum Leonis et Damasi Romanorum pontificum contradictionem, in quibus de potestate papae et patriarcharum, divisioneque provinciarum inter patriarchas late agitur, aut ex eis deducuntur diversa argumenta pro et contra supradictam Papae potestatem. Patres praedicti quoad dictum articulum convenerunt in negativam sententiam, quam tamen limitarunt tripliciter: 1º In materia dogmatum fidei; 2º si papa explicite in suis constitutionibus faciat mentionem, et disponat de praedictis subditis patriarchalium sedium, ut in casu schismaticorum bullae Coenae; 3º si implicite in eisdem constitutionibus de eis disponat, ut in casibus appellationis ad futurum concilium, et deferentium arma ad infideles, et similibus." A transcription of the original text from the archives is found in the appendix to this dissertation. Other transcriptions of the entirety of this section of the day's minutes are found in *Collectanea S. Congregationis de Propaganda Fide, seu Decreta Instructiones Rescripta pro Apostolicis Missionibus* (Rome: Typographia Polyglotta S. C. de Propaganda Fide, 1907) 1:252 note 1; *Fontes*, 7:8 (#4449) (based on the *Collectanea* text); *Fonti*, 1/2:279–281. These texts all have some variations from the original, with the most notable being that the *Collectanea* and *Fontes* versions use "et" in place of "ut" in the second limitation ("ut in casu schismaticorum bullae Coenae"). "Ut" is correct based on a review of the original text.

> On this point the fathers were in disagreement. For the most eminent lord Cardinal and Father Orazio held an affirmative opinion, namely that they would be included and could not be absolved because of the clear mind of the pope in the reservation. But the most reverend Father master of the sacred palace and Father Thomas held a negative one, both because there is no case of reservations with the Greeks, and because the said subjects, bound by censures, cannot approach the Apostolic See without danger to their life or a great loss of goods.[74]

No final decision was recorded on this matter.

Finally, there was a debate about the question that gave rise to this discussion, namely whether Armenian and Greek "uniate" priests could absolve their subjects from cases reserved to the Apostolic See, noting the lack of use of reservations in the patriarchates of the Eastern Church. It was decided, in light of their doubts about the law and the prudential admonition to be given to the missionaries, that the question be more diligently examined.[75] However, it was noted by another hand in margin of the original record: "Non amplius examinatum fuit."[76]

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[73] In the aforementioned version of the bull (Urban VIII, *Pastoralis Rom. Pont. vigilantia*), the statement of reservation is found in §22. The question is found in the June 4, 1631 minutes transcribed in Mansi, 50:36*–37* note 1: "Fuit disputatum an in casibus, in quibus praefati subditi comprehenduntur quoad ligamen excommunicationis vel alterius censurae, sint etiam comprehensi quoad punctum reservationis, ita ut a suis sacerdotibus vel episcopis metropolitis et patriarchis absolvi non possint."

[74] Transcription of the particular congregation of June 4, 1631 of the Sacred Congregation for the Propagation of the Faith, in Mansi, 50:37* note 1: "[...] et in hoc articulo patres fuerunt discordes. Nam eminentissimus dominus cardinalis et pater Horatius tenuere affirmativam sententiam, quod scilicet sint comprehensi et non possint absolvi ob claram mentem papae in reservatione: reverendissimus vero pater magister sacri Palatii, et pater Thomas negativam, tum quia apud Graecos nulla est casuum reservatio, tum quia subditi praedicti censuris irretiti ad sedem apostolicam sine periculo vitae, vel magna iactura bonorum accedere non possunt."

[75] Ibid.: "Et postremo repetito particulari dubio praedictorum missionariorum occasione cuius fuit disputatus praecedens articulus, an scilicet sacerdotes Armeni et [Graeci Uniti] sanctae Romanae ecclesiae possint absolvere eorum subditos a casibus sedi apostolicae reservatis, attento quod in patriarchatibus orientalis ecclesiae non est in uso reservatio casuum, post diversas considerationes factas tam circa resolutionem [ipsius] particularis dubii de iure, quam circa prudentialem admonitionem missionariis tradendam, patribus placuit, ut diligentius praedictum dubium examinaretur." "Ipsius" added and the dash between "Graeci" and "Uniti" removed on basis of original text of decision in Sacred Congregation for the Propagation of the Faith, *Atti* for 1631, 81v.

[76] Transcription of the particular congregation of June 4, 1631 of the Sacred Congregation for the Propagation of the Faith, in Mansi, 50:37* note 1.

1.4.3. The Bases for the Decision

The particular congregation listed several documents it reviewed prior to making its initial determination concerning the non-applicability of certain censures reserved by apostolic constitutions to the pope or Apostolic See. It would be helpful to review these, to understand what points the members of the congregation took from them concerning "the power of the pope and patriarchs" and "the division of the provinces among the patriarchs" in order to make their determination.

1.4.3.1. Nicaea I, Canon 6 and Constantinople IV, Canon 17

The sixth canon of the First Council of Nicaea concerned the jurisdiction that the bishops of certain major sees possessed over neighboring bishops.

> The ancient customs of Egypt, Libya and Pentapolis shall be maintained, according to which the bishop of Alexandria has authority over all these places, since a similar custom exists with reference to the bishop of Rome. Similarly in Antioch and the other provinces the prerogatives of the churches are to be preserved.
>
> In general the following principle is evident: if anyone is made a bishop without the consent of the metropolitan, this great synod determines that such a one shall not be a bishop. If however two or three by reason of personal rivalry dissent from the common vote of all, provided it is reasonable and in accordance with the church's canon, the vote of the majority shall prevail.[77]

[77] First Council of Nicaea, canon 6: text and translation in Tanner, 1:8–9: "Τά ἀρχαῖα ἔθη κρατείτω τὰ ἐν Αἰγύπτῳ καὶ Λιβύῃ καὶ Πενταπόλει ὥστε τὸν ἐν Ἀλεξανδρείας ἐπίσκοπον πάντων τούτων ἔχειν τὴν ἐξουσίαν, ἐπειδὴ καὶ τῷ ἐν Ῥώμῃ ἐπισκόπῳ τὸ τοιοῦτον σύνηθές ἐστιν. Ὁμοίως δὲ καὶ κατὰ τὴν Ἀντιόχειαν καὶ ἐν ταῖς ἄλλαις ἐπαρχίαις τὰ πρεσβεῖα σῴζεσθαι ταῖς ἐκκλησίαις. Καθόλου δὲ πρόδηλον ἐκεῖνο· ὅτι, εἴ τις χωρὶς γνώμης τοῦ μητροπολίτου γένηται ἐπίσκοπος, τὸν τοιοῦτον ἡ μεγάλη σύνοδος ὥρισε μηδὲ εἶναι ἐπίσκοπον. Ἐὰν μέντοι τῇ κοινῇ πάντων ψήφῳ, εὐλόγῳ οὔσῃ καὶ κατὰ κανόνα ἐκκλησιαστικόν, δύο ἢ τρεῖς δι᾽ οἰκείαν φιλονεικίαν ἀντιλέγωσι, κρατείτω ἡ τῶν πλειόνων ψῆφος." The canon is found in the *Decretum Gratiani*, divided among D. 64, c. 8 (445–446); D. 65, c. 1 (445–448); D. 65, c. 6 (449–450).

The Fourth Council of Constantinople referenced this canon in issuing legislation concerning the obligation of metropolitans to attend synods called by their patriarch.

> The first, holy and universal synod of Nicaea orders that the ancient custom should be preserved throughout Egypt and the provinces subject to her, so that the bishop of Alexandria has them all under his authority; it declares, "Because such a custom has prevailed in the city of Rome." Therefore this great and holy synod decrees that in old and new Rome and the sees of Antioch and Jerusalem the ancient custom must be preserved in all things, so that their prelates should have authority over all the metropolitans whom they promote or confirm in the episcopal dignity, either through the imposition of hands or the bestowal of the pallium; that is to say, the authority to summon them, in case of necessity, to a meeting in synod or even to reprimand and correct them, when a report about some wrongdoing leads to an accusation.
>
> But since some metropolitans give as an excuse for not responding to the summons of their apostolic prelate that they are detained by their temporal rulers, it has been decided that such an excuse will be utterly invalid. For since a ruler frequently holds meetings for his own purposes, it is intolerable that he should prevent leading prelates from going to synods for ecclesiastical business or hold some back from their meetings. We have learnt, however, that such an obstacle and alleged refusal of permission can come about in various ways at the suggestion of the metropolitan.
>
> Metropolitans have had the custom of holding synods twice a year and therefore, they say, they cannot possibly come to the chief one, that of the patriarch. But this holy and universal synod, without forbidding the meetings held by the metropolitans, is conscious that the synods summoned by the patriarchal see are more necessary and profitable than the metropolitan ones, and so demands that they take place. A metropolitan synod affects the good order of only one province; a patriarchal synod often affects the good order of a whole civil diocese, and in this way the common good is provided for. So it is fitting that the common good take priority over a particular one, especially when the summons to meet has been issued by those of greater authority. The fact is that certain metropolitans seem to regard with contempt the ancient custom and canonical tradition, by their not meeting together for the common good. Therefore the laws of the church demand, with severe penalties and leaving no loop-hole, that they comply with the summons of their patriarchs whether they are summoned as a body or individually.
>
> We refuse to listen to the offensive claim made by some ignorant people that a synod cannot be held in the absence of the civil authorities. The reason for this is that the sacred canons have never prescribed the presence of secular rulers at synods but only the presence of bishops. Hence we find that they have not been present at synods but only at universal councils. Furthermore, it is not right that secular rulers should be observers of matters that sometimes come before the priests of God.
>
> Therefore, if any metropolitan ignores his patriarch and disobeys his summons, whether addressed to him alone or to several or to all, unless prevented by a genuine illness or a

> pagan invasion, and for two whole months after notice of the summons makes no attempt to visit his patriarch, or if he hides in some way or pretends he has no knowledge of the patriarch's summons, he must be excommunicated. If he shows the same stubbornness and disobedience for a year, he must be unconditionally deposed and suspended from all sacerdotal functions and excluded from the dignity and honour that belong to metropolitans. If any metropolitan disobeys even this directive, let him be anathema.[78]

These two norms indicate that the heads of specific sees possessed a certain degree of autonomy. According to the sixth canon of Nicaea I, the bishop of Alexandria possessed authority over certain places, even though they were directly subject to other bishops. Some similar prerogatives existed "in Antioch and the other provinces," which were to be preserved. The

[78] Fourth Council of Constantinople, Session 10, February 28, 870, canon 17: text and translation in Tanner, 1:179–180: "Sancta et universalis Nicaena prima synodus antiquam consuetudinem iubet servari per Aegyptum, et provincias quae sub ipsa sunt, ita ut horum omnium Alexandrinus episcopus habeat potestatem, dicens: 'Quia et in Romanorum civitate huiusmodi mos praevaluit.' Qua pro causa et haec magna et sancta synodus tam in seniori et nova Roma, quam in sede Antiochiae ac Hierosolymorum, priscam consuetudinem decernit in omnibus conservari, ita ut earum praesules universorum metropolitanorum, qui ab ipsis promoventur, et sive per manus impositionem, sive per pallii dationem, episcopalis dignitatis firmitatem accipiunt, habeant potestatem: videlicet ad convocandum eos, urgente necessitate, ad synodalem conventum, vel etiam ad coercendum illos et corrigendum, cum fama eos super quibusdam delictis forsitan accusaverit. Sed quoniam sunt quidam metropolitanorum, qui ne secundum vocationem apostolici praesulis occurrant a mundi principibus se detineri sine ratione causantur, placuit talem excusationem omnimodis esse invalidam. Cum enim princeps pro suis causis conventus frequenter agat, impium est ut summos praesules ad synodos pro ecclesiasticis negotiis celebrandum impediant, vel quosdam a conciliis eorum prohibeant, licet tale impedimentum et fictam prohibitionem metropolitanorum suggestione diversis modis fieri didicerimus. Consueverunt autem metropolitani bis in anno synodos facere, ideoque, sicut dicunt, ad patriarchale penitus non posse concurrere caput. Sed sancta haec et universalis synodus, nec concilia quae a metropolitanis fiunt interdicens, multo magis illa novit rationabiliora esse ac utiliora metropolitanorum conciliis quae a patriarchali sede congregantur; et idcirco haec fieri exigit: a metropolita quippe unius quidem provinciae dispositio efficitur, a patriarcha vero saepe totius causa dioeceseos dispensatur ac per hoc communis utilitas providetur, propter quod et speciale lucrum propter generale bonum postponi convenit, cum a maioribus super haec facta fuerit advocatio. Quamvis apud quosdam metropolitanorum antiqua consuetudo et canonica traditio per contemptum ipsorum postposita videantur, non currentibus eis ad communem profectum, quos leges ecclesiae severe condemnantes, omni excusatione remota, subiacere vocationibus proprii patriarchae, sive cum communiter, sive cum sigillatim factae fuerint, exigunt. Illud autem tamquam perosum quiddam ab auribus nostris repulimus, quod a quibusdam imperitis dicitur, non posse synodum absque principali praesentia celebrari: cum nusquam sacri canones convenire saeculares principes in conciliis sanxerint, sed solos antistites. Unde nec interfuisse illos synodis, exceptis conciliis universalibus, invenimus: neque enim fas est saeculares principes spectatores fieri rerum quae sacerdotibus Dei nonnunquam eveniunt. Quisquis ergo metropolitanorum proprium patriarcham contempserit, et vocationi eius, quae sive ad unum solum, sive ad plures, sive ad omnes sit, absque validissima aegrotatione vel paganorum incursu, non obedierit, et per totos duos menses post notitiam vocationis, ad proprium venire patriarcham minime festinaverit, vel si quocumque modo latitare, aut non cognoscere nuntium ab illo missum tentaverit, segregetur: si vero intra unum annum eamdem contumaciam et inobedientiam demonstraverit, deponatur omnibus modis, et ab omni sacerdotali operatione decidat, atque a dignitate et honore, qui metropolitanis convenit, propellatur. Is autem, qui huic definitioni non obedierit etiam, et a[nathema] s[it]."

canon even seemed to reference a similar custom concerning the bishop of Rome.[79] However, the exact content of this authority and these prerogatives was not stated in that canon, other than the need for a metropolitan to approve the election of a bishop of the province. By the time of Constantinople IV, the authority of the bishops (now called patriarchs) of five particular sees (Rome, Constantinople, Alexandria, Antioch, Jerusalem) was stated to extend "over all the metropolitans whom they promote or confirm in the episcopal dignity." By such action, these patriarchs could order such bishops to attend a patriarchal synod (considered as considerably important in the life of the Church) and "reprimand and correct" them.

In each canon, the authority of the Roman pontiff was not invoked as a necessary requirement for patriarchs to carry out certain actions. Patriarchs did not need authorization from the Roman pontiff to hold a synod, nor authority delegated by him to correct bishops subject to them. The divisions of the Church over which the patriarchs presided had their own juridic structure, each unit distinct from the other. Thus, these two canons suggested that it was legitimate to consider legislation of the Roman pontiff as possibly limited to his own "patriarchate."

[79] Again, note Loughlin, 220–239, arguing that the similar custom concerns recognition of Alexandrian authority over neighboring sees, rather than Roman authority over sees neighboring it.

1.4.3.2. The Council of Chalcedon, Canon 6 of Nicaea I, and the Letter of Pope St. Leo I[80]

The Council of Chalcedon also had occasion to review the sixth canon of the First Council of Nicaea. In its sixteenth session, two redactions of canon 6 were read to the assembly. The first, the Western version, included an assertion of Roman primacy; this statement was not found in the second-read, Greek version.[81] The first three canons of the First Council of Constantinople were then read.[82]

It is not so much the texts as read at the council that drew the attention of the particular congregation in 1631; rather, it was the context in which they were read. The sixteenth session of the Council of Chalcedon concerned the approval of what would later be known as canon 28:

> Following in every way the decrees of the holy fathers and recognising the canon which has recently been read out—the canon of the 150 most devout bishops who assembled in the time of the great Theodosius of pious memory, then emperor, in imperial Constantinople, new Rome—we issue the same decree and resolution concerning the prerogatives of the most holy church of the same Constantinople, new Rome. The fathers rightly accorded prerogatives to the see of older Rome, since that is an imperial city; and moved by the same purpose the 150 most devout bishops apportioned equal prerogatives to the most holy see of new Rome, reasonably judging that the city which is honoured by the imperial power and senate and enjoying privileges equalling older imperial Rome, should also be elevated to her level in ecclesiastical affairs and take second place after her. The metropolitans of the dioceses of Pontus, Asia and Thrace, but only these, as well as the bishops of these dioceses who work among non-Greeks, are to be ordained by the aforesaid most holy see of the most holy church in Constantinople. That is, each metropolitan of the aforesaid dioceses along with the bishops of the province ordain the

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[80] Council of Chalcedon, session 16: Mansi, 7:423–454; *The Acts of the Council of Chalcedon*, trans. Richard Price and Michael Gaddis (Liverpool: Liverpool University, 2005) 3:73–91. There are some doubts about the actual date of this session; see the commentary at *The Acts of the Council of Chalcedon*, 3:72–73. It should be noted that the use of "praefatae epistolae" in the later section of the Pamphilian decision dealing with non-subscription of the Egyptian bishops to the *Tome* of Leo would appear to suggest that the use of "epistolam" in the section under consideration here also concerns the *Tome*. However, nothing in the *Tome*, nor in the reactions to it by the members of the council (aside from the issues with the Egyptian bishops), concerns the power of the patriarchs or the division of the Church into patriarchates. Thus, I believe that the "epistolam" in this section refers to the instructions given by Pope St. Leo I to his delegates for the council.

[81] The Western version also included a declaration concerning the honor to be granted to the metropolitan of Aelia, which was actually the seventh canon of Nicaea I; the Greek version did not include this.

[82] See below, 1.4.3.13.

> bishops of the province, as has been declared in the divine canons; but the metropolitans of the aforesaid dioceses, as has been said, are to be ordained by the archbishop of Constantinople, once agreement has been reached by vote in the usual way and has been reported to him.[83]

Bishop Lucentius, representative of the Roman Church, claimed that the council fathers had been pressured to approve this canon, a claim that the other council fathers generally denied.[84] He also objected that the canon contravened canon 6 of Nicaea I, and only referred to the canons of Constantinople I, whose decrees, he maintained, "are not among the conciliar canons."[85] When asked what instruction he and the other representatives of the Roman Church had been given on the matter, he read from a letter from Pope St. Leo I:

> Do not allow either the constitution issued by the holy fathers to be violated through temerity, preserving in every way the dignity of our person in you whom we sent in our stead; and if perchance any, relying on the splendour of their cities, attempt to usurp anything for themselves, you are to repel this with the firmness it deserves.[86]

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[83] Council of Chalcedon, session 16: text and translation in Tanner, 1:99–100 (canon 28): "Πανταχοῦ τοῖς τῶν ἁγίων Πατέρων ὅροις ἑπόμενοι, καὶ τὸν ἀρτίως ἀναγνωσθέντα κανόνα τῶν ἑκατὸν πεντήκοντα θεοφιλεστάτων ἐπισκόπων, τῶν συναχθέντων ἐπὶ τοῦ τῆς εὐσεβοῦς μνήμης μεγάλου Θεοδοσίου, τοῦ γενομένου βασιλέως, ἐν τῇ βασιλίδι Κωνσταντινουπόλει νέᾳ Ῥώμῃ, γνωρίζοντες, τὰ αὐτὰ καὶ ἡμεῖς ὁρίζομέν τε καὶ ψηφιζόμεθα περὶ τῶν πρεσβείων τῆς ἁγιωτάτης ἐκκλησίας τῆς αὐτῆς Κωνσταντινουπόλεως νέας Ῥώμης. Καὶ γὰρ τῷ θρόνῳ τῆς πρεσβυτέρας Ῥώμης διὰ τὸ βασιλεύειν τὴν πόλιν ἐκείνην οἱ πατέρες εἰκότως ἀποδεδώκασι τὰ πρεσβεῖα· καὶ τῷ αὐτῷ σκοπῷ κινούμενοι οἱ ἑκατὸν πεντήκοντα θεοφιλέστατοι ἐπίσκοποι, τὰ ἴσα πρεσβεῖα ἀπένειμαν τῷ τῆς νέας Ῥώμης ἁγιωτάτῳ θρόνῳ, εὐλόγως κρίναντες, τὴν βασιλείᾳ καὶ συγκλήτῳ τιμηθεῖσαν πόλιν καὶ τῶν ἴσων ἀπολαύουσαν πρεσβείων τῇ πρεσβυτέρᾳ βασιλίδι Ῥώμῃ, καὶ ἐν τοῖς ἐκκλησιαστικοῖς ὡς ἐκείνην μεγαλύνεσθαι πράγμασι, δευτέραν μετ᾽ ἐκείνην ὑπάρχουσαν· καὶ ὥστε τοὺς τῆς ποντικῆς καὶ τῆς ἀσιανῆς καὶ τῆς θρακικῆς διοικήσεως μητροπολίτας μόνους, ἔτι δὲ καὶ τοὺς ἐν τοῖς βαρβαρικῆς ἐπισκόπους τῶν προειρημένων διοικήσεων, χειροτονεῖσθαι ὑπὸ τοῦ προειρημένου ἁγιωτάτου θρόνου τῆς κατὰ Κωνσταντινούπολιν ἁγιωτάτης ἐκκλησίας· δηλαδή ἑκάστου μητροπολίτου τῶν προειρημένων διοικήσεων μετὰ τῶν τῆς ἐπαρχίας ἐπισκόπων χειροτονοῦντος τοὺς τῆς ἐπαρχίας ἐπισκόπους, καθὼς τοῖς θείοις κανόσι διηγόρευται· χειροτονεῖσθαι δέ, καθὼς εἴρηται, τοὺς μητροπολίτας τῶν προειρημένων διοικήσεων παρὰ τοῦ Κωνσταντινουπόλεως ἀρχιεπισκόπου, ψηφισμάτων συμφώνων κατὰ τὸ ἔθος γινομένων καὶ ἐπ᾽ αὐτὸν ἀναφερομένων."

[84] See the commentary to the sixteenth session in *The Acts of the Council of Chalcedon*, 3:68–69: "It is manifest that, while a majority of the bishops directly affected seemed content with the new canon, there was a sizable minority who had no liking for the measure but recognized that it would be impolitic to oppose it."

[85] Council of Chalcedon, session 16: Mansi, 7:442: "Lucentius reverendissimus episcopus, vicarius sedis apostolicae, dixit: Accedit ad cumulum, quod trecentorum decem et octo constitutionibus postpositis, centum quinquaginta, qui in synodicis canonibus non habentur, mentionem tantum fecisse noscuntur, quae dicunt ante octoginta propre annos constituta fuisse." Translation from *The Acts of the Council of Chalcedon*, 3:84.

[86] Council of Chalcedon, session 16: Mansi, 7:443: "Sanctorum quoque patrum constitutionem prolatam nulla patiamini temeritate violari vel imminui, servantes omnimodis personae nostrae in vobis (quos vice nostra transmisimus,) dignitatem: ac si qui forte civitatum suarum splendore confisi, aliquid sibi tentaverint usurpare, hoc qua dignum est constantia retundatis." Translation from *The Acts of the Council of Chalcedon*, 3:85. Footnote 35

When the council nevertheless approved the canon, Lucentius lodged a formal protest to be recorded in the minutes of the council, "so that we may know what we ought to report to the apostolic man the pope of the universal church, so that he may pass sentence on either the insult to his see or the overturning of the canons."[87]

The immediate concern of these actions during the council involved not so much an attack on and defense of the primacy of Rome in light of the growing authority of Constantinople, but the threat of Constantinople to the patriarchal authority of Antioch and Alexandria.[88] This focus indicates that certain sees possessed a rightful autonomy, based in the conciliar declaration of the First Council of Nicaea. However, the letter of Pope St. Leo I to his representatives also implied that the Roman Church had the obligation to defend this autonomy; Rome would not suffer the overturning or defrauding of the ancient privileges of these sees, [89] and any action concerning the patriarchates was void without the concurrence of the Roman pontiff.

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on that page of the translation states that the pope's statement was originally intended to block "the ambitions of Dioscorus of Alexandria and Juvenal of Jerusalem rather than those of Anatolius of Constantinople."

[87] Council of Chalcedon, session 16: Mansi, 7:454: "Lucentius reverendissimus episcopus (vicarius sedis apostolicae) dixit: Sedes apostolica nobis praesentibus humiliari non debet: et ideo quaecumque in praeiudicium canonum vel regularum hesterna die gesta sunt nobis absentibus, sublimitatem vestram petimus, ut circumduci iubeatis: sin alias, contraditio nostra his gestis inhaereat, ut noverimus quid apostolico viro universalis ecclesiae Papae referre debeamus: ut ipse aut de suae sedis iniuria, aut de canonum eversione possit ferre sententiam." Translation from *The Acts of the Council of Chalcedon*, 3:91.

[88] See the commentary to the sixteenth session in *The Acts of the Council of Chalcedon*, 3:70–72.

[89] Cf. the letter of Pope St. Leo I to Bishop Anatolius of Constantinople (#106), May 22, 452: Mansi, 6:206: "Non convellantur provinicalium iura primatuum, nec privilegiis antiquitus institutis Metropolitani fraudentur Antistites."

1.4.3.3. The Letter of (Pseudo) Pope Marcellus I to the Antiochenes[90]

This letter, a part of the pseudo-Isidorian decretals, asserted the primacy of the Church of Rome to the Antiochenes. After declaring his concern for all Churches, the author stated:

> We ask you brothers, therefore, that you are not to teach or hold anything other than what you have received from the blessed apostle Peter and the other apostles and fathers. For you have been instructed first by Peter; therefore, you ought not to leave your own father and follow others. For he is the head of the whole Church, as the Lord said to him: "You are Peter, and on this rock I will build my Church," etc. For his chair was first with you, and afterwards, by the order of the Lord, was transferred to Rome, over which, supported by divine grace, we preside in the present day. You ought not deviate from its disposition; all major ecclesiastical matters (as divine grace ordains) are ordered to be referred to it, so that they may be regularly determined by the Church from which the principles arise. But if your Antiochene Church, which had once been first, yielded to the Roman see, there is no see that is not subject to its jurisdiction, to which, according to the sanctions of the apostles and their successors, all bishops, who should desire, or for whom it should be necessary, can go seeking safety, as if to the head; and they ought to appeal to it, so that they may receive protection and liberation from that Church from which they received instruction and consecration. It is not at all agreeable to deny this to all bishops, but it is conceded to them to go freely, without any confinement, or excommunication, or loss, or despoiling. Likewise, they established (with the inspiration of the Lord) that no synod could occur outside of the authority of the same see, nor could any bishop, accused of any crimes, be heard or judged except in a legitimate synod held at its time by apostolic authority. For, as was touched on a little while above, the judgments of bishops, and the matters of the highest cases, or all doubts, must be treated and determined by the authority of the Apostolic See. And all co-provincial matters must be withdrawn to the judgment of this holy universal and apostolic Church, if the pontiff of this Church should so order. Nor is it permitted for someone to leave the priests who govern by divine command the Churches of God in the same province and fly to other provinces, or to seek or suffer the judgment of the bishops of other provinces, without prejudice to the Roman Church (towards which reverence must be maintained in all cases), but when all bishops of the same province are congregated, the trial is ended by the authority of this see. Nevertheless, as was stated, it shall be treated through his vicars, if it should please him, and whatever has been done unjustly shall be reformed. Therefore, the pastoral care of our office admonishes us both to aid the destitute and to reform all neglected or poorly carried out matters, so that the fire, which the coming Lord should send into the world, animated with a great movement of emendation and constant contemplation, may become warm so as to inflame, and become so inflamed so as to give light.[91]

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[90] Letter of (Pseudo) Pope Marcellus I to the Antiochenes: Mansi, 1:1262–1265.

[91] Ibid., 1:1262–1263: "Rogamus ergo vos, fratres, ut non aliud doceatis neque sentiatis, quam quod a beato Petro apostolo, et a reliquis apostolis et patribus accepistis. Ab illo enim primo instructi estis: ideo non oportet vos

The letter ended with numerous biblical quotations calling the Antiochenes to be charitable with one another.[92]

In contrast to the previous sources, this letter indicated that the Roman Church ought to be involved in the governance of other Churches. Peter (and, through him, the bishop of the Roman Church) was the head of the whole Church; all major matters (*negotia maiora*) were to be deferred to the judgment of the Roman Church, regardless of the high status of a see (such as that of Antioch), and all bishops anywhere could appeal to Rome without repercussions. In an apparent contradiction to canon 17 of Constantinople IV, bishops could not be judged, nor synods held, outside of the authorization of the Roman Church, as (it was claimed) the apostles had established. Further, co-provincial matters, although not pertaining necessarily to the judgment of the Roman Church, could be reserved to it if the Roman pontiff so ordered. This letter, therefore, indicated a much more substantial role for the Roman Church in the internal

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proprium derelinqere patrem, et alios sequi. Ipse enim caput est totius ecclesiae, cui ait dominus: *Tu es Petrus, et super hanc petram aedificabo ecclesiam meam*: et reliqua. Eius enim sedes primitus apud vos fuit, quae postea, iubente domino, Romam translata est, cui adminiculante gratia divina, hodierna praesidemus die. Nec ab eius dispositione vos deviare oportet, ad quam cuncta maiora ecclesiastica negotia (divina disponente gratia) iussa sunt referri, ut ab ea regulariter disponantur, a qua sumpsere principia. Si vestra vero Antiochena, quae olim prima erat, Romanae cessit sedi, nulla est quae eius non subiecta sit ditioni, ad quam omnes quasi ad caput, iuxta apostolorum eorumque successorum sanctiones, episcopi, qui voluerint, vel quibus necesse fuerit, suffugere, eamque appellare debent, ut inde accipiant tuitionem et liberationem, unde acceperunt informationem atque consecrationem. Quod omnibus minime convenit denegare episcopis, sed absque ulla custodia, aut excommunicatione, vel damnatione, aut exspoliatione, libere ire concedatur. Simulque idem (inspirante domino) constituerunt, ut nulla synodus fieret praeter eiusdem sedis auctoritatem, nec ullus episcopus, nisi in legitima synodo suo tempore apostolica auctoritate convocata, super quibuslibet criminibus pulsatus audiatur vel iudicetur: quia (ut paulo superius praelibatum est) episcoporum iudicia, et summarum causarum negotia, sive cuncta dubia, apostolicae sedis auctoritate sunt agenda et finienda. Et omnia comprovincialia negotia, huius sanctae universalis et apostolicae ecclesiae sunt retractanda iudicio si huius ecclesiae pontifex praeceperit. Nec cui liceat sine praeiudicio Romanae ecclesiae (cui in omnibus causis debet reverentia custodiri) relictis his sacerdotibus, qui in eadem provincia Dei ecclesias nutu divino gubernant, ad alias convolare provincias, vel aliarum provinciarum episcoporum iudicium experiri vel pati, sed omnibus eiusdem provinciae episcopis congregatis, iudicium auctoritate huius sedis terminetur: quod tamen (ut praefatum est) per eius vicarios, si libuerit, erit tractandum: et quidquid iniuste actum est, reformandum. Pastoralis ergo cura officii nos admonet, et destitutis succurrere, et cuncta neglecta vel male acta reformare, ut ignis ille, quem dominus veniens misit in terram, motu crebro emeditationis vel crebrae meditationis, agitatus, sic calescat, ut ferveat: et sic inflammetur, ut luceat." The text, from "Rogamus" to "ditioni," is in the *Decretum Gratiani* as C. 24, q. 1, c. 15 (1835–1838).

[92] Jas 3:1–18; 1 Pt 1:13–2:9, 4:8–11.

matters of other Churches, even of those that would become patriarchal Churches. Judgments of bishops, holding of synods, and handling of *negotia maiora* could be carried out only with the authority of the Roman Church, and other co-provincial matters could be called to its judgment should the Roman pontiff so order.

1.4.3.4. The Second Letter of (Pseudo) Pope Anacletus[93]

Another pseudo-Isidorian decretal, the second letter of (pseudo) Pope Anacletus was said to have been sent to the bishops of Italy concerning various topics, which discussed, among other things, the formation of ecclesiastical provinces.

> The provinces were divided for the most part at a time very much before the coming of Christ, and afterwards that division was renewed by the apostles and blessed Clement our predecessor. At one time, at the head of the provinces, there were the primates of secular law as the first judicial power. Those who lived throughout the other cities, who could not or were not permitted to go to the hall of the emperor or kings, would go to the primates for their oppressions or injustices when it was necessary for them; they would appeal to the primates whenever necessary, as had been ordered in their law. In our cities or places, divine and ecclesiastical ordered that there be placed and be patriarchs or primates (who have a single form, although they are different names), to whom bishops (if it were necessary) would go and appeal, and they, and not others, enjoyed the name of primates. But the remaining metropolitan cities, which had lesser judges (although they were greater than counts), had their metropolitans, who rightly obeyed the said primates (just as had once been ordained in secular laws); they would enjoy not the name of "primates," but "metropolitans" or "archbishops." And although the individual metropolitan cities have their own provinces, and had to have their metropolitans as bishop judges (as they earlier had metropolitans as secular judges), yet (as has been established) these metropolitan cities then and now have been ordered to have primates, to whom (after the Apostolic See) come the most important matters, so that those, for whom it should be necessary, may be relieved and justly restored there, and those who are unjustly oppressed may be justly restored and supported, and the causes of their bishops and the judgments of the highest matters (save the authority of the Apostolic See) may be ended most justly.[94]

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[93] Letter of (Pseudo) Pope Anacletus to the Bishops of Italy: Mansi, 1:608–615.

[94] Ibid., 1:612: "Provinciae autem multo ante Christi adventum tempore divisae sunt maxima ex parte, et postea ab apostolis et beato Clemente praedecessore nostro ipsa divisio est renovata. Et in capite provinciarum, ubi dudum primates legis saeculi erant, ac prima iudiciaria potestas, ad quos qui per reliquas civitates commorabantur, quando

According to this letter, patriarchs/primates acted as judges of appeal for the areas subject to them, mirroring the former civil structure of the Roman Empire. As such, they had a legitimate area of judicial autonomy, even in *summa negotia* and cases of bishops; however, this autonomy did not infringe on the authority of the Apostolic See ("salva apostolicae sedis auctoritate") if the matter seemed to require its intervention. Thus, the text of this letter was more supportive of the autonomy of the various patriarchal/primatial jurisdictions than the previous letter of (pseudo) Pope Marcellus I.

1.4.3.5. *Licet* of Lateran IV

The Fourth Lateran Council dealt with matters concerning Eastern faithful in the aftermath of the various crusades. The constitution *Licet*, referenced in the congregation's meeting, concerned the "tolerance" to be shown to the customs of the Greeks.

> 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 other wicked

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eis necesse erat, qui ad aulam imperatoris vel regum confugere non poterant, vel quibus permissum non erat, confugiebant pro oppressionibus vel iniustitiis suis, ipsosque appellabant, quotiens opus erat, sicut in lege eorum praeceptum erat: ipsis quoque in civitatibus vel locis nostris, patriarchas vel primates, qui unam formam tenent, licet diversa sint nomina, leges divinae et ecclesiasticae poni et esse iusserunt, ad quos episcopi (si necesse fuerit) confugerent eosque appellarent, et ipsi primatum nomine fruerentur, et non alii. Reliquae vero metropolitanae civitates, quae minores iudices habebant, (licet maiores comitibus essent) haberent metropolitanos suos, qui praedictis iuste obedirent primatibus, sicut et in legibus saeculi olim ordinatum erat, qui non primatum, sed aut metropolitanorum aut archiepiscoporum nomine fruerentur. Et licet singulae metropoles civitates suas provincias habeant, et suos metropolitanos iudices habere debeant episcopos, sicut prius metropolitanos iudices habebant saeculares, primates tamen (ut praefixum est) et tunc et nunc habere iussae sunt, ad quos post sedem apostolicam summa negotia conveniant, ut ibidem, quibus necesse fuerit, releventur et iuste restituantur, et hi qui iniuste opprimuntur, iuste reformentur atque fulciantur, episcoporumque causae, et summorum negotiorum iudicia (salva apostolicae sedis auctoritate) iustissime terminentur." The text, from "Provinciae" to "fruerentur" (with minor alterations), is in the *Decretum Gratiani* as D. 99, c. 1 (633–636).

> things which they committed out of contempt for them, when 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 conform themselves like obedient sons to the holy Roman church, their mother, so that there may be *one flock and one shepherd*. 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.[95]

The text indicated that the customs and rites of the Greeks did not contain anything contrary to the Catholic faith simply from the fact that they were "Greek"; they were to be preserved "as much as we can in the Lord." However, specific customs did cause danger to souls; these were to be suppressed by order of the Roman Church, to which the Greeks were subject *de iure*.[96] Further, violators of this norm were to be punished with excommunication, indicating the ability of the Roman pontiff to impose penalties on the Eastern faithful. Thus, the Greeks could have differences in their rites and customs from the Latins; such differences were to be preserved, but anything offering danger to souls had to be removed by order of the Roman pontiff.

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[95] Fourth Lateran Council, constitution 4: text and translation in Tanner, 1:235–236: "Licet Graecos in diebus nostris ad obedientiam sedis apostolicae revertentes, fovere ac honorare velimus, mores ac ritus eorum, quantum cum Domino possumus, sustinendo, in his tamen illis deferre nec volumus nec debemus, quae periculum generant animarum et ecclesiasticae derogant honestati. Postquam enim Graecorum ecclesia cum quibusdam complicibus ac fautoribus suis ab obedientia sedis apostolicae se subtraxit, in tantum Graeci coeperunt abominari latinos, quod inter alia quae in derogationem eorum impie committebant, si quando sacerdotes latini super eorum celebrassent altaria, non prius ipsi sacrificare volebant in illis, quam ea tamquam per hoc inquinata lavissent; baptizatos etiam a latinis ipsi Graeci rebaptizare ausu temerario praesumebant et adhuc, sicut accepimus, quidam hoc agere non verentur. Volentes ergo tantum ab ecclesia Dei scandalum amovere, sacro suadente concilio districte praecipimus, ut talia de cetero non praesumant, conformantes se tamquam obedientiae filii sacrosanctae Romanae ecclesiae matri suae, ut sit *unum ovile et unus pastor*. Si quis autem quid tale praesumpserit, excommunicationis mucrone percussus, ab omni officio et beneficio ecclesiastico deponatur." The text is in the *Decretales*, at X 3.42.6 (990–991).

[96] *Decretales*, 990 (gloss to "Revertentes"): "De iure n. ecclesia Graecorum subiecta est Romanae Ecclesiae 24 quaest. 1 rogamus [the letter of (pseudo) Pope Marcellus I to the Antiochenes]."

1.4.3.6. *Antiqua* of Lateran IV

In addition to a determination concerning Greek rites and customs, the Fourth Lateran Council also established both the precedence to be observed among the patriarchs and patriarchal privileges.

> Renewing the ancient privileges of the patriarchal sees, we decree, with the approval of this sacred universal synod, that after the Roman church, which through the Lord's disposition has a primacy of ordinary power over all other churches inasmuch as it is the mother and mistress of all Christ's faithful, the church of Constantinople shall have the first place, the church of Alexandria the second place, the church of Antioch the third place, and the church of Jerusalem the fourth place, each maintaining its own rank. Thus after their pontiffs have received from the Roman pontiff the pallium, which is the sign of the fullness of the pontifical office, and have taken an oath of fidelity and obedience to him, they may lawfully confer the pallium on their own suffragans, receiving from them for themselves canonical profession and for the Roman church the promise of obedience. They may have a standard of the Lord's cross carried before them anywhere except in the city of Rome or wherever there is present the supreme pontiff or his legate wearing the insignia of the apostolic dignity. In all the provinces subject to their jurisdiction let appeal be made to them, when it is necessary, except for appeals made to the apostolic see, to which all must humbly defer.[97]

The text interestingly adopted the order of precedence of Chalcedon—placing Constantinople as second after Rome—that had been rejected by Pope St. Leo I. The conciliar action, therefore, indicated that not only could the Roman Church defend the rights of the patriarchal sees, but it could also restructure them, at least acting within an ecumenical council; the decrees of Nicaea I

[97] Fourth Lateran Council, constitution 5: text and translation in Tanner, 1:236: "Antiqua patriarchalium sedium privilegia renovantes, sacra universali synodo approbante sancimus, ut post Romanam ecclesiam, quae disponente Domino super omnes alias ordinariae potestatis obtinet principatum, utpote mater universorum Christi fidelium et magistra, Constantinopolitana primum, Alexandrina secundum, Antiochena tertium, Hierosolymitana quartum locum obtineant, servata cuilibet propria dignitate, ita quod postquam eorum antistites a Romano pontifice receperint pallium, quod est plenitudinis officii pontificalis insigne, praestito sibi fidelitatis et obedientiae iuramento, licenter et ipsi suis suffraganeis pallium largiantur, recipientes pro se professionem canonicam et pro Romana ecclesia sponsionem obedientiae ab eisdem. Dominicae vero crucis vexillum ante se faciant ubique deferri, nisi in urbe Romana et ubicumque summus pontifex praesens exstiterit vel eius legatus, utens insigniis apostolicae dignitatis. In omnibus autem provinciis eorum iurisdictioni subiectis ad eos, cum necesse fuerit, provocetur, salvis appellationibus ad sedem apostolicam interpositis, quibus est ab omnibus humiliter deferendum." The text is included in the *Decretales*, at X 5.33.23 (1290–1291). For observations concerning how the reference to the pallium indicated a suffragan relationship between patriarchs and pope, see Francis J. Marini, *The Power of the Patriarch: An Historical-Juridical Study of Canon 78 of the* Codex Canonum Ecclesiarum Orientalium, Excerpta ex dissertatione ad doctoratum in facultate iuris canonici (Rome: PIO, 1994) 83–85.

were not as impervious to change as Pope St. Leo I had suggested.[98] However, very little authority was attributed to the heads of these patriarchal sees in this text. After obtaining the pallium from the Roman pontiff and swearing an oath of obedience and fidelity to him, they could confer pallia on suffragan bishops, receiving from them the canonical profession for themselves and the promise of obedience for the Roman Church, have a standard of the Lord's cross carried before them anywhere except Rome or in the presence of the pope or his legate wearing the proper insignia, and could hear appeals from the jurisdictions of their respective provinces, unless appeal was made to Rome (as was stated in the aforementioned second letter of [pseudo] Pope Anacletus).[99] Nothing was said about the patriarchs' governmental authority, nor was any reference made to their synods (as had been referenced in canon 17 of Constantinople IV).

1.4.3.7. "Gregory of Cyzicus"

There appears to have been no one by this name who wrote anything concerning "the power of the pope and patriarchs" or "the division of the provinces among the patriarchs." While the city of Cyzicus was involved in a decision concerning patriarchal jurisdiction, namely the confirmation of a distinct jurisdiction for exiled Cypriots at the Council of Trullo of 692

[98] See below, 1.4.3.14. A forerunner of such alteration occurring with the apparent approval of the Roman pontiff is found in Fourth Council of Constantinople, session 10, February 28, 870, canon 21: text in Tanner, 1:182, forbidding disrespect of secular powers towards patriarchs or attempting to remove them, listing explicitly Rome, Constantinople, Alexandria, Antioch, and Jerusalem in that order. Canon 17 of the same council (discussed above at 1.4.3.1) also references all five sees, albeit not in the order of *Antiqua*, when considering the rights of sees founded in canon 6 of Nicaea I. See also the comments on this canon in Kane, 85–88.

[99] One could add to this list the ability to relax a sentence of suspension incurred for conferring benefices on unworthy persons (Fourth Lateran Council, constitution 30: text in Tanner, 1:249).

(Quinisext Council), no Gregory from that town was involved in that decision.[100] There was one bishop of Cyzicus named Gregory, according to the list provided by Michel Le Quien, but he is not reported to have done anything of importance impacting the two relevant topics.[101] The actual text of the Pamphilian decision in the archives of the Sacred Congregation for the Propagation of the Faith does indeed appear to have "Greg^{um} Cyzicaenum" written, so there is no error in the transcription given in Mansi.[102]

This written reference was probably an error made at the time, either in the discussion itself or its transcription by the secretary, and was intended to indicate the historical work of Gelasius of Cyzicus concerning the First Council of Nicaea.[103] If this is in fact the case, it is probable that the particular congregation reviewed in this work the letter sent by the council to the Church of Alexandria, those living in Egypt, Pentapolis, and Libya, and all orthodox Churches, clergy, and people, concerning the schism of Meletius (which prompted the promulgation of canon 6 at the council).[104] Meletius, bishop of Lycopolis, had illicitly ordained persons in dioceses other than his own, on the supposed basis that the Diocletian persecution had caused a number of episcopal vacancies (through martyrdom or imprisonment).

> This synod was moved to incline towards mildness in its treatment of Meletius, for strictly speaking he deserved no mercy. It decreed that he might remain in his own city

[100] Council of Trullo, canon 39: Mansi, 11:961–962. The latter part of the canon subjected Cyzicus to the authority of the prelate of New Justinianopolis.

[101] Michel Le Quien, *Oriens Christianus, in Quatuor Patriarchatus Digestus* (Paris: Typographia Regia, 1740) 1:757–758 (#30) states concerning Gregory: "Quo tempore Photius, Ignatio defuncto, Byzantinam iterum sedem arripuit, Cyzici episcopatu donatus erat *Gregorius*, qui in concilio quod illius restitutionis causa habitum est, sedit et subscripsit."

[102] *Atti* of the Sacred Congregation for the Propagation of the Faith for 1631, 80v. The words appear on the twelfth line of the page (omitting the heading "Die 4 Iunii 1631" from the numbering). The first few letters of "Cyzicaenum" are somewhat light, but they are clear enough to determine that this is indeed the word that was written.

[103] Gelasius of Cyzicus, "Gelasii Cyziceni historia, seu commentarius actorum concilii Nicaeni, Libri III": *Sacrosancta Concilia ad Regiam Editionem Exacta*, ed. Philip Labbe and Gabriel Cossartius (Paris: Societas Typographica, 1671) 2:109–286. Discussion on this text is found in an introduction in ibid., 2:103–110.

[104] Ibid., 2:249–252.

> without any authority to nominate, ordain, or install, and that he was not to show himself for this purpose in the country or in another city, and that he was to retain the bare name of his office. [...]
>
> This privilege [of being eligible for an office on the death of the current holder], which has been granted to all others [ordained by Meletius], does not apply to the person of Meletius because of his inveterate seditiousness and his mercurial and rash disposition, lest any authority or responsibility should be given to one who is capable of returning to his seditious practices.[105]

The letter indicates how destructive the members of the council viewed Meletius's actions. He could retain only the title attributed to him, and could not exercise any authority in the Church since he usurped the authority of another. What would become patriarchal authority thus enjoyed the protection of law through punitive measures.

1.4.3.8. "Eastern Canons"

Like the previous reference, it is unclear exactly what texts the phrase "Eastern Canons" is meant to indicate. One could think of various collections of canons of (mostly) Eastern councils made for the use of Latins, such as the *Codex Canonum Ecclesiae Universae* or the *Codex Canonum Ecclesiasticarum* of Dionysius Exiguus,[106] the collection of Eastern canons attributed to St. Martin of Braga (Martinus Bracarensis),[107] or the compendium of Eastern and

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[105] Ibid.: "ἔδοξεν οὖν Μελίτιον μὲν, φιλανθρωπότερον κινηθείσης τῆς συνόδου· κατὰ γὰρ τὸν ἀκριβῆ λόγον οὐδεμιᾶς συγγνώμης ἄξιος ἦν· μένειν ἐν τῇ αυτοῦ πόλει, καὶ μηδεμίαν ἐξουσίαν ἔχειν, μήτε χειροτονεῖν, μήτε χειρίζειν, μήτε χειροθετεῖν, μήτε ἐν χώρᾳ, μήτε ἐν πόλει ἑτέρᾳ φαίνεσθαι ταύτης τῆς προφάσεως ἕνεκα· ψιλὸν δὲ τὸ ὄνομα τῆς τιμῆς κεκτῆσθα· [...] ἐπὶ δὲ τοῦ Μελιτίου προσώπου οὐκέτι τὰ αὐτὰ ἔδοξε, διὰ τὴν ἀνέκαθεν αὐτοῦ ἀταξίαν, καὶ διὰ τὸ πρόχειρον καὶ προπετὲς τῆς γνώμης, ἵνα μηδεμία ἐξουσία ἢ αὐθεντία αὐτῷ δοθείη, ἀνθρώπῳ δυναμένῳ πάλιν τὰς αὐτὰς ἀταξίας ἐμποιῆσαι." Translation (with a minor adjustment to fit the wording used by Gelasius) taken from Tanner, 1:17–18.

[106] Dionysius Exiguus, "Codex Canonum Ecclesiae Universae": *Patrologiae Cursus Completus, Series Latina: Patrologiae Latinae Tomus LXVII: Dionysius Exiguus, S. Caesarius, Facundus Hermianensis, Alii*, ed. J. P. Migne (Paris: J. P. Migne, 1865) 39–94; idem, "Codex Canonum Ecclesiasticarum": *Patrologiae Cursus Completus, Series Latina: Patrologiae Latinae Tomus LXVII*, 135–230.

[107] St. Martin of Braga, "Capitula Collecta a Martino Episcopi Baracarensi": *Sacrosancta Concilia ad Regiam Editionem Exacta*, ed. Philip Labbe and Gabriel Cossartius (Paris: Societas Typographica, 1671) 5:903–914.

African canons sent by Pope St. Adrian I to Charlemagne.[108] Something common to all four of these collections, and possibly what the particular congregation reviewed, is a Latin translation of the ninth canon of the Council of Antioch held in 341. The canon states:

> It is proper that the bishops throughout each province know that the bishop who presides over the metropolis also has care of the entire province, from the fact that all who have business come from everywhere to the metropolis. Hence it seems proper that he also take precedence as concerns honor, and that the remaining bishops enter into nothing of importance without him, as the ancient canon of the fathers wills us, but only enter into those matters that pertain to the parish of each, and its regions. For each bishop has power over his parish, and administers it according to the discretion demanded of each, and undertakes provision of the entire region that is subject to his city. Further, they are to ordain presbyters and deacons, and treat individual matters with judgment, and they are not to attempt to enter into anything beyond these things without the bishop of the metropolis, nor is he to act without the opinion of the other bishops.[109]

The canon indicated that the metropolitan had to be consulted in matters of greater importance by the bishops of the province; they were to "enter into nothing of importance without him," as indicated by an "ancient canon," possibly referencing one of the Apostolic Canons on the same matter.[110] This canon, therefore, appeared to conflict with the letter of (pseudo) Pope Marcellus, which demanded all *negotia maiora* be submitted not to the metropolitan, but to the Roman

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Reference to this collection as a *collectio et emendatio canonum orientalium* is found in Caesar Baronius, *Annales Ecclesiastici*, editio novissima (Antwerp: Officina Plantiniana, 1603) 7:578.

[108] The *Collectio Dionysio-Hadriana*. See *Canones Apostolorum; Veterum Conciliorum Constitutiones; Decreta Pontificum Antiquiora*, ed. Johannes Wendelstinus (Mainz: Johannes Wendelstinus, 1525).

[109] Council of Antioch of 341, canon 9: Mansi, 2:1312: "Τοὺς καθ' ἑστάστην [*sic*] ἐπαρχίαν ἐπισκόπους εἰδέναι χρὴ τὸν ἐν τῇ μητροπόλει προεστῶτα ἐπίσκοπον, καὶ τὴν φροντίδα ἀναδέχεσθαι πάσης τῆς ἐπαρχίας, διὰ τὸ ἐν τῇ μητροπόλει πανταχόθεν συντρέχειν πάντας τοὺς πράγματα ἔχοντας. ὅθεν ἔδοξε καὶ τῇ τιμῇ προηγεῖσθαι αὐτόν, μηδέν τε πράττειν περιττὸν τοὺς λοιποὺς ἐπισκόπους ἄνευ αὐτοῦ, κατὰ τὸν ἀρχαῖον κρατήσαντα ἐκ τῶν πατέρων ἡμῶν κανόνα, ἢ ταῦτα μόνα, ὅσα τῇ ἑκάστου ἐπιβάλλει παροικίᾳ, καὶ ταῖς ὑπ' αὐτὴν χώραις. ἕκαστον γὰρ ἐπίσκοπον ἐξουσίαν ἔχειν τῆς ἑαυτοῦ παροικίας, διοικεῖν τε κατὰ τὴν ἑκάστῳ ἐπιβάλλουσαν εὐλάβειαν, καὶ πρόνοιαν ποιεῖσθαι πάσης τῆς χώρας τῆς ὑπὸ τὴν ἑαυτοῦ πόλιν, ὡς καὶ χειροτονεῖν πρεσβυτέρους καὶ διακόνους, καὶ μετὰ κρίσεως ἕκαστα διαλαμβάνειν· περαιτέρω δὲ μηδὲν πράττειν ἐπιχειρεῖν δίχα τοῦ τῆς μητροπόλεως ἐπισκόπου, μηδὲ αὐτὸν ἄνευ τῆς τῶν λοιπῶν γνώμης." The Latin versions of this canon are found in Dionysius Exiguus, "Codex Canonum Ecclesiae Universae," 62; idem, "Codex Canonum Ecclesiasticarum," 161 (#87); St. Martin of Braga, 5:905 (#4); *Canones Apostolorum; Veterum Conciliorum Constitutiones; Decreta Pontificum Antiquiora*, 28v. This canon also appears in the *Decretum Gratiani* as C. 9, q. 3, c. 1 (1151–1152).

[110] "Canones Apostolorum": Mansi, 1:35–36. In this edition, the relevant canon is #33; it is found (attributed as canon 34) in the *Decretum Gratiani* as C. 9 q. 3, c. 2 (1151–1154). Note, however, that recent scholarship has questioned the relative times that each canon was formulated, suggesting that the "apostolic canon" was actually formulated after the canon of the Council of Antioch; see Marini, 31–32, 35.

Church, and fell more in line with the statements of the letter of (pseudo) Pope Anacletus, emphasizing the reliance of individual bishops on their metropolitans.

1.4.3.9. Azor and Salas

The canonical reflections of Juan Azor and Juan de Salas have been discussed in previous sections. The important element taken from their commentaries concerned the determination that the Roman pontiff, for the most part, did not intend to encompass Eastern faithful (particularly clerics) in the legislation he issued.

1.4.3.10. St. Gregory concerning the Three Patriarchs

The phrase "St. Gregory concerning the three patriarchs" refers to part of a letter sent by Pope St. Gregory the Great to Eulogius, bishop of Alexandria:

> Therefore, while there are many apostles, nevertheless for the principate itself only the see of the prince of the Apostles has grown strong in authority; this see, while in three places, is of one person. For he [Peter] himself raised the see in which he deigned to rest and end his present life [Rome]. He honored the see where he sent his evangelizing disciple [Alexandria]. He founded the see in which (although he would leave) he sat for seven years [Antioch]. Therefore, as it is one see of one person, over which by divine authority three bishops now preside, whatever of good I hear of you, I impute to myself. If you receive as true something good about me, impute this to your merits, since we are one in Him Who says, "That they may all be one, just as You, Father, are in me, and I in You, so that they may also be one in Us" (Jo 17:21).[111]

[111] Letter of St. Gregory the Great to Eulogius, bishop of Alexandria: *Patrologiae Cursus Completus, Series Latina Prior: Patrologiae Latinae Tomus LXXVII: Sanctus Gregorius Magnus*, ed. J. P. Migne (Paris: J. P. Migne, 1862) 899 (Letters, Book 7, letter 40): "Itaque cum multi sint apostoli, pro ipso tamen principatu sola apostolorum principis sedes in auctoritate convaluit, quae in tribus locis unius est. Ipse enim sublimavit sedem, in qua etiam quiescere et presentem vitam finire dignatus est. Ipse decoravit sedem, in qua evangelistam discipulum misit. Ipse firmavit sedem, in qua septem annis, quamvis discessurus, sedit. Cum ergo unius atque una sit sedes, cui ex auctoritate divina tres nunc Episcopi praesident, quidquid ego de vobis boni audio, hoc mihi imputo. Si quid de me boni creditis, hoc vestris meritis imputate, quia in illo unum sumus, qui ait: *Ut omnes unum sint, sicut et tu, Pater, in*

This text indicated some form of commonality among the three sees of Rome, Antioch, and Alexandria, deriving from their common founding by Peter, either personally (Rome, Antioch) or intermediately (Alexandria, through his disciple Mark). On the one hand, this could suggest that their prelates had equal authority in their respective spheres, insofar as they were, in fact, exercising the same authority of Peter. On the other hand, the full authority of Peter was found only in the Roman Church; the powers exercised by the bishops of Antioch and Alexandria could thus be held as simply a participation in this authority.

1.4.3.11. The Act of the Egyptian Bishops at Chalcedon[112]

This reference in the Pamphilian decision concerned a contingent of thirteen Egyptian bishops who appeared at the fourth session of the Council of Chalcedon. Having been subject to Dioscorus, patriarch of Alexandria (who chaired the "robber synod" at Ephesus in 449 and was subsequently deposed at the third session of Chalcedon[113]), they offered a petition affirming their orthodoxy:

> To our most pious and Christ-loving emperors Flavius Valentinian and Flavius Marcian, triumphant victors always Augusti from all the bishops of your Egyptian diocese. The orthodox faith which from the beginning has been handed down to us by our holy and inspired fathers, St Mark the evangelist, the celebrated bishop and martyr Peter, and our holy fathers Athanasius, Theophilus and Cyril, who is among the saints, this we too preserve, this we advocate as the disciples of their confession, and this we hold, in accordance with the definitions of the 318 at Nicaea and of the most blessed Athanasius and Cyril, who is among the saints. We anathematize every heresy—those of Arius, Eunomius, Mani, Nestorius, and of those who say that the flesh of our Lord is from

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me, et ego in te, ut et ipsi in nobis unum sint (*Ioan.* xvii, 21)." The text, from "Itaque" to "sedit," is found in a note by the *Correctores Romani* to D. 21, c. 1 (*Decretum Gratiani*, 121–122).

[112] Council of Chalcedon, fourth session, October 17, 451: Mansi, 7:49–62; *The Acts of the Council of Chalcedon*, 2:147–153.

[113] See the summary and analysis of the third session in *The Acts of the Council of Chalcedon*, 2:29–37.

> heaven and not from the holy Virgin Mary the Theotokos, being like us in all things except sin—and in addition every heresy that holds or teaches what is alien to the catholic church.[114]

The petition did not please the council fathers, as it included neither an explicit condemnation of the doctrine of Eutyches, nor an adherence to the *Tome* of Leo.[115] One of the Egyptian bishops, Hieracis of Aphnaeum, agreed to the condemnation of Eutyches if he (or others) should differ from the doctrine contained in their petition, but stated that the bishops could not subscribe to Leo's *Tome* since they had no archbishop, Dioscorus having been deposed at the previous session of the council: "For this was laid down in a canon [namely, canon 6] by the 318 holy fathers who assembled at Nicaea, that the whole Egyptian diocese should follow the archbishop of the great city of Alexandria and that nothing should be done without him by any of the bishops under him."[116] The members of the council objected that such bishops, refusing to admit orthodox doctrine, would appear to be, by very that fact, incapable of electing a new archbishop.[117] The Egyptian bishops then argued that acting without their archbishop would

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[114] Council of Chalcedon, fourth session, October 17, 451: Mansi, 7:49–52: "Τοῖς εὐσεβεστάτοις, καὶ φιλοχρίστοις ἡμῶν βασιλεῦσι, Φλαυουίῳ Οὐαλεντινιανῷ, καὶ Φλαυουίῳ Μαρκιανῷ, νικηταῖς, τροπαιούχοις, ἀεὶ Αὐγούστοις, παρὰ πάντων τῶν τῆς ὑμετέρας Αἰγυπτιακῆς διοικήσεως ἐπισκόπων. Τὴν ἔξ ἀρχῆς παραδοθεῖσαν ἡμῖν ἐκ τῶν ἁγίων, καὶ πνευματοφόρων ἡμῶν πατέρων ὀρθόδοξων πίστιν, ἀπὸ τε τοῦ εὐαγγελιστοῦ τοῦ ἁγίου Μάρκου, καὶ τοῦ ἀοιδίμου ἐπισκόπου, καὶ μάρτυρος Πέτρου, καὶ τῶν ἁγίων ἡμῶν πατέρων, Ἀθανασίου, Θεοφίλου, καὶ τοῦ ἐν ἁγίοις Κυρίλλου, καὶ ἡμεῖς φυλάττοντες, καὶ τῆς ἐκείνων ὁμολογίας ὑπάρχοντες μαθηταὶ, ταύτην πρεσβεύομεν, καὶ κατὰ ταύτην φρονοῦμεν, καθὼς καὶ οἱ ἐν Νικαίαι τιὴ ἐξεθεντο, καὶ ὁ μακαριώτατος Ἀθανάσοις, καὶ ὁ ἐν ἁγίοις Κύριλλος· ἀγαθεματίζοντες πᾶσαν αἵρεσιν, τήν τε Ἀρείου, καὶ Εὐνομίου, καὶ Μανιχαίου, καὶ Νεστορίου, καὶ τῶν λεγόντων ἐξ οὐρανοῦ τὴν σάρκα τοῦ κυρίου ἡμῶν ὑπάρχειν, καὶ μὴ ἐκ τῆς ἁγίας θεοτόκου Μαρίας τῆς ραπθενου, καθ' ὁμοοιότητα πάντων ἡμῶν, χωρὶς ἁμαρτίας· πρὸς δὲ τούτοις καὶ πᾶσαν αἵρεσιν, ἐκτὸς τῆν καθολικῆς ἐκκλεσίας φρονοῦσάν τε, ἢ διδάσκουσαν." Translation from *The Acts of the Council of Chalcedon*, 2:148.

[115] Council of Chalcedon, fourth session, October 17, 451: Mansi, 7:52: "Πάντες οἱ εὐλαβέστατοι ἐπίσκοποι ἐβόησαν· τὸ δόγμα τοῦ Εὐτυχέως διὰ τί οὐκ ἀνεθεμάτισαν; μετὰ ἐπιθέσεως τὰς δεήσεις ἐπιδεδώκασι. τῇ ἐπιστολῇ Λέοντος ὑπογράφωσιν, ἀναθεματίζοντες Εὐτυχέα, καὶ τὸ δόγμα αὐτου. συνθῶνται τῇ ἐπιστολῇ Λέοντος. χλευάσαι ἡμᾶς θέλουσι, σαὶ ἀπελθεῖν." The *Tome* is found in Tanner, 1:77–82.

[116] Council of Chalcedon, fourth session, October 17, 451: Mansi, 7:53: "Τοῦτο γὰρ καὶ οἱ ἐπι τῆς Νικαέων ἅγιοι πατέρες συναγηγερμένοι εκανόνισαν τιη· ὥστε ακολουθεῖν πᾶσαν τὴν Αἰγυπτιακὴν διοίκησιν τῷ ἀρχιεπισκόπῳ τῆς μεγαλοπόλεως Ἀλεξανδρείας, καὶ μηδὲν δίχα αὐτοῦ πράττεσθαι παρὰ τινος τῶν ὑπ' αυτῶν επισκόπων." Translation from *The Acts of the Council of Chalcedon*, 2:150.

[117] Council of Chalcedon, fourth session, October 17, 451: Mansi, 7:53: "πάντες ἐβόησαν· φανερῶς ἀναθεματίσατε τὸ δόγμα Εὐτυχέως. ὁ μὴ ὑπογράφων τῇ ἐπιστολῇ, ἦ συνῆνεσαν ἡ ἁγία σψνοδος, αἱρετικός ἐστιν. ἀνάθεμα Διοσκόρῳ, καὶ τοῖς φιλοῦσιν αὐτον· ἐὰν μὴ ὀρθοδόξως φρονῶσι, πῶς ἔχουσι ψηφίσαθαι ἐπίσκοπον;"

incur the wrath of the Egyptian Church, leading to their possible exile or deaths. The bishops at the council appear to have rejected their pleas; the officials of the Senate of the Eastern Roman Empire present at the council, nevertheless, granted them leave:

> Since the most devout bishops of Egypt have for the time being deferred signing the letter of the most sacred Archbishop Leo not out of opposition to the catholic faith but on the grounds that it is the custom in the Egyptian diocese to do nothing of the kind without the approval and decision of the archbishop, and since they ask for a postponement until the appointment of the future bishop of the great city of Alexandria, it seems to us reasonable and compassionate that a postponement be granted to them, while they remain in the imperial city of their present footing, until the appointment of an archbishop of the great city of Alexandria.[118]

The representatives of the Apostolic See admitted the decision, but asked for securities: "If this is the order of your authority and you command that something be granted them out of compassion, let them provide securities that they will not leave this city until Alexandria gets a bishop."[119] The officials of the Senate agreed, asking for either securities or an oath.

The reasoning in the response to the Egyptian bishops appeared to resemble that cited at the beginning of Berò's canonical commentary. The Egyptian bishops objected to signing Leo's *Tome*. Had this been done out of contempt of the teaching contained therein, they would have been condemned as heretics. However, since they did so for a canonical reason—the need for a new bishop of Alexandria to be elected prior to their adherence—the imperial officials decided not to subject them to any penalties. Further, compassion had to be shown to them because of

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[118] Ibid., 7:60: "[Ἐ]πειδὴ οἱ εὐλαβέστατοι ἐπίσκοποι τῆς Αἰγυπτίων, οὐχ ὡς μαχόμενοι τῇ καθολικῇ πίστει, ὑπογράψαι τῇ ἐπιστολῇ τοῦ θειοτάτου ἀρχιεπισκόπου Λέοντος ἐπὶ τοῦ παρόντος, ἀνεβάλοντο, ἀλλὰ φάσκοντες ἔθος εἶναι ἐν τῇ Αἰγυπτιακῇ διοικήσει, παρὰ γνώμην, καὶ διατύπωσιν τοῦ ἀρχιεπισκόπου μηδὲν τοιοῦτο ποιεῖν, καὶ ἀξιοῦσιν ἐνδοθῆναι αὐτοῖς ἄχρι τῆς χειροτονίας τοῦ ἐσομένου τῆς Ἀλεξανδρέων μεγαλουπόλεως ἐπισκόπου· εὔλογον ἡμῖν ἐφάνη, καὶ φιλάνθρωπον, ὥστε αὐτοῖς μένουσιν ἐπὶ τοῦ ἰδίου σχήματος ἐν τῇ βασιλευούσῃ πόλει, ἔνδοσιν παρασχεθῆναι, ἄχρις ἂν χειροτονηθῇ ἀρχιεπίσκοπος τῆς Ἀλεξανδρέων μεγαλοπόλεως." Translation from *The Acts of the Council of Chalcedon*, 2:153.

[119] Council of Chalcedon, fourth session, October 17, 451: Mansi, 7:59: "Paschasinus reverendissimus episcopus, vicarius sedis apostolicae, dixit: Si praeceperit gloria vestra, et iubetis illis aliquid praestari humanitatis, fideiussoribus datis, non exeant de ista civitate, quamdiu Alexandria episcopum accipiat." Translation from *The Acts of the Council of Chalcedon*, 2:153.

the reaction in Egypt should they sign without having an archbishop. This reasoning suggested the praxis of "toleration" of Eastern customs by various popes, such as Innocent III at the Fourth Lateran Council—the rites and customs of the Eastern faithful had to be tolerated so that they would return to or remain in the communion of the Roman Church; it would be excessively harsh and counterproductive to demand that they follow the canons and rites of Rome.

1.4.3.12. The Synodal Letter of the Council of Chalcedon to Pope St. Leo I[120]

Several fathers of the Council of Chalcedon signed a letter sent to Pope St. Leo I, expressing their gratitude for his support for the council's actions against Dioscorus.[121] However, at the end of the letter there is a statement concerning their action taken in approving canon 28:

> We also inform you that we issued some other decrees for the sake of good ordering of affairs and the confirming of the ecclesiastical ordinances, being convinced that your holiness, when informed of them, would also approve and ratify them. The long-standing custom in the holy church of God at Constantinople of ordaining metropolitans for the Asian, Pontic and Thracian dioceses we have now ratified by conciliar decree, not so much to confer something on the see of Constantinople as to ensure good order in the metropolitan sees because of the frequent disturbances that often break out on the death of their bishops through both the clergy and the laity in them being without a leader and disrupting church order, a fact that has not escaped your holiness either, since you have often experienced annoyance particularly over Ephesus. We have also confirmed the canon of the 150 holy fathers who convened at Constantinople under the great Theodosius of pious memory, which declares that after your most holy and apostolic see that of Constantinople should enjoy privileges in second place, for we are convinced that, in view of the strength of your apostolic beam, you have often, in your habitual solicitude, extended it to the church of Constantinople, because of your generosity in sharing all your good things with your children. Therefore deign to embrace as your own

[120] Letter of the Council of Chalcedon to Pope St. Leo I (#98): Mansi, 6:145–161; *The Acts of the Council of Chalcedon*, 3:120–128.

[121] *The Acts of the Council of Chalcedon*, 3:128 note 81 states that the bishops of Illyricum do not appear to have signed, having been opposed to canon 28, and that there are several Eastern metropolitans missing from the list of signatories; thus, the statement at the end of the letter, "'All the remaining bishops signed similarly,' is not to be credited."

and welcome and conducive to harmony, most holy and blessed father, the decree we have issued to remove all confusion and to confirm good church order. For the representatives of your holiness, the most sacred bishops Paschasinus and Lucentius and their companion the most God-beloved presbyter Boniface, attempted to put up strong opposition to this decree, surely out of a desire that this good work also should be initiated by your forethought, so that the establishment of good order as well as of the faith should be attributed to you. For we, serving the most pious and Christ-loving emperors, who are delighted by this, and the illustrious senate and, so to say, the whole imperial city, considered it opportune for the ecumenical council to confirm the honour conferred on her, and confidently ratified it as if it had been initiated by your sacredness through your constant and zealous fostering, since we know that every achievement by children redounds on fathers who treat it as their own. Therefore, we entreat you, honour our decision by adding your own decree; as we have contributed to the head our consent to what is good, so also the head should fulfil for the children what is fitting. This will also show due regard for the pious emperors, who have confirmed as law the judgment of your sacredness; and the see of Constantinople will receive its recompense for having always shown you great ardour in the cause of piety and for having zealously allied itself with you for the sake of harmony. So that you may know that we have done nothing to win favour or out of animosity but have acted under the guidance of the divine will, we have informed you of the whole purport of our proceedings, to sustain our position and to win for our proceedings confirmation and approval.[122]

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[122] Letter of the Council of Chalcedon to Pope St. Leo I (#98): Mansi, 6:151–154: "Indicamus vero, quia et altera quaedam pro rerum ipsarum ordinata quiete, et propter ecclesiasticorum statutorum definivimus firmitatem, scientes quia et vestra sanctitas addicens et probatura, et confirmatura est eadem. Eam namque consuetudinem, quae ex longo iam tempore permansit, quam habuit Constantinopolitanorum sancta Dei Ecclesia ad ordinandum Metropolitanos provinciarum tam Asianae, quam Ponticae vel Thracicae, et nunc synodali decreto firmavimus, non tantum sedi aliquid Constantinopolitanae praestantes, quantum metropolitanis urbibus quietem congruam providentes, eo quod frequenter Episcopis vitam finientibus, multae turbae nascuntur, absque rectore clericis ac populis remanentibus, qui per easdem sunt civitates, et ecclesiasticum confundentibus ordinem: quod nec vestram latuit Sanctitatem, maxime propter Ephesios, unde quidam vobis saepius importuni fuerunt. Confirmavimus autem et centum quinquaginta sanctorum Patrum, qui in Constantinopoli congregati sunt sub piae memoriae maiore *Theodosio*, quae praecepit, post vestram sanctissimam et apostolicam Sedem, honorem habere Constantinopolitanam, (quae secunda est ordinata;) confidentes, quia lucente apud vos Apostolico radio, et usque ad Constantinopolitanorum Ecclesiam, consuete gubernando parentes, hunc saepius expanditis, eo quod absque invidia consueveritis vestrorum bonorum participatione ditare domesticos. Quae igitur definivimus ad interemtionem quidem totius confusionis, confirmationem vero ecclesiasticae ordinationis, haec sicut propria et amica, et ad decorem convenientissima, dignare complecti, sanctissime et beatissime Pater. Qui enim locum vestrae Sanctitatis obtinent sanctissimi Episcopi *Paschasinus et Lucentius*, et qui cum eis est reverendissirnus Presbyter *Bonifacius*, his ita constitutis vehmenter resistere tentaverunt, procul dubio a vestra providentia inchoari et hoc bonurn volentes: ut sicut fidei, sic bonae ordinationis vobis deputetur effectus. Nos enim curantes tam piissimos et Christi amicos Imperatores, qui super hoc delectantur, quam clarissimum Senatum, et totam, sicut dicere convenit, imperii civitatem, opportunum credidimus esse honoris eius confirmationem ab universali Concilio celebrari, et velut haec a tua Sanctitate fuerint inchoata, eo quod fovere semper studeas, roboravimus, praesumentes, dum noverimus, quia quidquid rectitudinis a filiis sit, ad patres recurrit, facientes hoc proprium sibi. Rogamus igitur, et tuis decretis nostrum honora iudicium; et sicut nos capiti in bonis adiecimus consonantiam, sic et summitas tua filiis, quod decet adimpleat. Sic enim et pii Principes complacebunt, qui tamquam legem tuae Sanctitatis iudicium firmaverunt; et Constantinopolitana Sedes suscipiet praemium, quae omne semper studium vobis ad concordiam eodem zelo coniunxit. Ut autem cognoscatis, quia nihil cuilibet donando per gratiam fecimus, aut per inimicitias adversando, sed ut nutu gubernati divino; omnem vobis gestorum vim insinuavimus, ad comprobationem nostrae sinceritatis, et ad eorum quae a nobis gesta sunt, firmitatem, et consonantiam." Translation from *The Acts of the Council of*

This part of the letter was carefully composed so as to avoid giving offense to Pope St. Leo I, in the hopes that he would confirm what the council had done concerning the status of Constantinople. Basing themselves on the need for "good ordering" (and noting the pope's previous bad experiences in the matter), they confirmed the authority of the head of the Church of Constantinople to ordain certain metropolitans, stating that it was a "long-standing tradition." They further confirmed a declaration of the First Council of Constantinople establishing that Constantinople enjoyed second place after Rome, noting that the pope had often been generous to that see. The letter framed the objections of the papal legates as their desire that this action be taken by the pope "so that the establishment of good order as well as of the faith should be attributed to you." While constantly stating that the council was merely confirming an already-existing state of affairs, and seeming to hold that their act was legally valid in itself, the signatories of the letter nevertheless realized the practical need of papal approbation for their decision to have effect. They asked Leo to add his own decree, to "fulfil for the children what is fitting." This section of the letter thus seems to be in tension, affirming that the council had already acted validly ("we [...] confidently ratified" the decree) but also asking for papal support ("honour our decision by adding your own decree").

The import of this letter for the particular congregation arises in its connection with the final texts reviewed, the second canon of Constantinople I and the responses of Popes Damasus I and Leo I to it.

Chalcedon, 3:123–124. Note ibid., 3:120 note 60, stating that the two Latin versions of this letter (the other, "older" version is transcribed in Mansi, 6:155–161) have issues with grammar, indicating their translation from the Greek text and suggesting that neither was the official Latin text sent to Pope St. Leo I. The introduction at Mansi, 6:145–146 contains comments on the Latin versions.

1.4.3.13. Canon 2 of the First Council of Constantinople

The synodal letter stated that the Council of Chalcedon merely confirmed what had been decreed at the First Council of Constantinople concerning the status of major sees, particularly Constantinople. The Pamphilian decision specifically cited canon 2 of this council:

> Diocesan bishops are not to intrude in churches beyond their own boundaries, nor are they to confuse the churches: but in accordance with the canons, the bishop of Alexandria is to administer affairs in Egypt only; the bishops of the East are to manage the East alone (whilst safeguarding the privileges granted to the church of the Antiochenes in the Nicene canons); and the bishops of the Asian diocese are to manage only Asian affairs; and those in Pontus only the affairs of Pontus; and those in Thrace only Thracian affairs. Unless invited, bishops are not to go outside their diocese to perform an ordination or any other ecclesiastical business. If the letter of the canon about dioceses is kept, it is clear that the provincial synod will manage affairs in each province, as was decreed at Nicaea. But the churches of God among barbarian peoples must be administered in accordance with the custom in force at the time of the fathers.[123]

This canon appeared to confirm canon 6 of Nicaea I, although it was more focused on what would become ecclesiastical provinces. It further established Pontus, Thrace, and Asia as distinct jurisdictional units; it was these three jurisdictions that would be subjected to Constantinople by canon 28 of Chalcedon. Finally, the provincial synod was established as the competent authority to "manage the affairs in each province." These elements would support the existence of both a negative autonomy on the part of certain types of jurisdictions, insofar as the head of one jurisdiction was not to interfere in the affairs of another, and a "positive" autonomy, as the "affairs in each province" were to be managed by an internal organ—the provincial synod.

[123] First Council of Constantinople, canon 2: text and translation in Tanner, 1:31–32: "Τοὺς ὑπὲρ διοίκησιν ἐπισκόπους ταῖς ὑπερορίοις ἐκκλησίαις μὴ ἐπιβαίνειν μηδὲ συγχέειν τὰς ἐκκλησίας, ἀλλὰ κατὰ τοὺς κανόνας τὸν μὲν Ἀλεξανδρείας ἐπίσκοπον τὰ ἐν Αἰγύπτῳ μόνον οἰκονομεῖν, τοὺς δὲ τῆς ἀνατολῆς ἐπισκόπους τὴν ἀνατολὴν μόνην διοικεῖν, φυλαττομένων τῶν ἐν τοῖς κανόσι τοῖς κατὰ Νίκαιαν πρεσβείων τῇ Ἀντιοχέων ἐκκλησίᾳ, καὶ τοὺς τῆς Ἀσιανῆς διοικήσεως ἐπισκόπους τὰ κατὰ τὴν Ἀσιανὴν μόνην οἰκονομεῖν, καὶ τοὺς τῆς Ποντικῆς τὰ τῆς Ποντικῆς μόνον, καὶ τοὺς τῆς Θρᾴκικης, τὰ τῆς Θρᾳκικῆς μόνον· ἀκλήτους δὲ ἐπισκόπους ὑπὲρ διοίκησιν μὴ ἐπιβαίνειν ἐπὶ χειροτονίᾳ ἤ τισιν ἄλλαις οἰκονομίαις ἐκκλησιαστικαῖς. Φυλαττομένου δὲ τοῦ γεγραμμένου περὶ τῶν διοικήσεων κανόνος εὔδηλον, ὡς τὰ καθ᾽ ἑκάστην ἐπαρχίαν ἡ τῆς ἐπαρχίας σύνοδος διοικήσει, κατὰ τὰ ἐν Νικαίᾳ ὡρισμένα. Τὰς δὲ ἐν τοῖς βαρβαρικοῖς ἔθνεσι τοῦ θεοῦ ἐκκλησίας οἰκονομεῖσθαι χρὴ κατὰ τὴν κρατήσασαν ἐπὶ τῶν πατέρων συνήθειαν."

However, considering the statement following this citation in the Pamphilian decision stating that Popes Damasus I and Leo I offered a *contradictio* against the canon, it appears that what was intended by the citation is the conciliar declaration now considered[124] as canon 3:

> Because it is new Rome, the bishop of Constantinople is to enjoy the privileges of honour after the bishop of Rome.[125]

This canon was the basis for canon 28 of the Council of Chalcedon, and offered an earlier instance of an ecumenical council attempting to grant special rights to a see, in apparent opposition to the declaration of canon 6 of the First Council of Nicaea.[126]

1.4.3.14. The Objections of Popes Leo I and Damasus I to the Canon

The members of the particular congregation believed that a nearly-immediate response to the action of the First Council of Constantinople was given by Pope St. Damasus I:[127]

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[124] See *The Acts of the Council of Chalcedon*, 3:87, where what are now considered canons 1–3 of Constantinople I were read at Chalcedon without any divisions being made; note 40 states: "The following three paragraphs were later (conveniently) numbered as three distinct canons, but at this date they were referred to as a single canon [...]." This third canon is found in *Decretum Gratiani*, 131–132, at D. 22, c. 3, where it is said to be the *fifth* canon of the council. Calling it the second canon, as the text of the Pamphilian decision appears to do, may indicate (along with the attribution of opposition to this canon to Pope St. Damasus I) that the members of the particular congregation were using Baronius, who, citing sources holding it as the third, fourth, or fifth canon, called it an "appendix" to the previous (second) canon (Baronius, 4:431–432). It could also be that the members of the congregation were using the edition of texts in the "Codex canonum ecclesiasticorum" of Dionysius Exiguus, which combines the texts of the second and third canons into a single canon: *Patrologiae Cursus Completus, Series Latina: Patrologiae Latinae Tomus LXVII*, 170–172.

[125] First Council of Constantinople, canon 3: text and translation in Tanner, 1:32: "Τὸν μέντοι Κωνσταντινουπόλεως ἐπίσκοπον ἔχειν τὰ πρεσβεῖα τῆς τιμῆς μετὰ τὸν Ῥώμης ἐπίσκοπον διὰ τὸ εἶναι αὐτὴν νέαν Ῥώμην."

[126] One notes that the canon references only privileges of honor; unlike canon 28 of Chalcedon, no jurisdiction is explicitly attributed to Constantinople, especially as the previous canon had stated that Asia, Pontus, and Thrace (subjected to Constantinople at Chalcedon) were autonomous provinces.

[127] The following text comes from what is commonly called the "Decretum Gelasianum," since it was once attributed to Pope St. Gelasius I (492–496). The first sentence of the text is part of D. 21, c. 3 of the *Decretum Gratiani* (223–224), also being attributed to Pope St. Gelasius I there. The introduction to the text at *Patrologiae Cursus Completus, Series Latina Prior: Patrologiae Latinae Tomus LIX: S. Gelasius I Papa, S. Avitus, S. Faustinus, Ioannes Diaconus, Iulianus Pomerius, Anonymi Duo, Incertus Auctor, M. Aurelius Clemens Prudentius*, ed. J. P. Migne (Paris: J. P. Migne, 1862) 163–166 notes the various attributions made of this text, to Popes Gelasius I,

> Therefore, the first Church of the Apostle Peter is the Roman Church, "not having stain or wrinkle or anything of the sort." The second see has been consecrated at Alexandria, in the name of blessed Peter by his disciple Mark the evangelist, and he, sent to Egypt by Peter the Apostle, preached the word of truth and suffered a glorious martyrdom. The third honorable see of the most blessed Apostle Peter is located at Antioch, because before coming to Rome, he lived there and there arose for the first time the name of "Christians" for the new race.[128]

The text established the precedence of sees on the basis of their connection to Peter, thus being a precursor for the letter of Pope St. Gregory I to Eulogius of Alexandria. If considered as a response to Constantinople I (as it was by the members of the particular congregation), it also appeared to base the rights of these sees in St. Peter; thus, Constantinople, having no connection to that apostle, could not claim the rights dependent on him.

The canon of Constantinople I factored into the letters sent to Pope St. Leo I asking for his confirmation of the similar action taken at the Council of Chalcedon. The letter sent on behalf of the council to the pope had stated:

> We have also confirmed the canon of the 150 holy fathers who convened at Constantinople under the great Theodosius of pious memory, which declares that after your most holy and apostolic see that of Constantinople should enjoy privileges in second place, for we are convinced that, in view of the strength of your apostolic beam, you have often, in your habitual solicitude, extended it to the church of Constantinople, because of your generosity in sharing all your good things with your children.[129]

Emperor Marcian wrote:

Damasus I, and Hormisdas. As referenced earlier, the particular congregation may have been using Baronius, since in his work the text is attributed to a Roman synod held under Pope St. Damasus I: Baronius, 4:462–463.

[128] "Decretum Gelasianum," 3.3: *Patrologiae Cursus Completus, Series Latina Prior: Patrologiae Latinae Tomus LIX*, 169–170: "Est ergo prima Petri apostoli sedes Romana ecclesia 'non habens maculam nec rugam nec aliquid eiusmodi.' Secunda autem sedes apud Alexandriam beati Petri nomine a Marco eius discipulo atque evangelista consecrata est, ipseque in Aegypto directus a Petro apostolo verbum veritatis praedicavit et gloriosum consummavit martyrium. Tertia vero sedes apud Antiochiam beatissimi apostoli Petri habetur honorabilis, eo quod illic priusquam Romae venisset habitavit et illic primum nomen Christianorum novellae gentis exortum est."

[129] Letter of the Council of Chalcedon to Pope St. Leo I (#98): Mansi, 6:154: "Confirmavimus autem et centum quinquaginta sanctorum Patrum, qui in Constantinopoli congregati sunt sub piae memoriae majore *Theodosio*, quae praecepit, post vestram sanctissimam et apostolicam Sedem, honorem habere Constantinopolitanam, (quae secunda est ordinata;) confidentes, quia lucente apud vos Apostolico radio, et usque ad Constantinopolitanorum Ecclesiam, consuete gubernando parentes, hunc saepius expanditis, eo quod absque invidia consueveritis vestrorum bonorum participatione ditare domesticos." Translation from *The Acts of the Council of Chalcedon*, 3:123.

> Because indeed it was also decreed that the decree of the 150 most holy bishops under the divine Theodosius concerning the honour of the venerable church of Constantinople and the recent decree of the holy council on the same matter are to be firmly upheld, namely that the bishop of the city of Constantinople is to have the second place after the apostolic see, because the same most glorious city is called Junior Rome, may your sanctity deign to bestow your own assent on this article also, even though the most devout bishops who came to the holy council to represent your religiousness formally objected to it; for they strove to prevent any enactment in the council relating to this venerable church.[130]

Finally, Bishop Anatolius of Constantinople wrote:

> Because, however, it was necessary for us to examine other topics, so that so great a council might be seen to transact without omission everything that needed amendment or confirmation in canonical and other ecclesiastical matters, the rulers of the universe and the most magnificent and glorious officials, the illustrious and glorious senate, and all the clergy and people were concerned that the most holy see in this imperial Constantinople should perceive some increase in honour through the agreement of this holy council with the canon of the 150 holy fathers, who were assembled at Constantinople in the time of the great Theodosius of pious memory, who was emperor, under the then leadership of Nectarius bishop of Constantinople, Timothy of Alexandria, Meletius of Antioch, Helladius of Caesarea in Cappadocia, Cyril of Jerusalem and others.[131]

All three of these letters appealed to the determination of Constantinople I in order to justify their action concerning elevating the see of Constantinople.

The objection of Pope St. Leo I to the canon of the First Council of Constantinople is found throughout his reactions to these appeals. Pope St. Leo I refused to accept what the

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[130] Emperor Marcian's letter to Pope St. Leo I (#100), December 18, 451: Mansi, 6:167–168: "Quoniam vero et hoc statutum est, ut ea quae centum quinquaginta sanctissimi Episcopi sub divo *Theodosio* Maiore de honore venerabilis Ecclesiae Constantinopolitanae statuerunt, et quae nunc a sancta Synodo de eadem re statuta sunt, firma serventur: scilicet ut post Sedem apostolicam Constantinopolitanae urbis Antistes secundum obtineat locum; quoniam et eadem splendidissima civitas iunior Roma nuncupatur: dignetur Sanctitas tua etiam huic parti proprium adhibere consensum; quamvis reverentissimi Episcopi, qui tuae religionis vicem agentes ad sanctam Synodum convenerunt, contradixerint. Vehementer enim prohibebant de hac venerabili Ecclesia a Synodo aliquid ordinari." Translation from *The Acts of the Council of Chalcedon*, 3:137.

[131] Letter of Bishop Anatolius to Pope St. Leo I (#101): Mansi, 6:175–178: "Quoniam vero etiam de aliis rebus oportebat nos considerare, ut tanta Synodus omnia videretur agere sine ulla omissione, quae correctionis indigent, atque approbationis tum in canonicis, tum in ecclesiasticis capitibus; cura adhibita est et ab iis qui omnia moderantur, et a magnificentissimis gloriosissimisque iudicibus et illustri et glorioso Senatu et clero universo et populo, ut afficeretur aliquo honoris additamento sanctissima Sedes huius regiae urbis Constantinopolis per consensum huius sanctae Synodi circa canonem centum quinquaginta sanctorum Patrum, qui congregati fuerant sub magno *Theodosio* piae recordationis, qui fuit Constantinopolis imperator, praesidente tunc *Nectario* quidem Constantinopoli, *Timotheo* vero Alexandriae, et *Meletio* Antiochiae, *Helladio* Caesareae Cappadociae, *Cyrillo* Hierosolymis, et reliquis." Translation from *The Acts of the Council of Chalcedon*, 3:140.

Council of Chalcedon did, regardless of the justifications provided, particularly the claim that the council was simply confirming the earlier act of the First Council of Constantinople. To Emperor Marcian he wrote:

> Let the city of Constantinople, as we desire, keep its high rank, and through the protection of God's right hand long enjoy the rule of your clemency. Yet secular affairs have a different rationale than divine ones, nor apart from the rock that the Lord placed as a foundation can any building be stable. [...] [L]et [Anatolius] not distain an imperial city because he cannot make it an apostolic see, and let him on no account hope that he can become greater through wronging others. For the privileges of the churches, having been bestowed by the canons of the holy fathers and defined by the decrees of the venerable council of Nicaea, cannot be overturned by any unscrupulousness or changed by any innovation. In the faithful performance of this task with the help of Christ I am obliged to render perseverant service, because it is a stewardship that has been entrusted to me, and it brings guilt upon me if the rules of the fathers' enactment, which were drawn up under the direction of God's Spirit at the council of Nicaea for the government of the whole church, are violated with my connivance (which God forbid), and if the wishes of a single brother weigh more with me than the common good of the entire house of the Lord.[132]

To Bishop Anatolius he wrote:

> Therefore after the not irreproachable origins of your ordination, and after the consecration of the bishop of Antioch, which you arrogated to yourself contrary to the canonical rule, I am distressed that your love should have descended even to this, an attempt to transgress the most sacred ordinances of the Nicene canons, as if this occasion was offered to you opportunely for the see of Alexandria to lose its privilege of the second place of honour and for the church of Antioch to forgo its enjoyment of being third in rank, so that when these places had been subjected to your authority all the metropolitan bishops would be deprived of their due honour. [...] Let no synodal councils preen themselves on the size of their membership, and let not the number of priests, however superior, presume to either compare or prefer itself to those 318 bishops, seeing that the council of Nicaea is hallowed by such a God-given prerogative that, whether ecclesiastical judgements are issued by fewer [priests] or by more, whatever differs from

[132] Letter of Pope St. Leo I to Emperor Marcian (#104), May 22, 452: Mansi, 6:191: "Habeat, sicut optamus, Constantinopolitana civitas gloriam suam, ac protegente dextera Dei, diuturno Clementiae vestrae fruatur imperio. Alia tamen ratio est rerum saecularium, alia divinarum: nec praeter illam petram, quam Dominus in fundamento posuit, stabilis erit ulla constructio. [...] Non dedignetur Regiam civitatem, quam apostolicam non potest facere sedem; nec ullo speret modo, quod per aliorum possit offensiones augeri. Privilegia enim Ecclesiarum, sanctorum Patrum canonibus instituta, et venerabilis Nicaenae Synodi fixa decretis, nulla possunt improbitate convelli, nulla novitate mutari. In quo opere, auxiliante Christo, fideliter exequendo, necesse est me perseverantem exhibere famulatum: quoniam dispensatio mihi credita est, et ad meum tendit reatum, si paternarum regulae sanctionum, quae in Synodo Nicaena, ad totius Ecclesiae regimen, Spiritu Dei instruente, sunt conditae, me (quod absit) connivente, violentur; et maior sit apud me unius fratris voluntas, quam universae domus Domini communis utilitas." Translation from *The Acts of the Council of Chalcedon*, 3:144.

> what they laid down is utterly destitute of all authority. [...] For your persuasiveness is in no way whatever assisted by the subscription of certain bishops given, as you claim, sixty years ago, and never brought to the knowledge of the apostolic see by your predecessors; this subscription, which was futile from the start and has long fallen into abeyance, you now wish to prop up by supports that are tardy and ineffectual, by extracting from the brethren an appearance of consent which to their own detriment their modesty yielded to you out of mere weariness.[133]

Finally, in a letter to the Empress Pulcheria, he wrote:

> Since it is conceded to no one to attempt anything against the statues of the canons of the fathers, which had been established many years ago in the city of Nicaea by spirit-filled decrees, thus, if any should want to do something different, he diminishes himself rather than destroys those statutes. [...] But what does the prelate of the Church of Constantinople desire further than what he has obtained? What will satisfy him if the magnificence and brilliance of such a great city does not suffice? It is too prideful and immoderate beyond due limits to try and want to take someone else's right with antiquity trodden upon; to attack the primacies of so many metropolitans so that the dignity of oneself may increase; to wage a war of new upheaval when the provinces are peaceful and already arranged by the organization of the holy Nicene Synod; to offer the consent of some bishops (to which a period of so many years has denied effect) so that the decrees of the venerable fathers may be loosened. For it is boasted to be roughly the sixtieth year of this connivery; by this claim the said bishop thinks he will be helped, hoping in vain that it offers some benefit to him—but if anyone dares to want this, no one has been able to obtain it. [...] Agreements of bishops that are opposed to the rules of the holy canons established at Nicaea we, with the piety of your faith united with us, deem null, and by the authority of blessed Peter the Apostle, we utterly nullify them by general definition, obeying in all ecclesiastical causes those rules that the Holy Spirit, through the 318 bishops, established for the peaceful observance of all priests. Thus, even if many more determine other than what they established, whatever should be different from the constitution of the said fathers is to be held in no reverence.[134]

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[133] Letter of Pope St. Leo I to Bishop Anatolius of Constantinople (#106), May 22, 452: Mansi, 6:199–203: "Post illa itaque ordinationis tuae non inculpata principia, post consecrationem Antiocheni episcopi, quam tibimet contra canonicam regulam vindicasti, doleo etiam in hoc dilectionem tuam esse prolapsam, ut sacratissimas Nicaenorum canonum constitutiones conareris infringere: tamquam opportune se tibi hoc tempus obtulerit, quo secundi honoris privilegium sedes Alexandrina perdiderit, et Antiochena Ecclesia proprietatem tertiae dignitatis amiserit: ut his locis iuri tuo subditis, omnes Metropolitani Episcopi proprio honore priventur. [...] Nulla sibimet de multiplicatione congregationis Synodalia Concilia blandiantur, neque trecentis illis decem atque octo Episcopis quantumlibet copiosior numerus Sacerdotum vel comparare se audeat, vel praeferre; cum tanto divinitus privilegio Nicaena sit Synodus consecrata, ut sive per pauciores, sive per plures ecclesiastica iudicia celebrentur, omni penitus auctoritate sit vacuum, quidquid ab illorum fuerit constitutione diversum. [...] Persuasioni enim tuae in nullo penitus suffragatur quorumdam Episcoporum ante sexaginta (ut iactas) annos facta conscriptio, numquamque a praedecessoribus tuis ad apostolicae Sedis transmissa notitiam, cui ab initio sui caducae, dudumque collapsae sera nunc et inutilia subiicere fulcimenta voluisti, eliciendo a fratribus speciem consensionis, quam tibi in suam iniuriam verecundia fatigata praeberet." Translation from *The Acts of the Council of Chalcedon*, 3:147–148.

[134] Letter of Pope St. Leo I to the Empress Pulcheria (#105), May 22, 452: Mansi, 6:195–198: "Quoniam contra statuta paternorum canonum, quae ante longissimae aetatis annos in urbe Nicaena spiritualibus sunt fundata decretis, nihil cuique audere conceditur: ita ut si quis diversum aliquid decernere velit, se potius minuat quam illa corrumpat.

Pope St. Leo I held the determinations of the First Council of Nicaea to be incapable of alteration by any later authority. The Council of Chalcedon could not alter it, even if the number of bishops was greater than the 318 at Nicaea.[135] Further, the appeal to the action of the First Council of Constantinople was without effect; as stated in his letter to Bishop Anatolius, it was never brought to the attention of the Apostolic See, was invalid from the beginning, and had even fallen into abeyance. In addition, it was the role of the Roman pontiff to act in defense of this Nicene ecclesiastical structure: "I am obliged to render perseverant service, because it is a stewardship that has been entrusted to me." These responses establish that the various ecclesiastical structures had their own proper integrity, and that it was the duty of the Roman pontiff to watch over and defend these structures.

[...] Et tamen haec illis tunc insinuabantur qui de pusillo volebant crescere, et de infimis ad summa transire. Constantinopolitanae vero praesul Ecclesiae, quid amplius quam assecutus est, concupiscit? aut quid illi satisfaciet si tantae urbis magnificentia et claritudo non sufficit? Superbum nimis est et immoderatum ultra proprios terminos tendere, et antiquitate calcata alienum ius velle praeripere; atque ut unius crescat dignitas, tot Metropolitanorum impugnare primatus; quietisque provinciis, et olim sanctae Synodi Nicaenae moderatione dispositis, bellum novae perturbationis inferre; atque ut venerabilium Patrum decreta solvantur, quorumdam Episcoporum proferre consensum, cui tot annorum series negavit effectum. Nam sexagesimus fere annus huius conniventiae esse iactatur, qua se praedictus Episcopus aestimat adiuvari, frustra cupiens id sibi prodesse, quod etiam si quisquam ausus est velle, nullus tamen potuit obtinere. [...] Consensiones vero Episcoporum, sanctorum canonum apud Nicaeam conditorum regulis repugnantes, unita nobiscum vestrae fidei pietate in irritum mittimus, et per auctoritatem beati Petri Apostoli, generali prorsus definitione cassamus, in omnibus ecclesiasticis caussis his legibus obsequentes, quas ad pacificam observantiam omnium Sacerdotum, per trecentos decem et octo Antistites Spiritus sanctus instituit: ita ut etiam si multo plures aliud, quam illi statuere decernant, in nulla reverentia sit habendum, quidquid fuerit a praedictorum constitutione diversum."

[135] *The Acts of the Council of Chalcedon*, 3:147 note 135 states that only 200 of the fathers had actually signed canon 28, although Leo, relying on an earlier letter stating the general number of bishops at Chalcedon, thought that 500 were present.

1.4.4. Analysis of the Pamphilian Decision

1.4.4.1. Context of the Decision

The decision rendered by the particular congregation at the palace of Cardinal Pamphili requires careful analysis. First, considering the later adaptation of this decision, one must remember the original context in which it was given. The *dubium* concerned whether "Greeks and others subject to the sees of the schismatic patriarchs" were the intended subjects of "the bull *In Coena Domini* and other apostolic constitutions, in which [the Roman pontiff] reserves cases to himself and the Apostolic See." The ultimate decision reached by the particular congregation, therefore, concerned only censures established in apostolic constitutions that reserved cases to the pope and Apostolic See, particularly *In Coena Domini*.[136] It did not give a general response, declaring that Eastern faithful were not bound by *any* apostolic constitutions except in the three cases that they listed. Some of the confusion over the interpretation of elements of this decision as rendered in current law can be resolved by remembering this context.[137]

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[136] Note that John A. Duskie, *The Canonical Status of the Orientals in the United States*, Canon Law Studies 48 (Washington, D.C.: Catholic University of America, 1928) 56 incorrectly states that the decision concerns papal constitutions without qualifications, based on the rendering of the decision by Benedict XIV. Note also that the rotal decision *coram* Wynen, in *Periodica* 37 (1948) 319, argues that the particular congregation responded "non ad quaesitum particulare sed ad dubium generale," which does not seem to comport with the text of the decision.

[137] The current confusion particularly concerns how matters "de rebus fidei vel morum" (the current wording in *CCEO* c. 1492 for the first exception, orignally "in materia dogmatum fidei") can constitute, in themselves, ecclesiastical laws. Note in particular the comments of John M. Huels on *CCEO* c. 1492, in the forthcoming *The Code of Canons of the Eastern Churches: A Practical Guide and Resource*, ed. John D. Faris and Jobe Abbass (for which I am an editorial assistant): "Faith and morals, as well as declarations of the divine law, are not *per se* the subject matter of ecclesiastical laws, which are of human origin. They pertain to the doctrinal arena, not the juridical, and to the discipline of theology, not canon law." Read in the original context, the reference to faith and morals ("matter of the dogmas of faith") concerns the basis for an ecclesiastical censure, not the ecclesiastical law itself.

1.4.4.2. Subjects of the Decision

The manner in which Eastern faithful are described here must also be noted. They were called "Greeks and others subject to the sees of the schismatic patriarchs." Thus, not only did these persons have to follow some Eastern rite,[138] they also had to be "subject to the sees of the schismatic patriarchs." This latter qualification suggests that the decision did not apply those "Greeks and others" outside of the jurisdictions of the schismatic patriarchs, such as the Italo-Greeks. One could also question what type of "schismatic patriarch" was intended: did the decision only pertain to subjects of the four "major" Eastern patriarchs—Constantinople, Alexandria, Antioch, Jerusalem—or did the subjects of the "minor" patriarchs, such as the Armenian patriarchs, also enjoy the benefit of the decision?[139] Finally, there is no restriction on the application of the ultimate decision to Eastern Catholics alone or Eastern schismatics alone. As Aemilius Herman notes:

> To properly understand this [1631] response, it must be known that the doubts had been proposed by Capuchin missionaries who worked in the East among Catholics and

[138] Latins would not have been subject to Eastern hierarchs at this time, even if living in the limits of the Eastern patriarchates. Note Alexius Petrani, *De Relatione Iuridica inter Diversos Ritus in Ecclesia Catholica* (Turin-Rome: Marietti, 1930) 44: "Patriarchae et alii Ordinarii orientales nullam iurisdictionem accipiunt a Sancta Sede super fideles latinos in Oriente commorantes, quia latini Episcopis orientalibus nullo in casu vel loco subiiciuntur." At this time, the canonical figure of "rite" was still somewhat undefined, with several commentators holding that it was territorially binding, akin to a local custom (e.g., a Latin had to conform to the Greek rite when in a Greek territory), or constituted a personal prerogative, akin to a privilege (e.g., a Latin had the right to use the Latin rite anywhere, though he/she did not have to); see Bassett, 117–123. Beginning with Urban VIII (the pope reigning when the Pamphilian decision was made), observance of one's "proper" rite became more binding (ibid., 120). Benedict XIV would offer the first detailed analysis by a pope of the canonical figure of rite; this will be considered in the following chapter.

[139] If the latter was the case, then one would also have to account for the Maronite patriarch, who would be a patriarch, but not a *schismatic* patriarch as stated in the text of the Pamphilian decision—would the decision apply to his subjects? One could turn to the jurisprudence of Verricelli, who argued that minor patriarchs were *de iure* subject to the four major patriarchs. Thus, while the Maronite patriarch was not schismatic, he was at this time *de iure* subject to the schismatic Greek Patriarch of Antioch, and so the decision would apply to his subjects. By the time there was a non-schismatic Greek Patriarch of Antioch in the eighteenth century, another element of Verricelli's jurisprudence—replacing "sees of the schismatic patriarchs" with "four patriarchal Churches of the East"—would allow the jurisprudence to apply to the subject of any of the four major patriarchates of the East, regardless of whether a Catholic or schismatic was patriarch. On all of this jurisprudence, see below, 1.6.

> dissidents. At that time, Catholics and dissidents had not yet been fully separated, but often continued to live under the same bishop, of whom some openly admitted union, others favored it, and others were hostile to the Catholic Church. [...] Therefore, the doubt proposed by the missionaries and the response given to the doubt concerned not only Catholics but even more the dissidents who wanted to enter the Church.[140]

Therefore, while the practical application of this decision would have applied only in some Catholic contexts ("schismatics" would not care by what censures in the relevant apostolic constitutions they were considered to be bound), the ecclesial status of the member of the Eastern faithful—in communion or not—did not affect the theoretical application; all Eastern faithful were bound by such censures only in the three cases specified.

1.4.4.3. General Response Rendered

The particular congregation decided, as a general response, that those "subject to the sees of the schismatic patriarchs" were *not* subject to censures established in apostolic constitutions that reserved cases to the pope and Apostolic See, insofar as the Roman pontiff did not intend

[140] Herman, "Regunturne Orientales dissidentes legibus matrimonialibus Ecclesiae latinae?" 13–14: "Ad recte intelligendam hanc responsionem, sciendum dubia proposita esse a missionariis Capuccinis qui in Oriente inter catholicos et dissidentes laborant. Illo tempore catholici et dissidentes nondum plene separati erant, sed saepe sub iisdem Episcopis vivere pergebant, ex quibus alii unionem aperte profitebantur, alii ei favebant, alii Ecclesiae catholicae infesti erant. [...] Dubium igitur a missionariis propositum et responsio ad dubium data non solum catholicos spectabat, sed vel fortiore ratione dissidentes qui Ecclesiam ingredi quaerebant." Note that some commentators argue that the reference to "schismatic" in the text of the decision indicates that, in the understanding of the particular congregation, Eastern *Catholics* were subject to all papal legislation. See the rotal decision *coram* Wynen, in *Periodica* 37 (1948) 320, appearing to attribute the supposed expansion of the decision's application to any member of the Eastern faithful to Benedict XIV, who omitted the word "schismaticorum" when citing the decision (Joseph Hajjar, "Quelques jalons modernes de la codification canonique orientale," *Apollinaris* 35 [1962] 233 note 4 also cites Benedict XIV in this regard). See also Carl G. Fürst, "Interdipendenza del Diritto Canonico Latino e Orientale," in *Il Diritto Canonico Orientale nell'ordinamento ecclesiale*, Studi Giuridici 34, ed. Kuriakose Bharanikulangara (Vatican City: Libreria Editrice Vaticana, 1995) 32 note 66: "Questo canone [*CCEO* c. 1492] alla fine si fonda su una decisione coram Cardinale Pamphili, del 4 giugno 1631, che di per sé era valida soltano nei confronti degli scismatici orientali, ma più tardi spesso e non limitata soltanto alle riservazioni fu applicata anche nei confronti dei cattolici orientali." First, as a technical point, the omission of "schismaticorum" is to be attributed to the citation of the decision in Verricelli, 204; Benedict XIV simply copied this version. Further, the jurisprudence surrounding the question (Azor, Baldellus) did not focus on such a distinction. Finally, one notes that the decision describes the *patriarchs* as schismatic, not the subjects. Being subject *de iure* to a schismatic patriarch did not render one schismatic; as Herman notes, both Catholics and schismatics lived under bishops having various attitudes towards communion with the Catholic Church.

them to be so subject. In this regard, the decision follows the jurisprudence of Azor and Salas, who argued that the Roman pontiff was not presumed to be a legislator for the Eastern faithful, and in most cases did not intend his legislation to extend to them; the Eastern communities possessed a negative autonomy. The decision also reflected the dignity attributed to the patriarchal sees by canon 6 of Nicaea I, canon 2 of Constantinople I, and canon 17 of Constantinople IV, a dignity lauded and defended through the actions of various popes ([pseudo] Anacletus, Damasus, Leo, Gregory). Further, Eastern customs that appeared contrary to those of the Latins or that, at first glance, appeared to oppose papal authority (such as not being bound by censures established in apostolic constitutions reserving cases to the pope) were nevertheless legitimate, or at least tolerable, provided there was no danger to souls or threat to ecclesiastical decency, as was determined with *Licet* of Lateran IV and suggested by the tolerance given to the Egyptian bishops at Chalcedon.

However, the Pamphilian decision was limited to determining the non-applicability of certain apostolic constitutions to Eastern faithful; it did not speak to the internal legislative authority or scope for legislation of the patriarchs and synods—how far could a patriarch or synod go in making law? On the one hand, establishing such non-application of such papal constitutions could imply an internal legislative authority capable of legislating on those matters for the particular community.[141] On the other hand, the canonists Azor and Salas did not speak of modern law as a distinguishing factor between the Western and Eastern Churches, only of abrogation of conciliar law by custom, *ancient* law and custom, and modern law issued for the Latins. Looking at *Antiqua* from Lateran IV, it would seem that the authority of patriarchs would be very limited, with the authority of synods not even referenced (as it had been in canon

[141] Cf. Duskie, 24: "Already in the early part of the seventeenth century, canonists held that Orientals were not embraced by pontifical constitutions save in matters which of their nature pertained to them; hence, it may be inferred that the Orientals are governed by a particular canonical discipline."

2 of Constantinople I and canon 17 of Constantinople IV); looking at the letter of (pseudo) Pope Marcellus I to the Antiochenes, patriarchs and their synods could not exercise jurisdiction over *negotia maiora*, nor could bishops be judged without papal authorization. As these Eastern communities were considered analogous to Western supra-diocesan structures, there was no distinct ecclesial nature attributed to them (as would occur with the Second Vatican Council), so their internal law would be considered no different in nature than the law of a Latin province.

While the members of the particular congregation established a general rule that censures established in apostolic constitutions that reserved cases to the pope or Apostolic See did not bind Eastern faithful, they nevertheless "limited" this rule in three cases.

1.4.4.4. First Limitation: Matter of the Dogmas of Faith

First, the congregation determined that the censures concerning "matter of the dogmas of faith" applied to "Greeks and others subject to the sees of the schismatic patriarchs." This limitation in practice meant that the Eastern faithful were subject to the excommunication for heresy of *In Coena Domini*, as well as any other particular censures established in such apostolic constitutions for delicts concerning the faith. The pope had universal authority over matters of faith (as seemed to be indicated by the reaction to the Egyptian bishops' refusal to sign the *Tome*, and implied by the concern of Innocent III concerning the integrity of the faith in *Licet*), so he would naturally intend that his censures established in such apostolic constitutions concerning these matters apply to *all* Christian faithful.

1.4.4.5. Second Limitation: If the Pope Explicitly Mentions them in his Constitutions

The second limitation on their general negative response to the *dubium* concerned cases when "the pope explicitly makes mention of the said subjects of the patriarchal sees in his constitutions and makes determinations concerning them, as in the case of schismatics in the bull *In Coena Domini*." Agreeing with Azor and Salas, the congregation held that while the pope did not normally make law for "Greeks and others subject to the sees of the schismatic patriarchs," he nevertheless had the capacity to do so, should he so intend. Thus, the pope could explicitly establish that the censures in apostolic constitutions that reserved cases to the pope and the Apostolic See would be applicable to such persons.[142]

1.4.4.6. Third Limitation: If the Pope Implicitly Makes Determinations concerning them in his Constitutions

The third and final limitation concerned cases when the pope "makes determinations concerning them in the same constitutions implicitly," with the examples given of "the cases of appeal to a future council, and bearing arms to infidels, and other similar matters." The exact manner whereby a censure would "implicitly" apply to "Greeks and others subject to the sees of the schismatic patriarchs" is not clear from the text, especially considering the examples given. While one could argue that a censure for appealing to a future ecumenical council would include Eastern faithful implicitly insofar as the entity to which appeal was made—an ecumenical council—exercises authority over all Christians regardless of patriarchal subjection, the other—

[142] Although not a reserved censure, the excommunication and deprivation "of every ecclesiastical office and benefice" imposed by *Licet* particularly on Greeks for certain matters "which [...] detract from the church's honour" can be considered a similar case (translation from Tanner, 1:235–236).

bearing arms to infidels—has no clear connection to Eastern faithful, other than perhaps geography, with many Eastern faithful living among the "infidels" (Muslims). The congregation appears to have felt that certain censures established in such apostolic constitutions ought to apply to the subjects of the four schismatic patriarchs, but did not fall under either of the two previous categories. The "implicit" exception offered a way to cover such cases, but its ambiguity could cause many other censures established in such apostolic constitutions to apply to such Eastern faithful, through a simple declaration that these censures "implicitly" included them.

1.4.4.7. Absence of Official Approval

Finally, although this Pamphilian decision would become extremely significant in the development of Eastern juridic autonomy[143] and the basis for much curial praxis, it appears to have never been officially approved by the pope or the Sacred Congregation for the Propagation of the Faith.[144] Like the other parts of the *dubia* offered by the Capuchin missionaries, it seems

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[143] Acacius Coussa, *Epitome Praelectionum de Iure Ecclesiastico Orientali* (Typis Monasterii Exarchici Cryptoferratensis, 1948) 1:9 argues that this decision was the first recognition of a difference between Latin and Eastern discipline: "A schismate Cerularii (1054) Oriens et Occidens separatim processerunt; quod influxum exercuit etiam in disciplinam seu legislationem. Disciplina orientalis pergit adhuc fundari in substratu communi, sed in sua evolutione magis pervaditur a caesaropapismo; dum e contra disciplina occidentalis in dies, ope decretorum Romanorum Pontificum, magis perficitur. Unde duplex disciplina plene constituta est: orientalis et occidentalis. Hanc divisionem primo agnovit S. C. de Propaganda Fide, die 4 iunii 1631; eandem saepe Sedes Apostolica confirmavit et primus canon CIC. retulit."

[144] Ayrinhac, 98: "This decision never received formal papal approval and therefore it remains in itself a mere theological opinion [...], but it enjoyed great authority"; Herman, "De Conceptu 'Ritus,'" *The Jurist* 2 (1942) 337: "Quae norma quamquam numquam authentice confirmata est, de facto tam ab Orientalibus servata est, quam a S. Sede, uti agnovit Benedictus XIV et S. Congregatio de Propaganda Fide"; idem, "De «Ritu» in Iure Canonico," 121: "Haec decisio sane non erat authentica quaedam et solemnis declaratio sed pro praxi maxime aestimanda erat"; idem, "Regunturne Orientales dissidentes legibus matrimonialibus Ecclesiae latinae?" 13, using the adjective *celeberrimus* in describing this decision, but at 14 noting "numquam authentice approbatum sit"; Eduardus F. Regatillo, *Institutiones Iuris Canonici*, 7th augmented ed. (Santander: Sal Terrae, 1963) 1:31, noting that while the Pamphilian decision was considered as a general norm in praxis, "usque ad Codicem decisio S. Sedis clara et expressa defuit"; Sacred Roman Rota, decision *coram* Wynen, in *Periodica* 37 (1948) 320: "Quae tamen resolutio *a*

not to have been examined further by the particular congregation. In fact, it would never be officially approved in universal law until it was used as a source for canon 1 of the 1917 *Codex Iuris Canonici*, and even in this case it appears that the application of the decision's jurisprudence would be limited to the code itself.[145]

1.4.4.8. The Other Matters Debated at the Meeting of June 4, 1631

The other matters discussed at the particular congregation do not require much analysis as, besides the fact that no official response was sent to the missionaries, no firm determinations were even made. The four members of the congregation were evenly split as to whether such Greeks and other Easterners would be subject not only to the censures established in apostolic constitutions that reserved cases to the pope and Apostolic See, but also to the reservations themselves. Those in favor of the application of such reservations argued that the pope's intent in establishing censures for all Christian faithful was the same as that in establishing the reservations applying to those censures. Those opposed noted that Eastern faithful did not have the reservation of cases and, further, the distances involved in obtaining the remission of the censure from the Apostolic See would open the Eastern faithful to many dangers of life and property (akin to the situation of the Egyptian bishops at Chalcedon). The last question, concerning the ability of Greek and Armenian priests united with Rome to absolve from such

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nullo Pontifice approbata fuit (Mansi, l. c. col. 37)"; Franz X. Wernz and Petrus Vidal, *Ius Canonicum, Tomus I: Normae Generales*, 2nd ed. (Rome: Gregorian University, 1952) 1:109: "Inde enim coepit proponi ut doctrina tendenda atque etiam in documentis pontificiis allegari, licet RR. PP. eam expresse sua auctoritate nondum sanxissent."

[145] Cf. Wernz-Vidal, 1:110, regarding the jurisprudence underlying 1917 *CIC* c. 1: "*Codex talem expressam sanctionem continet* quoad Codicis praescripta, nihil dicens de futuris legibus post Codicem promulgandis."

censures, was never resolved (just as the previous question was never resolved), and a proposed later study of the matter never took place.

1.5. Backtracking? The 1639 Decision of the Holy Office

About eight years after the Pamphilian decision, a meeting of members of the Holy Office took up the same question, and rendered a decision officially published on August 3, 1639:

> In a congregation held in the palace of the most eminent and most reverend lord Cardinal de Cremona on June 7, 1639, before his most eminent lordship, doubts sent by Father Michael Albertino, SJ, for the missions of the archipelago [Aegean islands] were related, which were resolved by the reverend lord *qualificatores* as follows:
>
> 1. Whether those Catholics of the Greek rite living in [those islands] are encompassed in the excommunications reserved to the Apostolic See, and in particular those of the bull *In Coena Domini*.
>
> R. Affirmative in what pertains to the excommunications of the bull *In Coena Domini*. The same must be said about other [excommunications] equally general; but they can nevertheless be excused by some ground, e.g., ignorance.[146]

This jurisprudence given above appears to contradict in some ways the previous determination of the particular congregation of the Sacred Congregation for the Propagation of the Faith.[147]

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[146] Sacred Congregation of the Holy Office, decision of the congregation of June 7, 1639, published on August 3, 1639, in Mansi, 50:37* note 1: "In congregatione habita in palatio eminentissimi ac reverendissimi domini cardinalis de Cremona die 7 iunii 1639 coram eminentissima dominatione sua fuerunt proposita dubia transmissa a patre Michaele Albertino societatis Iesu pro missionibus Archipelagi, quae per reverendos dominos qualificatores fuerunt resoluta ut infra: 1. Se li cattolici del rito greco abitanti in quell'isola siano compresi nelle scomuniche riservate alla sede apostolica, e particolarmente in quelle della bolla in Coena Domini. R. 'Affirmative quod attinet ad excommunicationes bullae Coenae. Idem dicendum de aliis aeque generalibus; sed possunt tamen excusari ex aliquo capite v.g. ignoratione.' *Omissis* etc. Feria IV, 3 augusti 1639. Relata in congregatione coram generalibus inquisitoribus." The decision is also found in *Iuspont*, 2:83, from which the translation's use of "those islands" is taken ("in quelle Isole").

[147] De Vries, *Rom und die Patriarchate des Ostens*, 229: "Wenige Jahre nach de klärenden Weisung der Propaganda von 1631 entschied das Heilige Offizium (am 7. Juni 1639) im gegenteiligen Sinne, nämlich: die Griechen der Inseln seien doch an die Exkommunikationen der Bulle 'In Coena Domini' gebunden, wenn sie nicht durch Unwissenheit entschuldigt seien"; Herman, "De «Ritu» in Iure Canonico," 122, 123–124: "Paucis post annis (7. VI 1639) S. Officium sane responsum dedit quo pro Graecis archipelagi saltem superio decisio aliquatenus

Unlike that determination, the decision of the Holy Office expressed no limitation on the application of the excommunications contained in *In Coena Domini* to "Catholics of the Greek rite" in the Aegean Islands to those involving matters of the dogmas of faith, including Greek Catholics explicitly, and including Greek Catholics implicitly. The determination of the Holy Office further established this much broader rule to be the case in "other [excommunications] equally general." As this decision did not declare them not bound by the censures, Greek Catholics in the Aegean Islands could only be "excused" for a reason like ignorance. Yet this decision, although officially approved and published by the Holy Office, was not to have as much of an impact on the developing recognition of Eastern juridic autonomy as the previously-cited Pamphilian decision, due to the use of that latter decision in a work of Angelo Maria Verricelli, and the citation of his work by a Roman pontiff.[148]

1.6. The Jurisprudence of Angelo Maria Verricelli

The canonist Angelo Maria Verricelli considered the question of whether Eastern faithful were subject to apostolic constitutions in general in his *Quaestiones Morales* (*Tractatus de*

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restringebatur"; Joubeir, 53: "Il [the 1631 decision] s'agissait, à la vérité, des sujets des patriarches schismatiques, et cette décision n'a jamais été rende officielle; plus encore, en 1639 le Saint-Office prenait une décision différente au sujet des catholiques de rite grec habitant l'Archipel." It is possible that the jurisdictional issues referenced in the analysis of the Pamphilian decision may have impacted the decision of the Holy Office, namely that the apostolic constitutions did bind the Greek Catholics in question due to the fact that they may have been subject to Latins. However, without further information this would only be conjecture, especially as there may have been some islands that also had Greek bishops with jurisdiction over Greek Catholics; again, note Benedict XIV, *Etsi pastoralis*, §9, n. 20: *Bullarium Benedicti XIV*, 1:82, referencing certain Greek islands that, even in 1742, still had Greek bishops with jurisdiction over Greek Catholics alongside Latin bishops with jurisdiction over Latin Catholics.

[148] Cf. Herman, "De «Ritu» in Iure Canonico," 122: "Sed quidquid est de hoc ultimo responso [Sancti Officii] certum est normam practicam agendi evasisse responsum anni 1631. Haec non solum semper citatur ab auctoribus ut Verricelli, Baldello, Benedicto XIV in opere de Canonisatione Sanctorum scripto ante elevationem suam ad summum pontificatum sed ab doctissimo Pontifice affertur etiam in Constitutione «Allatae sunt»." Again, note that Baldelli never actually cites this jurisprudence in his work.

Missionibus Apostolicis), published in 1656. His rather extensive reflections on the question would become the basis for future considerations of the problem.

> Whether Greeks and other subjects of the four patriarchal Churches of the East are bound to observe constitutions of the Roman pontiff, of the Council of Trent, and others recently issued, if they do not make determinations concerning them by name.
>
> Berò affirms this to be the case in the chapter *Canonum statuta* of *De Constitutionibus* (number 197), which can be proven from the following arguments.
>
> First, [it is proven] from the text in the chapter *Conquaestus* in Causa 9, question 3, where Pope Nicholas says: "Primates or patriarchs have no privileges before other bishops, except insofar as the sacred canons concede them and ancient custom confers them."[149] But [the privilege] that the patriarchal sees are not comprehended in new constitutions issued for the whole Church is not contained in the sacred canons, for such a privilege is not enumerated among those that are found in the chapter *Antiqua* in *De Privilegiis*, nor in canon 6 and canon 39[150] of the Nicene Council, nor do the doctors who enumerate the privileges of patriarchs mention such a privilege (particularly Saint Antoninus in his *Summa*[151] and Agostinho Barbarosa in his tract on the power of bishops[152]), nor can ancient custom in hatred of the Roman See introduced through schism be alleged as a basis, for old schism does not diminish fault, but increases it, according to the last chapter of *De Consuetudine*.[153]
>
> Second, it is proven because new pontifical constitutions oblige heretics, and especially Catholics living in the lands of heretics, and no one can be in doubt about this; otherwise, heretics would obtain the benefit of immunity and exemption from pontifical constitutions through their delict. Thus, Rebellus speaks truly in *De Obligationibus Iustitiae*, that "in the lands of heretics the custom of the entire people to eat meat on forbidden days and violate ecclesiastical fasts does not abrogate the ecclesiastical

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[149] In the *Decretum Gratiani*, at C. 9, q. 3, c. 8 (1155–1158).

[150] "Canon 39" is part of a spurious group of Nicene canons. The text is found in "Canones Concilii Nicaeni LXXX ex Arabico in Latinum inteprete Turriano": Mansi, 2:965: "Consideret patriarcha ea quae archiepiscopi et episcopi in provinciis suis faciunt; et si quid reperiat secus quam oportet factum, mutet, et disponat, prout sibi videatur; siquidem ipse est pater omnium, et illi filii eius. Et quamvis sit archiepiscopus inter episcopos tanquam frater maior, qui curam habet fratrum suorum, et ei debeant obedientiam, quia praeest; est tamen patriarcha iis omnibus qui sub potestate eius sunt, sicut ille qui tenet sedem Romae, caput est et princeps omnium patriarcharum; quandoquidem ipse est primus, sicut Petrus, cui data est potestas in omnes principes Christianos, et omnes populos eorum, ut qui sit vicarius Christi domini nostri super cunctos populos et universam ecclesiam Christianam, et quicumque contradixerit, a synodo excommunicatur."

[151] Antoninus of Florence, *Tertia pars summe reverendissimi in Christo patris ac domini: Domini Antonini archiepiscopi florentini* (no publication information given) 3.20.4.

[152] Agostinho Barbosa, *Pastoralis Solicitudinis, sive de Officio et Potestate Episcopi, Tripartia Descriptio* (Lyons: Anisson and Pousel, 1724) 114–117 (3.1.19–45).

[153] *Decretales*, 68–69 (X 1.4.11): "Cum tanto sint graviora peccata, quanto diutius infelicem animam detinent alligatam [...]."

precepts, even if it should be observed continuously for a thousand years."[154] Also, Layman states: "Heretics who do not observe the new calendar err."[155] Therefore, if heretics are obliged to new pontifical constitutions, there is no reason why schismatics would not be obliged; therefore, there is no reason why Greeks and other Easterners would be considered immune [from such constitutions] after separation from the Western Church.

Third, [it is proven] because, when Father Michael Albertino, SJ had proposed the question to the sacred congregation, "Whether Greek Catholics living on the islands of the Aegean See are bound by apostolic censures, especially those of the Bull *In Coena Domini*," there was an affirmative response obtained from a congregation of most learned theologians held at the palace of the most eminent lord Cardinal de Cremona on July 7, 1639.

Fourth, [it is proven] because Clement VIII in his instruction of August 31, 1595[156] expressly established many things for the Greeks, and although Roman pontiffs do not extend these and similar constitutions to all Greeks, it was due to them not giving occasion to the perfidious schismatics to condemn pontifical decrees. Yet, it is implicitly the intent of the pontiffs to bind all of them by their laws, since they promulgate them for the entire world, as there is no reason to except schismatics (or heretics), for otherwise they would obtain a benefit from a delict.

Fifth, [it is proven] because the reason that Azor, the first author of the opposing opinion, gives—that the mind of the pontiff is not to direct his laws to Greeks, which is clear since they differ in many things from Latins, yet none of the pontiffs reprehends or condemns them—is easily upended, as the Greeks are not reprehended due to the fact that those customs, uses, and rites of Greeks are most ancient, legitimately introduced before the schism by ancient common law or most ancient custom. Thus, Greeks from the times of the Apostles licitly honor piously and religiously Saturday just like Sunday; some of the married men are promoted to holy orders; in fact, they can even be married after minor orders, although they cannot enter marriage after holy orders (note Diana[157]); sons of presbyters are admitted to orders; three or four times in the year they observe [the Lenten] fast, but do not fast on the vigils of the Apostles; before holy orders they confer no minor order besides lector; they recite the divine office differently; they fulfill the obligation of the divine office differently; presbyters confer the sacrament of confirmation on those whom they baptize; they offer the Eucharist even to infant children; they observe many other things in the sacrifices and sacraments differently from the customs and institutes of the Latin Church. Thus, concerning those matters about

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[154] Ferdinandus Rebellus, *Opus de Obligationibus Iustitiae, Religionis, et Caritatis* (Lyons: Horatius Cardon, 1608) 40 (1.1.5.14).

[155] Paulus Layman, *Theologia Moralis in quinque libros partita* (Moguntiae: Joanes Godoffredus, 1654) 67 (1.4.11.8).

[156] Clement VIII, instruction *Sanctissimus*, August 31, 1595: *Magnum Bullarium Romanum,* editio novissima (Lyons: Philip Borde, Laurence Arnaud, and Claudius Rigyad, 1655) 3:46–47.

[157] Antoninus Diana, *Resolutionum Moralium Pars Quinta* (Lyons: Laurentius Durandus, 1639) 29–30 (5.1.26).

which they have a particular custom and their own sacred canons, the Roman pontiff does not reprove them, nor corrects them, nor are those customs and particular laws of the Greeks considered removed by a new universal constitution of the pontiff, according to the text in chapter 1 of *De Constitutionibus* in the Liber Sextus,[158] but as for other matters, in which there is no particular and ancient custom or law for them, there is no reason why they would not be obliged by pontifical laws.

Seventh [*sic*], the reasoning that others affirm for the benefit of Greek Catholics—it would be an intolerable burden for them to observe new pontifical constitutions in the lands of the schismatics—is easily overturned. For the same reason is present for Latin Catholics living in the lands of heretics. But these Latins are *per se* bound by pontifical laws, although in some cases they are excused *per accidens* from the observance of them, by reason of danger or grave inconvenience, according to the things that Layman teaches.[159] Therefore, Greek Catholics living among schismatics are also *per se* bound by these laws, although *per accidens* they are excused sometimes by reason of danger or grave inconvenience.

These arguments notwithstanding, I respond in the negative, namely that the subjects of the four patriarchal Churches of the East are not bound by new pontifical constitutions, except in three cases: first, in matter of the dogmas of faith; second, if the pope explicitly makes mention of the said subjects of the patriarchal sees in his constitutions and makes determinations concerning them, as in the case of schismatics in the bull *In Coena Domini*; third, if he makes determinations concerning them in the same constitutions implicitly, as in the cases of appeal to a future council, and providing arms to infidels, and in other similar matters. This was decided harmoniously in a certain congregation of most learned men held on July [*sic*] 4, 1631 concerning questions of missionaries of the East at the palace of the most eminent Pamphili, now our most holy lord Innocent X, at which he was present, as well as the Most Reverend Father Master of the Sacred Palace Nicholas Riccardi, Father (later Cardinal) Orazio Giustiniani, and Theatine Father Thomas de Afflicto. Also, Azor, Salas, Baldelli, de Grassi,[160] Squillante,[161] Thomas del Bene,[162] and Diana write [in support of this opinion]; relying on Camillus de Curtis,[163] they teach that Eastern married clerics, whom we call Greeks, enjoy the privilege of the forum, even if they do not serve in a church according to the disposition of Trent.[164]

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[158] *Liber sextus*, 10–13 (VI 1.2.1).

[159] Layman, 67 (1.4.11.8).

[160] Carolus de Grassis, *Tractatus de Effectibus Clericatus* (Venice: Peter Maria Bertanus, 1638) 75 (1.82).

[161] Paulus Squillante, *Tractatus de Privilegiis Clericorum* (Naples: Vincentius de Francho, 1635) 242 (7.15). Cf. ibid., 288–289 (8.11–12).

[162] Thomas del Bene, *De Immunitate, et Iurisdictione Ecclesiastica*, Pars Prior, 3rd ed. (Lyons: Larentius Arnaud and Peter Borde, 1674) 23 (1.8.1–2).

[163] Camillus de Curte, *Secunda Pars Diversorii, sive Compehensorii Iuris Feudalis* (Naples: Constantine Vitale, 1605) 59 (2.90). Only Azor, Salas, and Baldelli, with Diana and del Bene (quoting Baldelli), offered any broader analysis of the question; de Grassis, Squillante, and de Curtis simply affirmed that married Eastern clerics enjoy the privilege of the forum.

[164] Cf. Council of Trent, Session 23, July 15, 1563, decree on reform, c. 6: text in Tanner, 2:747.

[Our affirmative answer] is proven first from Azor,[165] because after the separation of the Eastern Church from the Western Church, and after the transfer of the empire from the Greeks to the Germans under the Roman pontiff Leo III, Eastern and Greek clerics are bound neither by pontifical laws, nor by laws constituted in general councils (such as the Council of Trent) for ecclesiastics. This is due to the fact that, although the pontiff can bind them by his new laws, he does not will it, and the mind of the pontiff is not to direct his laws to those Easterners. This fact is clear because, as they differ from Latins in many things, even in those things in which they have neither a very ancient particular custom introduced prior to the schism nor an ancient common law, nevertheless the pontiff does not reprove them, nor condemns them, even when they are among Latins.

Second, I prove it most efficaciously from the text in the chapter *Licet* in *De Baptismo*, where the Lateran Council held under Innocent III, in chapter 4, established: "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."[166] Therefore, from the decree of this council, even customs introduced by schismatics after the schism, illicitly and with fault, are sustained and confirmed by apostolic authority and the authority of the general council, so that [the Greeks] may more easily return to the obedience of the Apostolic See, except if the customs are to the danger of souls or derogate from ecclesiastical decency. But there had been a most ancient custom introduced prior to Innocent III, that Greeks were not bound by new pontifical laws, except if the laws explicitly established something concerning them; this custom does not derogate from ecclesiastical decency, nor is it unreasonable, because the pontiff can concede it through privilege, and all that can be conceded through privilege can also be introduced by custom. Therefore, whatever the case was—whether before Innocent III this custom was legitimately prescribed, with the schism standing—nevertheless that custom, and all others that are not repugnant to decency, have been confirmed by the Lateran Council.

Third, it is proven because it would indeed be very harsh to force Easterners returning to the obedience of the Apostolic See to observe all pontifical laws and laws of councils, issued through the previous nearly eight hundred years during which the schism perdured, and to change their rites and customs that are not repugnant to ecclesiastical decency. Thus, it cannot be in the mind of the pontiff to oblige them to new pontifical constitutions.

From these words the response to the contrary arguments is clear.

To the first we respond that [Pope] Nicholas in the cited letter does not act concerning Greeks, nor concerning the major patriarchs, but concerning the minor patriarchs, as are among the Latins.

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[165] Verricelli actually quoted the wording used in Baldelli's commentary on the question (see above, 1.3.4).

[166] Fourth Lateran Council, constitution 4: translation from Tanner, 1:235.

To the second we respond that the Church acts with more mercy towards Greeks and schismatics than towards heretics.

To the third we respond that Greeks are bound only to those censures of the bull *In Coena Domini* in which a determination is made explicitly or implicitly concerning them, as we have said above.

To the fourth we respond that the instruction of Clement VIII binds all Greeks because it expressly acts concerning them. Indeed, it must be observed that it binds even Greeks living in the East, and in Greece, because that constitution is directed to Latin bishops in whose dioceses Greeks live, and there is almost no city in the East, or in Greece, in which there is not a Latin bishop constituted.

To the fifth and the sixth, the response is clear from what has been said.

Note, however, that although Innocent III in the cited decree [*Licet*] tolerates and sustains the ancient customs and rites of the Greeks, nevertheless the depraved customs of the heretics are not to be considered approved through this act, as the Sacred Congregation for the Propagation of the Faith responded on March 8, 1648 concerning the Nestorians. For, when the most eminent Maidalchini brought forward the letters of Father Bartholomew Stellini, prefect of the mission in Mesopotamia, concerning a Nestorian priest who, converted to the faith, took a wife according to the custom of the Nestorians, and then being penitent, but not able to dismiss his wife without scandal, asked for a remedy and solution to the question, the sacred congregation ordered to be written back, that the said priest cannot be admitted to celebrating sacraments, nor are the sacraments to be administered to him, unless he dismisses his wife. Thus the Apostolic See never tolerates the depraved customs of heretics with approbative tolerance, although sometimes, it permits through abstaining from punishment because it cannot.[167]

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[167] Verricelli, 203–204 (3.83): "An Graeci, aliique subditi quatuor Patriarchalium Ecclesiarum Orientis teneantur ad observandas constitutiones Romani Pontificis, Concilii Tridentini, aliasque noviter editas, si de ipsis nominatim non disponant? [...] Affirmat Berous *in cap. Canonum statuta num.* 197. *Constitutionibus*, quod posset sequentibus argumentis probari. Primo, ex tex. *in cap. conquaestus* 9. *qu.* 3. ubi Nicolaus Papa, ait: *Primates, vel Patriarchas nihil privilegii habere prae ceteris Episcopis, nisi quantum sacri Canones concedunt, et prisca consuetudo eis contulit*. Sed quod sedes Patriarchales non comprehenduntur in novis Constitutionibus latis pro tota Ecclesia, non habetur in sacris Canonibus, eiusmodi enim privilegium, non enumeratur inter alia, quae habentur *in cap. antiqua, de privilegiis*, nec *in Canone* 6. *ac* 39. Concilii Nicaeni, neque tale privilegium afferunt Doctores, qui patriarcharum privilegia enumerant, praesertim S. Antoninus *in summa* 3. *par. tit.* 20. *cap.* 4. Barbosa *tract. de potestate Episcopi tit.* 3 *cap.* 1. *a num.* 19. neque potest allegari antiqua consuetudo in odium Romanae sedis per schisma introducta; vetus enim schisma auget non minuit peccatum, iuxta *cap. fin. de consuetud.* Secundo probatur, quia novae Pontificiae Constitutiones obligant haereticos, ac etiam catholicos in haereticorum terris versantes, et de hoc nemo dubitat; alioquin haeretici ex eorum delicto consequerentur commodum immunitatis, et exemptionis a Pontificiis Constitutionibus; quare vere Rebellius *de obligationibus Iustitiae lib.* 1. *in praeludiis qu.* 5. *num.* 14. ait: *Quod in terris haereticorum consuetudo totius populi comedendi carnes in diebus vetitis, et violandi Ecclesiastica ieiunia, nec per mille annos continuata, Ecclesiastica praecepta abrogaret*; et Layman *lib.* 1. *tract.* 4. *cap.* 11. *num.* 8. ait: *Peccare haereticos non observantes Kalendarium novum*: ergo si haeretici novis Pontificiis Constitutionibus obligantur, non est ratio cur schismatici non obligentur: ergo non est ratio cur Graeci, aliique Orientales, post separationem ab Ecclesia Occidentali reputentur immunes. Tertio, quia cum Pater Michael Albertinus Societatis Iesu proposuisset sacrae Congregationi dubium: An Catholici Graeci habitantes in Insulis Aegei mari, ligarentur

censuris Apostolicis, praesertim Bullae Coenae Domini, fuit affirmative responsum a Congregatione doctissimorum Theologorum habita in Palatio Eminentissimi Domini Cardinalis de Cremona *die* 7. *Iulii* 1639. Quarto, quia Clemens VIII *die* 31. *Augusti* 1595 in eius *Constit.* 47. expresse multa statuit quo ad Graecos, et quamvis has similesque Constitutiones expresse Romani Pontifices non extendaut [*sic*] ad omnes Graecos, causa fuit, ne perfidis schismaticis darent occasionem contemnendi Pontificia Decreta: at implicite mens Pontificum est, eos omnes suis legibus ligare, cum eas pro toto orbe promulgant; quia nulla est ratio excipiendi schismaticos, sicut nec haereticos, alioquin ex delicto commodum reportarent. Quinto, quia quod ait Azorius primus Author oppositae opinionis *tom.* 1. *lib.* 5. *cap.* 11. *qu.* 7. quod mens Pontificis est non dirigere ad Graecos suas leges, quod patet, quia cum in multis discrepent a Latinis, nullus tamen ex Pontificibus eos reprehendit, et damnat, etiam quando sunt inter Latinos. Haec autem ratio faciliter evertitur; quia ideo non reprehendunt, nam istae Graecorum consuetudines, et usus atque ritus antiquissimi sunt, ante schisma, antiquo iure communi, aut vetustissima consuetudine legitime introducti; et ideo licite Graeci a temporibus Apostolorum sabbatum, perinde, ac Dominicum diem, sancte et religiose colunt: ex coniugatis ad Ordines sacros promoventur; immo etiam minores Ordines post coniugium suscipere possunt; quamvis post Ordines sacros nequeunt inire matrimonium, Diana *par.* 5. *tract.* 1. *resol.* 26. Presbyterorum filii admittuntur ad Ordines; ter aut quater in anno ieiunium servant, sed in pervigiliis Apostolorum non ieiunant: ante sacros Ordines nullum minorem Ordinem conferunt, nisi lectoris: aliter divinas praeces recitant: aliter divini Officii pensum exoluunt: iis, quos Presbyteri baptizant, Sacramentum confirmationis conferunt: Eucharistiam pueris etiam infantibus praestant: multa alia in sacrificiis, et sacramentis observant diversa a moribus, et institutis Latinae Ecclesiae. Itaque quo ad haec, circa quae peculiarem habent consuetudinem, ac suos sacros Canones, Romanus Pontifex eos non reprehendit, neque corrigit, neque ex universali Pontificis nova Constitutione censentur istae Graecorum consuetudines, et leges particulares sublatae, iuxta tex. *in cap.* 1. *de Constitution. in 6*, sed quo ad caetera, in quibus non adest eis peculiaris, et antiqua consuetudo, aut lex, non est ratio cur non obligentur, Pontificiis legibus. Septimo [*sic*], faciliter evertitur ratio, quam alii pro Graecis Catholicis afferunt; quod esset eis intollerabile onus, observare novas Pontificias Constitutiones in terris schismaticorum; nam eadem ratio est de Latinis catholicis in terris haereticorum versantibus: sed isti per se ligantur Pontificiis legibus; quamvis in aliquibus casibus per accidens excusentur ab observatione, ratione periculi, aut gravis incommodi, iuxta, ea quae docet, Layman *lib.* 1. *tract.* 4. *cap.* 11. *num.* 8. ergo etiam Catholici Graeci inter schismaticos commorantes per se illis ligantur; quamvis per accidens excusentur aliquando ratione periculi, aut gravis incommodi. His tamen non obstantibus, respondeo negative, nempe subditos quatuor Patriarchalium Ecclesiarum Orientis non ligari novis Pontificiis Constitutionibus, nisi in tribus casibus: primo, in materia dogmatum fidei. Secundo si Papa explicite in suis Constitutionibus faciat mentionem, et disponat de praedictis subditis Patriarchalium sedium, ut in casu schismaticorum Bullae Coenae. Tertio si implicite in eisdem Constitutionibus de eis disponat, ut in casibus appellationis ad futurum Concilium, et deferentium arma ad infideles, et similia, ita fuit concorditer responsum in quadam Congregatione doctissimorum viroum *die* 4. *Iulii* [*sic*] 1631. habita super dubiis Missionariorum Orientis in Palatio Eminentissimi Pamphilii, nunc SS. D. N. Innocentii X. cui interfuerunt ipse, ac Reverendissimus P. Magister sacri Palatii Nicolaus Riccardius, Pater Horatius Iustinianus deinde Cardinalis, ac P. D. Thomas de Afflictis Theatinus, ita quoque scripserunt Azorius *tom.* 1. *lib.* 5. *cap.* 11. *quaest.* 7. Salas *de legibus disp.* 14. *sect.* 15. Baldellus *tom.* 1. *lib.* 5. *disp.* 41. *num.* 2. Carolus de Grassis *de effectibus Clericatus effectu primo, num.* 82. Squillante *de privilegiis Clericorum, cap.* 7. *num.* 16. [*sic*: read "15"] Thomas del Bene *de Immunitate Ecclesiast. cap.* 1. *dub.* 8. *nu.* 2. Diana *par.* 5. *tract.* 1. *resol.* 26. qui post Camillum de Curtis, ex hoc fundamento docent: Clericos coniugatos Orientales, quos Graecos appellamus, gaudere privilegio fori, etiam si Ecclesiae non deserviant, iuxta dispositionem Tridentini. Probatur primo ex Azorio, quia post separationem Ecclesiae Orientalis ab Occidentali, et post translatum Imperium a Graecis ad Germanos sub Leone III. Romano Pontifice, Cleri Orientales et Graeci non tenentur legibus Pontificiis, neque legibus conditis in Conciliis generalibus pro Ecclesiasticis, ut est Concilium Tridentinum, ex eo quia quamvis posset Pontifex eos novis suis legibus ligare, tamen non vult, et mens Pontificis non est dirigere ad eos suas leges; quod patet, quia cum in plurimis discrepent a Latinis; etiam in iis in quibus non habent peculiarem consuetudinem vetustissimam introductam ante schisma, neque antiquum ius commune, tamen Pontifex eos non reprehendit, neque damnat, etiam quando sunt inter Latinos. Probo secundo, efficacissime ex tex. *in cap. licet, de baptismo*, ubi Concilium Lateranense sub Innocentio III. *cap.* 4 sic statuit: *Licet Graecos diebus nostris ad obedientiam sedis Apostolicae revertentes fovere, ac honorare velimus, mores, ac ritus eorum (quantum cum Domino possumus) sustinendo: in his tamen illis deferre non volumus, nec debemus, quae periculum generant animarum, et Ecclesiasticae derogant honestati*. ergo ex decreto huius Concilii etiam consuetudines introductae a schismaticis post schisma, illicite, et cum peccato; tamen ut facilius ad obedientiam Apostolicae sedis revertantur Graeci, sustinentur, et confirmantur Apostolica, ac generalis Concilii Auctoritate; nisi essent in periculum animarum, ac derogarent Ecclesiasticae honestati: sed vetustissima consuetudo ante Innocentium III. introducta erat, ut Graeci non ligarentur novis

Verricelli offered a comprehensive study of the problem of applying apostolic constitutions to Eastern faithful. In this, he cited many of the sources already analyzed above. However, unlike previous commentators, Verricelli offered a certain rule for determining whether apostolic constitutions extended to the "Greeks and others subject to the four patriarchal Churches of the East"—the Pamphilian decision. While the later 1639 decision of the Holy Office was placed in its original context—applications of apostolic censures, especially those in *In Coena Domini*—Verricelli did not do the same in citing the Pamphilian decision; he simply wrote that the decision established that "the subjects of the four patriarchal Churches of the East are not bound by new pontifical constitutions, except in three cases." Those commenting on the problem after Verricelli would adopt his use of the Pamphilian decision outside of its original context,[168]

Pontificiis legibus, nisi explicite de eis statuerint: et haec consuetudo non derogat Ecclesiasticae honestati, neque irrationabilis est, quia posset Pontifex id per privilegium concedere; et omnia quae possunt per privilegium concedi, possunt etiam consuetudine introducti: ergo quicquid fuit, an ante Innocentium III. haec consuetudo esset legitime praescripta, stante schismate, tamen ista consuetudo, et omnes aliae, quae honestati non repugnant, a Concilio Lateranensi confirmare sunt. Probatur tertio, nam sane durissimum esset cogere Orientales redeuntes ad obedientiam sedis Apostolicae ad observandas omnes leges Pontificias, ac Conciliorum, editas per octingentos fere annos, quibus schisma duravit, et ad mutandos ritus, et consuetudines eorum Ecclesiasticae honestati non repugnantes: ergo non potest esse de mente Pontificis eos obligare ad novas Pontificias constitutiones. Ex his patet responsio ad contraria argumenta. Ad primum respondetur, Nicolaum *in cap. conquestus* 9. *quaest.* 3. non agere de Graecis, neque de maioribus, sed minoribus Patriarchis, prout sunt inter Latinos. Ad secundum respondetur, Ecclesiam mitius agere cum Graecis, et schismaticis, quam cum haereticis. Ad tertium respondetur, Graecos ligari tantum illis censuris Bullae Coenae, in quibus explicite vel implicite de iis disponitur, ut supra dixi. Ad quartum respondetur ideo Constitutionem 47. Clementis VIII. ligare omnes Graecos, quia expresse de illis agit: imo observandum ligare etiam Graecos commorantes in Oriente, et in Graecia; quia ea Constitutio dirigitur ad Episcopos Latinos, in quorum Dioecesibus commorantur Graeci; at nulla fere Civitas est in Oriente, aut in Graecia, in qua non sit Latinus Episcopus constitutus. Ad quintum, et sextum, responsio patet ex dictis. Adverte autem quod quamvis Innocentius III. *in cap. licet de baptismo*, toleret, ac sustineat antiquas consuetudines, et ritus Graecorum, tamen haereticorum pravae consuetudines per hoc non censentur approbatae; prout de Nestorianis respondit sacra Congregatio de propaganda fide *die* 8. *Martii* 1648. nam referente Eminentissimo Maidalchino litteras P. Bartholomaei Stellini praefecti Missionarii in Mosopotamia [*sic*], de Sacerdote Nestoriano, qui conversus ad fidem, duxit iuxta morem Nestorianorum uxorem, et modo poenitens, neque sine scandalo uxorem dimittere valens, quaereret remedium, et dubii solutionem. *Sacra Congregatio iussit rescribi, praedictum Sacerdotem non posse admitti ad celebrandum, neque ei Sacramenta administrari; nisi dimittat uxorem*. Itaque sedes Apostolica nunquam tolerat haereticorum pravas consuetudines, tolerantia approbativa; quamvis aliquando permittat non puniendo, quia non potest."

[168] Hajjar, "Quelques jalons modernes de la codification canonique orientale," 233 note 4 states that this jurisprudential expansion (the removal of reference to reserved censures) occurred in *Allatae sunt* of Benedict XIV, but omits reference to its source in Verricelli's work. Also omitting consideration of Verricelli is de Vries, *Rom und die Patriarchate des Ostens*, 228.

forming what will be hereafter called the "Pamphilian jurisprudence"—a jurisprudential rule governing the application of *any* apostolic constitution (not simply those containing specific type of penal law) to "Eastern faithful" (however that term would come to be defined) based on the ultimate determination made at the residence of Cardinal Pamphili in 1631.

Two other innovations ought to be noted. First, Verricelli stated that the subjects of the four patriarchal Churches of the East were not bound to observe "laws constituted in general councils" held after the schism. Verricelli thus explicitly associated conciliar decrees with papal decrees, arguing that Eastern faithful were not bound by either outside of the three cases given in the Pamphilian decision. Such association appears intended to resolve the practical problem of Eastern faithful not following conciliar decrees (Verricelli specifically noted that Eastern clerics enjoyed the privilege of the forum even without serving a church as required by the Council of Trent), resting on the presumption that the decrees of post-schism general (ecumenical) councils were generally intended only for Latins. While seeming to fit the historical facts,[169] ecclesiological problems do arise from such an association; the affairs of one part of the Church were not taken into account in the meetings of a supposedly universal ecclesial body exercising supreme authority. The Latin Church would thus appear to be, as a rule, *the* Catholic Church, with Eastern communities constituting exceptions or appendices to it.

Second, Verricelli replaced the phrase "Greeks and others subject to sees of the schismatic patriarchs" in the Pamphilian decision with "subjects of the four patriarchal Churches of the East." With this change, the Pamphilian jurisprudence could be applied to any subject of the four "major" Eastern patriarchal Churches, regardless of whether the relevant patriarch was

[169] Cf. Tăutu, xx–xii note 4, applying the Pamphilian jurisprudence to the post-schism councils, finding that, "[s]i hanc doctrinam conciliis oecumenicis in Occidente post schisma habitis applicaveris, parum quid disciplinare invenies, quod Orientales quoque afficere possit, si Lateranensem IV, Lugdunensem II et Florentiam excipies" (quote from ibid., xx).

in communion or not with the Roman Church. Thus, for example, members of the Melkite Church, whose (Antiochene) patriarch entered communion with Rome in the eighteenth century, could appeal to this jurisprudence of Verricelli, while it could not, strictly speaking, appeal to the Pamphilian decision itself; besides being limited to the non-application of specific types of censures, it spoke only of subjects of the sees of *schismatic* patriarchs.

These jurisprudential developments are not the only thing that Verricelli bequeathed to later canonists. In the following section of his *Quaestiones Morales*, he took up the question as to whether this jurisprudence would also apply to those Eastern faithful who were subject not to the four major patriarchs of the East, but to other, "minor" patriarchs:

> Whether the subjects of the minor patriarchs of the East, such as the patriarchs of the Maronites, Armenians, Chaldeans, Assyrians, Georgians (Iberians), and Ethiopians, are bound by new pontifical constitutions issued for the whole Church.
>
> It could be brought forward on behalf of the affirmative side that the minor patriarchs of the East are not truly and properly patriarchs, nor do they enjoy the privileges of patriarchs, as the doctors commonly teach [...]. It is clear from the text at the chapter *Grave* of *De Praebendis*: "[This sentence of suspension] is not to be relaxed [outside of the authority of the Roman pontiff] or the proper patriarch, so that in this matter the four patriarchal sees may also be particularly honored."[170] Therefore, the subjects of the minor patriarchs do not enjoy the privileges that other subjects of the four major patriarchates enjoy, especially that they may licitly observe their rites and customs, and not be bound by new pontifical constitutions.
>
> Notwithstanding these things, it is responded that no Eastern people, even subjects of the minor patriarchs, are bound by new pontifical constitutions, except if the pope expressly makes determinations concerning them.
>
> It is proven by the fact that when the Lateran Council under Innocent III in *Licet* established that the rites and customs of the Greeks be sustained, it wanted to encompass under the name of Greeks all Easterners, subjects of the four major patriarchs, whose ancient privileges the council confirmed in *Antiqua*. But Azor[171] expressly teaches that, by the name of Greeks, Innocent III understands all Easterners. He states that Innocent III and others said: Greeks are in this error, that they believe that the chalice is to be consecrated with only wine, without water. However, this statement is not true of true

[170] *Decretales*, 745 (X 3.5.29), taken from constitution 30 of Lateran IV.

[171] Azor, 1298 (1.10.30.1).

Greeks, but it is true of other Easterners, for this error is attributed to the Armenians in canon 32 of the Council of Trullo[172] and our Galano writes the same.[173] Thus, as often as we say Greeks have returned to the obedience of the Holy Roman Church, as in the Council of Lyons under Gregory X, in the Lateran Council under Innocent III, and in the Council of Florence under Eugene IV, by the name of Greeks are understood all Easterners subject to the four major patriarchs—Constantinople, Alexandria, Antioch, and Jerusalem. But, as Bellonus[174] notes, all those minor patriarchs, and equally all Easterners, are subject to those four major patriarchs *de iure*, as is manifestly clear from the division of all the sees of the East [...]. Thus the Armenian patriarch is subject to the Antiochene patriarch; when he removed himself from obedience to Antioch, Gregory IX compelled him to obedience [...]. Thus the Patriarch of Ethiopia is subject to that of Alexandria, by whom the former is chosen and consecrated [...].

Although those minor patriarchs should have removed themselves from obedience to the major patriarchs, and indeed as some have been created by the power of the Turks or unjust violence of bishops, nevertheless some of them, presenting obedience to the Apostolic See, merited to be confirmed by the Roman pontiff, as occurred with the Catholic patriarch of the Maronites (Baronius at year 1182[175]), who from then on, through all these centuries, has always remained Catholic, with all his flock [...]. Miraeus[176] writes regarding him and the other minor patriarchs of the East, who have obtained the pallium from the Roman pontiff. Father Clement Galano, a cleric regular and apostolic missionary, writes in his work concerning the other patriarchs of the Armenians living at Constantinople who, through his advice and zeal, sent to the Apostolic See a profession of Catholic faith.[177] Also, some of these minor patriarchs can, through most ancient custom, obtain an exemption from the major patriarchs [...], for almost all minor patriarchs ordain bishops and archbishops [...].

Thus, since by the name of Greeks come all Easterners, and the customs of Greeks, according to the Lateran Council, "we must sustain as much as we can in the Lord," consequently Armenians, Maronites, Chaldeans, Assyrians, Georgians (Iberians), Ethiopians, and other Easterners, according to their most ancient custom, are not bound by new pontifical constitutions, unless they expressly ordain something concerning them; for if they had to observe the new laws, and give up those customs that could otherwise

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[172] Mansi, 11:955–958.

[173] Clement Galano, *Conciliatio Ecclesiae Armenae cum Romana* (Rome: Typis Sacrae Congregationis de Propaganda Fide, 1650) 1:461–462 (28.32) and 516 (30.25).

[174] Petrus Bellonius, *Plurimarum singularium et memorabilium rerum in Graecia, Asia, Aegypto, Iudaea, Arabia, aliisque exteris Provinciis ab ipso conspectarum Observationes, tribus Libris expressae* (Antwerp: Christopher Plantinus, 1589) 78–83 (1.35).

[175] Baronius, 12:749–750.

[176] Aubertus Miraeus (Aubert le Mire), *De Statu Religionis Christianae per Europam, Asiam, Africam, et Orbem Novum, Libri IV* (Colonia Agrippina: Bernardus Gualtherus, 1619) 135–142, 145–147, 151–153 (2.3–5, 7, 10).

[177] Galano, 120–184 (12).

be sustained as not offensive to decency, they would be driven away from the obedience of the Roman pontiff.[178]

[178] Verricelli, 204–205 (3.84): "An subditi Minorum Patriarcharum Orientis, ut Maronitarum, Armenorum, Chaldaeorum, Assyriorum, Georgianorum, seu Iberorum, et Aethyopum ligentur novis Pontificiis Constitutionibus, latis pro tota Ecclesia? [...] Pro parte affirmativa posset afferi; nam isti Patriarchae minores Orientis non sunt vere, et proprie Patriarchae, nec gaudent Patriarcharum privilegiis, ut docent communiter Doctores Sanctus Antoninus *tertia parte summae titul.* 20. *cap*. 4. Alvarotus, Praepositus, et Cardinalis Alexandrinus, *in titul. Episcopum vel Abbatem in usibus feudorum*, Cassaneus *in Catalogo gloriae mundi parte* 4. *considerat.* 9. Iacobatius *lib.* 1. *de Conciliis a numer.* 256. Anastasius Germonius *lib.* 3. *de sacrorum immunit. capit.* 7. *numer*. 11. Barbosa *de potestate Episcopi titul*. 3. *cap.* 1. *numer.* 37. Azorius *tomo* 2. *lib*. 3. *capit.* 35. *quaest.* 2. *et capit.* 36. *quaest*. 3. et patet ex text. *in capit. grave* 29. *de praebendis*, ibi: *Aut proprii Patriarchae minime relaxentur, ut in hoc quoque quatuor Patriarchales Sedes honorentur*: Ergo eorum minorum Patriarcharum subditi non gaudent privilegiis, quibus gaudent alii quatuor maiorum Patriarcharum, praesertim ut licite suos ritus, et consuetudines observent, neque ligentur novis Pontificiis constitutionibus. His tamen non obstantibus, Respondetur nullos populos Orientales, etiam subditos minorum Patriarcharum ligari novis Pontificiis constitutionibus, nisi expresse Papa de illis disponat. Probatur, quia cum Concilium Lateranense sub Innocentio III. *cap*. 4. *quod refertur in capit. licet de baptismo*. Statuit sustineri ritus, et consuetudines Graecorum, nomine Graecorum comprehendere voluit omnes Orientales, subditos quatuor maiorum Patriarcharum, quorum antiqua privilegia confirmavit Concilium *in sequenti capit.* 5. Quod autem nomine Graecorum omnes Orientales intelligat Innocentius III. expresse docet Azorius *parte* 1. *lib.* 10. *capit.* 30. *quaest.* 1 *versic. altera*, ubi ait Innocentium III. et alios dixisse: Graecos in eo esse errore, ut credant, in solo vino sine aqua Calicem consecrandum; quod utique non de veris Graecis, sed de aliis Orientalibus est verum; hic enim error Armenis tribuitur in Concilio Trullano *can.* 32. et scribit noster Galanus *in Conciliatione Ecclesiae Armenae cum Romana cap.* 28. *numer*. 32. *et capit.* 30. *numer.* 25. sic quoties dicimus ad Sanctae Romanae Ecclesiae obedientiam reversos esse Graecos, ut in Concilio Lugdunensi sub Gregorio X. in Lateranensi sub Innocentio III. et in Florentino sub Eugenio IV., nomine Graecorum intelliguntur omnes Orientales subditi quatuor Patriarcharum maiorum, nempe Constantinopolitani, Alexandrini, Antiocheni, et Hierosolymitani, prout notavit Bellonus *lib*. 1. *observationum capit.* 35. quia omnes illi Patriarchae minores Orientis, atque adeo omnes Orientales de Iure subiecti sunt quatuor illis maioribus Patriarchis, ut manifeste patet ex divisione omnium Sedium Orientis, quam affert Azorius *parte* 2. *lib.* 3. *capit.* 35. *quaestio* 5. Sic Armenus Patriarcha subditus est Antiocheno, a cuius obedientia cum *anno* 1238. se subtraxisset Gregorius IX. coegit ad obedientiam, ut ex eiusdem Gregor. IX. *epist.* 198. *lib* 12. scribit noster Clemens Galanus *in Conciliatione Ecclesiae Armenae cum Romana cap.* 25. *numer.* 2. Vide eundem Galanum *cap.* 2. *numer.* 66. *et* 67. *ac* 70. Sic Aethiopiae Patriarcha subditus est Alexandrino a quo eligitur, et consecratur, ut scribit Miraeus *de statu religionis Christianae lib.* 3. *cap.* 5. Nicolaus Godignus *lib.* 1. *de rebus Abassinorum*. Quamvis autem isti minores Patriarchae a maiorum obedientia se subduxerint, imo aliqui Turcarum potentia, aut iniusta Episcoporum violentia, creati sint; tamen ex iis aliqui praesentes obedientiam Sedi Apostolicae, a Romano Pontifice confirmari meruerunt, prout de Catholico Maronitarum Patriarcha habetur ex Baronio *anno* 1182. qui ex tunc per tot secula semper preseveravit Catholicus, cum omnibus suis ovibus, vide Vitriacum *lib.* 1. *cap.* 78. et Turium *lib.* 22. *capit.* 8. et de isto, atque aliis minoribus Patriarchis Orientis, qui a Romano Pontifice pallium obtinuerunt, scribit Miraeus *de statu Christianae religionis lib.* 2. *capit.* 3. 4. 5. *et sequentibus*: de aliis Patriarchis Armenorum Constantipoli commorantibus, qui consiliis et industria Patris Clementis Galani Clerici Regularis Apostolici Missionarii ad Sedem Apostolicam Catholicae fidei professionem transmiserunt, scribit idem Galanus *in Conciliatione Ecclesiae Armenae cum Romana cap.* 12. Aliqui etiam ex his minoribus Patriarchis, potuerunt per antiquissimam consuetudinem praescribere exemptionem a maioribus Patriarchis, iuxta ea, quae notat Baronius *anno* 325. nam fere omnes minores ordinant Episcopos, et Archiepiscopos, ut scribit Miraeus *de statu Christianae Relig. lib.* 2. *cap.* 9. Galanus *cap.* 2. *num.* 70. Itaque, cum nomine Graecorum veniant omnes Orientales, et Graecorum consuetudines ex Concilio Lateranensi, *quantum in Domino possumus sustinere debeamus*, consequenter etiam Armeni, Maronitae, Chaldaei, Assyrii, Georgiani, seu Iberi, Aethyopes aliique Orientales, iuxta antiquissimam eorum consuetudinem, non ligantur novis Pontificiis constitutionibus, nisi expresse de illis disponant, nam arcerentur ab obedientia Romani Pontificis, si oporteret novas leges servare, eorum antiquissimas consuetudines relinquere, quae alioquin sustineri possunt, utpote honestati repugnantes." Note that there is a statement of a particular congregation of the Sacred Congregation for the Propagation of the Faith of January 28, 1636: *Iuspont*, 2:74, making a distinction between the "general" Antiochene patriarch of the Greeks and the "national" Antiochene patriarchs of the Maronites, Nestorians, and Jacobites; aside from the titles, however, there is no explanation of the distinction between general and national patriarchs.

Verricelli expanded the application of the Pamphilian jurisprudence beyond the four Eastern patriarchates through arguing that one of the bases of the Pamphilian decision—the constitution *Licet* of Lateran IV—included all Eastern faithful under the designation "Greek,"[179] that the so-called "minor" patriarchates were, at least *de iure*, also subject to the four major patriarchates, and that the practical advantage of the jurisprudence—not repelling Greek faithful interested in coming into communion with the Roman Church—also applied to other Eastern faithful. Thus, those subject to any Eastern hierarch, who himself was at least *de iure* subject to one of the four "major" Eastern patriarchs, would likewise not be bound by the norms given in apostolic constitutions, with the three exceptions referenced in the Pamphilian decision.

However, this expansion still omitted some Eastern faithful, namely those not subject to Eastern hierarchs, such as the Italo-Greeks. At this time, there still was not much clarity on the exact status of Eastern faithful subject only to Latin hierarchs: were they fully Eastern? One could argue that the liturgical rites made one legally "Eastern." The lists of distinguishing factors between Eastern faithful and Latins, drawn from Azor's commentary, were all connected with the liturgy; Eastern faithful followed their liturgy, regardless of the type of hierarch—Eastern or Latin—to whom they were subject. Thus, it would appear that even Eastern faithful not subject to a patriarch would be able to invoke the Pamphilian jurisprudence. However, Verricelli never directly addressed this question.[180]

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[179] Cf. Bassett, 15–16, who argues that it was because of the dominance of Constantinople that "even until the nineteenth century Roman documents continued to equate the Greek rite with the entire East, and include all the disparate Oriental communities under the general heading of «*Ecclesia Orientalis sive Graeca*»."

[180] One notes that Verricelli's response to the fourth objection in the previous question (3.83, at p. 204) did not treat jurisdictional subjection (i.e., Eastern faithful subject to Latin bishop) but simple residence (i.e., Eastern faithful living in an area where a Latin bishop had jurisdiction, regardless of whether there was also an Eastern bishop); hence, he argued that Clement VIII's instruction *Sanctissimus* (*Magnum Bullarium Romanum*, editio novissima, 3:46–47) applied to almost all "Greeks," since it was explicitly directed to Latin bishops in whose dioceses Greeks *resided* and there was almost no place where a Latin bishop was not constituted. One notes that the instruction itself appears to have been intended for Latin bishops to whom Greeks were subject in the absence of a proper Greek

As a final discussion of the matter, Verricelli considered whether the law of Pope Martin V concerning avoidance of excommunicated persons applied also to Eastern faithful. The law stated:

> Furthermore, to avoid many scandals and dangers, and to help fearful consciences, by the tenor of the present letters we mercifully grant to all Christian faithful that no one henceforth is bound to abstain from someone's communion in the administration or reception of the sacraments, or in any other divine actions, or outside of them, or avoid anyone, or obey ecclesiastical interdict, on the pretext of some ecclesiastical sentence or censure issued in a general manner *a iure* or *ab homine*, unless such a sentence or censure should be particularly and expressly published or pronounced by a judge against a certain person, group, university, church, community, or place (or a certain number of them); any other apostolic constitutions acting to the contrary notwithstanding, save if it should be established that someone incurred a sentence given *a canone* for sacrilege and putting hands on a cleric so notoriously that the fact cannot be hidden by any avoidance, nor excused by any appeal to law, for we wish that one abstain from his communion according to the canonical sanctions, although he has not been denounced.[181]

Verricelli thus asked:

> A corollary from the preceding teaching: Whether the *extravagans Ad evitanda* [*sic*] of the Council of Constance under Martin V, by which faithful are not bound to avoid excommunicated persons unless they have been denounced by name or are public attackers of clerics, is to be extended to the Greeks—that is, whether a Greek is bound to avoid an undenounced Greek.[182]

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hierarch—for example, §3, requiring Greek priests to obtain Chrism from Latin bishops, makes no sense if they had their own bishops. Yet because of the broad way Verricelli interpreted *Sanctissimus*, he never quite considered the specific question of application of pontifical and conciliar law to Eastern faithful not juridically subject to Eastern patriarchs.

[181] Council of Constance, session 43, March 21, 1418, concordat with Germany, §7: Mansi, 27:1192–1193: "Insuper ad vitanda scandala et multa pericula, subveniendumque conscientiis timoratis, omnibus Christi fidelibus tenore praesentium misericorditer indulgemus, quod nemo deinceps a communione alicuius in sacramentorum administratione, vel receptione, aut aliis quibuscumque divinis, vel extra; praetextu cuiuscumque sententiae aut censurae ecclesiasticae, a iure vel ac homine generaliter promulgatae, teneatur abstinere, vel aliquem vitare, ac interdictum ecclesiasticum observare. Nisi sententia vel censura huiusmodi fuerit in vel contra personam, collegium, universitatem, ecclesiam, communitatem, aut locum certum, vel certa, a iudice publicata vel denunciata specialiter et expresse: Constitutionibus Apostolicis et aliis in contrarium facientibus non obstantibus quibuscumque; salvo, si quem pro sacrilegio et manuum iniectione in clerum, sententiam latam a canone adeo notorie constiterit incidisse, quod factum non possit aliqua tergiversatione celari, nec aliquo iuris suffragio excusari. Nam a communione illius, licet denunciatus non fuerit, volumus abstineri, iuxta canonicas sanctiones."

[182] Verricelli, 206 (3.85): "Corollarium ex praecedenti doctrina: An Extravagans *ad evitanda* Concilii Constantiensis sub Martino V. qua fideles non tenentur evitare excommunicatos, nisi nominatim denunciatos, aut publicos percussores Clericorum, extendatur ad Graecos; seu an Graecus teneatur evitare Graecum non denunciatum?"

Verricelli stated as one of the two[183] arguments in support of non-extension of this law that this was one of the new constitutions spoken of in his previous commentary, as it was issued around 1418. "But new constitutions after the schism are not extended to the Greeks, as I have proven above. Therefore, this is not so extended."[184] However, he took the opposing view:

> It is proven [that this constitution is extended to Greeks] first because, although other new pontifical constitutions are not extended to the Greeks, nevertheless this is true if a constitution contains a burden or imposes an obligation. However, constitutions containing a favor or privilege, or releasing from another burden or obligation (such as the *extravagans* constitution *Ad evitanda* [*sic*], which frees one from the burden and obligation of avoiding an undenounced excommunicated person) are, in fact, extended to the Greeks. The reason is obvious: the pontiff does not want to extend to Greeks onerous constitutions, because he wants to act kindly with them, and draw them to the obedience of the Apostolic See, as is clear from *Licet* of the Lateran Council held under Innocent III. However, he would not act kindly if he forced them to follow new, onerous laws, because it is very hard to change ancient customs. However, it must be presumed of the same kind mind of the pontiff that he wants to extend to Greeks new, favorable constitutions, releasing one from a burden, because the Greek Catholics will embrace them of their own accord. This is confirmed because, although a lay [civil] statute is not extended to clerics, it is extended if it contains a favor and privilege, as the doctors commonly teach.[185]

Verricelli argued that a favorable apostolic constitution embraced Greeks as well as Latins since it granted a favor or privilege. Because the Roman pontiff intended to act kindly towards Greeks, he generally did not intend to impose obligations on them, but (by the same logic) would

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[183] The second argument (for which there is a lengthy response) concerned possible loss of the privilege through non-use, and thus does not specifically pertain to non-application of pontifical laws to Eastern faithful.

[184] Verricelli, 207: "Quod non extendatur ad Graecos; Primo affertur quia haec est una ex novis constitutionibus, cum edita fit circa *annum* 1418. novae autem constitutiones post schisma non extenduntur ad Graecos, ut supra probavi: ergo neque ista extenditur."

[185] Ibid.: "Probatur, quia quamvis caeterae novae constitutiones Pontificiae non extendantur ad Graecos, tamen id verum est si constitutio contineat onus, aut obligationem imponat: At vero constitutiones continentes favorem, et privilegium, et relevantes ab onere, et obligatione aliqua, prout est constitutio *extravag. ad evitanda*, quae liberat ab onere, et obligatione evitandi excommunicatum non denunciatum; Istae utique extenduntur ad Graecos; ratio est manifesta; quia ideo Pontifex non vult extendere ad Graecos constitutiones onerosas; quia vult benigne cum illis agere, ac suaviter ad obedientiam Sedis Apostolicae adducere, ut patet ex Concilio Lateranensi sub Innocentio III. *cap.* 4. quod refertur *in cap. licet de baptismo*: non ageret autem benigne, si cogeret ad novas leges onerosas; quia satis durum est antiquos mores mutare: At vero ex eadem benigna mente Pontificis praesumendum est, velle extendere ad Graecos novas constitutiones favorabiles, et relevantes ab onere; quia istas sponte Catholici Graeci amplectentur. Confirmatur, nam quamvis statutum laicale ad Clericos non extendatur, tamen extenditur si contineat favorem, et privilegium, ut docent communiter Doctores."

also intend to grant favors to them. However, Verricelli did not clarify the nature of such a favor or privilege. If, for example, the Roman pontiff granted a favor releasing persons from the obligation to fast on certain days, would this favor also be granted to Eastern faithful? On the one hand, it would be a release from an obligation, and thus be a favor; on the other hand, such a release from obligation could do harm to the particular fasting traditions among Eastern faithful. It would take some time to work out the implications of such jurisprudence.

Verricelli's jurisprudence would not have a major impact for about a century.[186] A canonist named Prospero Lambertini would cite Verricelli's work, and specifically the Pamphilian jurisprudence contained therein, in his study on beatification and canonization. After Lambertini's election as Roman pontiff, taking the name Benedict XIV, he would cite this jurisprudence twice more, once in a private work on "rites," and another time in actual legislation issued for Eastern faithful. Through these citations, the Pamphilian decision would

[186] I have found only a few references to this jurisprudence, specifically citing the Pamphilian decision or the statements of Verricelli, in canonical commentators prior to age of Benedict XIV. One is Franciscus Monacelli, *Formularium Legale Practicum Fori Ecclesiastici* (Venice: Antonius Bortolus, 1706) 503 (commentary on a circular letter of Sacred Congregation of Bishops and Regulars of March 16, 1697, considering whether its being sent "a tutti pastori di diocesi" included Eastern faithful), also referenced in the anonymous tract *A Tutti: Investigazioni di un Teologo-Canonista Italiano sulle Attuali Vertenze degli Armeni Cattolici Orientali di Costantinopoli con la Propaganda di Roma contro Mons. Antonio Hassun* (July 1870) 22. The second is Francesco Albizzi, *De Inconstantia in Iure Admittenda, vel Non* (Amsterdam: Joannes Antonius Huguetan, 1683) 51 (1.10.34–36), mentioned at Mansi, 50:37* note * (Albizzi appears to have used the original Pamphilian decision correctly, in a section on the application of penalties). The third is Iacobus Pignatelli, *Consultationum Canonicorum Tomus Octavus* (Venice: Paulus Balleonius, 1688) 209 (#135, concerning the observance of interstices by Greeks). Note also the comments of Francesco Carlo a Breno, *Manuale Missionariorum Orientalium* (Venice: Typographia Balleoniana, 1726) 1:76–86 (1.1.8, #372–426). He argued that of three types of papal constitutions—those issued generally, those with express mention of the Western Church but none of the Eastern Church, and those with express mention of the Western Church and exclusion of the Eastern Church—Eastern faithful were not bound by the third, nor by the second provided that the constitution was not issued for the whole Church (#377, 385), but were bound by the first type (#377). In terms of praxis, the only act cited in this connection in the sources to *CCEO* c. 1492 is Sacred Congregation of the Holy Office, *Le costituzione*, June 13, 1710: *Collectanea S. Congregationis de Propaganda Fide*, 1:92 (#279) (also in *Fontes*, 4:60 [#775]): "Le Costituzioni pontificie emanate *contra sollicitantes* comprendono tutte le nazioni, ed in conseguenza così obbligano i greci come gli armeni." The fact that the Holy Office felt the need to state explicitly the application of pontifical constitutions *contra sollicitantes* to "Greeks and Armenians" suggests that it admitted the Pamphilian jurisprudence to be valid. Obviously, there were numerous other instances of the Apostolic See acting in particular cases related to Eastern faithful during this time period; however, I have not found any of these acts specifically dealing with this jurisprudence.

gain publicity (although still not official approbation) and would affect the major juridic determinations made by the Apostolic See on this significant issue in the following centuries.

1.7. Conclusion

The juridic relationship between the Roman Church and the major Eastern sees varied considerably over the first sixteen centuries of the Church's history. Certain sees began to acquire authority over neighboring areas; a special autonomy developed, with even the Roman Church intervening relatively rarely in the affairs of sees subject to an Eastern patriarch. The Great Schism and the trend towards Roman centralization reduced the importance of this intermediary structure; Rome, in some ways, "forgot" the patriarchal system.[187] With the increased emphasis on evangelization and conversion after the Council of Trent, and the resulting increased contact between Latin missionaries and Eastern faithful, practical questions arose concerning the relation of these Eastern faithful to pontifical legislation. Canonical reflections on this matter coalesced into the opinion that Eastern faithful were, for the most part, not subject to pontifical legislation, as the pope did not generally intend to bind them by his legislation—a "negative" autonomy. A particular congregation of the Sacred Congregation for the Propagation of the Faith held in 1631 adopted this jurisprudence in a decision concerning the application of censures established in apostolic constitutions that reserved cases to the pope and Apostolic See to Greeks and others subject to the sees of schismatic patriarchs. It limited the

[187] For an example of Roman authorities literally forgetting something concerning the patriarchs, see Pierre Chebli, "Le patriarcat maronite d'Antioche," *Revue de l'Orient chrétien* 8 (1903) 140–142 (an English translation is found in Pierre Dib, *History of the Maronite Church*, trans. Seely Beggiani [Beirut: Imprimerie Catholique, 1971] 46–47). In 1513, Maronite Patriarch-elect Simeon of Hadeth sent a legate to Rome (with the assistance of Franciscans in Beirut) asking for confirmation of his election from Pope Leo X. When the pope took up the matter, he found that no one, not even the legate, could offer proof about any previous election or confirmation of Maronite patriarchs; the pope actually had to send for the previous papal letters of confirmation prior to making a decision.

application of such censures to only cases that concerned matters of the dogma of faith, explicitly included such faithful, or implicitly included them. Angelo Maria Verricelli used this response as a general rule for determining whether *any* apostolic constitution applied to Eastern faithful, and extended its application to any member of the Eastern faithful at least *de iure* subject to an Eastern patriarch. The use of this jurisprudence by Pope Benedict XIV, as well as the resulting conception of the Eastern communities' juridic relation to the Roman Church, is the next focus of this dissertation.

CHAPTER 2

The Juridic Autonomy of Eastern Communities according to Benedict XIV

2.1. Introduction

The purpose of this chapter is to describe and analyze the understanding of the autonomy of Eastern communities held by Pope Benedict XIV, who reigned from 1740 to 1758. It is through the works of this pope that the Pamphilian jurisprudence would gain wider recognition in the Church. Further, his notions on the structure of Eastern communities lasted long after the end of his pontificate, and even today affect how these communities are understood as canonical entities. Hence, this dissertation must thoroughly treat the canonical philosophy and legislative activity of Benedict XIV concerning Eastern matters.

This chapter begins with a brief biographical background of Benedict XIV. It then reviews the instances when this pope cited the Pampilian jurisprudence in his works, analyzing these references and their implications for the developing recognition of Eastern autonomy. The chapter will then sketch the juridic structure of the Christian East as discernible in the various works of Benedict XIV. Three particular concepts—Eastern Church, rite, and *natio*—will be reviewed, and their implications for juridic autonomy will be presented. The chapter will close with brief comments of the state of affairs of Eastern communities between the death of Benedict XIV and the beginning of the pontificate of Pius IX, the next pope to take a strong interest in Eastern affairs.

2.2. Background of Benedict XIV and His Involvement in Eastern Affairs

The man who would become Pope Benedict XIV was born as Prospero Lorenzo Lambertini on March 31, 1675 in Bologna.[1] He was very bright from a young age, and after his ordination quickly rose through the ecclesiastical ranks in Rome.[2] Patrick Healy offers this description of him:

> Benedict XIV is best known to history as a student and a scholar. Though by no means a genius, his enormous application coupled with more than ordinary cleverness of mind made him one of the most erudite men of his time and gave him the distinction of being perhaps the greatest scholar among the popes. His character was many-sided, and his range of interests large.[3]

While fulfilling various duties under Pope Clement XI, he was asked in 1713 to advise the pope on whether it was appropriate to grant the Latin pallium to Greek patriarchs and archbishops.

> Of those congregated, however, there was not one single opinion or judgment, as is accustomed to happen. Indeed, some thought that the honor of the Latin pallium was not proper for the Greek patriarchs and archbishops; on the other hand, others, although much fewer in number, among whom we also were, thought that the best thing to do was to concede the pallium to the Greek patriarch, if his integrity of faith was clear and he offered most humble prayers to this Holy See for the concession of the pallium, which is the proper ornament of his dignity.[4]

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[1] William F. King, *Benedict XIV and the Orientals*, Fascicle 1: Documents (Rome: Scuola Tipografica Pio X, 1940) 7.

[2] King, 7–8 gives a listing of the positions held by Lambertini before becoming pope in 1740.

[3] Patrick Healy, "Pope Benedict XIV," *The Catholic Encyclopedia,* special edition, ed. Charles G. Herbermann et al. (New York: The Encyclopedia Press, 1913) 2:432.

[4] Benedict XIV, allocution *Septimus supra*, September 23, 1750: *Iuspont*, 1/7:176: "Congregatorum autem, uti evenire solet, non una fuit opinio, atque sententia. Putabant quippe nonnulli, honorem latini pallii Patriarchis atque Archiepiscopis Graecis minime convenire; alii contra, numero longe minores, inter quos fuimus et nos, factu optimum iudicabant, pallium Patriarchae Graeco, si de eius fidei integritate constaret idemque humillimas huic Sanctae Sedi preces porrigeret pro consequendo pallio, quod proprium dignitatis suae est ornamentum, pallium, inquam, concedere." Cf. idem, *De Synodo Dioecesana* (Rome: Ioannes Generosus Salomoni, 1755) 579–581 (13.15.18), reprinting the entire text of the allocution, prefaced by a brief introduction on the question. For a history of the conferral of the pallium on Eastern hierarchs, see D. Giorgio Orioli, "La Collazione del Pallio," *Nuntia* 2 (1976) 88–96.

This consultation may have caused Lambertini to take an interest in the Eastern communities upon becoming pope on August 17, 1740.[5] During his pontificate, he issued at least 193 papal documents concerning the East, ranging from letters of commendation for Eastern priests to apostolic constitutions containing near treatises on certain aspects of Eastern canon law.[6] Moreover, as pope he wrote a private text on the Eastern rites, *De Ritibus. Quae Intersit Differentia Inter Latinos et Graecos*.[7] As he stated in the encyclical letter *Ex quo primum*:

> From that time when we ascended to the Apostolic See of Blessed Peter up to the present day, we seem to ourselves to have given constant evidence of our entirely paternal charity with which we have embraced the Eastern ecclesiastics and Eastern laity, beloved to us in Christ, joined to us or, as they say, *uniate*, and immune from the fault of schism; we have left nothing untried by which those who are in schism, after abjuring their errors, may be associated with Catholic unity. We do not wish to recount here whatever we have done to this end, as the registers of the Congregation for the Propagation of the Faith are full of our decrees issued on this matter; and anyone can read in the volumes of our *Bullarium* the apostolic letters and constitutions issued by us for the matters of the Easterners.[8]

These apostolic letters, constitutions, and other documents had an enormous impact on the understanding of the Eastern communities in law, and some of this influence continues to the present day.

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[5] Prior to his election, then-Lambertini had also helped review the constitutions of the Ruthenian Synod of Zamosc of 1720. See Benedict XIV, constitution *Allatae sunt*, July 26, 1755, §16: *Bullarium Benedicti XIV*, 4:126.

[6] King, 21–83. Note that the numbers next to each text listed therein are for footnotes, not for numbering the texts. Hence, although the last footnote number is 209, the total number of texts in the list is only 193 (cf. Rosario F. Esposito, *Leone XIII e l'Oriente cristiano: studi storico-sistematico*, Multiformis sapientia 17 [Rome: Edizioni Paoline, 1961] 620). As a result, William W. Bassett, *The Determination of Rite*, Analecta Gregoriana 157 (Rome: Gregorian University Press, 1967) 48 errs in attributing "over two hundred" documents concerning the East to Benedict XIV based solely on King's list. Nevertheless, it is possible that King inadvertently omitted some texts from his listing—hence, the use of "at least" above.

[7] Benedict XIV, *De Ritibus. Quae Intersit Differentia Inter Latinos et Graecos*, in *Benedicti XIV Papae Opera Inedita*, ed. Franciscus Heiner (Friburgi Brisgoviae: Herder, 1904) 1–59.

[8] Benedict XIV, encyclical letter *Ex quo primum*, March 1, 1756, introduction: *Bullarium Benedicti XIV*, 4:158: "Ex quo primum tempore Apostolicam B. Petri Sedem conscendimus, usque in praesentem diem, assidua Nobis videmur edidisse argumenta paternae prorsus charitatis, qua dilectos Nobis in Christo Ecclesiasticos, Laicosque Orientales Nobis consentientes, sive, uti vocant, *Unitos*, et a schismatis labe immunes, complectimur; nihilque intactum reliquisse, quo ii, qui in schismate sunt, eiuratis erroribus, Catholicae unitati cosocientur. Nolumus hic quaecumque in hunc finem egimus, commemorare; quum et referta sint Regesta Congregationi[s] de Propaganda Fide Decretis nostris hac de re conditis; et Apostolicas Litteras, atque Constitutiones pro Orientalium rebus a Nobis editas, in Bullarii nostri Voluminibus unusquisque percurrere valeat."

2.3. The Use of the Pamphilian Jurisprudence by Benedict XIV

Being so interested in Eastern matters, it is no surprise that Benedict XIV came across the Pamphilian jurisprudence. He cited the Pamphilian jurisprudence, as contained in Angelo Maria Verricelli's work,[9] three times in his own writings—once in a study published prior to his elevation to Roman pontiff, once in an apostolic constitution, and once in the private study *De Ritibus* composed while he was pope. Each citation offers important information concerning how Benedict XIV viewed the relationship between the Eastern communities and the Roman pontiff, as each differed in the manner in which the jurisprudence was applied.

2.3.1. *De Servorum Dei Beatificatione et Beatorum Canonizatione*

In the first volume of his treatise *De Servorum Dei Beatificatione et Beatorum Canonizatione*, published in 1734,[10] then-Prospero Lambertini took up the following question in a discussion on the acts of veneration to be shown to the beatified after canonization:

> Third, one asks whether the precept of offering veneration to one canonized as a saint in the manner veneration is given to other saints, and of reciting the office in the whole

[9] Angelo Maria Verricelli, *Quaestiones Morales, seu Tractatus De Apostolicis Missionibus* (Venice: Francesco Baba, 1656) 203–204 (3.83). Thus, in place of "Greeks and others subject to the sees of the schismatic patriarchs" as used in the original Pamphilian decision, Benedict XIV in his first citation used "subjects of the four patriarchal Churches of the East"; in all three citations, he dropped the original reference to "the bull *In Coena Domini* and other apostolic constitutions, in which [the pope] reserves cases to himself and the Apostolic See." Interestingly, in all three cases of citation he also dropped the example of "the case of schismatics in the bull *In Coena Domini*" from the explicit application of apostolic constitutions to Eastern faithful, and in two cases the example of "providing arms to infidels" from the implicit application, despite them appearing in Verricelli.

[10] Benedict XIV (as Prospero Lambertini), *De Servorum Dei Beatificatione et Beatorum Canonizatione* (Bologna: Longhi, 1734). While not giving a book number in the title, this volume is, in fact, only book one. The entire treatise can be found in volumes 1–7 of *Opera Omnia*.

> Church and celebrating Mass in the honor of some canonized saint, encompasses with the Western Church also the Eastern Church.[11]

In his subsequent analysis of this question,[12] he noted the liturgical differences between the Eastern and Western Churches (differences that existed even before the schism), which the popes always ordered to be preserved unless they contained something contrary to the faith. The different liturgies contained various ways of praying the Office and celebrating the Mass. Considering this distinction, admitted by the popes over the centuries, Benedict XIV responded:

> These things having been said, returning to the solution of the question, it seems that one must distinguish between the precept contained in a canonization regarding the honoring of a saint in the whole Church, and the precept of reciting the Office and Mass in celebrating the saint's honor. Indeed, each of the above is separable from the other, and there are many canonized persons who do not have an Office or Mass in the entire Church.
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> The first precept [honoring of a saint in the whole Church] pertains to faith according to some, as will be seen below, and according to all its violation induces danger to souls, or at least derogates from ecclesiastical decency. For since the Roman pontiff is head of each Church—Eastern and Western—and each Church is subject to him, and since in the above-cited unions of Easterners with the Apostolic See the obligation was imposed on them to abjure their errors and conform themselves to the Roman Church in matters that respect universal discipline and in matters where a violation would induce danger to souls and derogate from ecclesiastical decency, it follows that Easterners are bound to honor as a saint any servant of God or blessed whom the Supreme Pontiff inserts into the catalog of the saints through canonization, and the sin that is committed by a Westerner, should that person not hold a saint canonized by the pope as a saint and not honor him or her as a saint, is the very same one committed by an Easterner, should the person not hold a saint canonized by the pope as a saint nor honor him or her as a saint, or should the person honor as a saint someone whom the supreme pontiff deems not to be a saint.
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> However, the matter holds itself otherwise regarding the second precept, that of reciting the Office and celebrating the Mass in honor of a canonized saint. Easterners are not, in fact, encompassed by the same precept [regarding the Office and Mass], unless it is

[11] Benedict XIV, *De Servorum Dei Beatificatione et Beatorum Canonizatione*, 324 (1.38.8): "Quaeres tertio, an praeceptum praestandi Cultum Canonizato tamquam Sancto, et ad instar Cultus, qui aliis Sanctis defertur, necnon recitandi in universa Ecclesia Officium, et celebrandi Missam in honorem alicuius Sancti Canonizati comprehendat simul cum Ecclesia Occidentali etiam Orientalem." A paraphrased version of the question is found in his *De Ritibus*, 53 (8.5.35): "[...] num scilicet Graeci ad venerandos debito cultu eos, qui canonizati, seu a Romano Pontifice in Sanctorum numerum relati sunt, et ad celebrandum in eorundem honorem Missam aut recitandum Officium teneantur."

[12] Benedict XIV, *De Servorum Dei Beatificatione et Beatorum Canonizatione*, 324–326 (1.38.8–13).

expressly ordered by the supreme pontiffs, according to the definition made on July [*sic*] 4, 1631 and related by Verricelli in *De Apostolicis Missionibus*: "The subjects of the four patriarchal Churches of the East are not bound by new pontifical constitutions, except in three cases: first, in the matter of the dogmas of faith; second, if the pope explicitly makes mention of the said persons in his constitutions and makes determinations concerning them; third, if he makes determinations concerning them in the said constitutions implicitly, as in cases of an appeal to a future council, etc. This was decided harmoniously in a certain congregation of most learned men held on July [*sic*] 4, 1631 concerning questions of missionaries of the East at the palace of the most eminent Pamphili, afterwards Innocent X."

But insofar as it is responded that Easterners are implicitly included by the precept because of the broadness of the words, the inane nature of this response would appear by looking at the Missals, Offices, and Breviaries issued in Rome for their use and approved by the supreme pontiffs. In these, Masses and Offices are prescribed especially in honor of the saints whom they honored with an Office and Mass prior to the schism, with no word about a Mass and Office of saints canonized afterwards, for which saints it has been granted in the whole Church that an Office be recited and a Mass celebrated to their honor.[13]

[13] Ibid., 326–328 (1.38.14–15): "Hisce praemissis, a redeuntibus ad dubii solutionem, distinguendum esse videtur inter praeceptum in Canonizatione contentum de Sancto colendo in universa Ecclesia, et praeceptum de recitando Officio, Missaque in eius honorem celebranda; siquidem alterum ab altero est separabile ex supradictis, et multi sunt Canonizati, qui non habent Officium, ac Missam in universa Ecclesia. Primum autem praeceptum iuxta nonnullos pertinet ad Fidem, ut infra videbitur, et iuxta omnes eius violatio periculum induceret animarum, aut ad minimum Ecclesiasticae derogaret honestati: quocirca, cum Romanus Pontifex utriusque Ecclesiae, Orientalis scilicet, atque Occidentalis, Caput sit, eidemque utraque Ecclesia subiecta sit, et in supra recensitis unionibus Orientalium cum Sede Apostolica imposita illis fuerit obligatio errores abiiciendi, et se conformandi ad Romanam Ecclesiam in his, quae respiciunt universalem disciplinam, necnon in his, quorum violatio periculum induceret animarum, et Ecclesiasticae derogaret honestati; sequitur, teneri Orientales colere tamquam Sanctum quemcumque Dei Servum, vel Beatum, quem Summus Pontifex canonizando refert in Sanctorum Catalogum, idemque omnino peccatum, quod patraretur ab homine Occidentali, si Sanctum a Papa Canonizatum non haberet pro Sancto, et non coleret tamquam Sanctum, committi quoque ab homine Orientali, si Sanctum a Papa Canonizatum pro Sancto minime haberet, et tamquam Sanctum minime coleret, aut tamquam Sanctum coleret, quem summus Pontifex censet Sanctum non esse. Secus porro se habet res quo ad secundum praeceptum recitandi Officium, et celebrandi Missam in honorem Sancti Canonizati; eodem quippe Orientales nequaquam comprehenduntur, nisi id expresse a Summis Pontificibus mandetur, iuxta definitionem habitam *die* 4. *Iulii* [*sic*] 1631. relatam apud Verricellum *de Apostolicis Missionibus quaest.* 83. *et* 84. *pag.* 204 *et sequentibus = Subditi quatuor Patriarchalium Ecclesiarum Orientis non ligantur novis Pontificiis Constitutionibus, nisi in tribus casibus; primo in materia dogmatum Fidei; secundo, si Papa explicite in suis constitutionibus faciat mentionem, et disponat de praedictis; tertio, si implicite in eisdem Constitutionibus de eis disponat, ut in casibus appellationis ad futurum concilium etc. Ita fuit concorditer responsum in quadam Congregatione doctissimorum virorum die* 4. *Iulii* [*sic*] 1631. *habita super dubio Missionariorum Orientis in Palatio Eminentissimi Pamphilii postea Innocentii X.* Quatenus vero respondetur, Orientales propter universitatem verborum implicite praecepto comprehendi, imbecillitas responsionis illico appareret, Missalia, Officia, Breviaria in Urbe edita pro eorum usu, et a Summis Pontificibus approbata respiciendo; in quibus nimirum Missae, et Officia praescribuntur in honorem praecipue Sanctorum, quos Officio, et Missa colebant ante schisma, nullo facto verbo Missae, et Officii Sanctorum postea Canonizatorum, quibusque indultum est, ut in eorum honorem Officium recitaretur, et Missa celebraretur in universa Ecclesia."

Benedict XIV ended his treatment of the question by noting that some papal acts seemingly opposed to this finding—the act of union with the Armenians in the Council of Florence,[14] which bound them to conform to Latin customs for the dates of certain major feast days, and the 1595 instruction of Clement VIII,[15] requiring Greeks subject to Latin bishops to observe Latin feasts—said nothing specifically about honoring certain saints in their Greek Masses and Offices.

In this response, Benedict XIV echoed the prior canonical jurisprudence on the application of apostolic constitutions to Eastern faithful. Like Juan Azor's response to Agostino Berò, Benedict XIV sought to clarify the parameters of the question, distinguishing between the recognition of persons as canonized saints and the honor offered to canonized saints through recitation of an Office or celebration of a Mass. Some considered the former as a matter of faith; if this was indeed the case, Eastern faithful would be bound to recognize such persons as saints in virtue of the Pamphilian jurisprudence, as it would pertain to "matter of the dogmas of faith." However, even if this were not the case, to reject recognition of such persons as saints constituted a threat to souls and a derogation of ecclesiastical decency, since it would put into question the pope's supreme authority. As such, the matter would be encompassed within the explicit declaration of *Licet* of the Fourth Lateran Council (referenced in the original Pamphilian decision) forbidding Greeks from following any rites or customs "which bring danger to souls and detract from the church's honour."[16] On the other hand, honoring a saint through reciting an Office or celebrating a Mass pertained to discipline, not faith. Thus, as the laws concerning how such saints would be honored did not explicitly or implicitly include Eastern faithful (as required

[14] Council of Florence, session 8, November 22, 1439, bull *Exultate Deo*: text in Tanner, 1:553–554.

[15] Clement VIII, instruction *Sanctissimus*, August 31, 1595, §6: *Magnum Bullarium Romanum*, editio novissima (Lyons: Philip Borde, Laurence Arnaud, and Claudius Rigyad, 1655) 3:47: "Graeci existentes inter Latinos, dies festos de praecepto eiusdem Latinae Ecclesiae servare teneantur."

[16] Fourth Lateran Council, constitution 4: text and translation from Tanner, 1:235: "[...] in his tamen illis deferre nec volumus nec debemus, quae periculum generant animarum et ecclesiasticae derogant honestati."

by the Pamphilian jurisprudence), and as their custom of not doing so was not opposed to the salvation of souls or ecclesiastical decency (and thus not forbidden by *Licet*), Eastern faithful were not bound to follow those laws.

2.3.2. *Allatae sunt*

In his constitution *Allatae sunt*, promulgated on July 26, 1755, Benedict XIV came to a question concerning the use of the Julian calendar by Eastern faithful.

> Another question comes up after the previous one, also pertaining to the Armenians and Syrians. It is asked whether these persons, for establishing the time of Easter and other feasts reliant on it, can use the old calendar when they carry out sacred acts in Latin churches, or instead must follow the new and emended one. And, insofar as the use of the old calendar is said to be licit for them, it is asked whether such a definition also affects those Easterners who in fact have their own church, but because it is so poor and meager, they all cannot meet together at it, and therefore many of them are forced to go to Latin churches.[17]

The pope noted that the emendation of the calendar carried out by his predecessor, Gregory XIII,[18] had abrogated the Julian calendar and ordered the new one to be followed by patriarchs, primates, archbishops, bishops, abbots, and other prelates.[19]

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[17] Benedict XIV, *Allatae sunt*, §42: *Bullarium Benedicti XIV*, 4:134–135: "Primae huic altera succedit quaestio, eosdem attingens Armenos, et Syros, qua disquiritur, an iidem, ad statuendum tempus Paschatis, aliorumque ei respondentium Festorum, possint veteri Kalendario uti, vel potius novum emendatumque sequi debeant, cum in Latinis Ecclesiis Sacra conficiunt; et quatenus iisdem licitus dicatur veteris Kalendarii usus, an huiusmodi definitio afficiat illos quoque orientales, qui, suam quidem habent Ecclesiam, sed adeo angustam, atque exiguam, ut, cum omnes in illam convenire non possint, eorum plerique Latinas Ecclesias adire compellantur."

[18] Gregory XIII, bull *Inter gravissimas*, February 4, 1581 (1582 new style), in Christoph Clavius, *Romani Calendarii a Gregorio XIII. P. M. restituti explicatio S. D. N. Clementis VIII. P. M. Iussu edita: accesit confutatio eorum, qui Calendarium aliter instaurandum esse contenderunt* (Rome: Aloysius Zannettus, 1603) 13–15.

[19] Ibid., 14: "Tollimus autem, et abolemus omnino vetus Calendarium, volumusque, ut omnes Patriarchae, Primates, Archiepiscopi, Episcopi, Abbates. et ceteri Ecclesiarum Praesides, novum Calendarium, (ad quod etiam accomodata est ratio Martyrologii) pro divinis officiis recitandis, et festis celebrandis in suas quisque Ecclesias, Monasteria, Conventus, ordines, militias, et dioeceses introducant, et eo solo utantur tam ipsi, quam caeteri omnes presbyteri et, clerici saeculares, et regulares utriusque sexus; necnon milites, et omnes Christi fideles, cuius usus incipiet post decem illos dies ex Mense Octobri anni MDLXXXII. exemptos."

> Yet, since in the constitution [*Inter gravissimas* of Gregory XIII] no word is given about the Easterners, the question then arises: does this constitution affect them? Indeed, this question is not only discussed by doctors, as seen in the works of Azor and Baldelli, but was also proposed and discussed in a meeting of eminent men held on July [*sic*] 4, 1631, at the residence of Cardinal Pamphili, who, ascending to the pontifical throne, took the name Innocent X. At that time, this resolution came forth: "The subjects of the four patriarchs of the East are not bound by new pontifical constitutions, except in three cases: first, in the matter of the dogmas of faith; second, if the pope explicitly makes mention of the said persons in his constitutions and makes determinations concerning them; third, if he makes determinations concerning them in the said constitutions implicitly, as in the cases of appeals to a future council." This resolution is referred to both by Verricelli in *De Apostolicis Missionibus* and by us in our work *De Canonizatione Sanctorum*.[20]

The pope did not actually resolve the doubt concerning the calendar in *Allatae sunt*. Instead, he simply cited the praxis of the Apostolic See in this matter relative to different groups of Eastern communities, which generally encouraged that the new calendar be adopted, but did not impose it on unwilling communities.[21]

The use of the Pamphilian jurisprudence in this instance by Benedict XIV was rather dissimilar to his prior use of it in *De Servorum Dei Beatificatione et Beatorum Canonizatione*. In his earlier work, then-Lambertini adopted the jurisprudence in his solution to the question of honoring saints in the liturgical discipline of Eastern communities, arguing that they were not

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[20] Benedict XIV, *Allatae sunt*, §44: *Bullarium Benedicti XIV*, 4:135: "Verum, cum in constitutione nullus [*sic*] de orientalibus factum fuerit verbum, exurgit hinc quaestio, num eadem orientales afficiat; quae quidem quaestio non a doctoribus modo instituitur, ut videre est apud Azorium *Institut. Moral. tom.* 1. *lib.* 5. *cap.* 11, *quaest.* 7. apud Baldellum *in sua Theologia Morali tom.* 1. *lib.* 5. *disput.* 41.; sed etiam proposita discussaque fuit in praestantium virorum conventu habito die 4. Iulii [*sic*] anno 1631., in aedibus cardinalis Pamphilii, qui ad Summum Pontificatum evectus, Innocentii X. nomen assumpsit. Haec autem tunc prodiit resolutio: *Subditi quatuor Patriarcharum Orientis non ligantur novis Pontificiis constitutionibus, nisi in tribus casibus: primo in materia Dogmatum Fidei; secundo, si Papa explicite in suis constitutionibus faciat mentionem, et disponat de praedictis; tertio, si implicite in iisdem constitutionibus de eis disponat, ut in casibus appellationum ad futurum concilium*: Refertur haec resolutio tum a Verricello *de Apostolicis Missionibus lib.* 3. *quaest.* 83. *num.* 4. tum a Nobis in nostro Opere *de Canonizatione Sanct. lib.* 2. [*sic*: read "1"] *cap.* 38. *num.* 15."

[21] Ibid., §§45–46. Note particularly his statement at the beginning of §45: "Hanc quaestionem Nos missam facimus, cum de illa disputare nulla nunc necessitas urgeat; satis enim Nobis erit indicare, quid ad rem hanc nostram gesserit Sedes Apostolica, quandoquidem ipsa praecedentia facta evincunt, consultissimum esse responsum quaestio redditum, nimirum: *Nihil esse innovandum*." One could also understand the following statement of Benedict XIV, *De Ritibus*, 59 (8.5.42) in this light: "[...] satis sit notum, quam caute Romani Pontifices procedant, ne Graeci Orientales sub Constitutionibus licet Generalibus comprehendantur, quamvis eaedem Occidentales comprehendant, quotiescumque per eas ritibus et moribus Ecclesiae Graecae approbatis praeiudicium afferi possit." This statement suggested that it was the actions of the pontiffs that helped avoid possible conflict with Eastern discipline, not the rule of the Pamphilian jurisprudence.

generally bound to honor saints canonized by the pope by celebrating Masses or praying the Office for them when their Latin brethren were so bound. In *Allatae sunt*, Benedict XIV refrained from definitively answering the question concerning use of the new calendar. By citing the Pamphilian jurisprudence, the pope suggested that Eastern faithful were not bound by *Inter gravissimas* of Gregory XIII. However, this remained at the level of suggestion; the pope's substantive response was not a solution at all, but merely expressed that the Apostolic See, for the most part, did not impose changes on unwilling Eastern faithful, tolerating their use of the old calendar.[22] While the publicity that Benedict XIV gave to the Pamphilian jurisprudence through citing it in one of his constitutions would support its later use as a practical norm by the Roman Curia,[23] his lack of full approbation of the Pamphilian jurisprudence in *Allatae sunt* allowed churchmen in the next century to reject it, deeming it to be a simple opinion lacking legislative force.[24]

[22] Ibid., §46: "Sed quoties Orientales minime consenserunt [to adopt the new calendar], iustusque adfuit timor, ne tumultus, dissensionesque excitarentur, si novi Kalendarii ipsis iniungeretur usus, tulit Apostolica Sedes, ut Orientales et Graeci, in remotis Regionibus degentes, veterem suam disciplinam retinerent, videlicet antiquum servarent Kalendarium, occasionem opportuniorem expectans, inducendi usum novi emendatione Kalendarii."

[23] Cf. Aemilius Herman, "De «Ritu» in Iure Canonico," *Orientalia Christiana Periodica* 32 (1933) 122: "Et quamvis Summus Pontifex ibi quaestionem dirimere noluisset, norma ab Congregatione particulari S. Congregationis de Prop. Fide data etiam posterioribus saeculis auctoritatem obtinuit."

[24] See the comments of Serafino Cretoni, secretary to the Vatican I preparatory Commission on Missions and the Churches of the Eastern Rite, at the Twenty-second *Congressus*, September 10, 1869: Mansi, 50:36*–37*: "Il pontefice Benedetto XIV la riferì prima nell'opera *de Canonizatione* ecc., poi nell'enciclica *Allatae sunt*; in quella parve ammetterla, ma fu da lui composta la detta opera prima di ascendere al pontificato; nella seconda poi senza entrare nel merito della cosa, dice di non voler disputare di questa ch'ei chiama *quistione*: e tale quistione non è stata posteriormente definita nè da alcuna congregazione di cardinali, nè da alcun pontefice."

2.3.3. *De Ritibus. Quae Intersit Differentia Inter Latinos et Graecos*

The third and final time Benedict XIV referenced the Pamphilian jurisprudence was in his private work *De Ritibus*, likely composed sometime between 1753 and 1758.[25] In writing on the Italo-Greeks, the pope once again turned to the question of the application of apostolic constitutions to Eastern faithful:

> Here an opportune place offers itself of entering generally into [the question of] other constitutions, which have already been established by the supreme pontiffs, or even come to be established by them—to wit, that we search out and ask whether Easterners, and especially the Italo-Greeks, are bound to observe these constitutions insofar as they are encompassed by them.
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> In our work *De Canonizatione Sanctorum*, we set up and proposed the question: If some servant of God or beatified person has been placed by the supreme pontiff among the saints, and it has been ordered by the same pontiff in his bull that the cult of veneration be offered to the saint, an Office be recited for the saint, and a Mass celebrated for the saint, were not only Westerners but also Easterners encompassed under this constitution? We, having made a distinction between one aspect and the other, responded that ecclesiastical cult must be attributed to a beatified person placed by the Roman pontiff among the saints both in the Western Church and in the Eastern Church, and that likewise in each Church the person must be considered by the faithful as an intercessor before God, since canonization is something to be numbered among those things that concern the rule of faith, which must be uniform in all things. However, the precept of cult is separable from the precept of reciting the Office and celebrating the Mass in honor of the canonized. As the Office of each who has been put in the number of the saints is not recited in the whole world, nor is a Mass celebrated for each, we were of the opinion that, notwithstanding the precept by which it would be decreed that an Office in honor of a canonized person be recited by the whole Church and a Mass be celebrated for the person, Easterners were not encompassed under such a precept, because they have their own particular breviaries with the express permission and approval of the Roman pontiffs, in which so many beatified and saints are seen recounted, the commemoration of whom is not found in the Latin Church. But, when one is discussing in particular the Italo-Greeks and the instruction of Clement VIII, we must note that this prescript is in the instruction [*Sanctissimus*], that the feasts of the Latins be observed by the Italo-Greeks—which is to say, that they be present at Mass and abstain from servile works. Yet, it is seen that no prescript is found in it imposing the obligation on those who are constituted in sacred orders or who are presbyters that they must recite the Office or celebrate Mass

[25] See the proem of Franciscus Heiner in *Benedicti XIV Papae Opera Inedita*, ed. Franciscus Heiner (Friburgi Brisgoviae: Herder, 1904) vii: "Composuit enim Summus Pontifex tractatus «de ritibus Graecorum» et «de Sacramentis» inter annos 1753 et 1758, quod probari potest variis argumentis."

in honor of those saints whose cult of Office and Mass are carried out among the Latins: "The cited instruction of Clement VIII, which concerns Greeks living in the dioceses of Latin bishops, orders that they observe the feasts of the Latins—that is, that they hear Mass and abstain from servile works—but not that they celebrate Mass and recite the Office in honor of the saints who are honored by the Latins."

The solution of this question [...] opened the way to examining another general controversy, whether Eastern Greeks are obliged to observe and retain pontifical constitutions, whether promulgated during general councils or outside of them, since this would also aid the favorable governance of Latin bishops, in whose dioceses the home and residence of the Greek races are.

Regarding this matter, Breno in his *Manuale Missionariorum* treats this matter extensively, but not with the clarity that is necessary. Azor seems to treat the same material much better in his *Institutionum Moralium*; in this work, he first posits that, by the institution of Christ, both Westerners and Easterners are subject to [the Roman pontiff's] constitutions. The ground of the controversy is then situated in this: when some general constitution is established by the Roman pontiff pertaining not to the faith, but to discipline, are both Westerners and Easterners encompassed in it? He says that Easterners are bound by all those laws that were established by the supreme pontiffs or general councils before the fatal, deplorable schism, but only if some long and legitimate custom contrary to those laws was not introduced that, as it would not have been introduced in the Western Church, would produce such a difference between Easterners and Westerners that the former remain immune from the observance of laws even though they were promulgated prior to the schism, while the latter have been obligated to retain and observe them. Then after he proved this with many examples, at the end he concluded without doubt that the various laws promulgated by the Roman pontiffs after the schism, laws that have been accommodated to the rule of Latins, are also those under which Greeks are in no way included.

Baldelli, in his *Theologia Moralia*, treads upon the same path.

When a meeting of learned men was held for the examination of this controversy on July [*sic*] 4, 1631 at the palace of Cardinal Pamphili, who afterwards was raised to the supreme pontificate and took the name Innocent X, the matter was concluded and pronounced in the following manner: "The subjects of the four patriarchs of the East are not bound by new pontifical constitutions, except in three cases: first, in the matter of the dogmas of faith; second, if the pope explicitly makes mention of the said persons in his constitutions and makes determinations concerning them; third, if he makes determinations concerning them in the said constitutions implicitly, as in the cases of appeals to a future council." This resolution is referenced in Verricelli's *De Apostolicis Missionibus* and also by us in our work *De Canonizatione Sanctorum*.[26]

[26] Benedict XIV, *De Ritibus*, 53–54 (8.5.34–35): "[...] opportunus iam hinc sese locus offert ad alias in universum Constitutiones gradum faciendi, quae a Summis Pontificibus vel iam conditae sunt, vel condi etiam ab eisdem occurrit, ut scilicet indagemus atque queramus, num Orientales, ac praesertim Italo-Graeci, utpote sub iisdem comprehensi, obligentur easdem observare. In opere nostro *de Canonizatione Sanctorum* lib. 1, cap. 38, num. 8 et

In contrast to his two earlier uses of the Pamphilian jurisprudence (one of which applied it to the specific question of Masses and Offices for saints, and the other remaining a simple reference

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seq., instituta et proposita quaestione, num scilicet, si aliquis Dei servus aut Beatus a Summo Pontifice inter Sanctos relatus sit, ab eodemque Pontifice in Bulla sua cultum venerationis eidem exhibendum, Officium recitandum, Missamque celebrandam esse sit praescriptum, sub huiusmodi Constitutione non solum Occidentales, verum etiam Orientales sint comprehensi: nos, adhibita rei alterius ab altera distinctione, respondemus, Beato per Romanum Pontificem inter Sanctos relato tam in Occidentali, quam in Orientali Ecclesia Ecclesiasticum cultum esse tribuendum, atque in utraque item Ecclesia eumdem a Fidelibus, tamquam Intercessorem apud Deum considerandum esse, cum Canonizatio nescio quid sit ad ea, quae de ratione Fidei sunt, redigendum, quae debet esse in omnibus uniformis; contra autem cum praeceptum cultus a praecepto recitandi Officium, ac Missam in Canonizati honorem celebrandi separabile sit; quippe quia non omnium, qui in Sanctorum numerum relati sunt, in universo orbe Officium recitatur, neque Misssa celebratur, sententiae illius fuimus, Orientales, praecepto eo non obstante, quo in Canonizati honorem Officium per universam Ecclesiam recitari Missamque celebrari decretum fit, minime sub eodem comprehensos esse, propterea quod hi peculiaria sua cum expressa Romanorum Pontificum permissione et approbatione Breviaria habeant, tot in quibus Beati ac Sancti videntur recensiti, nulla quorum habetur commemoratio in Ecclesia Latina; atque ubi peculiariter de Italo-Graecis sermo et de Clementis VIII Instructione habitus est, praescriptum in eadem esse animadvertimus, Festa Latinorum esse ab Italo-Graecis observanda, quod perinde est ac dicere, ut Missae intersint, et ab operibus servilibus abstineant, verum nihil praescriptum in eadem haberi in ordine ad eorum obligationem, qui vel in sacris constituti, vel Presbyteri sunt, ut aut Officium recitare, aut Missam celebrare debeant in eorum honorem Sanctorum, quibus Officii et Missae cultus apud Latinos persolvitur: *memorata autem Institutio Clementis VIII quae respicit Graecos in Dioecesibus Episcoporum Latinorum habitantes, mandat utique, ut festa Latinorum observent, hoc est Missam audiant, et abstineant ab operibus servilibus, et minime tamen, ut Missam celebrent, et Officium recitent in honorem Sanctorum, qui a Latinis coluntur.* Quaestionis praefatae solutio, num scilicet Graeci ad venerandos debito cultu eos, qui canonizati, seu a Romano Pontifice in Sanctorum numerum relati sunt, et ad celebrandam in eorumdem honorem Missam aut recitandum Officium teneantur, tum cum utramque rem in universa Ecclesia adimplendam esse praecipitur ac decernitur, ad aliam generalem controversiam examinandam viam aperit, num Graeci Orientales ad observandas et retinendas Pontificias Constitutiones obligati sint, sive eae intra Generalia Concilia, sive extra eadem sint promulgatae: cum hoc quoque ad felix Latinorum Episcoporum, quorum in Dioecesibus Graecarum Gentium sedes ac domicilium est, regimen conducat; hac autem de re pluribus quidem, sed non ea qua necesse est claritate, Brenus in suo *Manuali Missionariorum* tom. 1, lib. 1, quaest. 8, ac multo melius materia eadem pertractata ab Azorio videtur in suis *Institutionibus Moralibus*, tom. 1, Cap. II [*sic*: read 11; also,"lib. 5" was omitted in the original text or the transcription], Quaest. 7; ubi postquam, ex Christi institutione Romano Pontifici, eiusque Constitutionibus non minus Occidentales, quam Orientales subiectos esse primum posuit, et Controversiae caput in eo situm esse, ut videatur, num quando Generalis aliqua a Romano Pontifice Constitutio non ad fidem, sed disciplinam pertinens condatur, mentem habuisse Pontificem intelligendum sit, Occidentales simul atque Orientales comprehendendi; Orientales ait omnibus iis legibus teneri, quae a Summis Pontificibus, aut Conciliis Generalibus ante fatale deplorandum schisma conditae sint, dummodo tamen diuturna aliqua ac legitima contra easdem consuetudo introducta non foret, quae cum numquam in Occidentali Ecclesia introducta fuerit, talem Orientales inter et Occidentales differentiam producit, ut priores ab observantia legum licet ante schisma promulgatarum immunes remaneant, posteriores autem ad easdem retinendas atque observandas obligati sint. Tum postquam compluribus id exemplis comprobavit, ad extremum varias sine dubio leges esse concludit a Romanis Pontificibus post schisma promulgatas, quae Latinorum regimini accommodatae sint, et sub quibus Graeci minime comprehenduntur. Eadem via Baldellus insistit in sua *Theologia morali* tom. 1, lib. 5, disput. 41. Super huiusmodi autem controversiae examine cum die 4. Iulii [*sic*] ann. 1631 Doctorum virorum Congregatio in Palatio Cardinalis Pamphilii, qui postea ad summum evectus Pontificatum Innocentii X nomen assumpsit, habita fuisset, sequenti modo conclusum, ac pronunciatum est: *Subditi quatuor Patriarcharum Orientis non ligantur novis Pontificiis Constitutionibus, nisi in tribus casibus: Primo in materia Dogmatum Fidei; secundo si Papa explicite in suis Constitutionibus faciat mentionem, et disponat de praedictis; tertio si implicite in iisdem Constitutionibus de eis disponat, ut in casibus appellationum ad futurum Concilium*: quae resolutio a Verricello *de Apostolicis missionibus* tit. 3, quaest. 83, num. 4, atque etiam a nobis in opere nostro *de Canonizatione Sanctorum* lib. 1, Cap. 38, num. 15 refertur."

without direct application to the question at hand on the use of the older calendar), Benedict XIV in this work delved much deeper into the jurisprudence, citing the canonists Francesco Carlo a Breno, Juan Azor, and Nicholas Baldelli. As in the previous two citations, he used the broader rendering of the decision as found in Verricelli. Such a choice is noteworthy in this third case, however, as the pope would later state that he reviewed the original text of the decision in the archives of the Sacred Congregation for the Propagation of the Faith.[27] He would have read how limited the original decision was, yet he continued to use the broadened version as found in Verricelli. Furthermore, when referring to the decision itself, the pope stated that the matter was "concluded and pronounced," wording suggesting formal approval of the decision;[28] however, as was noted in the previous chapter, the decision itself appears never to have been officially approved, and the broadened rendering given by Verricelli certainly was not.

Continuing his extensive analysis of the question in *De Ritibus*, Benedict XIV studied the examples of the "implicit" exception given in the text:

> Thus, the said theologians [of the particular congregation of 1631] give the example of forbidden appeal from the Roman pontiff to a council, which prohibition was decreed in the constitution of Pius II, beginning *Execrabilis*,[29] then in another of Julius II.[30] [This example was given] because, although specific mention of the Easterners is not made at all in the said constitutions, and these constitutions speak in a general manner, nevertheless, since the constitutions are based on that obligation requiring each Catholic to recognize the Supreme Pontiff as the single supreme head of the entire Church, it is thus proven that both Westerners and Easterners are included under them. For the same obligation is present for both [Westerners and Easterners], as a token and sign of their

[27] See the following block quote. This review may explain why the pope replaced "patriarchal Churches" (found in *De Servorum Dei Beatificatione et Beatorum Canonizatione*, and taken directly from the text of Verricelli) with "patriarchs" (found here in *De Ritibus* and in *Allatae sunt*); the text of the original Pamphilian decision used "[schismatic] patriarchs," not "patriarchal Churches."

[28] The prior citations by Benedict XIV also suggested formal approval. In *De Servorum Dei Beatificatione et Beatorum Canonizatione*, he called the decision a *definitio*, and in *Allatae sunt* a *resolutio*.

[29] Pius II, *Execrabilis*, January 14, 1460. Benedict XIV cited the version found in Eugenius Lombardi, *Regale Sacerdotium Romano Pontifici Assertum, et Quatuor Propositionibus Explicatum* (Cyriandrus Donatus, 1684) 364–365 (2.7.3).

[30] Julius II, *Sucepti regiminis*, July 1, 1509. Benedict XIV cited the version found in *Bibliotheca Maxima Pontificia*, ed. Juan Tomás de Rocaberti (Rome: Joannes Franciscus Buagnus, 1698) 9:462–464.

Catholicity, that they honor the pope as the single supreme head of the whole Church. In this matter, see Andreas Duvallius, doctor of Sorbonne, in his tract *De Comparatione Summi Pontificis et Concilii*.[31]

In *De Apostolicis Missionibus* of Verricelli, where the aforementioned decree of the particular congregation is cited, it is said that the theologians so congregated added to the case just cited (appeal to a council) another: he who bears and furnishes arms to infidels. Concerning this case of bearing arms to infidels, while we said nothing about it in our tract *De Canonizatione Sanctorum* when we made mention of the decree of the particular congregation, we add it here in the present work, since certain documents from the archive of the Congregation for the Propagation of the Faith, where the acts of this particular congregation are preserved, offer proof to us concerning it. To bear arms to hostiles has been prohibited by civil laws, as is held in Roman civil law,[32] and so it must not seem a wonder or oddity that to bear arms to the Turks and infidels, who are enemies of the Christian name, is severely forbidden by the sacred canons.[33] While no particular mention of Eastern Christians is made in these canonical dispositions, and their prohibitions are general, nevertheless, because there is no one who does not see it to be a shameful act for someone who is Christian to furnish arms to him who is an enemy of the Christian name (see the constitution of Gregory X[34]), it is thus the case that, although Easterners are not named, the theological men wisely thought them to be comprehended by the same laws.

And since a rule is not restricted by examples, but is explicated by them, it must be said: Easterners are included in those pontifical constitutions in which there is a common cause for Easterners and Westerners, even if Easterners are not named in them.

For this reason, it was also decreed by us that, although the constitutions of the Roman pontiffs against priests soliciting penitents in the confessional *ad turpia* make no express mention of the Greeks, it does not follow from this that they are not also encompassed by them, as one can see in *Etsi pastoralis*: "They are subjected to every single constitution of the Roman pontiffs *contra sollicitantes*, especially issued as concerns confession; these constitutions extend their force to every single nation, and include Latins and Greeks equally in their extent."[35]

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[31] Andreas Duvallius, "De Suprema Romani Pontificis in Ecclesiam Potestate, adversus Vigorium Iurisconsultum," in *Bibliotheca Maxima Pontificia*, ed. Juan Tomás de Rocaberti (Rome: Joannes Franciscus Buagnus, 1698) 3:585–589.

[32] See *Corpus Iuris Civilis, Editio Stereotypa: Volumen Secundum: Codex Iustinianus*, ed. Paulus Krueger (Berlin: Weidmann, 1877) 178–179 (4.41.2), 392 (9.47.25).

[33] *Decretales D. Gregorii Papae IX. Suae Integritati una cum Glossis Restitutae* (Venice: 1591) 1174–1175 (X 5.6.6), 1178 (X 5.6.12), 1181 (X 5.6.17); *Liber Sextus Decretalium D. Bonifacii Papae VIII. Suae Integritati VI cum Clementinis et Extravagantibus, earumque Glossis Restitutus* (Rome: Aedes Populi Romani, 1582) 75–79 (*Extravagantes Ioannis XXII*, title 8), 323–324 (*Extravagantes communes*, Book 5, *De Iudaeis*). Note that in the cited version of *Liber Sextus*, the pagination restarts with the *Clementines*.

[34] Second Council of Lyons, constitution 1, *Zelus fidei*, §1c: text in Tanner, 1:311–312.

[35] Benedict XIV, *De Ritibus*, 54 (8.5.36.): "Idcirco vero a Theologis praedictis exemplum affertur prohibitae appellationis a Romano Pontifice ad Concilium, quae prohibitio in Pii II Constitutione, cuius initium *Execrabilis*,

Benedict XIV in his analysis considered the problem that was brought up in the previous chapter of this dissertation: what, exactly, did it mean to say that Eastern faithful were "implicitly" included in certain apostolic constitutions? The pope had to deal with both of the examples given in the Pamphilian decision (not simply the one concerning appeals to councils), and furthermore had to interpret them in the framework of the broader rendering of the decision by Verricelli. Thus, instead of referencing the penalties for each example in *In Coena Domini*, the pope referenced the laws themselves (the various sections of the *Corpus Iuris Canonici*, papal and conciliar constitutions). Therefore, he considered not why a censure applied to Eastern faithful, but why the law itself applied.

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decreta est, quae per extensum in opere cui titulus *regale sacerdotium* Eugenii Lombardi lib. 2, §. 7, pag. 364. refertur. Tum in alia Iulii II, quae item integra in Tractatu Cardinalis Iacobatii de Concilio pag. 462, tom. 9 Bibliothecae Pontificiae Roccaberti est relata: quia quamvis in dictis Constitutionibus individua Orientalium mentio nequaquam fiat, atque eaedem generatim loquantur, cum tamen ipsae obligationi illi innixae sint, quae cuicumque Catholico incumbit, ut Summum Pontificem tamquam supremum atque unicum Ecclesiae totius Caput agnoscat: exinde existit non minus Occidentales, quam Orientales sub eisdem comprehensos esse, quoniam utrisque pro suae Catholicitatis tessera ac signo eadem inest obligatio, ut Papam tamquam unicum supremumque universae Ecclesiae caput venerentur; qua in re videndus Andreas Duvallius Doctor Sorbonicus in Tractatu suo *de comparatione Summi Pontificis et Concilii* quaest. ult. in tom. 3 laudatae *Bibliothecae Pontificiae* pag. 585 et seq. Apud Verricellum de *Apostolicis missionibus* ubi memoratum particularis Congregationis decretum refertur, Theologos in eadem congregatos subditur casui paulo ante exposito appellationis ad Concilium aliud adiunxisse eius, qui fert ac subministrat arma infidelibus; quo de casu ferendi arma infidelibus cum nos in laudato Tractatu nostro *de Canonizatione Sanctorum*, ubi Decreti particularis Congregationis mentionem fecimus, nihil dixerimus, illud in praesentia adiungimus, cum de eo certa nobis extiterint documenta ex Tabulario Congregationis de Propaganda Fide, ubi supra memoratae paricularis Congregationis acta asservantur. Portare arma hostibus civilibus legibus interdictum est, quemadmodum habetur *in L. ad C. quae res exportari non debeant, et in L. ad C. de poenis*, ideoque minime mirum, aut novum videri debet, quod a sacris Canonibus portare arma Turcis atque infidelibus, qui Christiani nominis hostes sunt, severe interdicatur, quemadmodum habetur *in Cap. in* [*sic*; read "*ita*"] *quorundam, in Cap. quod olim, in Cap. ad liberandum, de Iudaeis et Saracenis, in Cap. multa* lib 5. *Extravagantium Communium, in Cap. de Iudaeis in extravagantibus* Ioannis XXII; licet vero nulla in Canonicis hisce dispositionibus particularis Christianorum Orientalium mentio fiat, earumque prohibitiones Generales sint; quia tamen nemo est, qui non videat, indignum factum esse, eum qui Christianus sit, illi qui Christiani nominis hostis est, arma subministrare, qua de re videnda *Constitutio* 2 Gregorii X in Bullario novo tom. 10, part. 2, hinc est, quod licet Orientales minime nominati sint, sapienter Theologici censuerunt eos sub iisdem comprehensos esse. Et quia regula per exempla nequaquam restringitur, sed explicatur, dicendum erit: Orientales in omnibus illis Pontificiis Constitutionibus, licet in ipsis non nominatos, comprehensos esse, in quibus Orientalibus et Occidentalibus ratio communis est. Quamobrem a nobis etiam decretum fuit, quod licet Romanorum Pontificum Constitutiones contra Sacerdotes, poenitentes in Confessionibus *ad turpia* sollicitantes, expressam Graecorum mentionem non faciant: non ex eo sequi, ut ipsi etiam sub iisdem comprehensi non sint, quemadmodum videre est in *laudata Constitutione nostra* 57 *Etsi pastoralis*, §. 9, num. 5: *tum subiectos omnibus, et singulis Romanorum Pontificum Constitutionibus, contra sollicitantes, praesertim in Confessione editis, quae in singulas nationes universim vires suas extendunt, ac Latinos aeque, ac Graecos sua amplitudine comprehendunt*."

In his reflection, the pope attempted to create a general rule for determining whether an "implicit" inclusion of Eastern faithful existed in a particular apostolic constitution: "Easterners are included in those pontifical constitutions in which there is a common cause for Easterners and Westerners, even if Easterners are not named in them." In one of the first attempts to understand the parameters of the "implicit" inclusion,[36] the pope offered a two-fold rule: the constitutions had to be "general," i.e., not excluding Eastern faithful; the matter had to be of some common concern for both Latin and Eastern faithful.[37] This explanation was still rather broad, and the canonist Aemilius Herman attempted to temper its broadness in his consideration of the pope's jurisprudence.

> Easterners are comprehended implicitly in apostolic constitutions when there is found a common concern for Easterners and Latins, but this is not understood as some abstract and remote concern [...]. The common concern about which Benedict XIV speaks is found when the special needs of the times demand certain new provisions, which through the same concern converge for the East and the West, when the evil affects each part of the Church; when the particular gravity of circumstances demands the intervention of the supreme authority for the whole Church [...]; when concerns are found that respect Easterners in a particular manner [...]. Moreover, it is required that the text itself of the constitutions indicate that Easterners are comprehended through at least the general and solemn tenor of the words.[38]

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[36] Herman, "De «Ritu» in Iure Canonico," 129 seems to suggest that Benedict XIV was the only major canonist to undertake this question: "Ut autem in multis aliis quaestionibus ad orientales ritus spectantibus factum est hic quoque accuratius non inquisierunt quibusnam in casibus Orientales implicite Constitutionibus Apostolicis comprehenderentur. Excipiendus est Benedictus XIV, insignis ille iuris orientalis cultor et cognitor." However, note that this question is also considered in the appendix to Paul Gabriel Antoine's "Tractatus de Legibus," in Paul Gabriel Antoine, *Theologia Moralis Universa* (Venice: Antonius Zatta, 1770) 1/2:115. The author, who may in fact be Philip de Carboneano, who posthumously annotated this work, attempted to reach a concord between the divergent opinions of Verricelli and Breno concerning applicability of pontifical law to Eastern faithful. In this attempt, he made the statement that the pope is presumed to intend to apply to Eastern faithful those constitutions aiming to remove abuses that were common (or at least could be common) to the entire Church: "Dum enim Romani Pontifices, pro pastorali, quam gerunt, Dominici gregis cura, ex universa Ecclesia sese abusus tollere velle declarant, ac ea amovere, quae in ruinam cadunt animarum, et Ecclesiasticis poenis oves omnes sibi concreditas student ad aeternae salutis viam revocare; praesumendum omnino est, velle omnes omnino obligare, dum ad universam Ecclesiam Constitutiones dirigunt, ac excludunt neminem." There follows citations of the Pamphilian jurisprudence (misattributed to the Supreme Inquisition) and the June 7, 1639 decision of the Holy Office.

[37] Herman, "De «Ritu» in Iure Canonico," 130: "Secundum mentem igitur Benedicti XIV Orientales implicite Constitutionibus Apostolicis comprehensi intelligebuntur: 1. si tenor istarum Constitutionum omnino generalis esset, et 2. ratio communis esset Orientalibus et Latinis."

[38] Ibid., 131: "Comprehenduntur Orientales implicite Constitutionibus Apostolicis ubi communis ratio pro Orientalibus et Latinis habetur, sed intelligitur non abstracta quaedam et remota ratio [...]. Communis ratio de qua

Even with this explanation, the one making the final determination on whether the factors listed by Herman were present in a given case would be the pope himself, as one can see with the declaration of Benedict XIV that constitutions *contra sollicitantes* applied to Eastern faithful. Thus, the problematic nature of "implicit" inclusion remained, even with the pope's explanation as interpreted by Herman.[39]

One final consideration of the Pamphilian jurisprudence is found in *De Ritibus*. Benedict XIV, as noted above, undertook this analysis in light of the situation of the Italo-Greeks.[40] This community initially consisted of Christians, often of Greek descent, who lived in Italy and Sicily and followed Byzantine liturgical traditions. After such Christians had been subjected to Greek bishops during the iconoclast controversy in the eighth century, Norman conquerors of the eleventh century slowly latinized these communities. However, an influx of Albanian refugees in the fifteenth century revitalized the Byzantine nature of this community. During the sixteenth century, bishops were sent by the Archbishop of Ohrid in Albania to oversee these communities. While this arrangement was initially accepted by the Roman pontiffs, after the Council of Trent the Italo-Greeks (now mostly ethnic Albanians) were subjected to Latin bishops; this was the state of affairs during the pontificate of Benedict XIV.[41] They were in an unusual situation vis-à-

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Benedictus XIV loquitur, habetur, ubi speciales temporum necessitates novas quasdam provisiones exigunt, quae eadem ratione Orientali et Occidentali conveniunt, cum malum utramquam partem Ecclesiae afficiat; ubi specialis rerum gravitas interventum supremae auctoritatis pro tota Ecclesia poposcit [...]; ubi rationes habentur, quae Orientales peculiari modo respiciunt [...]. Praeterea requiritur ut ipse textus Constitutionum Orientales comprehendi ob generalem saltem et sollemnem verborum tenorem innuat."

[39] The general problem of "implicit" inclusion is noted by Antoine Joubeir, *La Notion Canonique de Rite: Essai historico-canonique*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 14 (Rome: Basilian Fathers, 1961) 54: "Ce système ne va d'ailleurs pas sans difficulté pratique: si les deux premiers points de la décision de 1631 peuvent être considérés comme assez précis pour ne pas donner lieu, généralement, à des doutes sur l'interprétation des décrets pontificaux, le troisième point l'est beaucoup moins; on se trouvera souvent dans l'embarras quand il faudra opiner si le Souverain Pontife a «disposé implicitement des Orientaux» dans une constitution qui ne les mentionne pas..."

[40] The following brief history of the Italo-Greek community is based on John D. Faris, "Byzantines in Italy: A Microcosm of an Evolving Ecclesiology," *The Jurist* 67 (2007) 92–101.

[41] Benedict XIV, constitution *Etsi pastoralis*, May 26, 1742, §9, n. 19: *Bullarium Benedicti XIV*, 1:*XIV*, 1:82.

vis the Pamphilian jurisprudence. On the one hand, the Italo-Greeks, by definition, were part of the Eastern Church, since they had been baptized into the Greek rite.[42] On the other hand, they were not "subjects of the four patriarchs of the East," as no Eastern patriarch possessed jurisdiction in Italy;[43] thus, it would appear that they were not subject to the Pamphilian jurisprudence. Benedict XIV attempted to resolve this conflict by attenuating the Italo-Greeks' identity as "Eastern." Those members of the Greek rite who lived in the geographical East were considered as "Eastern Greek" (*Graeci Orientales*), as opposed to the members of the Greek rite in Italy, called "Italo-Greeks."[44] Based on this distinction, the pope offered a different jurisprudential rule concerning the application of apostolic constitutions to Italo-Greeks:

> Indeed, if these things [concerning the determination of "implicit" inclusion of subjects of the four patriarchs of the East in apostolic constitutions] have place among Eastern Greek Catholics, they must have much more place among the Italo-Greeks, and it will be the duty and burden of the Latin bishops to induce the said Italo-Greeks, who should be subject to their authority and jurisdiction, to the observance of these constitutions. In fact, as concerns what pertains to the Italo-Greeks, it seems it must be established as a general rule that they are obliged to the observance of all pontifical constitutions, with only those excepted in which, because of the difference in rite, something is forbidden to Westerners that is permitted for Easterners, as the Apostolic See, as has been stated rather often, wishes to maintain and preserve the Greek rite in all those things that are neither contrary to the faith nor, from another view, opposed to decency.[45]

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[42] The pope's understanding of how one became a member of the Roman/Latin or Eastern/Greek Church depended on his concept of rites. This will be dealt with below, 2.4.2.

[43] Note Benedict XIV, *Etsi pastoralis*, §9, n. 4: *Bullarium Benedicti XIV*, 1:81: "Deinde Summi Romani Pontificis, et Ordinarii Loci in Missis, ac Divinis Officiis commemoratio; non Patriarcharum, neque Antistitum Orientalium, *quibus nulla est in Italia, et adiacentibus Insulis iurisdictio*" (emphasis added); idem, *Ex quo primum*, §21: *Bullarium Benedicti XIV*, 4:162: "Itaque huiusmodi Presbyteri Italo-Graeci, in Sacrificio offerendo, Latinam disciplinam sequ[i] tenentur, commemorationem scilicet facientes Romani Pontificis, et Episcopi loci, nunquam vero Orientalium Episcoporum, aut Patriarcharum, quantumvis Catholici sint, *quum hi nulla fruantur iurisdictione in Italia, et Insulis adiacentibus*" (emphasis added).

[44] Cf. Benedict XIV, *De Ritibus*, 56 (8.5.40), stating that the Italo-Greeks and the Eastern Greeks gave different professions of faith, the former that of Gregory XIII, the latter that of Urban VIII.

[45] Benedict XIV, *De Ritibus*, 55 (8.5.38): "Quae quidem si in Graecis Orientalibus Catholicis locum habent, multo magis habere debebunt in Italo-Graecis; atque Episcoporum Latinorum officium atque onus erit Italo-Graecos praedictos, qui auctoritati suae ac iurisdictioni subiecti sint inducere ad eorumdem observantiam, quinimmo pro eo quod attinet ad Italo-Graecos, illud pro Generali regula videtur statuendum, ipsos ad omnium Pontificarum Constitutionum observantiam obligatos esse, iis solum exceptis, in quibus, pro ritus diversitate, aliquid Occidentalibus interdicitur, quod Orientalibus permissum est: quippe cum Apostolica Sedes, sicuti dictum saepius est, Graecum ritum in omnibus iis manere ac perseverare velit, quae nec Fidei contraria sunt, neque ex alio titulo

The pope distinguished between the way that the Pamphilian jurisprudence applied to "Eastern Greeks" and how it applied to the Italo-Greeks. The former enjoyed all of the benefits of the Pamphilian jurisprudence, while the latter did not, being exempt from only apostolic constitutions forbidding something to Latins that was permitted in the Greek rite. If one considers the context for this discussion—the "implicit" application of apostolic constitutions—it would appear that the basis for this inverted rule for Italo-Greeks resulted from the Italo-Greek hierarchical situation: with such a juridic bond between the Italo-Greeks and their Latin hierarchs, most matters of concern for those Latin hierarchs would necessarily be a concern also for the Italo-Greeks. Only in matters of rite (liturgical and sacramental matters) would there generally be no "common cause" between Latin hierarchs and Italo-Greek subjects.

As an example of the possible distinction between how apostolic constitutions (and, indeed, any papal law) would apply to "Eastern Greeks" and how they would apply to Italo-Greeks, one may consider the formalities involved in elections. In 1757, Benedict XIV confirmed the election of Tobias El Khazen as Maronite patriarch. In an allocution of March 27, 1757, the pope spoke about a choice he made concerning the wording of his confirmation:

> In that confirmation, we omitted that clause through which other elections are sometimes accustomed to be validated, "even as concerns substantial matters," because nothing in this election is lacking of the things that are considered necessary for the validity of the act according to Eastern discipline, and it cannot be affirmed for certain that the laws of the Western Church, by which other substantial nullities of elections have been introduced, also affect the Eastern Church, about which Church no mention occurs in those laws.[46]

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honestati repugnent." Cf. ibid., 34 (8.1.3.), and *Allatae sunt*, §10: *Bullarium Benedicti XIV*, 4:125, where reference is made to synodal decrees of Cyprus applying to Greeks in all matters excepting those that were opposed to their rites.

[46] Benedict XIV, allocution *Auditis*, March 27, 1757: *Opera Omnia*, 17/2:469: "In ipsa Confirmatione clausulam illam praetermisimus, per quam aliae nonnunquam Electiones validari solent, *etiam quoad substantialia*; quum nihil in ea desideretur ex iis, quae ad validitatem actus, iuxta Orientalem disciplinam, necessaria existimantur; neque vero affirmari pro certo valeat, Occidentalis Ecclesiae leges, quibus aliquae inductae fuerunt substantiales Electionum nullitates, Orientalem quoque Ecclesiam afficere, de qua in ipsis legibus nulla occurrit mentio." One should note the comments of Pierre Dib, *History of the Maronite Church*, trans. Seely Beggiani (Beirut: Imprimerie Catholique,

Thus, it was at least a rule of praxis that Eastern faithful not be considered subject to laws of the Western Church concerning additional substantive requirements for the validity of an election. However, such rules concerned discipline, not rite (liturgical/sacramental matters), and did not necessarily forbid an act on the part of Western Christians that was permitted to Eastern faithful. Further, it would have been unusual if Latin hierarchs were to oversee elections that, according to their own Latin law, would be invalid. Hence, it seems reasonable to conclude from a reading of *De Ritibus* that such rules concerning elections, if given in apostolic constitutions (or another form of papal law), would apply to Italo-Greeks if they should have found it necessary to hold an election.

The pope's interesting distinction between "Eastern Greeks" and Italo-Greeks in application of the Pamphilian jurisprudence resulted from his understanding of the ecclesial structure of what he called the Eastern or Greek Church. This understanding greatly impacted how Benedict XIV viewed the autonomy of individual Eastern communities, and would continue to have an impact on how these communities were comprehended in jurisprudence. It is to this understanding that this dissertation now turns.

2.4. The Structure of the Eastern Church and its Implications for Autonomy

In his jurisprudence, Pope Benedict XIV used various terms concerning Eastern faithful and their communities. "Eastern Church" (in the singular), "rite," and "*natio*" all are found throughout the extensive *corpus* of Eastern-related documents issued by this pope. While there

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1971) 139–141. Dib states that the pope did not adhere to this jurisprudence in an earlier judgment concerning the disputed election of the Maronite patriarch in 1743, specifically citing his use of decretal law, which ought not have been applicable to the Maronites by virtue of the Pamphilian jurisprudence.

was only a minimal attempt by this pope to systematize explicitly what each of these terms meant, a review of how the terms are used throughout his legislation clarifies their significance.

2.4.1. The "Eastern Church"

In the ecclesiologico-canonical understanding of this post-Trent period, the Catholic Church was a single entity. Membership in this Catholic Church required subjection to the governance of the Roman pontiff, along with profession of the same faith and communion of the same sacraments.[47] Thus, each individual member was subject to the full authority of the Roman pontiff, who held the place of Christ.[48] As Benedict XIV wrote in *De Synodo Dioecesana*: "The Roman Pontiff [...] is the head of all heads, and the prince, moderator, and pastor of the whole Church of Christ that is under heaven."[49] Eastern communities were not exempt from such subjection; the Roman Church was not simply the sister of the patriarchal Churches, but also

[47] The key text for this ecclesiological understanding is found in chapter 2 of Robert Bellarmine, "De Ecclesia Militante Toto Orbe Terrarum Diffusa," in Robert Bellarmine, *De Controversiis Christianae Fidei Adversus Huius Temporis Haereticos* (Venice: Ioannes Malachinus, 1721) 2:53: "Nostra autem sententia est, Ecclesiam unam tantum esse, et illam unam et veram esse coetum hominum eiusdem Christianae fidei professione, et eorundem Sacramentorum communione colligatum, sub regimine legitimorum pastorum, ac praecipue unius Christi in terris Vicarii, Romani Pontificis. [...] Tres enim sunt partes huius definitionis. Professio verae fidei, Sacramentorum communio, et subiectio ad legitimum pastorem Romanum Pontificem."

[48] For some interesting reflections on the nature of the Petrine office, see Benedict XIV, *De Synodo Dioecesana*, 19–20 (2.1.1). The pope argued that the unification of the offices of pastor of the whole Church with that of Bishop of Rome could have been otherwise: Peter could have not taken any see, retained Antioch to his death, or moved on from Rome. However, God inspired Peter to be martyred at Rome and, therefore, only its bishop could claim to be his successor.

[49] Benedict XIV, *De Synodo Dioecesana*, 19 (2.1.1): "Romanus Pontifex [...] est omnium capitum Caput, atque universae, quae sub coelo est, Christi Ecclesiae Princeps, Moderator, et Pastor." Cf. idem, *Ex quo primum*, §12: *Bullarium Benedicti XIV*, 4:160: "[I]dem Pontifex [Romanus] tamquam Ecclesiae Caput, Vicarius Christi, et B. Petri Successor agnoscitur"; idem, brief *Nuper ad Nos*, March 16, 1743, §5: *Iuspont*, 1/3:101–102 (from the profession required of Maronite patriarch-elect Simon Awad): "[Credo] ipsum Pontificem Romanum successorem esse Beati Petri Principis Apostolorum, et verum Christi Vicarium, totiusque Ecclesiae caput, ac omnium Christianorum patrem, ac doctorem existere, et ipsi in Beato Petro pascendi, regendi et gubernandi universalem ecclesiam a Domino nostro Iesu Christo plenam potestatem traditam esse."

their head and mother.[50] Yet, while the Catholic Church was a single entity and the sole Church of Christ in the world, the pope did recognize the existence of other ecclesial entities subordinate to the universal Church. In his writings, Benedict XIV distinguished a Latin or Western Church from a Greek or Eastern Church.[51] The pope's understanding of the juridic nature of each, and the relationship between them, can be elucidated from reviewing two canonical questions that he discussed in his legislation.

In 1744, Benedict XIV issued the bull *Inter plures*, merging the Ruthenian monasteries of the Order of St. Basil the Great into one congregation, divided into two provinces.[52] At this time, the question arose concerning the authority to whom the abbots of monasteries located in suffragan dioceses were subject, the proto-archimandrite or the metropolitan. In considering this matter, Benedict XIV made a distinction between the laws of the Western Church and those of the Eastern Church concerning the jurisdiction of hierarchs over monasteries.

> Returning to this proposed question, which concerned adjudicating the immediate subjection over abbots to either the proto-archimandrite or the metropolitan, we think you remember that in a congregation held before us on May 1, 1742, the jurisdiction of the metropolitan over monks was admitted, but restricted to the limits of apostolic constitutions and the Sacred Council of Trent, where the rights of a metropolitan over exempt monks is defined. Thus, it without doubt follows that abbots must be subject not to the metropolitan, but to the proto-archimandrite. It has been seen that the proper

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[50] Benedict XIV, *Ex quo primum*, §21: *Bullarium Benedicti XIV*, 4:162 (citing Christianus Lupus, *Synodorum Generalium, et Provincialium Decreta, et Canones: Continens Victoris secundi, Stephani noni, Nicolai secundi, et Alexandri secundi Concilia, et Dictatum sancti Gregorii septimi* [Brussels: Franciscus Foppens, 1673] 437 [not 427 as in the cited text of *Ex quo primum*]): "Mutua enim Patriarchalium nominum recitatio viguit in solis aequalibus, et consororibus, Orientalium Patriarcharum Sedibus, nunquam in Romana. *Haec enim Orientalium non tantum soror, sed etiam caput est, et mater* [...]" (emphasis added). Cf. Benedict XIV, brief *Romana Ecclesia*, March 18, 1743, introduction: *Bullarium Benedicti XIV*, 1:118, stating that the Roman Church had solicitude and vigilance for the rights, privileges, etc. of every single church, but "praesertim aliis Patriarchis subiectarum, diversisque in divinorum officiorum, et sacrosancti Missae sacrificii celebratione ritibus, linguis, et ceremoniis, per sacros Canones, et Ecclesiasticam disciplinam comprobatis, et confirmatis, utentium."

[51] The most notable statement in this regard is found in Benedict XIV, *Allatae sunt*, §3: *Bullarium Benedicti XIV*, 4:129. A translation of the relevant text will be given in the following section on the concept of "rite" (2.4.2). Again, there is a confusion of "Greek" and "Eastern" in such ecclesiastical terminology, with one used interchangeably with the other. On this matter, see Joubeir, 25, especially note 6 on how one could appeal to the law of one Eastern community to solve a problem in another, since all were equally "Greek" or "Eastern."

[52] Benedict XIV, bull *Inter plures*, May 2, 1744: *Opera Omnia*, 15:377–385.

arrangement for governing a religious order cannot exist where abbots depend immediately on the metropolitan, not the proto-archimandrite, since it must not be thought an imaginary or very rare occasion that an abbot, in the governance of his monastery, is said to have caused some injury to one or many monks, or has actually caused it. This injury could be easily and quickly emended if its investigation is deferred to the proto-archimandrite, but not when controversies arising in monasteries are reserved to the judgment and sentence of the metropolitan.

Moreover, having looked at the canons of the Western Church, we have understood that the exercise of metropolitan jurisdiction over those monasteries of monks that are found to be situated in the dioceses of suffragan bishops is not consonant with those canons, since monasteries that do not have the privilege of exemption and immediate subjection to the Apostolic See are ordered to be subject not to the jurisdiction of the metropolitan, but the local bishops. The Sacred Council of Trent was so solicitous that metropolitans not exercise jurisdiction in the dioceses of their suffragans that, except for the visitation of a particular one of their dioceses, it did not permit the cathedral churches and dioceses of the co-provincial bishops to be visited by them, except when it was commanded for them to do so by the provincial council.

An accurate discussion on the laws of the Eastern Church has not been omitted. According to their prescript, we learn that monasteries and monks must be subject to the bishop, but also that a *ius stauropegii* pertains to the patriarch, namely the right of affixing a cross at the foundation of monasteries, whence it follows that the monastery, although situated outside his particular diocese and in the boundaries of some suffragan bishop, remains immediately subject to the patriarch, and entirely exempt from the jurisdiction of the local bishops. Nevertheless, we have learned that such a *ius stauropegii*, which has been conceded to patriarchs (as previously stated), has never been extended to metropolitans; rather, when such a thing has been attempted by them, we have seen that it was held as the usurpation of another's right. But this fact principally moved us, that the aforementioned Synod of Zamosc is said to have taken zealous care that the monasteries of the Order of St. Basil of the province of Poland combine into one congregation, and to have decreed concerning the proto-archimandrite that the congregation is subject to the one to whom the Apostolic See should judge it must be subject. Further, when the synod issued decrees concerning visitation of monasteries and many other things pertaining to discipline, it reduced everything to the prescript of the Sacred Council of Trent.

These things are, obviously, the reason why the right of the metropolitan was previously rendered according to the terms of the Western Church and the Sacred Council of Trent.[53]

[53] Ibid., §§17–20: *Opera Omnia*, 15:381–382: "Ad aliam propositam quaestionem nunc redeuntes, quae circa immediatam in Abbates iurisdictionem, vel Proto-Archimandritae, vel Metropoltiano adiudicandam versatur; memores Vos esse putamus, in Congregatione apud Nos habita die prima Maii anni 1742. Iurisdictionem Metropolitani supra Monachos admissam fuisse; verumtamen restrictam ad terminos Constitutionum Apostolicarum, et Sacri Concilii Tridentini, ubi iura Metropolitani in Monachos exemptos praefiniuntur; ex quo procul dubio consequitur, Abbates, non quidem Metropolitano, sed Proto-Archimandritae immediato [*sic*] subesse debere. Visum est, rectum gubernandae Religionis ordinem minime subsistere posse, ubi Abbates a Metropolitano, non autem a Proto-Archimandrita immediate penderent; quum nec imaginaria, nec admodum rara existimari debeat occasio, qua

While somewhat confusing in organization, the pope's statements indicate that he admitted the existence of two broad bodies of law touching on the question, Western law and Eastern law. As it happened, neither law admitted that an abbot of a monastery in a suffragan diocese could be directly subject to the metropolitan; Western law limited metropolitan authority in general, and Eastern law admitted a certain subjection only to patriarchs, not metropolitans. At first glance, it appears unusual that the pope, who favorably cited the Pamphilian jurisprudence in other works, would have initially answered this question in 1742 according to the terms "of apostolic constitutions and the Sacred Council of Trent"—that is, he applied what should have been law intended solely for the Western Church to an Eastern community. However, as the pope noted at the end of the quoted text, the Ruthenians had adopted for themselves many norms of the Council of Trent at the Synod of Zamosc in 1720. Thus, the distinction between Western and

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Abbas in sui Monasterii regimine, alicui vel pluribus Monachis gravamen intulisse dicatur, vel etiam reipsa intulerit. Quod quidem gravamen facile et celeriter emendari poterit, si illius cognitio ad Proto-Archimandritam deferatur; non ita vero, ubi controversiae in Monasteriis exortae Metropolitani iudicio, et sententiae reserventur. Inspectis praeterea Ecclesiae Occidentalis Canonibus, eisdem minime consentaneum cognovimus exercitium Iurisdictionis Metropoliticae in ea Monachorum Monasteria, quae in Dioecesibus Episcoporum Suffraganeorum sita reperiuntur; quandoquidem Monasteria, quae non habent privilegium exemptionis, et immediatae subiectionis Sedi Apostolicae, non quidem Metropolitani, sed Episcoporum localium Iurisdictioni subesse iubentur. Sacrum vero Tridentinum Concilium adeo solicitum fuit, ne Metropolitani Iurisdictionem exercerent in Suffraganeorum Dioecesibus, ut, praeter peculiaris ipsorum Dioecesis visitationem, non aliter Episcoporum Comprovincialium Ecclesias Cathedrales atque Dioeceses ab ipsis visitari permiserit, quam ubi id a Concilio Provinciali eisdem mandatum fuerit. Neque omissa fuit accurata in Orientalis Ecclesiae leges disquisitio; et quamvis, iuxta earumdem praescriptum, agnoverimus, Monasteria, et Monachos Episcopo subesse debere, Patriarchae autem competere ius Stauropegii, nimirum figendae Crucis in Monasteriorum fundatione, ex quo sequebatur, ut Monasterium, licet extra ipsorum peculiarem Dioecesim, in alicuius Episcopi Suffraganei finibus situm esset, ipsi tamen Patriarchae immediate subiectum, atque ab Episcoporum localium iurisdictione omnino exemptum remaneret; Attamen huiusmodi Stauropegii ius, quod Patriarchis, ut supra, concessum fuit, nunquam ad Metropolitanos extensum fuisse cognovimus, quinimmo sicubi tale quidpiam ab his attentatum fuit, id veluti alieni iuris usurpationem habitum fuisse conspeximus. Illud vero potissimum Nos movit, quod animadvertimus, supradictam Synodum Zamosciae habitam studiose quidem curasse, ut Monasteria Ordinis S. Basilii Proviniciae Poloniae in unam Congregationem convenirent; de Proto-Archimandrita autem decrevisse, ut illi subesset, cui eumdem subiici debere Apostolica Sedes iudicasset. Atque eadem, ubi de Visitatione Monasteriorum, deque pluribus aliis ad disciplinam pertinentibus Decreta edidit, omnia reduxit ad Sacri Concilii Tridentini praescriptum. Haec nimirum in causa fuerunt, cur alias a Nobis ius Metropoliticum redactum fuerit ad terminos Apostolicarum Constitutionum Ecclesiae Occidentalis, et Sacri Tridentini Concilii." Benedict XIV discussed the nature of the *ius stauropegii* in *De Ritibus*, 49–50 (8.5.29).

Eastern law held; the pope applied the law the Ruthenian community adopted for itself, which simply happened to be the same as Western law.

A second case touching on the distinction between Western and Eastern laws concerned the marriage of those in sacred orders.

> For a long time great controversy was agitated among theologians, full of quarrel and dissent—whether a marriage entered into after the conferral of sacred orders, which would be considered null and void in the Western Church, should be thought of as only illicit in the Eastern Church, or instead illicit and invalid. In fact, many supported the opinion that such a marriage ought to be considered valid but illicit, both because the canonical sanctions and decrees of the Western Church nullifying it cannot be extended by their nature to the Eastern Church, and because the canons of the Synod of Trullo, whose authority has always been upheld by the Greeks, nowhere expressly nullify and make void a marriage contracted after sacred orders. Others strenuously fought against this opinion, arguing for total invalidity. And they certainly had the better sense, as they upheld the opinion supported by a greater number of backers and consonant with the mind of the congregations of Rome. They judged that the nullity of marriage could be sufficiently shown from canon 3 itself of the Council of Trullo with these words: "for them, namely after the nefarious marriage has been dissolved."[54]

The reasoning for this determination indicated possession of a proper law by the Eastern Church. Although Benedict XIV upheld the opinion supporting the invalidity of these marriages, he did not reject the argument of those who stated that the law of the Western Church did not extend *per se* to the Eastern Church, nor did he reject the idea of the Eastern Church having its own particular law on the matter. Rather, he supported his opinion from Eastern law itself—by

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[54] Benedict XIV, constitution *Eo quamvis tempore*, May 4, 1745, §38: *Bullarium Benedicti XIV*, 1:232: "Diu multumque agitata est inter Theologos controversia illa, plena iurgii, ac dissidii: An solum illicitum, vel potius illicitum et invalidum reputari debet et Matrimonium initum in Ecclesia *Orientali* post collationem Sacrorum Ordinum, quemadmodum nullum et irritum reputatur in Ecclesia *Occidentali.* Placuit sane pluribus, *validum*, sed *illicitum* censeri debere huiusmodi matrimonium, tum quia Canonicae Sanctiones, et Decreta Ecclesiae Occidentalis illud irritantia, protendi non possunt indole sua ad Ecclesiam Orientalem; Tum quia Canones Synodi Trullanae, quorum semper a Graecis commendata fuit auctoritas, nullibi expresse annullant, et irritant matrimonium post Sacros Ordines contractum. Strenue contra pugnarunt alii pro omnimoda invaliditate: Et saniori certe consilio; utpote tuentes sententiam maioribus suffragiis suffultam, et menti Congregationum Urbis consentaneam. Nullitatem Matrimonii satis erui posse iudicarunt ex ipso *Can.* 3. Concilii Trullani his verbis: *Eis nefario videlicet dissoluto Coniugio*." The entire sentence of the Latin translation of canon 3 that the pope quotes is found in Mansi, 11:942–943: "Eos vero, qui uni quidem uxori copulati sunt, si vidua erat, quae accepta est: similiter et eos, qui post ordinationem uni matrimonio se applicarunt hoc est, prespyteros [*sic*], diaconos, et hypodiaconos, brevi aliquo tempore a sacro ministerio prohibitos, et punitos, rursus propriis gradibus restituti, ad alium gradum nequaquam promovendos, eis nefario videlicet dissoluto coniugio."

indicating that such marriages were to be dissolved, the Council of Trullo[55] understood them to be invalid.[56]

These two examples, along with several others found throughout the work of Benedict XIV,[57] indicate that not only did the law of the Western Church not extend to the Eastern Church ("negative" autonomy), in line with the Pamphilian jurisprudence, but the Eastern Church as a whole had its own laws ("positive" autonomy). Such Eastern laws were at least capable of being contrary to the laws of the Western Church, even if, in the cited examples, there were actually no substantial differences.

With the recognition of these distinct bodies of law, one comes to the question of which juridic authority was capable of establishing, altering, or abolishing law that pertained to the

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[55] The pope's understanding of the force of the canons of Trullo appears complex. On the one hand, he admitted that at least canon 3 (and likely more) were received by the Eastern Church in such a way as to have authority; see ibid., §31: *Bullarium Benedicti XIV*, 1:231: "Disposita per Canones Apostolicos innovata fuerunt in Canone 3. Concilii Trullani; cuius auctoritas licet in Ecclesia Occidentali recepta non sit, illam tamen Orientalis Ecclesia suscipit, et veneratur." On the other hand, he argued that canon 13, allowing those in major orders to remain with their wives, had no authority as a canon of an ecumenical council, and the practice was simply tolerated by the Roman pontiffs for the sake of unity; see Benedict XIV, *De Sacramentis*, in *Benedicti XIV Papae Opera Inedita*, ed. Franciscus Heiner (Friburgi Brisgoviae: Herder, 1904) 397 (4.7.7); cf. Roman Cholij, *Clerical Celibacy in East and West* (Leominster: Gracewing, 1989) 185. Perhaps the pope's statements at *De Sacramentis*, 398 (4.7.9) concerning the limited approval of the canons given by Pope John VIII offer a resolution; only those canons had value for Greeks that were not contrary to the canons or decrees of the Holy See or to good morals.

[56] The pope would return to this question later in his constitution *Anno vertente*, June 19, 1750, §13: *Bullarium Benedicti XIV*, 3:131. He left the question in doubt here (noting the question was not as yet decided by an apostolic decree, although rotal praxis indicated such marriages to be null), but indicated that a dispensation should be sought for validating such marriages, although without needing a renewal of consent.

[57] For examples of references to particular discipline of the Eastern/Greek Church, see Benedict XIV, brief *Inter gravissimas*, March 7, 1746, §§1–2: *Iuspont*, 1/3:262 (discipline on abstinence and fasting); idem, brief *Decretalem nostram*, March 10, 1746, §§1–3: *Iuspont*, 1/3:264–265 (discipline of Mass of the presanctified, also at §3 citing Trullo c. 52, "quod Orientalis Ecclesia plurimi facit"); idem, bull *Imposita nobis*, March 29, 1751: *Bullpont*, Appendix 2:155–156 (discipline on celebrating Mass on a consecrated altar); idem, *Ex quo primum*: *Bullarium Benedicti XIV*, 4:158–174 (many distinctions between Eastern and Western liturgical practices, with reference to canons 52 and 67 of Trullo at §§32 and 66, respectively). Also note his extensive discussion of the obligation of reciting the Divine Office in *De Ritibus*, 16–20, 24–27 (chapters 4 and 6). Here, the laws and customs of the Western Church and the Eastern Church are treated separately; while Benedict XIV came to the conclusion that there was no significant distinction between the two regarding many aspects of the Office (e.g., the obligation to recite the Office in private—see page 27 [6.7]: "Quae cum ita sint, affirmari posse omnino videtur, nihil Occidentalem inter atque Orientalem Ecclesiam, interesse discriminis, pro eo quod attinet ad obligationem privatim etiam Canonicas Horas recitandi [...]"), such absence of difference was proven on the basis of specifically Eastern sources, not by applying Western law to the Eastern Church.

Eastern Church as a whole. No Eastern hierarch, not even a patriarch, possessed jurisdiction over the entirety of the Eastern Church. As inferior legislators, Eastern hierarchs were incompetent to establish, alter, abolish, or even dispense from the law of the Eastern Church as a whole. As was noted in the "Tractatus de Legibus" of Paul Gabriel Antoine:

> For bishops, and even major patriarchs of the Eastern Church—those of Alexandria, Antioch, Jerusalem, and Constantinople—are subject to the Roman pontiff and his laws, and also to the customs by which the universal discipline of the Eastern Church is contained. An inferior cannot loosen himself and those subject to him from a law that has been issued by a superior, and to which he himself is subject.[58]

It appears, therefore, that the only authority capable of establishing, altering, or abolishing Eastern Church law was the Roman pontiff, whether in or outside of an ecumenical council.[59] As Benedict XIV wrote, "The Roman pontiff is the head of each Church, namely the Eastern and the Western, and each Church is subject to him."[60] In light of this, while the Eastern Church was

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[58] Antoine, "Tractatus de Legibus," 1/2:116: "Nam Episcopi, ac etiam maiores Orientalis Ecclesiae Patriarchae, ut Alexandrinus, Antiochenus, Hierosolymitanus, et Constantinopolitanus, Romano Pontifici, eiusque legibus, ac etiam consuetudinibus, quibus universalis Orientalis Ecclesiae disciplina continetur, subiecti sunt. Inferior nequit se, sibique subiectos a lege solvere, quae a superiore sit lata, et cui sit ipse subiectus." This statement is found in a discussion of the power to dispense from laws. As with an earlier case mentioned in the notes above, it is possible that this statement was written by Philip de Carboneano, who annotated this edition of Antoine's works, as the previous sentence unusually refers to Antoine in the third person, and the discussion appears in an appendix that does not seem to be present in the "Tractatus de Legibus" found in a printing made when Antoine was living (*Theologia Moralis Universa* [Ingolstadii: John Andreae de la Haye, 1734] 1:52–178). However, the appendix (including the cited text) was written at least while Benedict XIV lived, as it is found in the work as annotated by de Carboneano in a 1754 printing (*Theologia Moralis Universa* [Venice: Balleoniana, 1754] 59). Thus, it should be considered at least as contemporary jurisprudential understanding.

[59] For an example, see Benedict XIV, constitution *Demandatam*, December 24, 1743: *Bullarium Benedicti XIV*, §6: *Bullarium Benedicti XIV*, 1:130. The pope not only revoked a determination by Melkite Patriarch Cyril VI Tanas that changed the received discipline of the Greek Church concerning fasts, but declared the determination void through lack of the necessary apostolic authority: "[...] licet alioquin, *deficiente auctoritate Apostolicae Sedis, nullius roboris esse dignoscantur*, eam tamen auctoritate Nostra expresse revocamus" (emphasis added). For comments on this situation, see Wilhelm de Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," *Orientalia Christiana Periodica* 27 (1961) 350–351. At 355, de Vries notes a 1745 letter of Cyril VI lamenting these restrictions: "E dove mai, o Padre Santo, ho esercitata l'autorità e giurisdizione, non dico di patriarca maggiore, ma di simplice vescovo?"

[60] Benedict XIV, *De Servorum Dei Beatificatione et Beatorum Canonizatione*, 326–327 (1.38.14): "[...] Romanus Pontifex utriusque Ecclesiae, Orientalis scilicet, atque Occidentalis, Caput sit, eidemque utraque Ecclesia subiecta sit [...]." One should note that because of the parallel made between the Eastern Church and the Western Church, the office of headship of the Western Church would be distinct from the office of patriarch of the West. The pope did not exercise patriarchal authority over the Eastern Church, insofar as patriarchal authority was exercised at a lower level within the Eastern Church by a number of different persons. The pope, as patriarch of the West, would

recognized by Benedict XIV as having a separate body of law, and therefore a positive autonomy, the same Church did not, as a whole, possess an internal legislative organ; anything concerning a change to Eastern law required the intervention of the Roman pontiff.

2.4.2. "Rites"

Western law or Eastern law applied respectively to those in the Western Church or Eastern Church, namely "Westerners" (*Occidentales*) or "Easterners" (*Orientales*). How, then, did one become a Westerner or Easterner? According to Benedict XIV, one became a Westerner or Easterner by ascription to a rite of the Western Church or of the Eastern Church.

> And it is known to all that the Eastern Church consists of four rites, namely Greek, Armenian, Syrian, and Coptic; all these rites are rightly understood under the single name of the Greek or Eastern Church. Not otherwise are the Roman, Ambrosian, Mozarabic rites and the various particular rites of the religious orders comprehended under the name of the Latin Roman Church.[61]

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only have the authority that Eastern patriarchs had; note Benedict XIV, *De Synodo Dioecesana*, 20 (2.1.1): "Siquidem aliquando operari potest, et re ipsa operatur, non tamquam Christi Vicarius, sed tamquam Patriarcha Occidentis, illa dumtaxat iura exercendo, quae ceteris Patriarchis competunt." Insofar as the pope's headship of the Eastern Church involved supra-patriarchal authority, so too would his headship of the Western Church involve authority exceeding his power as patriarch of the West alone.

[61] Benedict XIV, *Allatae sunt*, §3: *Bullarium Benedicti XIV*, 4:123: "Orientalem autem Ecclesiam omnibus notum est quatuor Ritibus constare, Graeco videlicet, Armeno, Syriaco, et Cophtico, qui sane Ritus universi subuno [*sic*] nomine Ecclesiae Graecae, aut Orientalis intelliguntur, non secus ac sub Ecclesiae Latinae Romanae nomine, Ritus Romanus, Ambrosianus, Mozarabicus, et varii peculiares Ritus Ordinum Regularium comprehenduntur." Cf. Sunny Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO*, Kanonika 15 (Rome: PIO, 2009) 307–308 for a brief summary of the pope's consideration of this question. Herman, "De «Ritu» in Iure Canonico," 109–110 notes the importance of this enumeration in future ecclesiastical praxis. For criticisms of this understanding of rite, see especially Bassett, 52, who considers this listing inadequate insofar as the pope "seemed to lend credence to an oversimplified view of the Church that would plague later writers" by focusing on "merely liturgical" variations. Further, "the three [Western] rites named, being purely local in character, bear but a superficial resemblance to those of the Eastern Church." Cf. Ioannes Chelodi, *Ius de Personis iuxta Codicem Iuris Canonici* (Trent: Tridentinum, 1922) 159 and Joubeir, 24, making the same point. Concerning the rites of the Latin Church, on the one hand there does appear to have been certain norms for ascription to the Mozarabic rite, with legal implications for tithing; thus, there was some parity with the rites of the Eastern Church in the pope's listing. See Raúl Gómez-Ruiz, *Mozarabs Hispanics, and the Cross* (Maryknoll: Orbis, 2007) 7: "Initially Mozarab nobility and personal membership in the parishes were transmitted in Toledo and elsewhere to all of the descendants of the first generation acknowledged by King Alfonso VI's *fuero*, whether male or female. This was confirmed by the Sacred Roman Rota in 1551. However, Pope Julius III in 1553 restricted this to Mozarabs living in Toledo. As a consequence, only descendants in the male line could claim the right. This was done to resolve conflicts between

One was not simply "Western" or "Eastern" in the abstract; one was ascribed to one of these specific rites, and through such ascription became a "Western" Christian or an "Eastern" Christian.[62]

This list of rites made by Benedict XIV comprised not individual communities (e.g., the Melkites, the Ruthenians[63]), nor liturgical, theological, spiritual, and disciplinary heritages as differentiated by culture and circumstances of peoples,[64] but rather liturgical families, called "traditions" in the current Eastern law.[65] It is unclear how Benedict XIV came up with this particular enumeration of rites. William W. Bassett attributes it to the work *De Sacris*

Latin and Mozarabic pastors in Toledo regarding tithes due the parishes." On the other hand, questions could arise particularly concerning the rites of the religious orders referenced in *Allatae sunt*; how could one be ascribed to these rites in the same way one could be ascribed to one of the Eastern rites? Insofar as such a question was not as urgent as those concerning ascription (and transfer) among Eastern rites and to the Latin/Roman rite, the pope never considered such implications.

[62] On not simply being a generic "Latin" or "Eastern," note Bassett, 77, commenting on 1917 *CIC* c. 98: "The minister of another rite referred to is not merely a Latin or an Oriental in general, but in particular a member of one specific rite, as is the priest of one's own rite."

[63] Specifically concerning the Greek rite, the pope held that the Greek Melkites, the Ruthenians, and the Italo-Greeks were all individually members of the Greek rite. See his *De Ritibus*, 4–5 (1.12–1.14). The pope stated that determinations regarding transfer of rite that were applicable to Italo-Greeks were not applicable "to all other Greeks" ("ad omnes alios Graecos"). He cited *Demandatam*, §15, speaking of Melkites "Graecum ritum servantibus," and Ruthenian uniates transferring "a Graeco ad Latinum ritum." Distinctions between the actual liturgies followed by these communities were considered simple matters of language. See idem, *De Ritibus*, 28 and 30 (7.4 and 7.9), noting that the Melkites and Ruthenians followed the Greek Missal and the rite of the Greeks, but used the Arabic and Slavic languages (respectively). Translation into another language did *not* change the rite; see idem, encyclical *In superiori*, December 29, 1755, §7: *Opera Omnia*, 17/2:299: "[...] semper Latinus Ritus esse censeantur, etsi in Armeniam Linguam versae [...]. Simillimum Nobis suppetit exemplum ex Missa Latina Patrum Dominicanae Familiae in Graecam Linguam versa [...]." Cf. Acacius Coussa, *Epitome Praelectionum de Iure Ecclesiastico Orientali* (Grossaferrata: Typis Monasterii Exarchici Cryptoferratensis, 1948) 1:17, stating that a sufficiently trained cleric could use all approved languages of his rite; thus, a "Byzantine rite" cleric could use Greek, Romanian, etc.

[64] Cf. *CCEO* c. 28 §1: "Ritus est patrimonium liturgicum, theologicum, spirituale et disciplinare cultura ac rerum adiunctis historiae populorum distinctum, quod modo fidei vivendae uniuscuiusque Ecclesiae sui iuris proprio exprimitur."

[65] *CCEO* c. 28 §2: "Ritus, de quibus in Codice agitur, sunt, nisi aliud constat, illi, qui oriuntur ex traditionibus Alexandrina, Antiochena, Armena, Chaldaea et Constantinopolitana." After the pontificate of Benedict XIV, the "Syrian rite" was separated into West-Syrian (Antiochene) and East-Syrian (Chaldean), resulting in the five traditions listed in *CCEO* c. 28 §2; see Herman, "De «Ritu» in Iure Canonico," 109. George Nedungatt, "A New Code for the Oriental Churches," *Vidyajyoti Journal of Theological Reflection* 55 (1991) 328 calls these "primary rites" "matrixes [*sic*] of traditions from which secondary rites evolved."

Christianorum Ritibus of the previously-mentioned Paul Gabriel Antoine.[66] However, no such enumeration of these four Eastern rites is found at the place cited by Bassett,[67] nor is such an explicit enumeration found elsewhere in the work.[68] While Antoine's work may have influenced Benedict XIV, the specific enumeration of rites appears to have been a creation of the pope himself.

In this perspective, a Christian was personally part of a liturgical tradition—a "rite."[69] Ascription to such a tradition—to a "rite"—was personal, regardless of where a person actually resided.[70] Furthermore, in light of the pope's consideration of rites as *liturgical* traditions, it is no surprise that he held that a person was ascribed to a rite through the liturgical form that was used for baptism:

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[66] Bassett, 49–51. The full citation of the work is Paul Gabriel Antoine, "De Sacris Christianorum Ritibus," in *Theologiae Cursus Completus, Tomus Decimus-Nonus: De Dispensationibus—De Sacris Ritibus*, ed. J. P. Migne (Paris: J. P. Migne, 1840) 1035–1140.

[67] Bassett, 50: "In the Oriental Church, he [Antoine] affirmed, there are four rites, the Greek, Syrian, Armenian and Alexandrian." Note 187 accompanying this sentence reads: "Cap. IV, «De Ecclesiae Orientalis Ritibus, eorumque varietate», col. 1091." The number of the chapter is wrong—the citation should read "Cap. VI." Column 1091 is part of §2 of that chapter, *De schismaticorum, haereticorumque sectis, quae in Orientali Ecclesia sunt; deque praecipuis earumdem erroribus*; the specific column cited contains a discussion of the errors of the Nestorians and Jacobites. No listing of rites is found here.

[68] The closest Antoine came to such an enumeration in "De Sacris Christianorum Ritibus" is in chapter 6, §3, *De propriis Orientalis Ecclesiae ritibus, eorumque varietate*. Antoine discussed the languages used in the liturgies of the Eastern Church. Reading through this section, the most significant languages appear to be Greek, Armenian, Syrian, and Coptic. However, Antoine noted that Persian, Arabic, Ethiopian, Georgian, Ruthenian, and Slavonic are also used in certain liturgies (ibid., 1094–1096). Another distinction concerning fasts references Greeks, Syrian Jacobites, Syrian Nestorians, Copts and Ethiopians, and Armenians (ibid., 1106–1110); however, these terms reference people, not rites. Other distinctions referred to Greeks, Syrians (orthodox, Nestorian, or Jacobite), Copts, and Ethiopians (omitting Armenians— ibid., 1097), and to Greeks, Syrians, Armenians, and others (without specific reference to Copts— ibid., 1105). Antoine does specifically list the Ambrosian and Mozarabic rites (ibid., 1118), but makes no mention of the rites of religious orders.

[69] Cf. Bassett, 51: "For to the historical and liturgical sources, the generic types, is now attached the name of rite. This is an entirely new departure. Consecrated in its acceptance by Pope Benedict XIV, this very subtle innovation became the standard of all that was to follow. [...] In the legislation of Pope Benedict XIV the change of rite will mean not changing from one independent community to another, but from one generic liturgical family to another."

[70] Cf. Benedict XIV, *De Ritibus*, 11 (2.15), speaking of the obligation for the observance of a rite: "Latino igitur Latinus, et Graeco Graecus ritus servandus est." The only explicit restriction concerned a Greek presbyter living in an area with only Latins, in which case he needed the permission of the Latin bishop to celebrate in the Greek rite; this permission "non difficiliter ab Episcopo eidem concedenda erit."

> The origin and basis whereby someone is to be considered to be of this or that rite is baptism. Thus, he who has been baptized according to Latin discipline is said to be of the Latin rite, and he who has been baptized according to Greek discipline is said to be of the Greek rite.[71]

Because of how ascription worked in this perspective, the liturgy in which one was baptized was, for the most part, the sole determinant of valid ascription.[72] However, Benedict XIV did recognize two cases where the ritual ascription of a person would *not* follow the liturgical rite used for baptism.[73] He wrote in *De Ritibus*:

> Therefore, having established and founded the rule that through baptism received by an infant either according to the Latin discipline or the Greek discipline, having received the consent of the parents that was spoken of earlier, an infant should be numbered among the Latins or the Greeks, it is nevertheless very necessary to add something here that pertains to the explication of the said rule. Indeed, it must be understood that rite depends on baptism only when it has been conferred outside of a specific case of necessity, or without apostolic dispensation. For if it should ever happen that, with no other priest present but a Latin, and the infant being in danger of death, the parents cause the infant to be baptized by the Latin priest; or if a Greek infant receives baptism in the Latin manner through apostolic dispensation with the condition that the child remain in the Greek rite, then it can in no way be contended that the infant has become a member of the Latin rite due to the fact that the child was baptized according to the Latin manner. *For in these cases the infant is not considered to have transferred from his own rite to another,* as is held in *Etsi pastoralis* §2.[74]

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[71] Benedict XIV, *De Ritibus*, 1 (1.1): "Quare quis huius, vel alterius Ritus esse censendus sit, origo ac fundamentum Baptismus est. Sic is, qui secundum Latinam disciplinam baptizatus est, Latini, qui vero secundum Graecam, Graeci esse ritus dicitur."

[72] There were norms determining liceity of ascription. Legislation issued by Benedict XIV provided rules for the Italo-Greeks and the Greek Melkites to determine into which rite a child should be baptized. The key texts are Benedict XIV, *Etsi pastoralis*, §2, nn. 8–10: *Bullarium Benedicti XIV*, 1:76; idem, *Demandatam*, §§16–17: *Bullarium Benedicti XIV*, 1:131; idem, bull *Praeclaris*, March 18, 1746: *Iuspont*, 1/3:278. Cf. the pope's comments in *De Ritibus*, 1–3 (1.1–9), and Bassett, 143–147, summarizing the legislation. One does need to note that, strictly speaking, these norms, while of some general jurisprudential value, applied as law only to the two aforementioned communities; note ibid., 147: "In assessing the principles enunciated by Pope Benedict XIV two thoughts should be borne in mind: the first is that the legislation in question was particular law for Greek Melkites and Italo-Greeks. Secondly, though the fundamental ideas were of value as guidelines of future jurisprudence, the law itself could not have a broader extension than its author originally intended."

[73] Cf. Bassett, 144, although he writes that these are three cases, not two, considering necessity through danger of death and necessity through lack of a proper priest separately.

[74] Benedict XIV, *De Ritibus*, 2 (1.5): "Posita igitur firmataque regula, quod ex Baptismo ab infante sive secundum Latinam disciplinam, sive secundum Graecam recepto, genitorum consensu, quo ante modo dictum est, accedente, infans vel inter Latinos, vel inter Graecos recensendus sit: aliquid tamen addere hoc loco necesse omnino est, quod ad praedictae regulae explicationem spectat. Ritum itaque tunc a Baptismo pendere sciendum est, cum ille extra praecisum necessitatis casum, vel sine Apostolica dispensatione collatus sit. Etenim si quando eveniret, ut cum nullus alius praeterquam Latinus Sacerdos adesset, et infans in vitae periculo versaretur, ac proinde parentes facerent

If one considers the question generally, the liturgical rite of baptism did not impact ritual ascription if baptism was conferred either (1) due to necessity or (2) through an apostolic dispensation authorizing baptism according to the liturgy of one rite with ascription in another rite. While in the case of (2), a positive juridic act (an apostolic dispensation) would be required, the case of (1) suggests that the rite has some juridically determinative authority over a person even prior to baptism, such that necessity would render the normal means of ascription (baptism by the liturgical form of one of the rites listed in *Allatae sunt*) inapplicable. This norm suggested that there was some juridic entity having "rights" over a person even prior to baptism; however, this entity would not seem to be the generic liturgical tradition (the "rite" of *Allatae sunt*), which was a complex of liturgical and sacramental norms. It would seem more logical that the individual community was the possessor of such "rights"; the hierarch presiding over the community would be deprived of a subject if those baptized in emergencies were ascribed to the tradition of the liturgical form used in baptism rather than the tradition of the parents. Thus, while heavily basing his analysis of ritual ascription on the idea that "rites" were liturgical

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eum a Sacerdote Latino baptizari; aut si infans Graecus ex Apostolica dispensatione Baptismum reciperet more Latino, ea tamen conditione ut remaneret in ritu Graeco, nullatenus tunc contendi posset, infantem illum factum esse ritus Latini, propterea quod Latino more baptizatus esset: *In his enim casibus non censetur a proprio ad alium ritum transiisse*, quemadmodum in citata Constitut. 57 [*Etsi pastoralis*], § 2 habetur." For the specific legislation, see idem, *Etsi pastoralis*, §2, n. 11: *Bullarium Benedicti XIV*, 1:76: "Infantes ad eius Parochi iurisdictionem pertinent, cuius ritu sunt baptizati, cum per Baptismum fiat suscepti ritus Graeci, vel Latini professio: [...] nisi iis Baptismus collatus fuerit, vel ob gravem necessitatem, cum nimirum morti proximi fuerint, nec haberi potuerit proprii Parochi, vel ritus copia, vel ex dispensatione Apostolica, cum videlicet facultas data fuerit, ut latine quidem baptizentur, sed in suo ritu Graeco permanent; In his enim casibus non censentur a proprio ad alium ritum transiisse"; idem, *Demandatam*, §18: *Bullarium Benedicti XIV*, 1:131: "Caeterum si quos imposterum Graecos, necessitate cogente, ob defectum Parochi Catholici Ritus Graeci, Baptismum, aut alia Sacramenta a Latino Presbytero recipere eveniat; illi non ideo censendi erunt Latinum Ritum suscepisse; sed, omni dubitatione sublata, Ritum Graecum, in quo orti sunt, observare teneantur." In the legislation of *Demandatam*, the use of *imposterum* indicates that this norm applied *in the future*, and therefore not the past. The pope likely used this word because doubt concerning the *latinizantes* (persons whose parents were of the Greek rite but who due to necessity were baptized in or followed the Latin rite) had existed in the past; *in the future*, no doubt was to arise.

traditions, Benedict XIV established a rule that suggested a communal aspect to ascription, an aspect that would become stronger in the following centuries.[75]

As the term "rites" as used by Benedict XIV actually referenced liturgical traditions, a similar juridic situation occurred as happened with the "Eastern Church": no single Eastern hierarch could be said to have authority over an entire rite. Thus, any alteration of one of these rites pertained exclusively to the Roman pontiff:

> It is not the role of a private man to remove some part from some rite, leaving the other parts of the rite untouched, but it is necessary that public authority intervene, namely, the authority of the supreme head of the universal Church, who is clearly the Roman Pontiff.[76]

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[75] Cf. Joubeir, 61: "Benôit XIV revenait ainsi nettement à l'explication de l'appartenance au rite par le concept d'origine, mais il ne réussit pas à se libérer complètement du courant d'idees qui donnait une place trop importante à la liturgie dans la notion de rite et, traitant de l'appartenance au rite, il posa comme principe général: «Origo ac fundamentum baptismus est»."

[76] Benedict XIV, *Allatae sunt*, §27: *Bullarium Benedicti XIV*, 4:129: "[...] partem etiam aliquam demere ex aliquo Ritu salvis reliquis eiusdem Ritus partibus, non est privati viri, sed auctoritas publica intercedat necesse est, videlicet Supremi Capitis universalis Ecclesiae, qualis plane est Romanus Pontifex." Similar comments are found at Antoine, "De Sacris Christianorum Ritibus," 1121: "Ergo ritus illi, quibus Orientalium Ecclesiarum disciplina continetur, leges sunt publica Ecclesiae auctoritate stabilitatae. Huiusmodi autem legibus fideles omnes obligantur, omnes episcopi et patriarchae omnes, ac is tantum ab eis dispensare potest, qui universae Ecclesiae praeest, Romanus pontifex." Cf. Bassett, 55: "Each rite has rites and customs, which no person, save the Sovereign Pontiff himself, may legitimately change"; Meletius M. Wojnar, "Decree on the Oriental Catholic Churches," *The Jurist* 25 (1965) 200: "In the patriarchates of the second millennium of the Church's history the Holy See no longer in fact left the regulation of the liturgy to the patriarchs." See also Alexius Petrani, "De Patriarcharum Orientalium in Ritus Proprios ac Particulariter circa Ieiunia et Festa Potestate,"*Apollinaris* 10 (1937) 536–543. Other examples of the prohibition of lower authorities to alter a rite are found in Benedict XIV, *Demandatam*, §3: *Bullarium Benedicti XIV*, 1:129–130; instruction of the Sacred Congregation for the Propagation of the Faith inserted into Benedict XIV, *Praeclaris*: *Iuspont*, 1/3:276; excerpts of the letter of the Sacred Congregation for the Propagation of the Faith of March 31, 1729 and its decision in the particular congregation of August 5, 1743: *Fonti*, 1/15 part 1:487. Benedict XIV did build on earlier decisions of his predecessors. Alexius Petrani, *De Relatione Iuridica inter Diversos Ritus in Ecclesia Catholica* (Turin/Rome: Editorialis Marietti, 1930) 11 cites a decree of Paul V of March 9, 1610, ordering the Maronite patriarch to undo innovations introduced into the liturgy; idem, "De Variis Ritibus Catholicis ac de Suprema Eos Moderandi Auctoritate," *Apollinaris* 11 (1938) 512 also notes the decree *Ad conservandam* of the Sacred Congregation for the Propagation of the Faith of April 2, 1669: *Iuspont*, 2:152, ordering no change to the Armenian liturgy without the express permission of the Apostolic See. However, because of the particular prominence of the declaration of Benedict XIV and the general nature in which it was stated, Wojnar, "Decree on the Oriental Catholic Churches," 200 does not err in stating that *Allatae sunt* is "the main document on this matter."

Eastern hierarchs were limited only to the correction and removal of abuses that may have crept in, and approving particular exercises of piety.[77] Thus, not only were Eastern hierarchs incapable of establishing, altering, or abolishing law that was considered to pertain to the entire Eastern Church, they were incapable of doing the same concerning anything deemed to pertain to the relevant liturgical tradition—the "rite."[78]

2.4.3. "*Nationes*"

In the jurisprudence of Benedict XIV, the individual Eastern communities over which Eastern hierarchs presided did not constitute rites as understood in *Allatae sunt*. Further, they were not considered as Churches.[79] Rather, these communities were considered territorial, usually consisting of locally-defined ecclesiastical structures—dioceses, provinces, patriarchates.

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[77] Benedict XIV, *Demandatam*, §3: *Bullarium Benedicti XIV*, 1:129–130: "[...] specialiter iniungentes Ven. Fratri Patriarchae Antiocheno, ut eorum [rituum et morum] conservationi diligenter invigilent, ac provideat, ne ulla novitas (unde confusionis, ut plurimum, et scandali occasio) in ipsis introducatur: Permittentes solummodo eidem Patriarchae, et Episcopis Catholicis in propriis Dioecesibus facultatem corrigendi, atque extirpandi abusus, si quos, aut errore vulgi, aut schismaticorum dolo, sive saeculi vitio inter eos irrepsisse compererint; vel etiam aliqua peculiaria pietatis exercitia admittendi, ac probandi, si quae ad promovendam Fidelium religionem apta, et proficua prudenter in Domino iudicaverint." Cf. Giovanni Řezáč, *Institutiones Iuris Canonici Orientalis (ad usum privatum auditorum)* (Rome: PIO, 1961) 1:154: "Ipsis Patriarchis generatim et Episcopis orient. potestas legifera est adempta liturgiam quod attinet; permittitur ut corrigant et extirpent abusus et errores et permittant pietatis exercitia extra liturgica ad promovendam religionem fidelium apta."

[78] This absence of power would continue even into the twentieth century; note Gommarus Michiels, *Normae Generales Iuris Canonici: Commentarius Libri I Codicis Iuris Canonici* (Lublin: Universitas Catholica, 1929) 1:40: "Quo ex studio orta est illa disciplina iam a longo tempore vigens, quod Episcopis et Patriarchis orientalibus potestas legislativa in liturgias adimeretur, solique Romano Pontifici maneret reservata; inde etiam principium generale et fundamentale, quod Orientalibus non tantummodo est ius, sed et obligatio proprios servandi ritus, leges disciplinares quoque et consuetudines; a qua obligatione sola S. Sedes dispensare potest." The same author makes similar comments in *Principia Generalia de Personis in Ecclesia*, 2nd ed. (Paris/Tournai/Rome: Typis Societatis S. Ioannis Evangelistae, Desclée et Socii, 1955) 298.

[79] Cf. Kokkaravalayil, 300: "In the ecclesiology of this [post-reformation] period there was no room for a communion of different Churches. The faithful of the Eastern Catholic Churches were considered different groups following distinct liturgical rites. Thus they were distinguished as 'rite-people;' and the entity which they belonged to was *rite*, not Church." On the lesser importance Benedict XIV attributed to the individual Eastern communities as compared with rites, see Bassett, 54: "Between the diverse groups composing one of these generic rites disciplinary and liturgical variations were relegated to a minor role, in spite of the fact that these were the juridically independent communities, with their own proper hierarchies, regime and discipline."

Benedict XIV frequently (albeit not exclusively[80]) employed the term "*natio*" ("nation") to describe these communities.[81] While using a term such as "*natio*" suggested that these Eastern communities were "peculiar" in comparison with Latin jurisdictions, which were almost never called "*nationes*," such a distinction did not indicate a greater autonomy. *Nationes*, whether patriarchates, provinces, dioceses, or simple groups of Eastern faithful without proper jurisdictions like the Italo-Greeks, were not recognized as having a greater right of self-governance in comparison with Latin structures. Thus patriarchates, the most distinctive Eastern structures, were considered juridically equivalent to provinces. Other than certain rights or privileges established by ecumenical councils or the popes,[82] patriarchs possessed *per se* as much authority as metropolitans.[83] The synod of a patriarchate was likewise equivalent in authority to

[80] For example, Benedict XIV sometimes used "*natio*" to denote a group of persons sharing a common ethnic or cultural source. Note Benedict XIV, brief *Quemadmodum ingenti*, August 4, 1742, §2: *Opera Omnia*, 15:82: "[...] ita ab aliorum Nationis tuae Antistitum erroribus immunem [...]." The Coptic bishop entering communion with Rome was immune from the errors of other bishops of his *natio* (who, therefore, were not considered Catholic); hence, "*natio*" here does not mean a particular community of Catholics, but a group sharing a common heritage. In another case, the pope referred to the *Polonae Natio*; see *Inter plures*, §31: *Opera Omnia*, 15:384. Even if referencing groups of Catholics, using "*natio*" did not necessarily mean that the group was constituted as a juridically unified jurisdiction. The Italo-Greeks did not have their own hierarchy or jurisdictions during this time (although they did possess bishops for the sake of ordinations, confirmations, and other sacramental matters), yet they still were called a *natio*; see Benedict XIV, constitution *Ex pastorali munere*, August 15, 1754, §1: *Opera Omnia*, 17/2:201: "Graecorum Rituum conservationi, et integritati, pro Italo-Graecorum, et Graeco-Melchitarum Nationibus, abunde providimus."

[81] Kokkaravalayil, 308. The pope adopted the term from earlier jurisprudence. Bassett, 34 states concerning the post-Florence era: "It would seem that a deliberate effort was made to substitute other words, such as «*mos*», «*consuetudo*», «*natio*», etc., where rite had been used earlier." At p. 43 he cites Thomas à Jesu (1564–1627) as distinguishing different Eastern nations in his "De Procuranda Omnium Gentium Salute" published in the early seventeenth century (a copy of this work is found in Thomas à Jesu, *Omnia Opera Homini Religioso et Apostolico tam quo ad Vitae Activae, quam Contemplativae Functiones Utilissima* [Coloniae Agrippinae: Ioannes Wilhemus Friess Iunior, 1684] 1:1–371). Benedict XIV, in fact, cited the work in *Allatae sunt*, §19: *Bullarium Benedicti XIV*, 4:127. For a general discussion on the term "*natio*," see Joubeir, 32–33.

[82] One immediately thinks of the privileges established in constitution 5 of the Fourth Lateran Council (text in Tanner, 1:236). To this one can add the possibility of constituting and installing metropolitan bishops; see the response of the Sacred Congregation for the Propagation of the Faith of March 21, 1623: *Fonti*, 1/1:153, tolerating the practice as based in the First Council of Nicaea; Benedict XIV, *Apostolica praedecessorum*, §10: *Opera Omnia*, 15:143, allowing the Maronite patriarch to so act.

[83] The main distinction (aside from the aforementioned rights and privileges) was that metropolitans and primates would also be subject to patriarchs, whereas only diocesan bishops were subject to metropolitans. See Benedict XIV, *De Synodo Dioecesana*, 27 (2.4.6–7), where he stated that the Primate Archbishops of Bourges, who were

a provincial synod,[84] with the only apparent distinctions being its members, its presiding official, and the territorial extent of its authority.[85]

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permitted to use the title "patriarch" by Pope Nicholas I, recognized it to be merely honorary since "nunquam Patriarchalia iura sibi vindicare, iurisdictionemque in ceteros Primates ausi sunt exercere." For canonical commentary from the following centuries making such equivalencies, see Ioannes Devoti, *Institutiones Canonici*, 5th ed. (Gandae: A.I. vander Schelden, 1852) 182 (1.3.3.36): "Potestatem, quam metropolitae habent in Suffraganeos, eamdem fere a sacris canonibus habent patriarchae in metropolitas. Praecipua eorum iura et privilegia sunt, ut post summum Pontificem et cardinales sedeant, posteaquam ipsi a Pontifice acceperunt; ut crucem prae se ferant per universum tractum sui patriarchatus, nisi occurrat summus Pontifex, aut eius a latere legatus; ut a suis metropolitis ad eos appellatur"; Franz X. Wernz, *Ius Decretalium: Tomus II: Ius Constitutionis Eccles. Catholicae, Pars Secunda*, 3rd emended and augmented ed. (Prati: Officina Libraria Giachetti, Filii et Soc., 1915) 514: "Cum nostra aetate antiqui illi Patriarchae maiores cum plena sua iurisdictione patriarchali non amplius existant, iura et officia sedium patriarchalium etiamnunc existentium generatim potius praerogativis sedium metropolitanarum aequiparantur, et si quid praerogativae praeterea habent, id ex iure speciali uniuscuiusque sedis patriarchalis vel ritus est eruendum." Note also that the Latin West at this time had no concept of the major archbishop, treating such persons (like the Archbishop of Kiev) "ad instar Metropolitarum latinorum" (Isidorus I. Patrylo, *Archiepiscopi-Metropolitani Kievo-Halicienses*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 16 [Rome: Basilian Fathers, 1962] 115; cf. Orioli, 93).

One should also note that the form used for confirming the election of a patriarch did not differ much from that confirming the election of a metropolitan archbishop. See Benedict XIV, bull *Romani Pontificis*, March 28, 1757: *Iuspont*, 1/3:682 (confirming the election of Tobias El Khazen as Maronite patriarch): "Quocirca eisdem venerabilibus fratribus nostris Archiepiscopis et Episcopis suffraganeis ac dilectis filiis Capitulo et Vasallis Ecclesiae Antiochenae nationis praedictae ac clero et populo eidem civitatis et dioecesis Antiochenae eiusdem nationis per apostolica scripta mandantes, ut suffraganei tibi tamquam membra capiti obsequentes et Capitulum tibi tamquam Patri et Pastori animarum suarum humiliter intendentes, exhibeant tibi obedientiam et reverentiam debitas et devotas, ita, quod mutua inter te et ipsos suffraganeos gratia gratos sortiantur effectus, et nos eorum devotionem possimus propterea in Domino commendare." Compare with Alexander VII, bull *Romani Pontificis*, March 24, 1663, in Jean-Louis Brunet, *Le Parfait Notaire Apostolique et Procureur des Officialistés* (Paris: Claude Robustel, 1730) 1:439 (confirming the election of Hardouin de Péréfixe de Beaumont as Archbishop of Paris): "[...] necnon venerabilibus fratribus nostris universis suffraganeis ac dilectis filiis capitulo et vasallis dictae Ecclesiae Parisiensis, clero quoque et populo civitatis et dioecesis Parisiensis similiter mandantes, ut suffraganei tibi, tamquam membra capiti obsequentes, ac capitulum tibi tamquam patri et pastori animarum suarum, humiliter intendentes; exhibeant tibi obedientiam ac reverentiam debitas; ita quod mutua inter se [*sic*] et ipsos suffraganeos charitas gratos sortiatur effectus, et nos eorum devotionem possimus propterea in Domino merito commendare."

[84] The clearest examples from this pontificate concern the Maronites, particularly in references to the Synod of Mount Lebanon of 1736. See Benedict XIV, *Singularis Romanorum*, §3: *Opera Omnia*, 15:102: "[...] Synodum Provincialem, seu totius Nationis [...]" (§2 of the same document replaces *synodus* with *concilium*: "[...] Provinciale, seu totius Nationis Concilium [...]"). Similar statements are found in idem, *Apostolica Praedecessorum*, §1: *Opera Omnia*, 15:141; idem, brief *Apostolicae servitutis*, February 16, 1742: *Bullpont*, Appendix 2:97; idem, *Nuper ad sedandos*, §3: *Opera Omnia*, 15:287. Cf. idem, brief *Litterae fraternitatis*, February 19, 1742: *Iuspont*, 1/3:48 note, referring to the "Maronitarum provincia." Benedict XIV also referred to the synod as: "the provincial synod of your nation of the Maronites" (*synodus provincialis nationis vestrae Maronitarum*)— idem, brief *Non possumus satis aptis verbis*, July 20, 1746: *Iuspont*, 1/3:290; the "Lebanese provincial synod" (*synodus provincialis libanensis*)— idem, brief *Nemini Sane*, July 20, 1746: *Iuspont*, 1/3:294; and the "provincial synod held in 1736 at Mount Lebanon" (*Provincialis Synodus habita sub annum 1736. in Monte Libano*)—idem, *In superiori*, §2: *Opera Omnia*, 17/2:297. The idea of the Maronites constituting a mere province had a long history; see the comments of Cyril Vasil', "Chiese Orientali Cattoliche nella Ecclesiologica e nel Diritto della Chiesa Cattolica: Il cammino del CCEO," *Folia Canonica* 10 (2007) 124, citing a 1642 response of the particular congregation for the correction of the Greek Euchologion, itself citing Innocent III. The equivalency of patriarchate and province would continue into the pontificate of Clement XIII, with application to the Greek Melkites. Note his brief *Cum Nobis constiterit*,

Because these communities were not rites as understood in *Allatae sunt*, the laws issued by patriarchs, synods, and other relevant legislative organs, as well as laws given to these communities by the Roman pontiff, were laws limited by territory. Therefore, while a member of the Eastern faithful would be personally subject to general Eastern law and the relevant ritual discipline regardless of location, their subjection to "national" law would depend on their residence. For example, Benedict XIV noted that some presbyters of the Greek rite came from the East to Italy, and they argued that, because they were not actually Italo-Greek, they were not bound by the papal laws issued for the Italo-Greeks, specifically the prohibition of the administration of chrismation by presbyters.

> Another difficulty then emerges by which it is objected and asserted that, although it is admitted that the said laws must be observed by the Italo-Greeks, and the exercise of vigilance over them pertains to the office of the Latin bishops, nevertheless those Greeks who departed from the East and now live in the dioceses of Latin bishops are not included among them—because they would not really be Italo-Greeks, but true Eastern Greeks. For such Eastern Greeks, there are proper and particular laws, which not only have not been reprobated by the supreme pontiffs, but were actually preserved by them.[86]

Benedict XIV rejected this argument:

> The said Greek presbyters were considering themselves as temporary residents [*advenae*] and as such were denying that they were bound by the laws where they were, but that it was permitted for them in that place to use those laws that were customary in their own regions and, even more, were admitted and tolerated by the Roman pontiffs there (just as the matter held itself as pertained to the conferral of Chrism, which, as has been made clear to us, is administered even by simple priests with the tacit permission of the supreme pontiffs). Passing over the fact that even temporary residents are bound by the

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August 1, 1760: *Bullpont*, Appendix 2:227, authorizing a papal delegate to call a national-provincial synod for the Greek Melkites: "Quarto, facultatem impartimur convocandi Synodum Nationalem, et Provincialem [...]."

[85] See Benedict XIV, *De Synodo Dioecesana*, 2 (1.1.2): "*Nationalia* sunt, in quae conveniunt Archiepiscopi, et Episcopi unius regni, vel nationis, praeside eiusdem nationis Patriarcha, vel Primate. [...] *Provincialia* sunt, in quibus conveniunt Episcopi unius Provinciae sub eorum Archiepiscopo, seu Metropolitano."

[86] Ibid., 51 (8.5.32): "[A]lia iam deinceps difficultas emersit, per quam oppositum assertumque est, quamvis admitteretur, indicatas leges ab Italo-Graecis esse observandas, et ad Latinorum Episcoporum officium pertinere, ut super earundem observantia invigilarent; non tamen sub indicatis Constitutionibus Graecos illos comprehendi, qui ab Oriente profecti in Latinorum Episcoporum Dioecesibus viverent: quippe cum ipsi non quidem Italo-Graeci, sed veri forent Graeci Orientales. Huiusmodi autem Graecis Orientalibus proprias esse, ac peculiares leges, quae non modo a Summis Pontificibus non reprobatae, sed etiam praeservatae forent."

> laws of the place when they obtain domicile or quasi-domicile in that place (as was the generally case for the Greek presbyters we are talking about), and saying nothing other than that wanderers or vagabonds, who have no certain residence, are obliged to the laws of the place from the fact that just as such persons obtain domicile there, so also they obtain subjection to local laws, and that the Eastern presbyters we are concerned with were generally wanderers and vagabonds, it is still a true rule that vagabonds and temporary residents—whether they should acquire domicile or not, whether they are vagabonds or not—must observe the laws of the place where they are when from their transgression some grave disturbance of things would arise, as certainly would be the case, and in fact has begun to happen in Latin dioceses where, as Italo-Greek presbyters saw the sacrament of Chrismation administered by Eastern Greek presbyters, they little by little began to contend that the faculty of doing the same pertained to them.[87]

The pope did not consider the law on chrismation that these "Eastern Greek" presbyters followed in their homeland to be anything pertaining to a person; rather, it was a law of place. Eastern Greek presbyters who had obtained domicile or quasi-domicile in Italy could not appeal to the law of their homeland. Instead, such presbyters, being of the Greek rite, had to follow the law on chrismation established for the Greeks living in Italy.[88] This example clearly shows that only ascription to one of the rites of *Allatae sunt* was personal, while subjection to the laws of a specific jurisdiction was determined by territory. Any member of the Eastern faithful moving

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[87] Ibid., 52 (8.5.33): "Et quoniam praefati Graeci Presbyteri sese tamquam advenas reputabant atque utpote tales negabant legibus loci, ubi forent, ipsos teneri, sed sibi in eodem loco legibus illis uti licere, quae propriis in regionibus in more sunt, ac multo magis quae a Romanis Pontificibus in ipsis admissae sint, ac tolleratae, sicuti proprie se habet res in eo quod attinet ad Chrismatis collationem, quae tacita Summorum Pontificum permissione, quemadmodum ostensum nobis est, a simplicibus etiam Sacerdotibus administratur: in hoc quidem ut illud omittamus, etiam advenas loci legibus teneri, tum cum Domicilium, vel quasi Domicilium in eodem loco adepti sunt, sicuti de iis Graecis Presbyteris, de quibus sermo fuit, ut plurimum erat, itemque ne illud aliud dicamus, quod errones, seu vagabundi, quique certam sedem minime habent, ad loci leges obligati sunt, propterea quod, sicut in eodem Domicilium, ita etiam subiectionem localibus legibus nanciscuntur; et quod Presbyteri Orientales, de quibus agitur, errones ut plurimum, et vagabundi erant: vera quidem regula est, vagabundos et advenas, sive ii acquisiverint, sive non acquisiverint Domicilium, sive ii vagabundi, sive minime tales sint, loci illius leges ubi sunt, observare debere, quando ex earumdem transgressione gravis aliqua rerum perturbatio existat, quemadmodum certe factum foret, et sicuti iam Latinis in Dioecesibus fieri incipiebat, in quibus cum Italo-Graeci Presbyteri administrari sacramentum Chrismatis a Presbyteris Graecis Orientalibus viderent, paulatim et ipsi contendere incipiebant idem sibi faciendi facultatem adesse."

[88] Cf. Joubeir, 28, especially the quote from Herman, "De «Ritu» in Iure Canonico," 115–116. Herman asks: if an Italo-Greek moves to Greece, can he validly marry in the eighth degree of consanguinity (fourth by Latin calculation)? If rite is considered as in *Allatae sunt*—the liturgical traditions—the marriage would be valid, since Italo-Greeks are part of the Greek rite, and such marriages are not invalid for members of the Greek rite in Greece. If one constricts "rite" to a more modern understanding—Church *sui iuris*—the Italo-Greek (for whom such marriages are invalid) remains Italo-Greek regardless of his/her residence, so the marriage would be invalid.

from the territorial bounds of their community or *natio* of origin would no longer be subject to the laws of that community or *natio*.[89]

The concept of rite as laid out in *Allatae sunt* did factor into determining to which hierarch a member of the Eastern faithful would be subject and to which jurisdiction that member would belong. Eastern jurisdictions were of one of the four rites, and a person ascribed to a certain rite would belong to the jurisdiction of the same rite (and be subject to its hierarch) if such a jurisdiction existed where the person lived.[90] For example, a person ascribed to the Greek rite living in the Levant, where jurisdictions of various Eastern rites existed, would not be subject to a Syrian, Armenian, or Coptic hierarch, but only a Greek hierarch. As the relevant Greek hierarchs in the Levant were subject to the Melkite patriarch of Antioch, such a person would thereby constitute part of the Greek Melkite *natio*.[91] However, one must again note that only rite pertained to the person and traveled with the person everywhere; *natio* remained defined by residence in a particular territory. Therefore, if this "Greek rite" person in the example moved their residence from the Levant to a place in Eastern Europe where a Greek Ruthenian jurisdiction existed, the person would become subject to the Greek Ruthenian hierarch and

[89] Cf. Joubeir, 45 and 79, who notes that most canonists held Maronites domiciled outside of the province were not bound to the laws of the Synod of Mount Lebanon, and those who held the opposite opinion did so because they could not conceive of faithful being bound by no law. He adds: "La division territoriale de la hiérarchie ne cadrait pas avec la division des fidèles et les conséquences s'en faisaient sentir."

[90] The development of the "ordinariate" for *all* Eastern Catholics came much later than the pontificate of Benedict XIV.

[91] Cf. Benedict XIV, brief *Dum nobiscum*, February 29, 1744, §1: *Opera Omnia*, 15:349, talking about the constitution *Demandatam* sent "ad Venerabiles Fratres Patriarcham Antiochenum Graecorum Melchitarum, et ad omnes *huius Ritus* Catholicos Episcopos *huic Patriarchae subiectos*" (emphasis added). Being part of the Greek Melkites required one to have the same rite (Greek, and not, e.g., Syrian) and to be subject mediately or immediately to the same hierarch (Melkite patriarch, and not, e.g., the Ruthenian metropolitan). I disagree with Bassett, 7 note 38, stating that Benedict XIV "often used the terms «rite» and «nation» interchangeably," citing the use of "ritus, et nationis" in *Demandatam*. If the words were totally interchangeable, Benedict XIV would have used a phrase like "ritus, *seu* nationis." Cf. ibid., 30, where Bassett uses the phrase "Graecorum et Ruthenorum" to argue that Greeks are thereby distinguished from Ruthenians.

constitute part of the Greek Ruthenian *natio*. Ritual ascription combined with residence determined the jurisdiction to which one belonged and the hierarch to which one was subject.[92]

While this system was generally adequate for the timeframe when Benedict XIV was pontiff, an incongruity must be noted. While Benedict XIV had twice referred to a "Maronite rite" in legislation issued early in his pontificate,[93] under his later systemization in *Allatae sunt*

[92] See the comments in Herman, "De «Ritu» in Iure Canonico," 115, stating that jurisdiction derives from ritual ascription but also depends on location, and the later reflections on the matter by Clement Pujol, "Distinctio inter «Ritum» et «Iurisdictionem»," *Periodica* 70 (1981) 193–219.

In my opnion, the current terminology used to designate many of the modern Churches *sui iuris* (e.g., "Ukrainian Greek Catholic Church") derives from combining rite as understood in *Allatae sunt* (in the example, Greek) and local community or *natio* (Ukrainian). Such a system appears in the listing of Eastern Catholic communities in the *Annuario Pontificio 1864* (Rome: Typografia della R.C.A., 1864) 53–55; cf. Michael W. Dziob, *The Sacred Congregation for the Oriental Church*, Canon Law Studies 214 (Washington, D.C.: Catholic University of America, 1945) 58–59. Also note Udalricus Beste, *Introductio in Codicem*, 3rd ed. (Collegeville: St. John's Abbey, 1946) 51, whose distinction of "canonical rites" (i.e., individual communities) follows this system of terminology exactly. Joubeir, 34 attributes the "périphrases" to the inability of a national qualifier to explain fully the ecclesial state of a Christian; it no longer sufficed to speak of a "Ruthenian," but one had to speak of a "Ruthenian of the Greek rite" or a "Latin Ruthenian." Cf. George Nedungatt, *The Spirit of the Eastern Code* (Rome/Bangalore: Centre for Indian and Inter-religious Studies/Dharmaram Publications, 1993) 79–80 note 34, noting the terminological issues involved with the two Eastern Churches based in India.

A review of websites for Eastern Catholic Churches found the following usages of this style, with "Byzantine" in place of "Greek" in some cases (all websites accessed October 2, 2017): "Ukrainian Greek-Catholic Church" (in Ukrainian—http://www.ugcc.org.ua/); "The Syro-Malankara Catholic Church" (http://www.majorarchdioceseoftrivandrum.com/home/);"Syro-Malabar Church" (http://www.syromalabarchurch.in/); "Romanian Church United with Rome, Greek-Catholic" (in Romanian—http://www.bru.ro/); "Byzantine-Ruthenian Catholic Church" (http://www.eparchyofpassaic.com/history.htm; note, however, that this Church otherwise refers to itself simply [but confusingly] as the "Byzantine Catholic Church": http://www.archpitt.org/history/). The phrase "Melkite-Greek Catholic Patriarchate" (http://www.pgc-lb.org/eng/home) has a more complex history. Benedict XIV attributed the term "Greek" to the Melkites' involvement in the schism of the Greeks, not specifically to the rite they used; see allocution *Magnus Pontifex*, February 3, 1744: *Opera Omnia*, 15:643.

It is also interesting to note that Wikipedia (http://en.wikipedia.org), while certainly not a scholarly cite, also uses this terminology in its individual English pages for some of the other Eastern Catholic Churches: "Albanian Byzantine Catholic Church," "Belarusian Greek Catholic Church," "Bulgarian Greek Catholic Church," "Greek Catholic Church of Croatia and Serbia" [or "Greek Catholic Church of Croatia, Slovenia, Bosnia-Herzegovina and Serbia"], "Greek Byzantine Catholic Church," "Hungarian Greek Catholic Church," "Macedonian Byzantine-Catholic Church," "Russian Greek Catholic Church," "Slovak Greek Catholic Church," and "Syriac Maronite Church."

[93] In *Demandatam*, §12: *Bullarium Benedicti XIV*, 1:131 (issued in 1743), the pope wrote of transfer "a Graeco ad Maroniticum Ritum." In the bull *Praeclaris*: *Iuspont*, 1/3:279 (issued in 1746), similar reference was made to "il passaggio al rito maronita" by Greeks. Both Bassett, 53 and Kokkaravalayil, 308 note this inconsistency. This may be the reason that Petrani, *De Relatione Iuridica inter Diversos Ritus in Ecclesia Catholica*, 2 lists "Maroniticus" as a separate "primary rite" (#5).

the Maronites would be ascribed to the Syrian rite,[94] while the Maronite community itself constituted an individual community or *natio*. However, there were other members of the Syrian rite—former "Jacobite" Syrian Christians who had come into communion with the Catholic Church—present in areas subject to the Maronites, but seemingly constituting their own separate community.[95] Neither rite (as understood in *Allatae sunt*) nor residence would distinguish such Syrians from Maronites; some other factor had to be involved.[96] However, with the lack of a substantial Syrian Catholic community at the time of Benedict XIV, there were few practical situations in which the question concerning this distinguishing factor could be pursued further.[97]

The multi-tiered ecclesio-canonical approach of Benedict XIV towards Eastern communities had a significant but mixed impact on the recognition of Eastern juridic autonomy in the Catholic Church. With the concepts of "Eastern Church" and Eastern "rites," the pope recognized that Eastern law was not a simple local variation akin to customs of local Latin communities, but constituted elements defining a Christian's relationship to the law and subjection to hierarchs. Members of the Eastern Church, as determined by ascription to an

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[94] Benedict XIV, drawing on previous jurisprudence, considered the Syrian rite and the Chaldean rite to be the same, with the rite of the Maronites being a simple localization of the Syrian/Chaldean rite. See especially his *De Ritibus*, 12 (2.16), referencing a priest and bishop ordained "ritu Syriaco Maronitarum,"and using the phrases "ritu Syriaco et Chaldaico" twice (once via quotation), "ritu Syriaco et Chaldaico" once (via quotation), and "Maronitico ritu" once (in foregoing cases, the use of "et" indicates that the adjectives are somehow distinct but, since "ritu" is singular, a single underlying element is being referenced). In the previous century, the Sacred Congregation for the Propagation of the Faith had considered liturgy of the Maronites as a variant of the Syrian/Chaldean rite; permission was given to "Jacobite" bishops to use the Maronite Missal to celebrate the Chaldean rite. See the responses of June 22 and June 29, 1633: *Fonti*, 1/1:429–431.

[95] Benedict XIV, brief *Singularis Romanorum*, September 1, 1741, §4: *Opera Omnia*, 15:102 specifically notes two Syrian bishops present at the 1736 Synod of Mount Lebanon, distinguished from the fourteen Maronite bishops (and two Armenian bishops). Cf. idem, *De Ritibus*, 56 (8.5.39), referencing professions of faith made "a Patriarcha Syrorum Aleppi, et ab Archiepiscopo Syrorum item Aleppi" in 1665.

[96] Bassett, 80 and 248–249 notes that ethnicity cannot, strictly speaking, be involved in the constitution of a "canonical rite" (i.e., an individual community or nation), since ascription occurs regardless of a person's ethnicity. For a discussion of the "ethnic" nature of Eastern communities, see Victor J. Pospishil, *Ex Occidente Lex* (Carteret: St. Mary's Religious Action Fund, 1979) 71–72.

[97] The "Jacobite" Archbishop of Aleppo, Michael Giarve, entered communion with Rome in 1783, after the pontificate of Benedict XIV; with this act, the Syrian Catholic Church gained stability with an uninterrupted line of patriarchs. See Pius VI, bull *Romani Pontificis*, January 1, 1783: *Iuspont*, 1/4:270–273.

Eastern rite, were generally exempt from papal law (which, as a rule, was intended only for the Western Church) and were subject to a separate body of Eastern law. Even if the pope would argue that the Latin/Roman rite had a certain preeminence over all other rites,[98] he held that other rites also existed, which were at least equal in their nature to the Latin rite.[99] However, by determining that Eastern hierarchs presided over individual communities or *nationes*, which were equated to Latin structures and subordinated to the Eastern Church as a whole as well as the individual rites, the self-governing capacity of the individual communities was rather limited *de iure*; hierarchs and synods could alter neither Eastern law nor the law of their rite without the intervention of the Roman pontiff.[100]

[98] This is the famous theory of *praestantia ritus latini*. The key texts are Benedict XIV, *Etsi pastoralis*, §2, n. 13: *Bullarium Benedicti XIV*, 1:76 (specifically comparing the Latin and Greek rites); Benedict XIV, *Allatae sunt*, §20: *Bullarium Benedicti XIV*, 4:127 (declaring the preeminence of the Latin rite over all other rites). While Benedict XIV did not invent the principle of *praestantia ritus latini* (Jan Krajcar, "Benedetto XIV e l'Oriente Cristiano," in *Benedetto XIV (Prospero Lambertini), Convegno Internazionale di studi storici sotto il patrocinio dell'Arcidiocesi di Bologna, Cento, 6–9 Dicembre 1979*, ed. Marco Cecchelli [Ferrara: Centro Studi «Girolamo Baruffaldi», 1981] 1:498), and instances of this idea existed prior to Benedict XIV (notably Cardinal Santoro wrote in the late sixteenth century to the Archbishop of Messina that the Latin rite was *securior et perfectior*; see Alexius Petrani, "An Adsit Ritus Praestantior," *Apollinaris* 6 [1933] 75; Řezáč, *Institutiones Iuris Canonici Orientalis* 145; Vasil', "Chiese Orientali Cattoliche nella Ecclesiologica e nel Diritto della Chiesa Cattolica: Il cammino del CCEO," 143; and Ivan Žužek, "Incidenza del *Codex Canonum Ecclesiarum Orientalium* nella storia moderna della Chiesa universale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 [Rome: PIO, 1997] 284), its specific canonical formulation and later prominence can be attributed to him. For an extensive study of Benedict XIV involving this theory, see Henricus L. Hoffmann, *De Benedicti XIV Latinisationibus*, Extractum e Periodico «Apollinaris» Annus XXVII (1954) Num. 1–2; see also the briefer analysis found in Vasil', "Chiese Orientali Cattoliche nella Ecclesiologica e nel Diritto della Chiesa Cattolica: Il cammino del CCEO," 142–145.

[99] Cf. St. John Chrysostom quoted in St. Thomas Aquinas, *Catena Aurea*, English translation (London: Baronius, 2009) 1:173 (commentary to Mt 5:20–22): "And see how even herein He confirms the Old Testament that He compares it with the New, for the greater and the less are always of the same kind." Even if the Latin rite was held to be preeminent, by listing it alongside other rites it was made clear that these other rites had a juridic nature identical to the Latin rite, and were not simply undefined assortments of customs tolerated by popes. Note also Benedict XIV, *Allatae sunt*, §48: *Bullarium Benedicti XIV*, 4:136: "[...] exoptans vehementer, ut diversae eorum Nationes conserventur, non destruantur, omnesque (ut multa paucis complectamus) Catholici sint, non ut omnes Latini fiant."

[100] The limitation is *de iure* since *de facto* the individual communities had a broader scope for legislation compared with Latin communities; by virtue of the Pamphilian jurisprudence, the Latin communities would be bound by papal laws not binding the Eastern communities.

2.5. Interim: Clement XIII to Gregory XVI

None of the pontiffs following Benedict XIV took as great an interest in Eastern matters as he had until Pius IX; as a result, there is little thorough jurisprudence on the question of Eastern autonomy.[101] Nevertheless, certain practical decisions should be noted.

Soon after the death of Benedict XIV, several new Eastern jurisdictions— Mukacheve, Gran Varadino, and Križevci—were established by his successors, despite initial opposition.[102] In the establishment of Mukacheve, Pope Clement XIV explicitly referenced the community's desire to be governed by a bishop of their own rite instead of the Latin Bishop of Eger, implying such a desire to be a legitimate basis for the establishment of an Eastern jurisdiction:

> God granting it, the number of that people deserting schism has grown so much that they most especially desire to be ruled and governed by a Catholic bishop of their own rite, and enjoy the comfort of a proper pastor, and be protected by this defense from the

[101] The closest to such in-depth jurisprudence I have found comes in a letter of Pius VI to the patriarchs, archbishops, bishops, and other secular and religious ecclesiastics of the Eastern Church concerning an Arabic translation of the Roman Catechism (*Catholicae Communionis*, May 24, 1787: *Iuspont*, 1/4:318–319; cf. Bassett, 55). The pope acknowledged the distinction between East and West concerning rites and ceremonies, reassuring these ecclesiastics of the Roman See's support of them despite the catechism focusing on Roman usages. Otherwise, one only finds simple acknowledgement of separate laws and customs, without jurisprudential discussion on the distinction. For example, see Pius VI, letter *Assueto paternae*, April 8, 1775, §2: *Iuspont*, 1/4:207: "Cum autem non una eademque festorum celebrandorum ratio inter latinos vigeat ac graecos ritus uniti [...]."

[102] Clement XIII had opposed the establishment of a Greek see in Mukachevo; the policy was reversed by Clement XIV. Pius VI initially opposed Greek sees for Zagreb and Gran Varadino, but later relented, establishing Gran Varadino and (in place of Zagreb) Križevci. For Mukachevo, see the following documents: Clement XIII, letters *De Episcopo*, June 11, 1766, and *Dudum a fraternitate*, November 14, 1767: *Iuspont*, 1/4:154–155 note 1; idem, letter *Magno cum animi*, July 13, 1768: *Iuspont*, 1/4:154–156; Clement XIV, letters *Litteras fraternitatis*, October 10, 1770, and *Etsi in gravissimam*, November 17, 1770: *Iuspont*, 1/4:175–176 note 1; idem, letter *Vix intelleximus*, November 24, 1770: *Clementis XIV Pont. Max. Epsitolae et Brevia Selectiora*, ed. Augustinus Theiner (Paris: Firmin Didot Brothers, 1852) 129–130; idem, constitution *Eximia regalium*, September 19, 1771: *Iuspont*, 1/4:175–179. For Gran Varadino and Križevci, see Pius VI, letter *Statim responsum*, November 30, 1776: *Iuspont*, 1/4:221–222; idem, letters *Tandem a nobis*, April 19, 1777, and *Maximo apud*, June 27, 1777: *Iuspont*, 1/4:223–224 note 1; idem, bull *Charitas illa*, June 17, 1777: *Iuspont*, 1/4:223–227. For the political context of these decisions, see John-Paul Himka, "The Greek Catholic Church and Nation-Building in Galicia, 1772–1918," in John-Paul Himka, *The Greek Catholic Church and Ukrainian Society in Austrian Galicia* (Cambridge: Ukrainian Studies Fund of Harvard University, 1986) 426–429 (note that this is the first article in the book [a collection of offprints], despite the page numbers).

> cunnings of the schismatics, who strive to remove them from the bosom of holy mother Church and quickly lead them into their own errors.[103]

The ritual distinction between peoples was acknowledged as a valid basis for a jurisdictional distinction between peoples, overcoming the prohibition of multiple jurisdictions in the same city established at the Fourth Lateran Council.[104] However, one notes that such jurisdictions are considered according to the concepts of rite used by Benedict XIV. Both Mukachevo[105] and Križevci[106] were established as simple "Greek" dioceses, their subjects not being limited to certain preexisting ethnic groups but extending to all members of the Greek rite living within their boundaries.

Several decades later, Pope Gregory XVI signaled his respect for Eastern discipline and stated his belief that Eastern hierarchs were sometimes more suitable for solving problems in their own communities than the pope or Roman officials were.

> We wish to commit to you [the Greek Melkite patriarch], rather than retain for ourselves, the election of the said archbishop [of Furzol], so that it is made clear that the Apostolic

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[103] Clement XIV, *Eximia regalium*, §1: *Iuspont*, 1/4:176: "[...] cumque Deo dante illius gentis numerus schisma deserentis adeo succreverit, ut ipsi a catholico sui ritus Antistite regi et gubernari, ac proprii pastoris solatio frui et praesidio tueri adversus schismatorum versutias, qui e sanctae matris Ecclesiae sinu eos divellere et in suos errores traducere saepe numero adnituntur, maxime desiderent."

[104] Fourth Lateran Council, constitution 9: text in Tanner, 1:239. Clement XIII had appealed to this rule when he rejected establishing Mukachevo as a Greek see: Clement XIII, *Magno cum animi*, §2: *Iuspont*, 1/4:155.

[105] While the pope did take into consideration the *ruthenorum graeci ritus uniti natio* (Clement XIV, *Eximia regalium*, §3: *Iuspont*, 1/4:177), the authority of the new bishop extended "in graecos omnes unitos" (ibid., §3) and "populum Ruthenorum graeci ritus uniti, *aliosque qui eosdem ritus, et unionem sequentur*" (ibid., §6, emphasis added). The new bishop's jurisdiction was not limited to Greek *Ruthenians*.

[106] The bull establishing Križevci likewise did not limit jurisdiction to a particular group, but spoke simply of jurisdiction "in graecos omnes unitos" (Pius VI, *Charitas illa*, §3: *Iuspont*, 1/4:225). I have not found a copy of the bull erecting Gran Varadino, but one should note the later bull of Pius VI, *Ingeniosa personarum*, August 6, 1780, §4: *Iuspont*, 1/4:253, using the phrases "Graeco-Catholicus episcopatus" and "dioecesa graeco-catholica," which suggest that the bishop's jurisdiction was not limited to a subset of members of the Greek rite. In this regard, also note the November 26, 1853 bull *Apostolicum ministerium* establishing the Eparchy of Lugoj (now considered part of the Romanian Church), which described the jurisdiction of the bishop as "in Romenos omnes graeci ritus catholici uniti aliosque, qui eosdem ritus et unionem sequuntur." The broad phrasing in the second half was viewed by the compilers of the *Fonti* as evidence that "iurisdictio non [est] nationalis, sed in omnes eiusdem ritus et disciplinae" (*Fonti*, 1/2:263).

> See most willingly takes the type of policy that seems more in conformity with the discipline of the Eastern Churches without damage to ecclesiastical laws.[107]
>
> Indeed, because of the higher principality of this [Roman] see we can determine those things that we have judged more useful for peace in the Church of Hierapolis of the Maronites. However, we preferred to offer a new argument to you of our benevolence towards you and of the zeal that we employ so that, as can be done without detriment to ecclesiastical affairs, the legitimately-established hierarchical order and discipline in each Eastern Church be protected. Therefore you yourself, venerable brother [the Maronite patriarch], shall order Paul Arutin the Maronite Archbishop of Hierapolis to come to Mount Lebanon and remain in a monastery designated by you until he should purge himself of the charges of which he is accused, in the meantime providing a qualified ecclesiastic to whom the goods of the Church of Hierapolis are to be committed for temporary administration.[108]

These words indicate that while the Roman pontiff possessed supreme authority and therefore could act in any ecclesial matter, even in the Eastern Church, it sometimes was better to leave matters to be treated according to the internal discipline of Eastern Church and refrain from direct intervention.

Finally, one must note the 1838 decree of the Sacred Congregation for the Propagation of the Faith, establishing a rule governing transfer of Catholics from one Eastern rite to another:

> Of the Easterners, some, like the Armenians and Maronites, use azymes for the Eucharist like the Latin Church, but others, namely the Melkites, Chaldeans, Syrians, and Copts, use fermented bread. Hence, let no one transfer without the approval of the Apostolic See from a rite in which azymes are used to a rite in which the Eucharist is confected in fermented bread. The same shall be observed regarding transfer from a rite in which fermented bread is used to a rite in which the use of azymes is required. However, when

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[107] Gregory XVI, brief *Cum Ecclesia*, December 24, 1831, §2: *Iuspont*, 1/5:29: "Hoc tibi potius committere voluimus, quam nobis ipsis praedicti Archiepiscopi electionem reservare, ut palam fiat Apostolicam Sedem libentissime id consilii capere, quod sine ecclesiasticarum legum damno ecclesiarum Orientalium disciplinae magis conforme videatur."

[108] Gregory XVI, brief *Summis saepe*, December 24, 1831, §§2–3: *Iuspont*, 1/5:28–29: "Possumus quidem propter potiorem sedis huius principalitatem ea decernere, quae ad pacem in ecclesia Maronitarum Hierapolitana utiliora in Domino iudicavimus, sed maluimus novum tibi argumentum praebere, et benevolentiae nostrae erga te et studii quo satagimus, ut quoad fieri poterit sine ecclesiasticarum rerum detrimento hierarchicus in unaquaque orientali ecclesia legitime statutus ordo et disciplina servetur. Quare tu ipse, venerabilis frater, Archiepiscopum Hierapolitanum Maronitam Paulum Arutin ad montem Libanum venire iubebis, et in monasterio a te designando manere, donec se purget a criminationibus de quibus accusatur, proviso interim de idoneo viro ecclesiastico cui Hierapolitanae ecclesiae res administrandae interim committantur."

> there is no such disparity of material in the Eucharist between the two rites involved in the change, the consent of the two bishops *a quo* and *ad quem* suffices.[109]

The decree suggested that Maronites were distinguished from Syrians by "rite," even though, according to the listing of rites in *Allatae sunt*, both the Syrians and the Maronites would be ascribed to the Syrian rite. William Bassett rightly asks:

> Would a Maronite who adopted the entire law, discipline and way of life of the Syrians, subjecting himself to their hierarchy, be changing rites? The generic liturgy is the same. Or in forbidding such a change could it be said that this was forbidding a change of rite? One wonders about the relationship of the [provision of] «*Allatae sunt*» of Pope Benedict XIV to this subsequent piece of legislation.[110]

As practical decisions like this 1838 decree appeared to consider the individual communities or *nationes* the relevant juridic unit, not the rites of *Allatae sunt*,[111] a reappraisal of the canonical philosophy concerning the Eastern Church started to take place. Combined with an increased interest in the codification and clarification of canon law, major changes in the understanding of the juridic and ecclesial nature of the Eastern communities would happen during the pontificate of Pius IX.

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[109] Sacred Congregation for the Propagation of the Faith, decree *Cum sacra*, November 20, 1838: *Iuspont*, 2:503: "Ex orientalibus nonnulli, uti sunt Armeni et Maronitae, cum Ecclesia Latina pro Eucharistia utuntur azymo, alii vero fermentato, Melchitae nimirum, Chaldaei, Syri, et Cophti: nemo proinde a ritu in quo fit usus azymi, transire valeat ad ritum in quo conficitur in fermentato, absque beneplacito Sedis Apostolicae, idemque erit servandum circa transitum ex ritu in quo adhibetur fermentatum, ad ritum in quo praecipitur usus azymi. Cum autem inter duos ritus permutandos non adest praefata materiae in Eucharistia disparitas, sufficiat consensus duorum Episcoporum a quo et ad quem fit transitus." For Eastern Christians coming into communion with the Catholic Church, they could choose whichever Eastern rite they preferred: "Haec pro illis sunt constituta qui iamdiu catholicam fidem profiteantur; quod vero ad haereticos et schismaticos pertinet, qui ad Ecclesiae sinum redeunt, permittendum censuit sac. Congregatio ut orientalem ritum, qui magis iis placuerit, amplecantur" (ibid.).

[110] Bassett, 56–57.

[111] Besides the reference to the Maronites, one notes that the "Greeks" are not referenced in the decree, but the Melkites are, and that Chaldeans are distinguished from Maronites and Syrians.

2.6. Conclusion

The jurisprudence of Benedict XIV greatly impacted the evolution of how Eastern communities were understood in canon law. With his adherence to the Pamphilian jurisprudence (albeit without officially approving it), the pope gave greater strength to the opinion that Eastern faithful were, for the most part, not the intended subjects of papal legislation, and thus were generally not bound to it. Formulating a multi-tiered approach to the Christian East in response to practical problems, the pope allowed members of the "Eastern Church" to be defined not by territorial subjection but by personal ascription to one of four Eastern rites. However, this approach allowed the individual Eastern communities to be viewed as identical in nature to Latin ecclesiastical jurisdictions. Ritual ascription was personal, and as a rule remained with a person regardless of where they took up their residence—a Greek was always a Greek even in Italy, a Latin was always a Latin even in Armenia, and so on. On the other hand, membership in a particular community— *natio*—depended on residence in a particular territory—a Greek in the Levant was part of the Melkite *natio*, a Greek in Eastern Europe was part of the Ruthenian *naito*, and so on. Further, Eastern hierarchs, whether individually or in a synod, were incapable of altering any law considered to pertain to the Eastern Church as a whole or to one of the four Eastern rites without the intervention of the Roman pontiff.

Unfortunately, the emphasis on "rite" in this approach would lead to detrimental effects. As an urge to organize and codify canon law swept through the Church, the laws of the Eastern communities came to be seen not simply as exceptions but dangers. The varied norms among the Eastern communities, the lack of systemization, and the contradiction of Eastern laws to the "general" law of the Church all fed into the idea that only the rites—strictly interpreted as

sacramental and liturgical matters—were to be protected by the popes; Eastern discipline had been merely tolerated until a better situation allowed reform. The wholesale rejection of Eastern discipline as something proper to the Eastern communities, combined with the overemphasis of papal primacy, would lead to attempts to limit Eastern autonomy in the pontificate of Pope Bl. Pius IX.

CHAPTER 3

Attempted Constrictions of Eastern Autonomy under Pius IX

3.1. Introduction

The purpose of this chapter is to study how the understanding of the juridic autonomy of the Eastern communities developed during the pontificate of Pope Bl. Pius IX (1846–1878). His pontificate was, in many ways, a key transitional point in the history of the Church: the Papal States were lost, modern liberalism was opposed, and the primacy and infallibility of the pope were defined. The desire for clarity and uniformity in canon law also grew strong during this time. As the existence of a distinct Eastern ecclesiastical discipline—or rather, multiple Eastern disciplines that, at times, contradicted one another—ran counter to such a desire for clarity and uniformity, it is no surprise that attempts were made to reduce such variety to "standard" Catholic canon law—the law of the Latin Church.

This chapter is divided into three sections. The first section briefly discusses two important interactions of Pius IX with Eastern communities prior to 1867, the year in which the pope publicly announced his intention to convoke an ecumenical council and issued the bull *Reversurus*, which imposed new laws on the Armenian Catholic community. The second section focuses on the First Vatican Council, reviewing the strong desires among many council fathers to reduce the juridic autonomy of the Eastern communities and impose disciplinary uniformity throughout the entire Church, and the opposition raised by several Eastern hierarchs to these desires. Finally, the third section will discuss the significant juridic interventions of Pius IX into two Eastern Catholic communities—the Armenians and the Chaldeans.

3.2. Two Initial Approaches of Pius IX to the Eastern Communities

Pope Pius IX, born as Giovanni Maria Mastai-Ferretti on May 13, 1792, was elected as successor to Gregory XVI on June 16, 1846. Only one and a half years into his pontificate, he turned his attention to the Eastern communities. On January 6, 1848, in the letter *In suprema*, he announced to Eastern faithful the appointment of Innocenzo Ferrieri, titular bishop of Side, as his representative to the Ottoman emperor.[1] Besides praising the Christian East[2] and appealing to Eastern non-Catholics to return to communion with the Roman Church,[3] the pope commented on the Eastern Catholic communities themselves, and specifically their rite and discipline.

> Yet since it has been related to us that, among other things, in the ecclesiastical rule of your nations there are certain things that, because of the chaos of that aforementioned time,[4] remain as yet uncertain or less than aptly constituted, we indeed will be freely present with our apostolic authority, so that all may be rightly composed and ordered according to the norm of the sacred canons, observing the institutes of the holy fathers. But we will conserve your particular Catholic liturgies, which we highly esteem despite their difference in many things from the liturgy of the Latin Churches. Indeed, your liturgies have equally been held as valuable by our predecessors, as they are commended by the venerable antiquity of their origin, are written in the languages that the Apostles or Church fathers had used, and contain rites to be celebrated with a certain splendid and

[1] Pius IX, letter *In suprema*, January 6, 1848: *Iuspont*, 1/6 part 1:48–53. The actual appointment of Ferrieri was made in Pius IX, brief *Ecclesiarum omnium*, December 14, 1847: *Iuspont*, 1/6 part 1:47–48.

[2] Pius IX, *In suprema*, §1: *Iuspont*, 1/6 part 1:48–49.

[3] Ibid., §§7–12: *Iuspont*, 1/6 part 1:50–53. Constantin G. Patelos, *Vatican I et les évêques uniates: Une étape éclairante de la politique romaine à l'égard des Orientaux (1867–1870)*, Bibliothèque de la Revue d'Histoire Ecclésiastique 65 (Louvain: Éditions Nauwelaerts, 1981) 38 considers *In suprema* the first unionist encyclical of the modern papacy. The response to the papal appeal signed by the Orthodox patriarchs of Constantinople, Antioch, Alexandria, and Jerusalem with their synods was extremely negative, seeing the addition of the *filioque* as the beginning of the heresy of the papacy and warning the Orthodox faithful to reject such overtures. The text of this response is found in Mansi, 40:377–418, attributed to the Synod of Constantinople of May 1848; commentary is provided in Patelos, 41–43.

[4] The "aforementioned time" references the Eastern schism and rise to power of non-Christians in the East, leading to "multiplices calamitates, et diuturna eorum praesertim temporum pericula" (Pius IX, *In suprema*, §1: *Iuspont*, 1/6 part 1:48–49).

> magnificent grandeur, through which the piety and reverence of the faithful is fostered towards the divine mysteries.[5]

Pius IX made a distinction between Eastern liturgies—the rite—and Eastern ecclesiastical rule—the discipline. Such a distinction, particularly the limitation of "rite" to liturgical matters, was based on the earlier jurisprudence of Benedict XIV, as noted by William W. Bassett:

> The separation of rite from discipline in its primary signification was accepted by the successors of Pope Benedict XIV. [...] The constitutions and responses of the Roman Pontiffs since the time of Pope Benedict XIV referring to the immutability of the oriental rites and promising their preservation canonized a difference between rite and discipline and codified different principles governing each. The full cycle of this development was reached in Pope Pius IX. Not only did he act upon this conviction and interpret previous pontifical law from the exclusive viewpoint of liturgical connotation, but on at least two solemn occasions he explicitly affirmed that the concept of rite absolutely does not mean anything else. [...] Concerning the solicitude of the Holy See for the preservation of the rites there are a number of documents clearly illustrating that throughout the term of his pontificate Pope Pius IX was consistent in applying this merely to the intention of respecting the liturgies.[6]

In *In suprema*, the pope stated that Eastern liturgies were "commended," while in Eastern discipline some things remained "as yet uncertain or less than aptly constituted"; the former would be "conserve[d],"[7] while in the latter, in a state of chaos, would be "rightly composed and

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[5] Ibid., §3: *Iuspont*, 1/6 part 1:49: "Quare cum inter alia relatum ad nos sit, in regimine ecclesiastico vestrarum nationum quaedam esse, quae ob anteacti temporis calamitatem incerta adhuc manent vel minus apte constituta, libenter equidem aderimus auctoritate nostra apostolica, ut ad normam sacrorum canonum, servatisque SS. Patrum institutis, rite omnia componantur et ordinentur. Omnino autem sartas tectas habebimus peculiares vestras catholicas liturgias; quas plurimi sane faciamus, licet illae nonnullis in rebus a liturgia ecclesiarum latinarum diversae sint. Enimvero liturgiae ipsae vestrae in pretio pariter habitae fuerunt a praedecessoribus nostris; utpote quae et commendantur venerabili antiquitate suae originis et conscriptae sunt linguis, quas Apostoli aut Patres adhibuerant, et ritus continent splendido quodam ac magnifico apparatu celebrandos, quibus fidelium erga divina mysteria pietas et reverentia foveatur." *Sarta tecta* is a technical phrase meaning "in good repair"; see Henry John Roby, *An Introduction to the Study of Justinian's Digest* (Cambridge: University Press, 1884) 60–61. Thus, "to hold/keep in good repair" means to conserve.

[6] William W. Bassett, *The Determination of Rite*, Analecta Gregoriana 157 (Rome: Gregorian University Press, 1967) 55, 58–59 (the two "solemn occasions" will be discussed later in this chapter relative to the Armenian crisis, 3.4.1). Note that Pius IX explicitly cited *Allatae sunt* in *In suprema*, §4: *Iuspont*, 1/6 part 1:49–50.

[7] Note also Pius IX, *In suprema*, §11: *Iuspont*, 1/6 part 1:52–53: "Hinc ad vestros sacros ritus quod attinet, reiicienda solummodo erunt, si quae in illos separationis tempore irrepserint, quae eidem fidei et unitati catholicae adversentur: atque his demptis, sartae tectaeque vobis manebunt veteres liturgiae vestrae orientales; quas pro illarum venerabili antiquitate et ceremoniis ad fovendam pietatem idoneis apud nostros decessores in pretio fuisse, atque a nobis pariter plurimi fieri in priori harum litterarum parte iam declaravimus." The pope stated only that liturgies would be conserved for those returning to communion with Rome; nothing was said of discipline. Cf. idem, allocution *In*

ordered."[8] Thus, Pius IX viewed Eastern ecclesiastical discipline as defective in some manner and in need of correction. While these statements had no immediate practical effects, they established the jurisprudential philosophy according to which the pope would later act towards Eastern communities.

Almost exactly fourteen years after *In suprema*, Pius IX established a section of the Sacred Congregation for the Propagation of the Faith dedicated solely to Eastern matters.[9] A council of cardinals and prelates, which had been established by the pope and entrusted to study how best to aid the Churches of the East, considered the many needs of the East as well as the variety in languages, rites, and disciplines of its peoples, but also realized how much work Catholic missions elsewhere required. Thus, the council suggested that

> according to the custom of the Congregation for the Propagation of the Faith itself—namely, of forming special congregations according to the gravity of matters and times—there be instituted a particular congregation, which in a stable manner would solely take

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Apostolicae, December 19, 1853: *Iuspont*, 1/6 part 1:209, where the pope repeated that Eastern sacred rites were to be observed and retained, and not abandoned without the permission of the supreme pontiff, without any reference to ecclesiastical discipline.

[8] Note also Pius IX, letter *Quam singulari*, June 21, 1858: *Iuspont*, 1/6 part 1:290, sending a representative to the Romanians: "[...] in animo nobis sit, omnibus praesentibus rerum temporum locorumque adiunctis sedulo perpensis, opportuna omnia inire consilia, quibusque spiritualem istius ecclesiasticae provinciae procurationem ad rectam orientalis Ecclesiae normam ac salutaria praescripta magis magisque componere et ordinare valeamus." This sentence paraphrased the above-cited quotation of *In suprema* §3, even using the same verbs—compare "componere et ordinare" here to "componantur et ordinentur" there. Cf. Ivan Žužek, "Common Canons and Ecclesial Experience in the Oriental Catholic Churches," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 216, blaming the Eastern Catholic communities' "general ignorance concerning the «sacri canones»" as resulting in the "vast juridic uncertainty as well as confusion and caprice" in the pre-Vatican I period: "if the tree «forgets» its own roots, it cannot blossom."

[9] The section was created with Pius IX, apostolic constitution *Romani Pontifices*, January 5, 1862: *Iuspont*, 1/6 part 1:351–356. The pope announced this decision to Eastern hierarchs in the encyclical letter *Amantissimus*, April 8, 1862: *Iuspont*, 1/6 part 1:367–372. Descriptions of the creation of this congregation are found in Michael W. Dziob, *The Sacred Congregation for the Oriental Church*, Canon Law Studies 214 (Washington, D.C.: Catholic University of America, 1945) 52–62; Michael Vattappalam, *The Congregation for the Eastern Churches: Origins and Competence* (Vatican City: Libreria Editrice Vaticana, 1999) 41–46. A description of how the decision was made to institute this congregation is found in Carol Capros, "Origine e Sviluppo della S. C. Orientale," in *La Sacra Congregazione per le Chiese Orientali nel Cinquantesimo della Fondazione (1917–1967)*, ed. Sacred Congregation for the Eastern Churches (Grossaferrata/Rome: San Nilo, 1969) 38–50.

> care of all matters to be treated and determined concerning the rite and the discipline of the Eastern Churches.[10]

The pope accepted this recommendation and established the Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite (*pro negotiis ritus Orientalis*).[11] Although having the same prefect and some of the same members as the Sacred Congregation for the Propagation of the Faith, it possessed a separate secretary, consultors, and officials.[12]

This new congregation had nearly full competence over all matters related to Eastern faithful, even if Latins were involved.[13] As such, it was natural that the project to compose and order the seemingly chaotic Eastern discipline would be attributed to this congregation; a cardinal *ponens* was constituted "who would exercise the function of carefully directing the studies that are necessary for collecting the canons of the Eastern Church" and would review Eastern books, including those on discipline.[14] On the one hand, such statements, indeed the

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[10] Pius IX, *Romani Pontifices*, §4: *Iuspont*, 1/6 part 1:353: "Quamobrem sensere opportunum omnino esse ad huiusmodi assequendum fidem, ut ex ipsius Congregationis Fidei Propagandae more, formandi scilicet speciales Congregationes pro rerum ac temporum gravitate, institueretur peculiaris Congregatio, quae stabili modo omnia tum ritus, tum disciplinae Orientalium Ecclesiarum negotia tractanda, ac dirigenda, unice curaret."

[11] Cf. ibid., §6: *Iuspont*, 1/6 part 1:354. Vittorio Peri, *Orientalis Varietas: Roma e le Chiese d'Oriente—Storia e Diritto canonico*, Kanonika 4 (Rome: PIO, 1994) 239–240 notes that the congregation's title indicates that the pope considered "i diversi riti orientali come uno solo, per astratta analogia con il rito occidentale latino, il quale peraltro ne comprendeva ancora alcuni accanto a quello romano, ch'era tuttavia considerato il rito cattolico per eccellenza."

[12] See John A. Duskie, *The Canonical Status of the Orientals in the United States*, Canon Law Studies 48 (Washington, D.C.: Catholic University of America, 1928) 29 note 36: "[...] practically speaking, it was in itself a congregation but it had no proper prefect and remained affiliated with the Propaganda." A listing of the first officials is given in Pius IX, *Romani Pontifices*, §§8–10: *Iuspont*, 1/6 part 1:354–357. Of these original officials (eight cardinals, fifteen consultors, one secretary), it appears none was a member of an Eastern community.

[13] Pius IX, *Romani Pontifices*, §5: *Iuspont*, 1/6 part 1: 354: "Nova Congregatio a nobis instituta omnia Orientalium negotia, etiamsi mixta, quae scilicet sive rei sive personarum ratione latinos attingant, tractare debebit, nisi eadem Congregatio negotia ipsa ad generalem Propagandae Fidei Congregationem deferenda esse interdum existimaverit." Dziob, 53–55 argues that, aside from graver matters (*graviora*), which were reserved to the pope, the new congregation had competence over all matters, even doctrinal, which concerned Eastern faithful. A brief discussion of this question is found in Vattappalam, 44–45.

[14] Pius IX, *Romani Pontifices*, §6: *Iuspont*, 1/6 part 1:354: "Volumus tamen, ut in eadem Congregatione hisce nostris litteris constituta existat Cardinalis *Ponens*, a nobis et a nostris successoribus stabili modo semper eligendus, qui munere fungatur sedulo dirigendi studia, quae necessaria sunt ad colligendos Ecclesiae Orientalis canones et ad examinandos, ubi opus fuerit, omnes orientales libros cuiusque generis sint, sive huiusmodi libri respiciant sacrorum Bibliorum versiones, sive catechesim, sive disciplinam." In §8, he named the *ponens* as Karl-August Cardinal von

very act of distinguishing Eastern matters from others through creation of a separate section of the Sacred Congregation for the Propagation of the Faith, seemed to admit as legitimate the difference of discipline between East and West, although still viewing Eastern discipline as in need of reform.[15] On the other hand, establishing a Roman dicastery dedicated to Eastern rite matters could also be understood as an attempt to centralize authority in the Church and consquently limit Eastern autonomy; the reform of Eastern discipline would not be undertaken by the Eastern communities themselves, but by Roman authorities.[16] As events progressed into the late 1860s, it would become clear that this latter viewpoint was closer to the truth.

3.3. Views on Eastern Juridic Autonomy at the First Vatican Council[17]

3.3.1. The Preparatory Commission for Missions and Churches of the Eastern Rite

On June 26, 1867, Pius IX made public his decision to call an ecumenical council to be held at the Vatican.[18] Several preparatory commissions were subsequently established to review

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Reisach. According to Dziob, 56 and Vattappalam, 43, this office was a remnant of the former *Congregatio super correctione librorum Orientalium*.

[15] Cf. Pius IX, *Romani Pontifices*, §§1–3: *Iuspont*, 1/6 part 1:352–353. While the pope focused on the "proprios Orientalium Ecclesiarum ritus, utpote venerabili suae originis antiquitate et sanctorum Patrum auctoritate commendatos" (§2), he did reference the variety of both rite and discipline in the East at §3 ("[...] inspecta Orientalium cum ritus tum disciplinae varietate [...]") when discussing particular congregations created by popes after the institution of the Sacred Congregation for the Propagation of the Faith in 1622, and at the already cited §4, where the council of cardinals and prelates who suggested a separate congregation described it as treating "tum ritus, tum disciplinae Orientalium Ecclesiarum negotia." An earlier statement of Propaganda suggested that the pope wanted Eastern discipline, at least as it was constituted prior to the schism, maintained; see Sacred Congregation for the Propagation of the Faith, instruction *Non latet*, March 24, 1858: *Collectanea S. Congregationis de Propaganda Fide, seu Decreta Instructiones Rescripta pro Apostolicis Missionibus* (Rome: Typographia Polyglotta S. C. de Propaganda Fide, 1907) 1:627–630 (#1158).

[16] Patelos, 12; cf. his more general comments on the Roman centralization taking place at this time at 29–30.

[17] For an overview of how Eastern matters progressed during the time of the council, see entirety of Patelos, *Vatican I et les évêques uniates*, as well as Joseph Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," *Revue d'Historique Ecclésiastique* 65 (1970) 432–455, 737–788.

[18] Pius IX, allocution *Singulari quidem*, June 26, 1867: *Iuspont*, 1/6 part 1:446–449. In 1864, the pope had privately asked cardinals and other prelates about whether it was opportune to hold such a council; see the documentation

various areas of concern and formulate schemata to submit to the council fathers.[19] The Particular Congregation of Cardinals for the Celebration of the Council (*Congregatio Particularis Cardinalium de Concilio Celebrando*), also called the Directory Congregation (*Congregatio Directrix*), which oversaw all of the preparations for the council, had determined that matters regarding the Eastern communities would be entrusted to the preparatory Commission on Missions and the Churches of the Eastern Rite (*Commissio super Missionibus et Ecclesiis Ritus Orientalis*).[20]

> It was thought that the basis for this commission had to be the Sacred Congregations of Propaganda [i.e., the general congregation and the congregation for matters of the Eastern rite]; it was established that the material to be studied and treated would be the various points concerning the discipline and hierarchy of the Eastern Church, and in particular the jurisdiction and prerogatives of the patriarchs.[21]

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provided in Mansi, 49:1–464. Of particular note, the letters sent to certain Eastern prelates asking their opinions on the proposed council, as well as their responses, are found at ibid., 49:179–202; a summary of all responses concerning the Eastern communities is found in *Summarium Responsorum ab Episcopis Datorum ad Illas Litteras de Materia Concilii Celebrandi*: Mansi, 49:231–238**.** The pope would invite Eastern non-Catholic bishops to the council; see Pius IX, apostolic letter *Arcano Divinae Providentiae*, September 8, 1868: *Iuspont*, 1/6 part 2:21–22. However, the letter leaked prior to being sent, and no Orthodox prelate responded favorably; see Charles A. Frazee, *Catholics and Sultans: The Church and the Ottoman Empire 1453–1923* (New York: Cambridge University Press, 2006) 234.

[19] For lists of the different commissions and their members, see Mansi, 49:464–476.

[20] See the plan for the council written by Giuseppe Cardinal Bizzarri, appended to the minutes of the Second *Conventus* of the Directory Congregation of March 19, 1865: Mansi, 49:106, and the determination of the matters to be studied by the commission in the minutes of the Third *Conventus* of the Directory Congregation, May 24, 1866: Mansi, 49:240. A list of the consultors of the Commission on Missions and the Churches of the Eastern Rite is found in Mansi, 49:472–473, as well as Pablo Gefaell, "Il Diritto Canonico Orientale nei lavori del Concilio Vaticano I. Voti dei Consultori della Commissione Preparatoria per le Missioni e le Chiese Orientali," *Ius Ecclesiae* 18 (2006) 45 note 72. Summaries of the principal points determined in this commission are found in Aemilius Herman, "De «Ritu» in Iure Canonico," *Orientalia Christiana Periodica* 32 (1933) 99–101 and Ivan Žužek, "Incidenza del *Codex Canonum Ecclesiarum Orientalium* nella storia moderna della Chiesa universale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 315–317. In the following notes, all references to particular *conventus* refer to the meetings of the Directory Congregation, and particular *congressus* to the meetings of the Commission on Missions and the Churches of the Eastern Rite, unless otherwise specified.

[21] Third *Conventus*, May 24, 1866: Mansi, 49:240: "Si procedette perciò alla commissione per le materie risguardanti *le missioni e la chiesa orientale*; e ritenuto che anche per questa il centro avessero ad essere le sacre congregazioni di Propaganda si stabilì che le materie da studiarsi e trattarsi fossero i varii punti della disciplina e gerarchia della chiesa orientale, e segnatamente la giurisdizione e le prerogative de'patriarchi."

The commission, which included only one member of an Eastern community,[22] would hold thirty-seven meetings over nearly three years,[23] preparing the material on Eastern matters for the council to discuss.

3.3.1.1. Establishing the Orientation of the Commission toward Eastern Discipline and Autonomy

In the first *congressus* of the commission, Alessandro Cardinal Barnabò, the president of the commission (being the prefect of the Sacred Congregation for the Propagation of the Faith), took a stance towards Eastern discipline that would come to dominate the ensuing discussions.

> Turning to the disciplinary element, the Easterners entirely lack a code that would govern their discipline; and in fact everything relies on traditional usages, which vary according to the will of the patriarchs and, often, the bishops as well. On the other hand, excepting the liturgical element and such points inapplicable to the Easterners through a lack of a presupposed basis, such as those points that concern ecclesiastical benefices, chapters, etc., there is no reason why Western discipline should not be applied to the Churches of the Eastern rite in all that regards custom, the life and decency of clerics, ecclesiastical hierarchy, the duties of bishops, seminaries, synods, administration of the sacraments, and similar matters.[24]

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[22] Reverend Giuseppe David, a Syrian; see Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," 427; Patelos, 124. A biography of David is provided at Patelos, 112–116.

[23] The minutes of the various *congressus* (September 21, 1867–May 9, 1870) are found in Mansi, 49:985–1056 and 50:1*–106*.

[24] First *Congressus*, September 21, 1867: Mansi, 49:987: "Venendo alla parte disciplinare si riflettè che gli Orientali mancano affatto di un codice, che ne regoli la disciplina: e quindi il tutto dipende dagli usi tradizionali, i quali variano secondo l'arbitrio dei patriarchi, e spesso anche de' vescovi. D'altronde, eccettuata la parte liturgica e qualche punto inapplicabile agli orientali per mancanza di substrato, come quello concernente i benefici ecclesiastici, i capitoli ecc., non v' ha ragione, per cui la disciplina occidentale non abbia ad applicarsi alle chiese di rito orientale in tutto ciò che risguarda il costume, la vità ed onestà dei chierici, l'ecclesiastica gerarchia, gli offici dei vescovi, i seminari, i sinodi, l'amministrazione dei sagramenti e cose simili." Another (unnamed) consultor stated that the first ecumenical councils made no distinctions among various communities in the application of disciplinary law; only with the schism did ecumenical councils focus on the discipline of the Western Church, and this strengthened the division between West and East. Monsignor Giovanni Simeoni repeated this desire to unify discipline at the Fifth *Congressus*, May 5, 1868: Mansi, 49:1009: "Uno dei criterii regolatori della commissione Orientale, come fu stabilito nella prima adunanza, si è quello di mettere in armonia la disciplina delle due chiese, salve sempre le differenze liturgiche, e le altre specialità che al rito più o meno attengono, e rendere in tal guisa partecipe l'Oriente di quelle salutari disposizioni che si sono adottate e si andranno adottando nella chiesa latina." For some comments on this guiding principle of uniformity of discipline, see Gefaell, "Il Diritto Canonico Orientale

Cardinal-president Barnabò did not appear to recognize the existence of any structured Eastern discipline; Easterners had "traditional usages," and even these were not applied uniformly but varied according to the arbitrary will of the hierarchs. The cardinal-president suggested applying Western discipline to the East, such that liturgical rite would be the sole positive[25] distinguishing factor remaining between West and East. Such an act would thereby deny any significant form of juridic autonomy to the individual Eastern communities; the major points of discipline would be determined not by the authorities of the community, but by the supreme authority, in this case the pope acting in an ecumenical council. However, the cardinal gave no justification for such an application of Western discipline; a specifically Eastern code of law, based on Eastern traditions, would correct what was perceived as the unstructured nature of Eastern discipline just as easily as applying Western discipline to the East.[26]

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nei lavori del Concilio Vaticano I," 47–54. Cf. Joseph Hajjar, "The Synod in the Eastern Church," in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 62: "The preparatory Oriental commission of Vatican Council I made an effort to unify Oriental discipline, but did so by practically suppressing it altogether in favor of Latin uniformity"; Aemilius Herman, "De Conceptu 'Ritus,'" *The Jurist* 2 (1942) 337: "Ultra processit Secretarius Commissionis 'super missionibus et Ecclesiis ritus orientalis' ad praeparandum concilium Vaticanum institutae. Hic aliique sodales huius Commissionis 'dualismum inter disciplinam orientalem et occidentalem' auferendum et ius latinum eis applicandum esse iudicaverunt, excepta materia liturgica late intellecta aliisque quibusdam capitibus quae Orientalibus applicari non possent, cum deficeret materia, v.g. quae ad beneficia, capitula etc. pertinent." Note that the preconciliar Commission on Discipline, after a long discussion (including support for uniform discipline), determined that any decisions about Eastern discipline did not pertain to their commission, but to the Commission on Missions and the Churches of the Eastern Rite: Sixth *Congressus* of the Commission on Discipline, April 30, 1868: Mansi, 49:770.

[25] The absence of certain Western juridic structures in the East (i.e., the "substrato") would constitute a negative distinction.

[26] A proper Eastern law had been suggested by Greek Melkite Patriarch Gregory Youssef in his comments sent to the Holy See on the opportuneness of the council; see Mansi, 49:200: "La chiesa orientale ha bisogno di essere riformata in molti capi: [...] la mancanza d'un gius canonico proprio, e conforme agli usi di ciasun'rito poiche i canoni antichi sono ineseguibili e per conseguenza le chiese orientali in molte cose si reggono arbitrariamente, e molti altri abusi secondarii." Professor Francesco Rosi supported the creation of an Eastern code at the Tenth *Congressus*, March 23, 1869: Mansi, 49:1028: "[...] il professore Rosi inculcò la necessità di provvederle di un codice di diritto e di disciplina, e aggiunse potersi ottenere adattandosi all'ordine del sinodo Libanese, il quale affidò al patriarca l'incarico di scegliere un numero di dotti, che si occupassero di raccogliere i canoni della chiesa maronita. E notificò in proposito il padre [Giovanni] Bollig, che coerentemente a questa disposizione fu intrapresa dall'Assemani una raccolta di canoni ecc., la quale però rimase inedita e si conserva nella biblioteca Vaticana." In discussing books needed in the East, Monsignor Simeoni suggested a code containing Eastern law; see Sixth *Congressus*, December 4, 1868: Mansi, 49:1012: "[...] che d'altronde il libro, di cui si sente maggiore il bisogno per

Monsignor Annibale Capalti would offer some justification for the proposal of the cardinal-president at the third *congressus*:

> The Latin Church has come, little by little, to form that system of discipline that governs it today; the Council of Trent was the result of a development and a progressive improvement that was needed over the space of sixteen centuries. The Easterners for ten centuries and more have in no way or in very little measure participated in these beneficial influences of the principle of life that animates the Catholic Church, either because they were all cut off from her, or because they were not united enough to her. But once the seeds of a new restructuring of the matter have been strewn, they shall bear the desired fruit, if they are cultivated by an episcopacy and a clergy animated by the spirit that must inform true ministers of the Gospel.[27]

Capalti argued that both Eastern and Western discipline were fundamentally two forms of the same universal discipline. From this perspective, universal discipline in the Western Church continually developed over the course of centuries to reach the point it had by the time of the First Vatican Council. On the other hand, the schism and its lingering effects inhibited this development of discipline for the Eastern communities.[28] As Monsignor Serafino Cretoni, secretary of the commission, later told the commission, "Eastern law" was improper terminology

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le chiese orientali, è un codice di diritto canonico, che ne regoli la disciplina, un codice autorevole, completo e generale per tutte le nazioni, e in armonia colle circostanze de' tempi (quale non può dirsi nè il *Pidalion* de'Greci, nè il *Pravila* de' Rumeni); che finalmente la compilazione di questo codice sembra essere il compito principale della nostra commissione." On the general desire for codification of canon law present among council fathers, see especially Giorgio Feliciani, "Il Concilio Vaticano I e la Codificazione del Diritto Canonico," *Ephemerides Iuris Canonici* 33 (1977) 115–143, and Pietro Cardinal Gasparri, "Praefatio," in *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, praefatione emi Petri Card. Gasparri et indice analytico-alphabetico auctus* (Rome: Typis Polyglottis Vaticanis, 1918) xxv–xxix. On the events influencing the council fathers' desire for a codification, see John D. Faris, "La Storia della Codificazione Orientale," in *Il Diritto Canonico Orientale nell'ordinamento ecclesiale*, Studi Giuridici 34, ed. Kuriakose Bharanikulangara (Vatican City: Libreria Editrice Vaticana, 1995) 255–257; Sunny Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO*, Kanonika 15 (Rome: PIO, 2009) 21–24.

[27] Third *Congressus*, November 15, 1867: Mansi, 993–994: "La chiesa latina (osservava) giunse poco a poco a formare quel sistema di disciplina che oggi ci governa; il concilio di Trento fu il risultato di un sviluppo e di un perfezionamento progressivo che abbisognè dello spazio di sedici secoli. Gli orientali da dieci secoli e più nulla o ben poco hanno partecipato ai benefici influssi del principio di vita che anima la chiesa cattolica, o perchè affatto recisi da lei, o perchè abbastanza a lei non uniti. Gettati però una volta i semi di un novello riordinamento di cose (conchiudeva il prelato), essi facilmente porteranno il frutto che si brama, qualora sieno coltivati da un episcopato e da un clero animati dello spirito che dee informare i veri ministri dell'evangelio."

[28] Cf. the comments made by Patriarch Giuseppe Valerga when discussing his *piano* at the Fourth *Congressus*, January 23, 1868: Mansi, 49:1005: "Prima dello scisma uniforme era la disciplina di tutte le chiese, salva poche differenze oltre le rituali."

as such law was, in fact, "the primitive universal law of the Church."[29] Thus, no proper Eastern discipline existed, being rather a defective, antiquated form of universal discipline.[30] Eastern discipline would have developed to roughly the same form as Latin discipline had the schism not happened; applying Latin discipline to Eastern communities would merely be bringing them "up to date."

The commission had to determine the exact measures whereby some uniformity in law would be established, and in making such determinations had to consider the juridic autonomy of the Eastern communities. In the first *congressus*, Cardinal-president Barnabò had noted several points that were to be resolved in the studies the commission was about to undertake, among which were:

> 1) The Catholic East can be said in a way to be united to the Roman Church in word only [*verbotenus*]. [...] The first thought of the commission will be to adopt measures and means more conducive to draw the Eastern Churches to the Holy See and the *cathedra* of St. Peter.
>
> 2) A point of highest interest for its consequences concerns the question about the dependence of Easterners on pontifical and conciliar constitutions [issued] after the schism. There are such constitutions that expressly extend to the East, and the Holy Office has decided recently that those relative to the condemnation of secret societies include Easterners as well. Further, in cases that have occurred it has also been desired that *Dei miseratione* of Benedict XIV be observed in substance in matrimonial trials even for Easterners. But there is a need to establish in this area a general maxim, as there can be found in the contrary opinion no small obstacle to the ordering the ecclesiastical discipline of the East.[31]

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[29] Twenty-first *Congressus*, September 3, 1869: Mansi, 50:33*: "Non si tratta poi di distruggere il gius antico, che il segretario disse impropriamente chiamarsi *orientale*, essendo il primitivo gius universale della chiesa, ma di perfezionarlo [...]."

[30] According to Salvatore Manna, *Chiesa Latina e Chiese Orientali all'epoca del Patriarca Giuseppe Valerga (1813–72)*, Excerpta e dissertatione ad Lauream (Naples: Pontificio Istituto degli Studi Orentali, 1972) 15, Patriarch Giuseppe Valerga's *piano di studi per l'ammiglioramento delle chiese e missioni orientali* presented to the commission referred to the separated Eastern Church as frozen, dead, and having the characteristics of cadavers, their only movement being dissolution and death.

[31] First *Congressus*, September 21, 1867: Mansi, 49:988: "1º L'Oriente cattolico potrebbe dirsi quasi *verbotenus* unito alla chiesa Romana. [...] [I]l primo pensiero della commissione sarà di predisporre le misure e i mezzi più conducenti allo scopo di ravvicinare le chiese orientali alla santa sede e alla cattedra di san Pietro. 2º Un punto di sommo interesse per le sue conseguenze riguarda la questione della dipendenza degli Orientali dalle costituzioni pontificie e conciliari posteriori allo scisma. Vi sono talune costituzioni espressamente estese all'Oriente, e il Santo

Particularly concerning the second point, the commission inevitably would have to consider the Pamphilian jurisprudence, the "contrary opinion" that could prevent the ordering of Eastern discipline by pope and council.

The broad questions were minimally discussed in the early *congressus* of the commission.[32] However, as the time for the opening of the council grew near, the commission sought guidance. On July 24, 1869, it sent a request to Monsignor Pietro Giannelli, secretary of the Directory Congregation, "to determine the principal points about which the Holy See intended to call to the attention of the Eastern bishops coming to the council, in order to predispose them to accept with docility the connected proposals."[33] This matter was remanded back to the commission itself two days later. Cardinal-president Barnabò invited Patriarch Giuseppe Valerga to formulate a report, explaining his own observations in this regard, to present to the other members of the commission.

Officio ha deciso recentemente che quelle relative alla condanna delle società segrete comprendono anche gli Orientali; inoltre nei casi occorrenti ha parimenti voluto, che si osservasse nei giudizi matrimoniali anche dagli Orientali quanto alla sostanza la Benedettina *Dei miseratione*. Convien però stabilire in proposito una massima generale, potendosi trovare nella contraria opinione non lieve ostacolo all'ordinamento dell'ecclesiastica disciplina delle chiese di Oriente." The second point would be entrusted to Abbot Giuseppe Piazza for study; see Second *Congressus*, September 30, 1867: Mansi, 49:991. The determination of the Holy Office concerning secret societies refers to the decision contained in Sacred Congregation for the Propagation of the Faith, encyclical letter *Clandestinas sectas*, 1867: *ASS* 27 (1894–1895) 572–573; this provision was repeated in Pius IX, letter *Maximo animi*, July 16, 1868: *Iuspont*, 1/6 part 2:19.

[32] The various *congressus* from the fourth up to the twentieth had, for the most part, concerned particular points of discipline such as marriage, missions, and religious orders.

[33] Twenty-first *Congressus*, September 3, 1869: Mansi, 50:27*: "Pregata la commissione direttrice con officio dei 24 luglio prossimo passato diretto a monsignor Giannelli segretario della medesima a determinare i punti principali su cui la santa sede intendesse chiamar l'attenzione dei vescovi orientali venuti al concilio ecumenico, onde predisporli ad accogliere con docilità le analoghe proposte."

3.3.1.2. The *Dubia* of Patriarch Valerga

Giuseppe Valerga,[34] the first residential Latin Patriarch of Jerusalem in centuries,[35] had already been involved with many Eastern matters prior to the commission meetings, notably acting as apostolic delegate at the synod that elected Gregory Youssef as Greek Melkite patriarch[36] and at that which elected Anthony Hassun as Armenian patriarch.[37] First appearing at the third *congressus* of the commission, his personality dominated the discussions.[38] He was one of the strongest proponents of making ecclesiastical discipline uniform, as he explained to the commission:

> Also mentioned by the monsignor patriarch was the question of the dependence of the Easterners on pontifical and conciliar constitutions subsequent to the schism, about which there was discussion in the first session. He would agree to establish that the principal elements of discipline be common to the two Churches, outside of those that were in opposition to the rite and to the particularities that were more or less connected to the rite. Then it would remain to see whether those points of law that are consequently more remote would be of value to them; then those concerning penalties, which the sanction of some of those aforementioned constitutions constitute. He expressed the opinion that, if it was not desired to extend these totally to the Easterners, it would be beneficial to give a certain latitude to the bishops, letting the guilty be punished according to their wise judgment.[39]

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[34] For biographical information, see Manna, *Chiesa Latina e Chiese Orientali*, xix–xxv.

[35] The residential Latin patriarchate of Jerusalem was restored with Pius IX, apostolic constitution *Nulla celebrior*, July 23, 1847: *Iuspont*, 1/6 part 1:40–44. The background to this restoration is related in Patelos, 152–157.

[36] Cf. Pius IX, allocution *Omnium ecclesiarum*, March 27, 1865: *Iuspont*, 1/6 part 1:428.

[37] Cf. Pius IX, bull *Commissum humilitati*, July 12, 1867: *Iuspont*, 1/6 part 1:464.

[38] Manna, *Chiesa Latina e Chiese Orientali*, 3; cf. Patelos, 110 stating that the patriarch had "un rôle primordial" in the commission. At the third *Congressus*, he asked for a comparative study of modern Eastern discipline and gave a lengthy explanation of what he believed to be the main issues in the East; see Third *Congressus*, November 15, 1867: Mansi, 49:992–1001.

[39] Third *Congressus*, November 15, 1867: Mansi, 49:1000–1001: "Fu pure accennata da monsignor patriarca la questione della dipendenza degli Orientali dalle costituzioni pontificie e conciliari posteriori allo scisma, di cui si discorse nella prima sessione. Converrebbe stabilire (così egli) che gli articoli principali di disciplina fossero comuni ad ambedue le chiese, fuori quelli che oppongonsi al rito e alle specialità che più o meno prossimamente a quello si riferiscono. Resterebbe quindi a vedere se valgano per loro quei punti di diritto che sono di conseguenza più remota; intorno poi alle penalità, che costituiscono la sanzione di alcune delle prenominate costituzioni, esternava il parere, che qualora non si volessero estendere totalmente agli Orientali, gioverebbe dare una certa latitudine ai vescovi, lasciando che i rei fossero puniti secondo il savio loro arbitrio."

He had already presented his *Piano di studi per l'ammiglioramento delle chiese e missioni orientali* to the commission by the time Cardinal-president Barnabò asked him to offer his opinions on the question remanded from the Directory Congregation.[40] The patriarch drew up his opinions and at the twenty-first *congressus* of the commission, less than two months after the matter was remitted to it, he presented his *votum*, *In qual modo debbano essere nel concilio ecumenico trattate le matierie riguardanti le chiese di rito orientale*.[41]

The patriarch's *votum* was divided into nine *dubia*, to which he offered his own answers for comment.[42] The first *dubium*, asking "whether the council ought to have particular regard for the Churches of the Eastern rite to alter their state, and possibly end the antagonism that exists between them and the Latin Church,"[43] was answered in the affirmative,[44] albeit for a variety of reasons.[45] It was the second *dubium* proposed in Patriarch Valerga's *votum* that brought the

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[40] Cf. Fourth *Congressus*, January 23, 1868: Mansi, 49:1001–1007. Additions were made to the *Piano di studi* at the following *congressus*; see Mansi, 49:1007–1009.

[41] Cf. Twenty-first *Congressus*, September 3, 1869: Mansi, 50:27* note 1. The version of this document presented to the Directory Congregation was described as an appendix of the aforementioned *Piano di studi*, which had also presented to the Directory Congregation by Patriarch Valerga: Forty-sixth *Conventus*, September 26, 1869: Mansi, 49:594.

[42] Patriarch Valerga prefaced the discussion of the *votum* by rejecting the objection that unity of discipline would be prejudicial to the return of Eastern non-Catholics to communion with Rome. He responded (1) that schismatics would compare the order of the Catholic Church with the juridic chaos of their own communities, and respond favorably to the former, (2) that it was not so much the bishops but the patriarchs who were attached to the current disciplinary form, and (3) that many Eastern schismatics coming into union with Rome wanted to become Latin, indicating that they were not very attached to their Eastern discipline. See Twenty-first *Congressus*, September 3, 1869: Mansi, 50:27*–28*.

[43] Mansi, 50:28* note 1: "Se atteso specialmente il fine generale cui è diretto il futuro concilio ecumenico e le favorevoli circostanze, nelle quali si terrà, debba il medesimo avere particolari riguardi per le chiese di rito orientale a fine di regolarne lo stato, e possibilmente distruggere l'antagonismo che è fra le medesime e la chiesa latina." Cf. Twenty-first *Congressus*, September 3, 1869: Mansi, 50:30*, on the objections of Reverend Giuseppe David and Father Leonardo di San Giuseppe to the use of the word *antagonismo*, and Patriarch Valerga's response to them.

[44] See the *allegato* to the Forty-sixth *conventus* of the Directory Congregation at Mansi, 49:596: "Non esitarono i consultori a rispondere *affirmative* al 1º dubbio [...]." Cf. Twenty-first *Congressus*, September 3, 1869: Mansi, 50:29*: "[...] furono le ragioni addotte dal segretario in conferma della risposta affermativa da lui data a questo dubbio. [...] Fu anche dagli altri risposto *affirmative*."

[45] On one hand, it was noted that an ecumenical council by its nature concerns the whole Church, and thus must not exclude any section of the Church from its solicitude. See the comments of Patriarch Valerga in Twenty-first

differences over the manner to obtain disciplinary unity between the Latin Churches and Eastern Churches to the fore.[46] The *dubium* asked:

> Whether it is proper to adjust the conciliar dispositions in such a way that they would oblige Latin Churches and Churches of the Eastern rite equally, and to avoid everything that could imply the consecration of disciplinary dualism, or give reason to consider this council as merely *Western*.[47]

Monsignor Cretoni considered this matter to be the hinge of the entire question on promoting uniformity in discipline throughout the whole Church.[48] He argued that the substantial part of

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Congressus, September 3, 1869: Mansi, 50:27*–28*: "Egli [Patriarch Valerga] prima di dare la richiesta indicazione partendo da un principio più alto, che cioè il concilio perchè ecumenico deve tutte insieme alla latina abbracciare le chiese di qualunque rito, si occupò del modo con cui nel concilio stesso debbansi trattare le materie allo scopo appunto di renderne universali le disposizioni. [...] Il fine del concilio che essendo ecumenico può e deve occuparsi di tutte le chiese"; cf. the comments of Father Giovanni Martinov at ibid., 50:30*: "Il padre Martinov disse: *Credo unam Ecclesiam catholicam*. Astraendo dunque dalle chiese orientali opinò il detto consultore che il futuro concilio debba estendere egualmente le sue sollecitudini a tutta la chiesa universale." On the other hand, the desire to reform the "abnormal" Christian East necessitated that the council have particular regard for it. See the comments of Patriarch Valerga in ibid., 50:29*: "Dapprima l'indulgenza che la madre chiesa ha mostrato agli orientali *poco* ha giovato: poco agli scismatici [...]; poco ai cattolici che si sono più o meno mantenuti in uno stato che certamente non può chiamarsi normale. [...] È tempo adunque che partecipano ai vantaggi che nel suo vitale sviluppo è andata acquistando la chiesa universale." Manna, *Chiesa Latina e Chiese Orientali*, 53 notes: "Ricorrente l'identificazione fra la chiesa latina e chiesa universale!" Note also the comments of Monsignor Edward Henry Howard (later joined by Monsignors Giovanni Simeoni and Lodovico Jacobini) at Twenty-first *Congressus*, September 3, 1869: Mansi, 50:30*: "Monsignor Howard si mostrò colpito non tanto dalla necessità di sottomettere gli orientali alla santa sede, o di distruggere l'antagonismo ch'è fra le chiese orientali e la latina, fini che potrebbero con altri mezzi raggiungersi, quanto dal bisogno, che l'Oriente entri a parte dello spirito che anima la chiesa universale." This "spirit" was a clear canonical discipline; the three monsignors specifically referenced the discipline concerning marriage impediments, dispensations, and processes, ending: "Donde la necessità che il futuro concilio stabilisca un sistema" (ibid.). Valerga also noted error gaining traction in the East that "the Holy See could not, on its own, change rite or discipline among them without the collaboration of those Churches, or at least of their respective patriarchs" ("[...] va serpeggiando fra gli orientali cattolici l'errore che la santa sede da sola non possa mutare come il rito così la disciplina fra gli orientali senza il concorso delle loro chiese, o almeno dei rispettivi loro patriarchi") as reasons supporting the council having particular regard for the Eastern communities; see ibid., 50:29*. Similar comments were made in the *Prospectus Eorum Quae in Commissione Conciliari super Missionibus et Ecclesiis Ritus Orientalis Hactenus Pertractata Sunt* formulated at the end of the commission's meetings: "Quod attinet ad eius [Romani Pontificis] iurisdictionem opportunum visum fuit aperte declarare Romanum pontificem, quoties pro sui sapientia existimet, id ad bonum animarum conferre, posse disciplinares et liturgicas leges iubere pro universa ecclesia et pro ecclesiis particularibus, independenter etiam ab earum prelatis, quacumque fulgeant dignitate" (Mansi, 50:105*).

[46] For a very brief summary of this discussion, see Bassett, 63–64.

[47] Mansi, 50:31* note 1: "Se convenga regolare le disposizioni del concilio in guisa che obblighino egualmente le chiese latine non meno che quelle di rito orientale; ed evitar tutto ciò che potrebbe implicare la consecrazione del dualismo disciplinare, o dar motivo di ritenere il concilio stesso meramente *occidentale*."

[48] Twenty-first *Congressus*, September 3, 1869: Mansi, 50:31*: "Il segretario premettendo che questo dubbio potrebbe dirsi il cardine della quistione, ch'è se abbiasi a promuovere possibilmente nel concilio l'unità di disciplina [...]." He argued that the very nature of ecclesiastical discipline supported disciplinary uniformity; this opinion was

the conciliar disciplinary norms must extend to the whole Church, "except on points that for the lack of a presupposed basis or for some reason would not be applicable in some places."[49] The contemporary disciplinary dualism was based in the schism; Eastern faithful remained subject to the ancient laws, which were modified only by the will of the patriarchs or through slowly-introduced abuses, such that "they remained deprived of all those beneficial dispositions that the Catholic Church came to adopt later."[50] He continued by explaining a trilemma for the structure of laws to be proposed at the council:

> Either one wishes to make at the future council one single discipline common to the East and the West, or one discipline for the West and another for all the Eastern Churches, or finally one for the West and as many for the East as there are Churches that are different from each other in their rite. The third hypothesis does not deserve to be discussed, nor will it come to the mind of any bishop; otherwise the ecumenical council would be reduced for the East to a collection of particular synods. For the second, since the various Churches of the Levant differ among themselves in many disciplinary points, in order to introduce uniformity among them each must cede something to the others; therefore, why should not all of them cede such things to the universal Church? Indeed, it could be said that, in some points, the difference that occurs between one Eastern Church and another is not that much smaller than the difference that occurs between the Eastern Churches and the Latin Church. Also, for one Eastern Church to cede to another in a matter of discipline is very difficult because of jealousies, which the sentiment of nationalism inspires, a sentiment alive and potent today also in the Levant. On the other hand, before the universal Church all nationalities disappear. Therefore, it is left to embrace the first hypothesis in the manner explained in the *votum*.[51]

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joined by Professor Giuseppe Piazza, who cited the constitution *Reversurus* of Pius IX (this constitution will be discussed in 3.4.1).

[49] Twenty-first *Congressus*, September 3, 1869: Mansi, 50:31*: "Disse pertanto il segretario che chi consideri la parte sostanziale della disciplina nella sua natura o nel fine cui è diretta, è chiaro potersi anzi doversi estendere a tutta la chiesa, salvi i punti che o per mancanza di substrato, o per altra ragione sieno ad alcuni luoghi inapplicabili." He asked why Easterners should not have the most basic laws, such as those concerning sanctity of the sacraments, applied to them (as though they did not already have such laws).

[50] Ibid.: "[...] rimasero privi di tutte quelle benefiche disposizioni, che la chiesa medesima andò successivamente adottando."

[51] Ibid., 50:31*–32*: "Conchiuse il segretario con un trilemma: O si vuol fare nel futuro concilio una disciplina sola comune all'Oriente e all'Occidente, o una disciplina per l'Occidente ed un altra per tutte le chiese orientali; o finalmente una per l'Occidente e tante per l'Oriente quante sono le chiese di colà che si differenziano tra loro nel rito. La terza ipotesi non merita d'esser discussa, nè potrà venir in mente a nessun vescovo; altrimenti il concilio ecumenico si ridurrebbe per l'Oriente ad una raccolta di sinodi particolari. Quanto alla seconda, differendo fra loro in molti punti disciplinari le varie chiese di Levante, per introdurre tra loro l'uniformità, ognuno dovrebbe cedere qualche cosa all'altra; e perchè piuttosto non cedono tutte qualche cosa alla chiesa universale? Tanto più che potrebbe forse dirsi, che non è molto minore in alcuni punti la differenza che passa fra una chiesa orientale e l'altra,

In order to destroy disciplinary dualism as much as possible, it was proper that the ecumenical council apply Latin discipline to the Eastern communities, and consequently reduce or even eliminate their capacity to establish their own discipline.[52]

While the members of the commission had agreed to reduce the "antagonism" between East and West, this particular manner proposed in Valerga's response to the *dubium* and supported by Secretary Cretoni caused opposition among three of the consultors—Reverend Giuseppe David, Professor Francesco Rosi, and Monsignor Giovanni Martinov.[53] These consultors argued that the manner whereby disciplinary uniformity could be achieved was through a measured updating of the existing norms of the Eastern communities. Reverend David specifically requested that there be an *Eastern* law. It already existed in a seminal form; while this law was neither universal nor updated enough, it consisted of the canons that ruled the Latin

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di quella che passa fra le chiese orientali e la latina. Che poi una chiesa orientale in fatto di disciplina ceda all'altra, è ben difficile per le gelosie, che ispira il sentimento di nazionalità, oggi così vivo e potente anche in Levante; per contrario davanti alla chiesa universale tutte le nazionalità scompariscono. Resta adunque ad abbracciarsi la prima ipotesi nel modo spiegato dal Voto." A similar comment on nationalism had been made by Patriarch Valerga; see the Fourth *Congressus*, January 23, 1868: Mansi, 49:998. Note that Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 23–24 errs in formulating this trilemma in relation to a proposed *codification*; as seen from Cretoni's introduction, the trilemma focused only on conciliar legislation. This error seems to be based on the statement in Žužek "Incidenza del *Codex Canonum Ecclesiarum Orientalium* nella storia moderna della Chiesa universale," 317: "Il trilemma—messo sul tappeto da Mons. Serafino Cretoni nel «Congressus XXI», del 3 set. 1869, della summenzionata commissione—«unico Codice, due Codici, o tanti Codici quanti sono i Riti», rimase irrisolto." Nevertheless, this trilemma would later be interpreted by Pietro Cardinal Gasparri in light of the proposed creation of a codal system; see Ivan Žužek, "L'idée de Gasparri d'un *Codex Ecclesiae Universae* comme «Point de Départ» de la Codification Canonique Orientale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 439–440; cf. Onorato Bucci, "Storia e significato giuridico del Codex Canonum Ecclesiarum Orientalium," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010)*, ed. Pontificio Consiglio Per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 98: "Questa triplice alternativa accompagnerà il dibattito sulla Codificazione Orientale fino alla pubblicazione del Codice il 1º ottobre 1990 (entrato in vigore il 1º ottobre 1991)."

[52] Cf. Twenty-first *Congressus*, September 3, 1869: Mansi, 50:31*: "Che però convegna distruggere, per quanto si può, questo dualismo, è secondo la mente della santa sede, la quale si è adoperata, come ha potuto, per avvicinare gli orientali alla disciplina latina." Note that Cretoni considered the Holy See's actions in the Synods of Diamper (Malabar/Latin, 1599), Zamosc (Ruthenian, 1720), and Mount Lebanon (Maronite, 1736) as promoting disciplinary uniformity.

[53] The entire discussion is found in Twenty-first *Congressus*, September 3, 1869: Mansi, 50:32*–35*.

Church in ancient times.[54] According to him, the Eastern Church could not be raised to the "perfection" of the Latin Church because it had been treated as separate for so long; the Latin Church grew step by step, and so should the Eastern Church.[55] He also suggested creating three classes of conciliar decrees: those applying to the universal Church, those only applying to the Latin Church, and those only applying to the Eastern Church. Father Martinov joined in stating that the Ruthenians had their own *Nomocanon* derived from the first seven ecumenical councils and particular councils received by all; this was the common basis of law that was sought, and its defects could be supplemented by the later councils.[56] Professor Rosi also supported a "completion" of existing Eastern laws, citing Lateran IV and Benedict XIV on the permission for the Eastern Church to use its own laws and customs, with the latter actually approving them.[57]

The other consultors did not agree with these assessments.[58] Because many of them held Eastern law to be, in actuality, universal law impeded from its proper development, the notion of

[54] Ibid., 50:32*: "La riforma poi deve farsi, ma convien prendere i germi del nuovo sistema dal gius orientale; chè v'ha pur troppo un gius canonico in Oriente. Non è desso universale, non è abbastanza spiluppato; ma pur v'ha un complesso di canoni che reggono quelle chiese, quale v'era anticamente nella chiesa latina."

[55] Ibid.: "Mal si apporrebbe chi credesse che le medesime tutto ad un tratto possano elevarsi allo stato di perfezione cui giunse la chiesa latina. Questa vi giunse gradi a gradi; lo stesso dovrà fare la chiesa orientale." He argued that disciplinary dualism, which the other consultors did not want to be consecrated at the council, had already been consecrated by previous councils, popes, and curial praxis—the separate section in the Sacred Congregation for the Propagation of the Faith, and the existence of the Eastern preconciliar commission itself, showed the "consecration" of this dualism.

[56] Ibid., 50:34*: "A dire del padre Martinov v'è un *gius* fondamentale nel Nomocanone usato dai Ruteni, che contiene i primi sette concilii generali e i particolari ammessi da tutti onde presenta la disciplina cattolica antica. V'è dunque il fondo comune che si cerca; se ne suppliscono i difetti per mezzo dei concilii posteriori."

[57] Ibid., 50:33*–34*. Cf. Joseph Hajjar, "Quelques jalons modernes de la codification canonique orientale," *Apollinaris* 35 (1962) 235: "Toutefois, l'archiviste émérite dela Propagande, le docte Francesco Rosi, révélait une meilleure connaissance juridique et historique. Il préconisait non point l'abolition mais le maintien du droit oriental particulier et son prefectionnement harmonieux."

[58] Hajjar, "Quelques jalons modernes de la codification canonique orientale," 236: "Le répliques savantes et pondérées de Francesco Rosi, aidées de l'oriental Clément [*sic*] David, détruisirent certes les véhémentes charges de Valerga, sans réussir pourtant à se concilier le sentiment général des membres de la Commission."

a truly Eastern law was unreasonable.[59] The appeals to Lateran IV and Benedict XIV did not pertain to the matter, according to Secretary Cretoni; he stated that Lateran IV only showed a *tolerance* and Benedict XIV's dispositions were limited to rite and liturgical discipline.[60] The *Nomocanon* cited by Martinov, the *Nomocanon* of Barhebreo used by the Syrians (referenced by Reverend David in a response to Professor Piazza), and any other Eastern canonical collection was defective by being incomplete and lacking authority *per se*.[61] Patriarch Valerga noted that the appeal to these collections proved the very point he was making; just as the ancient law on which these collections relied had been universal, so did the modern conciliar legislation and future pronouncements have to be universal as well.[62] According to him, the only real solution to dualism in law was a new code, common to East and West, which would maintain legitimate

[59] Again, note the comments of Secretary Cretoni at Twenty-first *Congressus*, September 3, 1869: Mansi, 50:33*: "Non si tratta poi di distruggere il gius antico, che il segretario disse impropriamente chiamarsi *orientale*, essendo il primitivo gius universale della chiesa, ma di prefezionarlo [...]."

[60] Ibid., 50:34*: "Intorno a ciò si permise il segretario di osservare che il capo *Licet* del Lateranense (*sustinere volentes*) dimostra solo una tolleranza; che nella enciclica *Allatae sunt* si parla solo dei riti, chi la santa sede tollerando conferma (§27); e se in detta enciclica dice altrove che la santa sede nel ritorno dei Greci procurò solo di svellere dai loro animi gli errori opposti al domma, *salva la disciplina*, intende *evidentemente* la disciplina liturgica; che finalmente nella costituzione *Demandatam* si vuole unicamente porre un freno all'autorità de'patriarchi di cambiare da se i riti, e se si vuole, anche la disciplina."

[61] Cf. the comments of Professor Piazza, Monsignor Howard, Patriarch Valerga, and Secretary Cretoni in ibid., 50:32*–33* and 34*. Note especially the statement at 50:33* about the *Nomocanon* of Barhebreo: "[...] monsignor Howard e monsignor Valerga risposero che il Barhebreo riporta i canoni dei concilii fino al Calcedonese; questo codice adunque è incompleto, il suo autore è scismatico, e se hanno autorità i singoli canoni, la raccolta al dire del segretario non può ritenersi autorevole. Le medesime eccezioni presso a poco possono darsi alle altre collezioni di canoni, cui s'appoggiano gli orientali."

[62] Ibid., 50:34*: "Questo fondo, ripeteva monsignor Valerga, è nostro; si richiami come base delle idee generali." He argued that dividing constitutions among those that did apply to Easterners and those that did not (as suggested by Reverend David) would consecrate the disciplinary dualism that they desired to remove, and trying to examine all the particular Eastern customs would be uncertain and take too much time (ibid., 50:33*).

customs, provided that these were first declared legitimate by the Holy See.[63] Otherwise, "there would be many particular codes without a center of disciplinary unity."[64]

Some of the consultors did agree with Reverend David's concerns about the possible sweeping nature of the changes.[65] Professor Giuseppe Piazza, joined later by Secretary Cretoni, stated that the reform would not be immediate and would only concern the fundamentals of discipline; secondary customs that had not been disapproved by the Holy See would remain in place.[66] Monsignor Howard added that "it suffices that the Vatican Council trace the first lines" of a long-term project of disciplinary uniformity;[67] nevertheless, disciplinary dualism could not be sustained, and the East needed to imbibe the spirit of the West.[68] In the meantime, Rosi, joined by Monsignor Simeoni, suggested that the doctrinal commission consider the power that the Holy See had to structure or change both rite and discipline when the good of souls demanded it.[69] The final response to this second *dubium* was affirmative.[70]

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[63] Ibid., 50:33*: "Si faccia adunque un codice comune, che salvi però le legittime consuetudini, sebbene a patto che ne sia prima dichiarata la legittimità dalla santa sede." He argued that the councils held in the East could not be the basis of a code, since they lacked subsequent legal developments; neither could those later held in the West be the basis, as the Easterners did not acknowledge them.

[64] Ibid.: "[A]ltrimenti vi saranno tanti codici particolari senza un centro d'unità disciplinare."

[65] Cf. Bassett, 63–64: "Even those who swung the majority were reluctant to crush all the venerable traditions of the Eastern churches. Nevertheless, canonical uniformity was agreed upon as the best alternative."

[66] Twenty-first *Congressus*, September 3, 1869: Mansi, 50:32*–33*.

[67] Ibid., 50:34*: "Del resto il perfezionamento della disciplina esigge tempo anche per l'Oriente. Basterà che il concilio Vaticano abbia tracciato le prime linee."

[68] Ibid.: "Oggi dunque tocca all'Oriente d'imbeversi dello spirito dell'Occidente."

[69] At the end of the *congressus*, Cardinal Barnabò entrusted to Secretary Cretoni the duty of asking the theological commission about this matter.

[70] *Allegato* to the Forty-sixth *Conventus* of the Directory Congregation: Mansi, 49:597: "Al secondo dubbio egualmente si rispose: *Affirmative*." Later, Monsignor Howard did note a problem with this approach: the conciliar legislation would be limited to particular points, meaning that it could not be the basis for a wholesale restructuring of Eastern law; see Twenty-third *Congressus*, September 10, 1869: Mansi, 50:45*: "Fu da ultimo proposta da monsignor Howard e ventilata dalla commissione una difficoltà. Volendo il concilio Vaticano, si disse, promuovere l'unità di disciplina, e prevedendosi d'altronde che forse per la moltiplicità delle materie, o per altri motivi si limiterà ad alcuni pochi punti disciplinari, i quali non saranno se non altrettante addizioni o modificazioni della vigente legislazione latina, alla quale finora si sono creduti estranei gli orientali, vi rimarranno fra loro moltissimi altri punti pei quali mancheranno di ogni canonica disposizione." It was suggested that a declaration be made that

At the following *congressus*, the commission took up the third *dubium*, concerning the juridic manner whereby conciliar legislation would bind Eastern communities:

> Whether to achieve this goal [of having conciliar legislation apply also to Eastern communities] there must be an *explicit* declaration that the Churches of the Eastern rite are also included in the conciliar dispositions, or it suffices to do it *implicitly*, but in a way that cannot engender doubt.[71]

Making the first statement of this discussion, Secretary Cretoni declared his opposition to an explicit declaration:

> It seemed to the secretary that stating *explicitly* that the Churches of the Eastern rite are also included in the disciplinary dispositions of the Vatican council would seem to confirm a vague, and indeed dangerous maxim—that the Easterners are not bound to observance of pontifical or conciliar constitutions in matters of discipline if they are not expressly named. Such a maxim is very dear to the Easterners; indeed, it has been embraced by some doctors among the Latins in such a way that it constitutes today even a criterion for us to decide on the extension of those constitutions to Churches of the Levant.[72] Now what is the foundation of this maxim? It is the noted opinion expressed by a consultation of theologians held in 1631, the text of which is conserved in the archives of the Propaganda. But what authority does this opinion of theologians have? Precisely that of an opinion of consultors. The pontiff Benedict XIV referred to it first in his work *De Canonizatione* and then in the encyclical *Allatae sunt*; in these works he seemed to admit the opinion, but the first work was composed by him before he became pope, and as for the second, without entering into the merits of the matter, he said he did

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the laws of the Council of Trent obliged Eastern faithful as well, either by including the main points of Trent (and opportune pontifical constitutions that followed) in the laws of the upcoming council, or at least by making a general declaration that any point not found in the conciliar decrees be referred to the dispositions of the Council of Trent: "Posto ciò si potrebbe dichiarare, che il Tridentino obbliga tutti anche gli orientali. Quindi si presenterebbero due progetti: 1º di fondere nel concilio Vaticano il Tridentino nei punti principali e di più facile applicazione, insieme alle opportune costituzioni pontificie che gli susseguirono; ovvero 2º qualora non si potesse ciò effettuare, dichiarare almeno che in tutti i punti a cui non avrà provveduto il concilio Vaticano, si dovrà ricorrere al Tridentino" (ibid.). This opinion was reported to the Directory Congregation (*allegato* to the Forty-sixth *Conventus*, September 26, 1869: Mansi, 49:600–601), which was left to make the determination between these two options; however, I have found no decision in this regard in their acts.

[71] Mansi, 50:35* note 1: "Se a raggiungere questo intento debba dichiararsi *esplicitamente* che anche le chiese di rito orientale sono compresse nelle disposizioni conciliari, o basti farlo *implicitamente*, in modo però che non vi possa nascer dubbio." The discussion of this *dubium* is found in the Twenty-second *Congressus*, September 10, 1869: Mansi, 50:35*–41*.

[72] Two decisions during the pontificate of Pius IX show how the Sacred Congregation for the Propagation of the Faith used the Pamphilian decision (and its "explicit" exception) in praxis. First, the congregation declared that the obligation to say the *Missa pro populo* also bound Eastern pastors (response of March 25, 1863: *Iuspont*, 2:633; *ASS* 14 [1881] 554–555). Second, in the already-referenced letter of the Sacred Congregation for the Propagation of the Faith, *Clandestinas sectas*: *ASS* 27 (1894–1895) 572–573, the congregation announced that the Holy Office determined that legislation concerning the prohibition of being a member in a secret society, as well as the attendant penalties, applied to Eastern faithful.

> not want to dispute what he called a *question*. Such a question has not been answered afterwards, neither by any congregation of cardinals nor by any pontiff. It would not, therefore, be expedient that the aura of the council confirm the aforementioned maxim, which then would have to be at least well clarified and determined, especially since it has unfortunately constituted an embarrassment when one treats the regular discipline of the Easterners. The Holy Office has declared that the Easterners are encompassed in the constitution *Sacramentum paenitentiae* of Benedict XIV *contra sollicitantes*. Now among the difficulties raised by a Syrian bishop in 1867 there was also this, that Benedict XIV decreed that Easterners are not obliged to constitutions having discipline as their object unless express mention is made of them.[73]

Secretary Cretoni suggested that a preamble stating that *omnes christifideles cuiuscumque gentis et ritus* were bound to observe the council would be appropriate for implicitly including Eastern faithful in the conciliar decrees—it was sufficient for the purpose and manner of redacting the conciliar decrees, which (as was planned) would provide for all cases with new legal prescriptions or those of the past,[74] and it was opportune for eliminating disciplinary dualism.[75]

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[73] Twenty-second *Congressus*, September 10, 1869: Mansi, 50:35*–37*: "[...] sembrò al segretario che dichiarandosi *esplicitamente* che anche le chiese di rito orientale sono comprese nelle disposizioni disciplinari del concilio Vaticano, si verrebbe a confermare una massima vaga, ed anche pericolosa, che cioè gli orientali non sono tenuti alla osservanza delle costituzioni pontificie o conciliari in materia di disciplina se non vi sieno espressamente nominati. Una tal massima è molto cara agli orientali; che anzi è stata abbracciata anche da alcuni dottori fra i latini in guisa da costituire oggi comunemente anche presso noi un criterio per decidere sulla estensione di dette costituzioni alle chiese di Levante. Ora qual è il fondamento di questa massima? È il noto opinamento espresso da una consulta di teologi tenuta nel 1631, il cui testo si conserva nell'archivio di Propaganda. Quale autorità però ha la sentenza di quei teologi? quella appunto di un parere di consultori. Il pontefice Benedetto XIV la riferì prima nell'opera *de Canonizatione* ecc., poi nell'enciclica *Allatae sunt*; in quella parve ammetterla, ma fu da lui composta la detta opera prima di ascendere al pontificato; nella seconda poi senza entrare nel merito della cosa, dice di non voler disputare di questa ch'ei chiama *quistione*: e tale quistione non è stata posteriormente definita nè da alcuna congregazione di cardinali, nè da alcun pontefice. Non sarebbe dunque espediente che avesse l'aria il concilio di confermare la rimembrata massima, la quale poi avrebbe per lo meno bisogno d'essere bene chiarita e determinata; tanto più che la medesima ha costituito pur troppo un imbarazzo, quando si è trattato di regolare la disciplina degli orientali. Avea dichiarato il Sant' Offizio esser compresi gli orientali nella costituzione *Sacramentum paenitentiae* di Benedetto XIV *contra sollicitantes*; ebbene fra le difficoltà opposte da un vescovo siro nel 1867 vi fu ancor questa, che Benedetto XIV avea decretato non essere gli orientali obbligati alle costituzioni aventi per oggetto la disciplina qualora non vi si faccia di loro espressa menzione." A proposal by Patriarch Valerga, joined by Reverend David, sought to "reinvest" apostolic constitutions with universality; see ibid., 50:39*.

[74] Eastern faithful who could not adopt the new legislation would be provided with the ability to use the old law; cf. ibid., 50:37*–38*: "Una tal espressione è *sufficiente*, ei [Cretoni] disse, allo scopo, in vista anche del modo, onde saranno redatti i decreti conciliari, i quali, come si è ideato, dovranno provvedere a tutti i casi sia colle disposizioni del diritto attuale, sia con quelle dell'antico, e perciò contempleranno gli orientali anche in quelle cose, in cui essi non potranno adattarsi alla nuova legislazione della Chiesa." Such a rule would not be contrary to the elimination of disciplinary dualism, insofar as it was the universal legislation of the council authorizing this use of the old law.

[75] It is interesting that Secretary Cretoni seems to have not realized that an *implicit* inclusion of Eastern faithful in the conciliar decrees would itself follow the Pamphilian jurisprudence.

The council must encompass all, so there should be no specific reference to Eastern faithful or Latin faithful except in one case.

> There would be a place to make an honorable mention of the Churches of the Eastern rite; the proposed chapter *de Ritibus* is most convenient for making mention of the Easterners, since precisely rite is the single difference that must remain between them and the Latins.[76]

Because of Cretoni's presuppositions, it was natural for him to deny the validity of the Pamphilian jurisprudence. As has been noted, he held that there was no proper Eastern discipline; rather, he held that Eastern communities retained ancient, undeveloped universal discipline. There was likewise no juridic autonomy proper to the East; appeals to such were simply attempts to protect the arbitrary rule of patriarchs and bishops. Thus, the Pamphilian jurisprudence, the modern foundation for recognizing some form of Eastern autonomy, was considered to have caused "embarrassment" for those in Rome trying to reform Eastern discipline.

Canon Roncetti quickly opposed Cretoni's arguments:

> It is not enough to say *implicitly* that the Easterners will be bound to the observance of the Vatican council. These arguments were adduced in support:
>
> 1) The very question mentioned by the prior speaker [Cretoni] saw the necessity of such an expression, as this maxim has been held by many theologians and canonists, and adhered to by Benedict XIV himself, and also Propaganda has adopted it, even if an authoritative decision is lacking in its support. Hence it has happened that the sacred congregation, in its correspondence, has refrained from citing constitutions that do not speak explicitly also of Easterners. Therefore, such a maxim serves to exempt them from observance of disciplinary decrees when they are not expressly named.
>
> 2) There are in the East various prejudices through which these faithful do not believe themselves obliged to decrees of the Holy See when they are not named. One should take account of such prejudices now.

[76] Twenty-second *Congressus*, September 10, 1869: Mansi, 50:38*: "[V]i sarà poi luogo a fare una onorata menzione delle chiese di rito orientale, ed è ideato capo *de Ritibus* il più conveniente per far menzione degli orientali, che appunto il rito è l'unica differenza che dee restare fra essi e i latini."

> 3) When one treats very grave laws, an explicit declaration is made for the Easterners, like that of the Holy Office relative to *sollicitantes* and to those ascribed to the Masonic sects. Thus for an equal reason it is proper today to govern in the same way.
>
> 4) An explicit declaration will succeed relative to the desired goal, namely abolishing disciplinary dualism.
>
> A declaration can be made (the same consultor then adds) in terms not offensive to the Easterners; for example, it can be said that the council, considering disciplinary laws to be connected with the good of souls, intends to oblige all, even *the Easterners*.[77]

Canon Roncetti's arguments were, in turn, opposed by Cardinal-president Barnabò and Patriarch Valerga:

> It was felt on the other hand by the most eminent president that an explicit declaration is not necessary. As the ancient general councils held in the East obliged all, even the Westerners, so must the future council oblige all, as it is ecumenical. Rather, there ought to occur a declaration for the contrary, when Easterners ought not be intended as encompassed in the Vatican council. It is true that the aforementioned maxim has formed a criterion even in Propaganda, but it is true also that this has served to maintain the concept of two disciplines. And it is also *false*, added Monsignor Valerga, because it follows from the chapter *Licet* of Lateran IV (to which appeal is made) that Easterners are not obliged to disciplinary constitutions only when they are in opposition to their legitimate customs. Thus, concluded his aforementioned eminence, we must make this clear in the instruction [to Eastern hierarchs] so that such confusion of ideas, whereby general councils are put in the class of particular councils, and nationality is exchanged for religion and rite for discipline, finally ceases. Eliminating all these equivocations will topple all opposition, and it will suffice to say that the future council obliges *universalem Christi ecclesiam*.[78]

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[77] Ibid., 50:38*: "Fu di contrario sentimento il canonico Roncetti sostenendo che non basta dir solo *implictamente* che gli orientali saran tenuti all' osservanza del concilio Vaticano. Gli argomenti addotti furono: 1º la stessa quistione accennata dal preopinante fa vedere la necessità di una espressa dichiarazione; poichè quella massima è stata tenuta da molti teologi e canonisti, e rispettata dallo stesso Benedetto XIV, ed anche la Propaganda vi si è adattata, quantunque manchi in suo appoggio un' autorevole decisione; ond'è che la sacra congregazione nella sua corrispondenza si astiene dal citare costituzioni, le quali esplicitamente non parlino anche degli orientali. Tale massima adunque servirà loro per esimersi dall' osservanza dei decreti disciplinari, quando non vi sieno espressamente nominati. 2º Vi sono in Oriente varii pregiudizi, per cui que'fedeli non si credono obbligati ai decreti della santa sede, qualora essa non li nomini. Ora conviene tener conto di siffatti pregiudizi. 3º Quando si è trattato di qualche legge gravissima, si è fatta per gli orientali un'esplicita dichiarazione, come quella del Sant'Officio relativa ai sollecitanti e agli ascritti alle sette massoniche. Dunque a parità di ragione convien oggi regolarsi nello stesso modo. 4º Un'esplicita dichiarazione riuscirà appunto allo scopo che si ha in mira, di abolire cioè il dualismo disciplinare. Si potrebbe fare la dichiarazione (aggiunse poscia lo stesso consultore) in termini da non urtare gli orientali, come per esempio se si dicesse che ritenendo il concilio esser le leggi disciplinari connesse col bene delle anime, intende obbligare tutti anche *gli orientali*."

[78] Ibid., 50:38*–39*: "Fu per altro avvertito dall' eminentissimo presidente non essere necessaria la esplicita dichiarazione. Come gli antichi concilii generali tenuti in Oriente obbligavano tutti anche gli occidentali, così tutti deve obbligare il futuro concilio, perchè ecumenico; anzi vi occorrerebbe una dichiarazione in contrario, qualora gli

After further debate, including a proposal by Reverend David for a "proem" issued at the beginning of the council,[79] the commission answered this *dubium* negatively to the first part (a need for an explicit declaration), affirmatively to the second (an implicit declaration was sufficient), and suggested using the phrase *omnes Christi fideles cuiuscumque gentis et ritus* in the conciliar documents.[80]

The debates over the second and third *dubia* indicate how differently many of the commission's members viewed Eastern juridic autonomy in comparison with Benedict XIV. Instead of understanding Eastern discipline as an integral whole, truly distinct from Western discipline, these members held it to be ancient *universal* discipline that had not evolved. The resulting disciplinary dualism was an abnormality that perpetuated abuses in the East; Eastern claims of "autonomy" were considered baseless, used only to maintain this abnormal situation.

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orientali non si dovessero intendere compresi nel concilio Vaticano. È pur vero che la massima suenunciata ha formato un criterio anche in Propaganda; ma è vero altresi che ha servito a mantenere il concetto delle due discipline. Ed è anche *falsa*, soggiungeva monsignor Valerga, perchè dal capo *Licet* del concilio Lateranense IV cui si appoggia, ne segue che allora solo gli orientali non sono obbligati alle costituzioni disciplinari, quando queste sono in opposizione delle loro legittime consuetudini. Convien pertanto, conchiudeva la prelodata eminenza sua, porre in chiaro tutto ciò nella divisata istruzione, affinchè cessi finalmente quella confusione d'idee, per cui si sono tenuti i concilii generali nel rango dei particolari, come si è scamiata la nazionalità colla religione, il rito colla disciplina. Eliminati tutti gli equivoci cadrà ogni opposizione; e basterà dire che il futuro concilio obbliga *universalem Christi ecclesiam*." See Žužek, "Common Canons and Ecclesial Experience," 218–219 on the proposed (but never implemented) "instruction" to be given to the Eastern prelates when they arrived in Rome, first mentioned at Twenty-first *Congressus*, September 3, 1869: Mansi, 50:35*: "L'eminentissimo signor cardinale presidente considerando che l'errore nasce dalla ignoranza, nel desiderio di veder tradotte in atto le idee e il programma di monsignor patriarca di Gerusalemme, suggerì che si rediggesse una specie d'*istruzione* da proporsi ai prelati orientali, quando saranno venuti in Roma." Note that Patriarch Valerga's *votum* had supported an explicit inclusion of Eastern faithful in conciliar legislation; see Manna, *Chiesa Latina e Chiese Orientali*, 50. However, he did admit the goodness and sufficiency of an implicit declaration, as well as seeing in it a way to block "Eastern subtlety and skill" ("sottigliezza e abilità orientali"), and (as seen above) eventually came to support an implicit declaration; see ibid., 56–57.

[79] Twenty-second *Congressus*, September 10, 1869: Mansi, 50:39*: "[...] era di fare un proemio in cui dopo aver toccati i vantaggi della unità disciplinare e lodati i tempi, in cui gli orientali si conformavansi nella disciplina al resto della chiesa cattolica, si dicesse che il concilio intende far rifiorire un tal sistema, e perciò obbliga tutti i fedeli *cuiuscumque gentis et ritus*."

[80] *Allegato* to the Forty-sixth *conventus* of the Directory Congregation: Mansi, 49:598: "Al terzo dubbio si rispose: *Negative ad primam partem, affirmative ad secundam*." The *allegato* noted Cardinal-president Barnabò's argument for using an explicit declaration only if Eastern faithful were to be exempted from some conciliar decision.

In their opinion, the forthcoming council had to correct this situation, both in terms of a reform of law and a reform in mentality. Thus, not only did its decisions have to apply equally to West and East, they had to apply in way that would reinforce the idea that Eastern faithful were generally exempt from laws issued by popes, whether inside or outside a general council. Because of this desire, these members rejected the Pamphilian jurisprudence on the basis of it being simply an opinion of canonists and theologians; furthermore, it only perpetuated ecclesiastical uncertainty, disciplinary dualism, and arbitrariness of judgment by hierarchs. If these members' plans were carried out, Eastern communities would no longer possess a proper autonomy or a proper discipline, but only particular customs.[81]

The commission's proposal to abolish disciplinary dualism was likely to cause uproar among the Eastern hierarchs coming to the council. Thus, the members decided not to inform the Eastern bishops of the whole scope of the project immediately, to preclude alarm being generated and an opposition bloc being created.[82]

> So although the Eastern bishops have always been tranquil, this [universality of the conciliar laws] must be openly demonstrated and pronounced, so it will not be said that they were taken by surprise. Nevertheless, from the beginning negotiations with the Eastern bishops could be initiated, but only on those points in which there would not be a supposed harm of the prerogatives of the people and of the rights of the episcopate, and particularly on those matters about which the council must speak, such as chrismation. It would indeed be opportune to depute without delay some individuals who would be judged most appropriate for the delineated undertaking, and give them proper instructions.[83]

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[81] Concerning customs, see the debate over the fourth *dubium* in Twenty-second *Congressus*, September 10, 1869: Mansi, 50:41*–44*. The *dubium* is given in Mansi, 50:41* note 2: "Se a dileguare qualsivoglia apprensione o timore per parte dei prelati orientali sia necessario dichiararne salve le consuetudini approvate o da approvarsi dalla santa sede, ovvero basti usare altre espressioni più generali, e quali."

[82] Eighth *dubium* at Mansi, 50:45* note 2: "Se usare all'effetto i mezzi proposti dal Voto, o altri consimili, e quali"; *allegato* to the Forty-sixth *conventus* of the Directory Congregation: Mansi, 49:600: "In risposta al dubbio ottavo, ammessi i mezzi sia negativi che positivi proposti nel voto, aggiunsero i consultori che non converrebbe palesare ai vescovi orientali, appena venuti in Roma, il programma di monsignor Valerga, almeno in tutta la sua estensione, potendo gettar l'allarme fra loro, e provocarne una coalizione."

[83] Twenty-third *Congressus*, September 17, 1869: Mansi, 50:45*: "[...] allora, ancorchè i vescovi orientali fossero stati sempre tranquilli, bisognerebbe apertamente dimostrarsi e pronunciarsi, affinchè non si avesse a dire che si fosse agito per sorpresa. Nondimeno sin dal principio potrebbero iniziarsi trattative coi prelati orientali, solo però in

The report sent to the Directory Congregation argued that the opposition that would be placed by Eastern bishops would be disingenuous, as they knew that discipline was mutable and, indeed, they themselves have changed some matters of discipline: "Do they only want to be reluctant when the changes are proposed by the Holy See?"[84] Thus, any opposition to disciplinary changes on the part of Eastern prelates was cast in a light of disingenuity, neglecting any consideration of possible ecclesial reasons for their defense of their discipline.[85]

The discussions of the commission were summarized in a *prospectus* formulated at the end of their meetings.[86] Recapitulating all of the matters described above, the members noted:

> The commission had before its eyes a certain most authoritative apparatus of studies that the most reverend Patriarch of Jerusalem, pro-delegate to Syria, has devised. It was established as a principle that the good of the Churches of the Eastern rite entirely demands that uniformity of discipline be restored not only among those Churches themselves, but also between them and the universal Church, as much as possible, regarding at least the principal points. For the difference of discipline that divides the Easterners from Westerners (except for particular customs of places, which existed here and there from earliest times) has arisen only from the schism, since there can be a multiplicity of rite, but only one discipline in the Catholic Church. Therefore, in order to recall the Eastern Churches to their prior splendor, the Holy See, while ordering that their received and approved rites be observed integrally by all, has always had in mind such uniformity, and has tried to promote it as much as was permitted through the vicissitudes of times, places, and persons.[87]

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quei punti in cui non evvi la pretesa lesione delle prerogative del popolo e dei diritti dell'episcopato, e di quei speciali, su cui il concilio dovrà interloquire, come quello della Cresima. Sarebbe quindi opportuno di deputare sin d'ora alcuni soggetti che si giudicassero i più idonei al delineato incarico, e fornir loro convenienti istruzioni." Another part of the deception was refraining from citing too many Western councils as sources, and abundantly citing synods held in the East; see Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 176 note 150.

[84] *Allegato* to the forty-sixth *conventus* at Mansi, 49:598: "Vorranno essere restii solo, quando le innovazioni son proposte dalla santa sede?"

[85] The Directory Congregation ameliorated some of the more extreme proposals; note Manna, *Chiesa Latina e Chiese Orientali*, 60: "Grazie a Dio, erano prevalsi il buon senso e la moderazione motivati anche dalla considerazione delle difficoltà di una tale impresa. Veniva così temperato lo zelo del Valerga."

[86] *Prospectus Eorum Quae in Commissione Conciliari super Missionibus et Ecclesiis Ritus Orientalis Hactenus Pertractata Sunt*: Mansi, 50:105*–112*. In addition, the commission also formulated questions about sacramental matters to be proposed to Eastern hierarchs; see *Quaestiones de re sacramentaria habita ratione rituum orientalium patribus eorumdem rituum propositae*: Mansi, 50:111*–114*.

[87] Ibid., 50:105*: "Commissio prae oculis habuit potissimum quemdam studiorum apparatum, quem reverendissimus patriarcha Hierosolymitanus pro-delegatus Syriae concinnavit. In eo principii loco constitutum fuit, bonum

This introduction to the *prospectus* neatly summarizes the main ideas of the commission: there was but one discipline in the Church; the Churches of the Eastern rite, due to the schism, had fallen away from this one discipline; it was time to bring their discipline into conformity with that of the universal Church; the promotion of such disciplinary uniformity required universally-applicable norms; rite, understood in a broadly liturgical sense, was the only essential difference to remain, since that was all the popes had promised to preserve for the Eastern faithful.

3.3.1.3. The Schema *De Ritibus* and Other Schemata concerning Discipline

The Directory Congregation had initially intended this commission to treat matters concerning Eastern ecclesiastical discipline and the hierarchy, especially the patriarchal office.[88] Patriarch Valerga, in fact, commented on these matters at the third *congressus*:

> Patriarchal authority, according to the Synod of Mount Lebanon, absorbs primatial, metropolitan, and archiepiscopal rights. [...] Each patriarch becomes a pope for his nation, and the bishops resemble just as many pastors [*parrochi*] or chorbishops before their patriarch; the dependence of bishops on the patriarch is greater than his on the Roman pontiff. No one is ignorant of how much the patriarchs, generally, are slack in consulting the pope, erecting dioceses and choosing bishops, both residential and titular, without giving notice to Propaganda (whence the inexactness of the public bulletin); they have arrogated the power to absolve from any ecclesiastical penalty and censure (even reserved), to authorize a marriage in the closest grades (excepting only the first), to

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ecclesiarum ritus orientalis omnino postulare, ut uniformitas disciplinae non modo inter ecclesias ipsas, sed etiam inter eas et ecclesiam universalem, quantum fieri posset, quoad praecipua saltem capita, restauraretur. Differentia enim disciplinae quae Orientales ab Occidentalibus dividit, exceptis peculiaribus locorum consuetudinibus, quae vel a primis temporibus passim extiterunt, nonnisi a schismate profecta est, quia multiplex quidem ritus, sed una dumtaxat disciplina in ecclesia catholica esse potest. Quocirca sancta sedes ut ecclesias orientales ad pristinum splendorem revocaret, dum receptos et probatos eorum ritus ab omnibus integros servari iussit, eandem uniformitatem semper cordi habuit, et quantum per varia temporum, locorum, ac personarum adiuncta liceret, promovere conata est."

[88] Again, note the minutes of the Third *Conventus*, May 24, 1866: Mansi, 49:240: "Si procedette perciò alla commissione per le materie risguardanti *le missioni e la chiesa orientale*; e ritenuto che anche per questa il centro avessero ad essere le sacre congregazioni di Propaganda si stabilì che le materie da studiarsi e trattarsi fossero i varii punti della disciplina e gerarchia della chiesa orientale, e segnatamente la giurisdizione e le prerogative de'patriarchi."

> dispense those to be promoted to orders from the defect of age, to grant dispensations from universal fasts, and to derogate from other laws that depend solely on the supreme legislator and hierarch of the Church. [...] It seems entirely indispensible that the council use every care to obtain that the patriarchs are contained within due limits; that the bishops, liberated from the yoke and pressure of the patriarchs, be freer in the exercise of their ministry and refreshed in their authority—in one word, that each return to the grade to which he pertains according to the original concept of the ecclesiastical hierarchy.[89]

Despite the orientation of the commission initially laid out by the Directory Congregation and the comments of Patriarch Valerga, no specific schema on the hierarchy was formulated. When the Directory Congregation discussed Patriarch Valerga's *votum* at their meetings of September 26 and October 3, 1869, an initial proposal for a disciplinary schema[90] was dropped, at the suggestion of Cardinal Capalti, in favor of having the disciplinary decrees of the other commissions sent to the Eastern commission, which would suggest any emendations to take the

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[89] Third *Congressus*, November 15, 1867: Mansi, 49:995: "L'autorità patriarcale a detta del sinodo Libanese, assorbe i diritti primaziali, metropolitici e arcivescovili. [...] Ogni patriarca diviene papa dinanzi la sua nazione, e i vescovi rassomigliano altrettanti parrochi o corepiscopi avanti al loro patriarca; maggiore è la dipendenza dei vescovi dal patriarca, che di questo dal Romano pontefice. Niuno ignora quanto i patriarchi, parlando in generale, sieno moderati nel rivolgersi al papa, eriggono diocesi, eleggono vescovi, sia residentziali, sia titolari, senza pur darne la notizia alla Propaganda (d'onde l'inesattezze del pubblico Notiziario); si sono arrogati il potere di assolvere da qualunque pena ecclesiastica e censura anche riservata, di autorizzare il matrimonio nei gradi i più stretti, appena eccettuato il primo, di dispensare i promovendi agli ordini sopra il difetto di età, di accordare dispense dai digiuni universali, e di derogare ad altre leggi che dipendono solo dal supremo legislatore e gerarca della chiesa. [...] Sembrò pertanto indispensabile che il concilio adoperi ogni cura per ottenere che i patriarchi si contengono entro i debiti limiti; che i vescovi emancipati dal giogo e dalla pressione dei patriarchi sieno più liberi nell'esercizio del loro ministero, e ne venga rinfrancata l'autorità; in una parola che ciascuno rientri nel grado che gli compete secondo il primitivo concetto dell'ecclesiastica gerarchia." Cf. his similar statement concerning his *Piano di studi* at the Fourth *Congressus*, January 23, 1868: Mansi, 49: 1005: "Tutti gli Orientali, al dire di monsignor Valerga, deplorano oggi l'inconveniente, che gli arcivescovi e i metropoliti sieno divenuti in Levante puri nomi. Difatti l'autorità che dovrebbe essere divisa secondo i vari gradi gerarchici in modo per altro che tutti venissero ad armonizzare tra loro, e come linee al centro stringersi alla sede apostolica, tutta in quella vece si assorbe dal patriarca; anche il potere episcopale è paralizzato dal patriarca, ed ecco perchè i vescovi vedendosi isolati guardono di buon occhio il delegato apostolico, per coprirsi cioè sotto l'egida della sua autorità dall'oppressione e dal despotismo dei patriarchi." Similar comments were made specifically concerning vigilance over the rite; see Thirtieth *Congressus*, November 30, 1869: Mansi, 50:76* (discussion of *dubium* VI on the schema *De Ritibus*): "[I]l che è tanto necessario esprimere [that bishops also have a role in vigilance over the rite], in quanto che si sa che i patriarchi orientali sogliono tutti concentrare in se i diritti dei vescovi." For Patriarch Valerga's views on the Eastern hierarchy prior to the preconciliar commission, see Manna, *Chiesa Latina e Chiese Orientali*, 5–9; for the outlook of his *Piano di studi* on the Eastern hierarchy, see ibid., 23–25.

[90] Forty-sixth *Conventus*, September 26, 1869: Mansi, 49:595; Forty-seventh *Conventus*, October 3, 1869: Mansi, 49:602.

Eastern communities into account.[91] The commission agreed to this method,[92] reviewing many schemata formulated by other commissions and suggesting emendations where needed.[93] By only indicating special rules for Eastern faithful and Eastern communities in the proposed conciliar decrees, the commission fulfilled its goal of supporting disciplinary uniformity. Anything particular to Eastern communities would be seen as exceptional, not constituting a distinct body of discipline, and Eastern faithful and their communities would be bound to all the other conciliar norms.[94]

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[91] Forty-seventh *Conventus*, October 3, 1869: Mansi, 49:602: "Sua eminenza reverendissima il signor cardinal Capalti riferiva, che sebbene nella suddetta adunanza si fosse detto di formare due schemi di decreti, uno cioè relativo ai riti, e l'altro relativo alle consuetudini delle chiese di rito orientale, per vedere cosa mai vi sia da emendare rapporto al rito attuale, e fino a qual punto si possa estendere all'Oriente la uniformà delle disposizioni disciplinari, che verranno emesse dal futuro concilio; pur nondimeno non sarebbe inopportuno l'adottare il sistema, che fermo rimandendo quanto si è già stabilito circa lo schema concernente l'articolo del rito, per quello poi che riguarda la disciplina sieno communicati alla commissione orientale gli schemi de'decreti, che si vanno preparando dalla commissione di disciplina ecclesiastica e dalla commissione pe'regolari, all'oggetto che la commissione orientale faccia conoscere, se ed in qual modo potrebbero le suindicate disposizioni disciplinari adattarsi anche all'Oriente."

[92] *Prospectus Eorum Quae in Commissione Conciliari super Missionibus et Ecclesiis Ritus Orientalis Hactenus Pertractata Sunt*: Mansi, 50:105*: "Hoc principium, quod nova elucubratione confirmatum fuit, executioni mandari coepit, annuentibus eminentissimis singularum commissionum praesidibus; receptis si quidem ab iisdem commissionibus nonnullis schematibus capitum et decretorum, quaedam illis fuerunt adiecta, quae pecularis Orientalium conditio ferre visa est, opportunis eum in finem adhibitis notis, quae in hoc prospectu quoad ea tantum quae praecipua sunt, allegantur."

[93] See the comments of the commission on the law concerning a *sede vacante* at Mansi, 49:922 note 1; on sacred celibacy and marriage impediments among the Easterners at Mansi, 53:629–631 (noting for the former, "E potrebbe ritenersi che le Chiese orientali non sieno ancora mature per adattarsi alla legge del celibato, come vige nella Chiesa latina"; cf. Thirty-sixth *Congressus*, March 15, 1870: Mansi, 50:103*); on the schema *De Episcopis, de Synodis, et de Vicariis Generalibus* in Mansi, 53:727–728; on the schema *De Vita et Honestate Clericorum* in Mansi, 53:732; on the schema *Super Confectione et Usu Unius Parvi Catechismi pro Universa Ecclesia* in Mansi, 53:733; on the schema *De Oneribus Missarum Aliisque Piis Dispositionibus* in Mansi, 53:736–737; on the schema *De Retinendo Capite* Tametsi *et Ubique Promulgando*, made by the secretary, at Mansi, 53:764. Two other schemata had special rules concerning the Eastern communities, although I have not found reference to any consultation made with the Eastern commission: *De Observantia Ritualis Romani* in Mansi, 53:737; *De Festorum Dierum Sanctificatione et de Abstinentia et Ieiunio* in Mansi, 53:768 and 770 (*adnotatio* C). A summary of these points (and others) is found in *Prospectus Eorum Quae in Commissione Conciliari super Missionibus et Ecclesiis Ritus Orientalis Hactenus Pertractata Sunt*: Mansi, 50:105*–112*.

[94] Cf. Aemilius Herman, "Regunturne Orientales dissidentes legibus matrimonialibus Ecclesiae latinae?" *Periodica* 27 (1938) 20, on the attitude of Latin canonists towards Eastern law: "Ex multis enim saeculis iuris periti latini assuefacti sunt ut quidquid discrepat cum iure latino communi, pro exceptione vel pro iure particulari habeant. Ita etiam de disciplina orientali iudicaverunt, illam sub iure particulari vel sub privilegio subsumentes. [...] Sed non ita est. Ius orientale multo altioribus principiis innititur."

The commission did formulate two specifically Eastern schemata.[95] One schema concerned chrismation by presbyters, and consisted of only one paragraph with accompanying notes.[96] The other, longer schema, *De Ritibus*,[97] focused on liturgical and sacramental matters—the rites.[98] Such a focus was a natural result of the path the discussions concerning Eastern

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[95] The commission also formulated a third schema concerning missions: *De Missionibus* (*Super Missionibus Apostolicis*), found at Mansi, 53:45–61.

[96] *Schema decreti de ministro extraordinario confirmationis*: Mansi, 53:893–897. The schema made it illicit for Eastern presbyters to confirm baptized persons without the permission of the proper bishop, and exhorted bishops to confirm personally insofar as they were able, conceding the aforementioned permission only in case of necessity.

[97] The schema, with notes from the commission, is found in Mansi, 53:897–914.

[98] This schema had been requested by the Directory Congregation; see Forty-seventh *Conventus*, October 3, 1869: Mansi, 49:602. The commission's members themselves had thought such a schema indispensible; see the sixth *dubium* at Mansi, 50:44* note 2: "Se convenga rediggere un capitolo *de Ritibus* nel senso proposto dal Voto"; *allegato* to the Forty-sixth *Conventus* of the Directory Congregation: Mansi, 49:600: "La risposta al dubbio sesto fu *affirmative*. È indispensabile (si disse) questo capo *De Ritibus*." The schema would show the desire to maintain liturgical variety even while attenuating disciplinary differences; things like fasting and uses concerning the administration of sacraments could be included, while still expressing the possibility of introducing some uniformity, subject to the examination and approval of the Holy See. See Twenty-third *Congressus*, September 17, 1869: Mansi, 50:44*–45*: "Con questo intento gioverebbe altresi, come si suggerisce nel Voto, riportare al rito molte cose, che hanno realmente con esso una più o meno prossima relazione, come le astinenze, i digiuni, le feste, il calendario, certi usi concernenti l'amministrazione de'sagramenti ecc. e solo potrebbe esprimersi il desiderio che i vescovi s'intendessero fra loro per introdurre possibilmente una qualche uniformità su tali materie presentando analoghi progetti all'esame e all'approvazione della santa sede, quando ciò non riuscisse praticare nel concilio stesso." Cf. Manna, *Chiesa Latina e Chiese Orientali*, 48 on this point.

It was decided that there would be no enumeration of rites in the schema; see Thirtieth *Congressus*, November 30, 1869: Mansi, 50:75* (responding to the *dubium* redacted in ibid., note 1, "An et quomodo enumerandi ritus qui in ecclesia catholica vigent"): "Tutti s'accordarono doversi omettere la proposta enumerazione o classificazione dei riti." The primary reason noted was that competition and rivalry in determining the precedence of one rite over another would easily arise; this would be aggravated by the lack of historical information about such precedence. There was also consideration of what specific rites would be enumerated: "Più in questo lavoro si potrebbe peccare o per eccesso o per difetto; *per eccesso* consagrando alcuni riti troppo particolari, che sono più che altro tollerati, e che vanno già a scomparire, come il gallicano, il mozarabico, proprio solo di alcune parrocchie di Spagna ecc.; *per difetto* qualora si omettessero alcuni altri perchè poco conosciuti, come il georgiano ecc." (ibid.). While Secretary Cretoni, Canon Roncetti, and Father Leonardo thought it would be a good idea to enumerate "primary" rites with a general reference to their "secondary" rites, Father Martinov responded that naming the primary rites would offend those said to be secondary. The members agreed to make a simple reference to the existence of a variety of rites in the Church. Bassett, 65–66 offers comments on this matter; however, I think he goes too far in considering the "secondary rites" as "those derived communities that enjoyed juridical independence within the generic liturgical families." All that the discussion indicates is that some distinction between "primary rites" and "secondary rites" was made, but does not indicate the precise juridic basis for the distinction (other than that the "primary rites" were those listed in *Allatae sunt* §3). It is likely that "secondary rite" was starting to be used in place of the term "*natio*," which began to have connotations with nationalism undermining attempts by the pope and the Roman Curia to exercise central authority: Seventh *Congressus*, December 23, 1868: Mansi, 49:1014–1015; cf. Bassett, 65 (however, "*natio*" was used later in the commission in the discussion of marriage impediments; see Thirty-fourth *Congressus*, December 17, 1869: Mansi, 50:89*–90*). On the threat of nationalism, see the comments made at the Tenth *Congressus*, March 23, 1869: Mansi, 49:1027–1028. If the phrase "secondary rites" was used in place of "*natio*," such "secondary rites" would not enjoy true "canonical exclusivity and autonomy" but rather would be the

discipline took. As was noted above, Secretary Cretoni had proposed no reference to Eastern disciplinary particularities at all; as the commission desired disciplinary uniformity throughout the Church, he felt that there should be only "an honorable mention of the Churches of the Eastern rite" in *De Ritibus*, "since precisely rite is the single difference that must remain between them and the Latins."[99] Thus, in a note to the schema, the commission specified how they thought "rite" should be understood:

> Thus, under the word "rite" can come both received customs in the celebration of sacred things—in external cult—and universal customs that respect religion. In the first sense the word "rite" includes only liturgical discipline and what is connected to it, like feasts and fasts; in the second sense, it can be extended also to canons, that is, to all laws, especially those by which the sacred hierarchy is structured. It would help some people to use this second sense, and so show that both disciplines of the Easterners—liturgical and canonical—were approved by the Roman pontiffs and general councils, and above all by Benedict XIV. Yet this is no less foreign to the truth than it is inopportune and dangerous. Indeed, lest any mistake of words arise, it was necessary to advise in what sense that word "rite" would be used by the Vatican Council, and determine its objective meaning, which was done in the schema [*De Ritibus*], where liturgical discipline is said "to concern the celebration of Holy Mass, the administration of sacraments, the completion of the Divine Praises, feasts and fasts, and every regulation of divine worship."[100]

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simple ecclesiastical groupings that *nationes* were, as understood by Benedict XIV and explained in the previous chapter. One should also note that Bassett's argument contains a misreading of the text: he states that "all agreed that the «Georgian» was a «secondary rite»," but "Georgian" is never specified as a secondary rite, only as one of the rites "poco conosciuti."

[99] Twenty-second *Congressus*, September 10, 1869: Mansi, 50:38*: "[V]i sarà poi luogo a fare una onorata menzione delle chiese di rito orientale, ed è ideato capo *de Ritibus* il più conveniente per far menzione degli orientali, che appunto il rito è l'unica differenza che dee restare fra essi e i latini."

[100] Mansi, 53:901–902 (*Adnotatio B*): "Itaque ritus nomine tam venire possunt mores recepti in sacrorum celebratione, seu in cultu externo, quam mores universi qui religionem respiciunt. Primo sensu ritus vocabulum comprehendit liturgicam solam disciplinam, quaeque illi nectuntur, uti festa et ieiunia; secundo extendi posset etiam ad canones, hoc est ad leges omnes, quibus sacra praesertim hierarchia regitur. Iuvat quosdam altero hoc sensu uti, atque ita utramquam orientalium eorum disciplinam, canonicam et liturgicam exhibere uti a Romanis pontificibus quin et a conciliis generalibus probatam, imprimis vero a Benedicto XIV; quod profecto non minus alienum a veritate est, quam inopportunum et periculosum. Proinde, ne qua verborum aequivicatio suboriatur, necesse fuit monere quo sensu vox ista *ritus* a concilio Vaticano adhibeatur, eiusque obiectivam significationem determinare, quod factum est in schemate, dum dicitur liturgica disciplina *circa sacrosancti sacrificii celebrationem, sacramentorum administrationem, divinarum laudum persolutionem, festa atque ieiunia, omnemque divini cultus ordinationem versari*." The quotation from the schema *De Ritibus* is found in the description of the development of rites, at Mansi, 53:897: "Apostoli autem tradita sibi a Domino potestate utentes, sacros ritus quoad potissimas partes sanxerunt, et ecclesia quoad reliquas pro diversa locorum ac temporum conditione ordinavit. Atque ita paullatim liturgica disciplina percrebuit, quae circa sacrosancti sacrificii celebrationem, sacramentorum administrationem, divinarum laudum persolutionem, festa atque ieiunia, omnemque divini cultus ordinationem versatur." Cf. Antoine

Because of this orientation, the schema contained only norms on conserving rites, transferring rites, and mixing of rites.[101] Almost nothing was stated concerning the internal governmental authorities of the different communities; indeed, the schema contained only one reference to anything patriarchal—a quote from *Demandatam* stating that not even those of patriarchal dignity could change the rite.[102]

The commission did not simply omit references to a separate Eastern discipline in this schema, but it also took particular care to omit references that could indicate *any* support for disciplinary dualism. Therefore, nothing was said of the Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite.[103] Professor Rosi argued:

> The Eastern congregation is not a congregation separate from that of Propaganda; hence the same cardinal prefect presides over both, and the authority of the one congregation is the same as that of the other. To insist on the distinction between one and the other would contribute to the dualism that we desire to destroy; such mention could be omitted insofar as in the chapter *De Missionibus* the Sacred Congregation for the Propagation of the Faith is named.[104]

Joubeir, *La Notion Canonique de Rite: Essai historico-canonique*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 14 (Rome: Basilian Fathers, 1961) 20, who argues that this complex description of "ritus" in *adnotatio B* "reconnaîtra implicitement que la position de Pie IX ne concordait pas avec l'histoire du mot rite."

[101] Concerning mixing rites, Patriarch Valerga considered the earlier prohibitions as perpetuating division between East and West; see Third *Congressus*, November 15, 1867: Mansi, 49:998: "La differenza dei riti è divenuta la tessera delle chiese orientali, in modo da servire d'un muro di divisione fra gli Orientali e i latini, e oscurar perfin l'idea della unità indivisibile della chiesa." Thus, the schema encouraged cooperation among ministers of different rites and tempered the laws concerning reception of the sacraments from ministers of a different rite; see Mansi, 53:900–901.

[102] Mansi, 53:899. See also the discussion on this point at the Thirtieth *Congressus*, November 30, 1869: Mansi, 50:76*. For a summary of the previous discussions in the commission concerning patriarchal power, see Patelos, 147–151.

[103] The commission was admittedly divided on the matter; Cretoni, Roncetti, Piazza, Leonardo, Martinov, and Bollig desired such a mention as a proof of the Holy See's care for the Eastern rites and the affairs of the Churches of the Levant, while Rosi, Howard, Jacobini, Simeoni, Paolo Brunoni, Valerga, and Barnabò were opposed; see Thirtieth *Congressus*, November 26, 1869: Mansi, 50:74*.

[104] Ibid., 50:74*: "Fu per altro avvertito dal professore Rosi [...] che la congregazione orientale non è una congregazione separata da quella di Propaganda, ond'è che ad ambedue presiede un medesimo cardinal prefetto; che l'autorita dell'una è la stessa che quella dell'altra; che l'insistere nella distinzione tra l'una a l'altra condurrebbe al dualismo che si vuol distruggere; che potrà tanto più omettersi questa menzione, in quanto che nel capo *de Missionibus* si nomina la sagra congregazione di Propaganda." (Reference to the congregation is found at the end of that schema, ibid., 53:54.) Cf. ibid., 50:75*, giving the same reason for omitting mention of that congregation in regard to the reform of Eastern liturgical books. Note that the *postulata* of eleven French bishops to the council at

Furthermore, an Eastern code of law would not be mentioned.

> This place did not seem opportune to treat the code of canon law to be compiled for the Easterners, especially because this schema contains those points in which Easterners differ from Latins. If a code of discipline is spoken of in the schema, it would implicitly consecrate disciplinary dualism, which was contrary to the mind of our commission, now sanctioned by the Directory Commission. For another thing, it could not be ignored that much would remain in order to organize the discipline of the Churches of the Eastern rite even after the Vatican Council. But as the cooperation of the bishops would be necessary, Monsignor Simeoni proposed to exhort the Eastern episcopacy, here or in another place, as to why they should seriously take action to collect the opportune elements and prepare the bases for constituting a body of law adapted for their Churches.[105]

The schema *De Ritibus* was intended to be limited to matters in which the Latin and the Eastern faithful differed from one another. As the commission had decided that rite, understood as only liturgical discipline and what was connected to it, was the only essential difference between Latin faithful and Eastern faithful, nothing else even hinting at further differences could be included in the schema. Thus, the schema could not recognize Eastern communities as possessing any distinct discipline or proper autonomy; particular exceptions could be made in other conciliar legislation for Eastern circumstances, and Eastern communities could retain their customs provided they did not oppose the faith, but they could not retain an entire *corpus* of discipline separate from the "general" discipline of the Latin Church, nor were they recognized as capable of constituting such discipline.

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ibid., 53:350 specifically requested a total division of the two sections of this congregation, with the resulting solely-Eastern congregation consisting of both Latin and Eastern prelates.

[105] Thirtieth *Congressus*, November 30, 1869: Mansi, 50:75*: "Non sembrò questo il luogo opportune per trattare del codice di diritto canonico da compilarsi per gli Orientali, tanto più che contenendo questo capo quei punti in cui gli Orientali si differenziano dai Latini, ove in esso si parlasse del codice di disciplina, verrebbe implicitamente a consagrarsi il dualismo disciplinare, il che è contro la mente della Commissione nostra oggimai sanzionata dalla Commissione direttrice. Non si disconobbe per altro che anche dopo il concilio Vaticano molto resterà a fare per ordinare la disciplina delle chiese di rito orientale; occorrendo però a tal fine la cooperazione dei vescovi, propose monsignor Simeoni di esortare in questo o in altro luogo l'episcopato orientale, perchè si adoperi seriamente a raccogliere gli opportuni elementi, e a preparare le basi per costituire un corpo di diritto adatto alle loro chiese."

3.3.2. The Sessions of the First Vatican Council

The First Vatican Council began on December 8, 1869 and was indefinitely suspended on October 20, 1870.[106] Because of the sudden suspension of the council, the council fathers did not approve the schema *De Ritibus* or the other disciplinary schemata that, in accord with the determination of the preconciliar commission, would generally apply to both West and East.[107] Nevertheless, certain council fathers did comment on the question of the juridic autonomy and particular discipline of the Eastern communities. The comments of the six Eastern council fathers who considered the question most extensively will be reviewed here. Four of these favored some form of juridic autonomy and distinct discipline for the East; two others preferred the imposition of uniform discipline throughout the Church at least in the principal matters, which would have consequently reduced Eastern autonomy. Even though the council did not enact anything specifically concerning Eastern discipline, it is important to review these speeches, as they reveal the varied understandings of the autonomy of Eastern communities within the Catholic Church at that time.

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[106] The convocation of the council was made in Pius IX, apostolic letter *Aeterni Patris*, June 29, 1868: *Iuspont*, 1/6 part 2:16–19 (the opening date is specified in §6). For its suspension *sine die*, see Pius IX, bull *Postquam Dei*, October 20, 1870: *Iuspont*, 1/6 part 2:103–104. For the geopolitical events surrounding the council, see Gefaell, "Il Diritto Canonico Orientale nei lavori del Concilio Vaticano I," 32–34.

[107] The numbers of schemata vary in Mansi. Forty-eight unpassed schemata are listed in the general index (Mansi, 53:xvii–xviii), while the listing of schemata at 53:715–718 gives forty-nine (plus the two that eventually passed: dogmatic constitution *Dei Filius* [*de fide catholica*], April 24, 1870: text in Tanner, 2:804–811; dogmatic constitution *Pastor aeternus*, July 18, 1870: text in Tanner, 811–816). Both of these lists in Mansi appear to omit *De Missionibus* (*Super Missionibus Apostolicis*). The council fathers only discussed seven schemata: *De Doctrina Catholica Contra Multiplices Errores ex Rationalismo Derivatos* (later *De Fide Catholica*); *De Episcopis, de Synodis, et de Vicariis Generalibus*; *De Sede Episcopali Vacante*; *De Ecclesia Christi* (from which was derived *Pastor aeternus*; see Mansi, 51:467, 637–732; 52:1–28); *De Vita et Honestate Clericorum*; *De Parvo Catechismo*; *Super Missionibus Apostolicis* (only written comments). Specifically concerning the absence of debate on *De Ritibus*, see Bassett, 66. Thus, the decisions of the preconciliar commission had no value on their own, and received none subsequently; see Herman, "De Conceptu 'Ritu,'" 338: "Ceterum quae in Commissione propositae sunt, auctoritatem nunquam acceperunt neque vim habuerunt ad praxim S. Sedis mutandam." Cf. Josephus Schweigel, "De Concilio Vaticano et de quaestione Liturgiae Orientalis," *Gregorianum* 21 (1940) 3–16, on the validity of using the schema *De Ritibus* for interpreting the canon law of his time (1940) as it applied to Eastern Catholics.

3.3.2.1. Greek Melkite Patriarch Gregory II Youssef

Greek Melkite Patriarch Gregory II Youssef[108] made two significant speeches to the council, defending the legitimate autonomy of the Eastern communities against possible undue papal interventions through the acceptance of the section of the schema *De Ecclesia Christi* defining papal primacy.[109] In his first speech,[110] the patriarch cited the text of the Council of Florence concerning papal primacy, specifically its use of the clause "renewing further the order of the other venerable patriarchs given in the canons... namely save all their privileges and rights."[111]

> The Eastern Church has always considered this clause as a defense of its autonomy, as a pledge of its immunities, as security for all its institutions. This clause is and always was like a foundation on which the supreme pontiffs endeavored to rely when recalling schismatics to unity, and by whose truth one part of the Greek Church has perdured in communion with the Roman Church. This clause, I say, is the single surety and hope that remains that the Greeks, most tenacious conservators of their antiquities, may be led back to offering obedience to the Apostolic See.[112]

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[108] A biography is found in Patelos, 307–328; a description of the problems in his Melkite community prior to Vatican I is found in Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," 436–447.

[109] Patriarch Youssef, as well as Chaldean Patriarch Joseph VI Audo and several other Eastern prelates, also made a written appeal to the pope to refrain from going beyond the definition of papal primacy issued at the Council of Florence; see the letter of January 18, 1870, recorded in Mansi, 51:683–685.

[110] Fifty-fourth General Congregation, May 19, 1870: Mansi, 52:133–137.

[111] Ibid., 52:134: "Notissimus omnibus est canon florentinus de primatu ex iure divino Romani pontificis eiusque dotibus et iuribus, et quomodo sit intelligendus 'ita ut in gestis oecumenicorum conciliorum et in sacris canonibus continetur'; et immediate praescribit ut omnia iura et privilegia, quae concilia et canones reliquis patriarchis concesserunt, sarta tectaque habeantur. Inde enim dicit: 'Renovantes insuper ordinem traditum in canonibus caeterorum venerabilium patriarcharum.... salvis videlicet privilegiis omnibus, et iuribus eorum." The "canon" referenced is Council of Florence, session 6, July 6, 1439, constitution *Letentur caeli*: text in Tanner, 1:528. Cf. Meletius M. Wojnar, "Decree on the Oriental Catholic Churches," *The Jurist* 25 (1965) 198–199 on the conflicting interpretations of "salvis videlicet..." made by Eastern hierarchs and the Roman See.

[112] Fifty-fourth General Congregation, May 19, 1870: Mansi, 52:134: "[...] quam clausulam ecclesia orientalis ut propugnaculum suae autonomiae, ut pignus suarum immunitatum, ut securitatem tandem omnium suarum institutionum esse, arbitrata semper est. Haec clausula est et fuit semper sicut fundamentum, quo summi pontifices innixi de revocandis schismaticis ad unitatem pertractarunt, et cuius veritate una pars ecclesiae graecae in communione cum ecclesia Romana adhuc perdurat. Haec, inquam, clausula est unica tabula et spes quae remanet, ut graeci conservatores tenacissimi suarum antiquitatum, ad obedientiam sedi apostolicae praestandam reduci possint."

However, no such clause appeared in the schema being debated. Indeed, the explication of supreme papal jurisdiction would appear as an innovation in light of prior councils and even recent papal documents.[113]

After making reference to the ecclesiological concept of the pentarchy,[114] the patriarch explained to the council fathers how the Eastern Church understood the "supreme and full power" of the Roman pontiff:

> The Eastern Church attributes the fullest supreme power to the Roman pontiff but with this condition, that his plentitude and primacy be held along with the rights of the patriarchal sees. Hence, by most ancient customary law it has happened that the Roman pontiffs have never exercised this ordinary and immediate jurisdiction (whose definition is presented to us for ratification without any exception) over these [patriarchal] sees except in the gravest cases. But this definition, as given in the third chapter [of the schema] and its corresponding canon, subverts the constitution of the entire Greek Church and pushes it towards total ruin; thus, pastoral conscience refrains from admitting it. For after eighteen centuries, that is, from the earliest times of the Christian religion up to this day, this Church has always been governed by adapted canons, a distinct discipline, its own proper institutions, institutions that the oldest custom beginning in apostolic times have introduced, the most ancient particular and general councils have sanctioned, the fathers and doctors [of the Church] have ratified, and all generations through so many centuries have surrounded with the greatest veneration. The basis and foundation of this rule is its autonomy and immunity; to believe what the supreme see of Peter says, to maintain communion with it, as all antiquity hands down, and our most holy lord Pope Pius IX inculcates in the cited text [*In suprema*]—this is absolutely necessary. These two constitute the Eastern Greek Church, and they coincide in one and the same with the Easterners who hold as firm and certain the external form, the

[113] Ibid., 52:135. Note that the patriarch cited, among other sources, the sixth canon of Nicaea I, the seventeenth canon of Constantinople IV, and Lateran IV, all of which had been cited in the Pamphilian decision (he also referenced the "eighth" canon of Constantinople I; this may refer to c. 2, as there are only seven total canons in the current numbering and c. 2 would make the most sense in context). Patriarch Valerga argued against this position in his speech at the Seventy-fourth General Congregation, June 20, 1870: Mansi, 52:779–781. However, Valerga was interrupted by Bishop Joseph Papp-Szilàgyi, and then Cardinal Capalti, as Valerga was reviewing matters concerning the third chapter of the schema on the Roman pontiff when the debate concerned the fourth.

[114] Fifty-fourth General Congregation, May 19, 1870: Mansi, 52:135: "Notum insuper est, quod apud Orientales a tota antiquitate usque ad haec tempora hic est et viget ecclesiae typus; quod scilicet universa Christi ecclesia in quinque patriarchiis iure canonico distribuatur, et in uno aliorum principe iure divino colligatur. Haec fuit et est ecclesiae unitas, ut episcopi cum proprio patriarcha et quilibet patriarcha cum aliis patriarchis tum maxime cum Romano patriarcha in fide et charitate communicet: iure divino unus ideo est Romanus pontifex caeterorum princeps, iure canonico principes ecclesiae apostolorum successores sunt quinque." He would reference this concept again in his second speech: Seventy-first General Congregation, June 14, 1870: Mansi, 52:673.

> autonomy of ecclesiastical rule to be the characteristic condition of their religious and social existence.[115]

The patriarch closed this speech urging that the problematic definitions of primacy be removed from the schema and that the aforementioned clause from the Council of Florence renewing the rights and privileges of the patriarchs be inserted.[116]

Patriarch Youssef addressed the council nearly a month later concerning the same topic.[117] In this speech, he specifically requested that a decree concerning the Eastern hierarchy be added to the decree on the primacy of the Roman pontiff.[118] Defending himself against the contrary opinions expressed by other council fathers,[119] he professed his belief in the primacy of the Roman Pontiff, both in honor and in jurisdiction, as well stating that he was not speaking "to derogate the rights of bishops, or so that a patriarchal system be introduced into the Western

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[115] Fifty-fourth General Congregation, May 19, 1870: Mansi, 52:136: "Summam et plenissimam ecclesia orientalis Romano pontifici tribuit potestatem, sed hac conditione ut eius plenitudo et principalitas cum iuribus sedium patriarchalium componeretur. Hinc iure consuetudinario antiquissimo factum est, ut numquam Romani pontifices, nisi in casibus gravissimis, in iis sedibus eam ordinariam et immediatam exercuerint iurisdictionem, cuius definitio sancienda nobis sine ulla exceptione exhibetur. At vero haec definitio, adhibita in capite tertio et canone respondente, constitutionem universae ecclesiae graecae subvertens eam ad completam illius ruinam intendit; et proinde eam admittere conscientia pastoralis refugit. Post enim octodecim saecula, id est, ab incunabulis religionis christianae usque ad hanc diem haec ecclesia semper administrata est canonibus aptatis, distincta disciplina, institutionibus propriis, quae vetustissima consuetudo aevo apostolico incepta introduxit, antiquissima particularia et generalia concilia sanxerunt, patres et doctores ratas habuerunt, omnes generationes per tot saecula maxima veneratione circumdederunt. Basis et fundamentum illius regiminis est eius autonomia et immunitas; credere quae dicit suprema Petri sedes, communionem cum illa servare, quemadmodum omnimoda antiquitas tradit, et sanctissimus dominus noster Pius papa IX in textu praecitato inculcat, hoc est absolute necessarium. Haec duo ecclesiam orientalem graecam constituunt, et in unum idemque apud orientales coincidunt, qui firmum et persuasum tenent formam externam, autonomiam regiminis ecclesiastici esse characteristicam conditionem suae existentiae religiosae et socialis."

[116] Ibid., 52:136–137. Cf. Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," 755, noting that the Melkites believed that Patriarch Youssef was called to the papal apartments and berated by the pope for this speech; while Hajjar could not find documentary evidence for this specific event, it seems likely to have happened, especially as a similar berating occurred later with Filippo Maria Cardinal Guidi. Patelos, 484 does report that Cardinal Barnabò reprimanded Youssef for not running his speech by him before giving it.

[117] Seventy-first General Congregation, June 14, 1870: Mansi, 52:671–676.

[118] Ibid., 52:671: "Quapropter maximopere optavi, ut in schemate, de quo discutimus, decreto dogmatico de Romani pontificis primatu addatur decretum disciplinare hierarchiam orientalem respiciens, sine quo, ut patet ex florentina historia, graeci patres nec unioni florentinae consensissent, nec decretum de primatu Romani pontificis suscepissent, quemadmodum oratores reverendissimi et disertissimi demonstrarunt."

[119] Among those offering contrary opinions was Syrian Archbishop Cyrille Behnam. The opinions of the archbishop will be dealt with below, 3.3.2.6.

Church, but so that this system be maintained in the Eastern Church as it has always existed and still exists."[120]

> I ask that this hierarchy, which has been constituted by the most ancient canon law, be maintained. I ask this not to bring down the Roman primacy, but to this end, that his supreme jurisdiction finally extend itself at some point not just to the Eastern uniates but also to the separated. For this purpose this venerable council should really consider whether, in defining those things that concern the rationale of the primacy, it will take care to maintain the rights, rites, discipline, ceremonies, and customs that have been active in the Eastern Churches from the time of the Apostles and that the Roman pontiffs themselves have ordered to be guarded and conserved inviolably.[121]

The patriarch requested the preservation of the Eastern hierarchy's rights and privileges, and asked that the council not determine anything opposed to such rights, privileges, customs, rule, and power.[122] To issue a text that seemed so opposed to the previous promises of the popes to preserve the Eastern hierarchy, liturgy, and custom would not only cause difficulties with Eastern Catholics but also would impede restoration of communion with separated Eastern Christians.

> Are we to think that the Greeks will be divided from us forever? [...] Will we dare to offer this decree on the primacy of the Roman pontiff, so impaired, even to those Greeks who prefer the decree of union [of Florence] as a basis? What should we say of the authority of the ancient canons? What of the promises made by the Holy See about

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[120] Seventy-first General Congregation, June 14, 1870: Mansi, 52:671–672: "Antequam meum propositum aggrediar, vos, eminentissimi et reverendissimi patres, eosque praeclarissimos oratores qui eam sententiam oppugnaverunt, de hoc monitos volo, quod ea quae dixi pro hierarchia, non in hunc finem protuli sive ut iuribus episcoporum derogem, sive ut in occidentali ecclesia systema patriarchicum inducatur, sed ut hoc systema in ecclesia orientali, prout semper extitit et adhuc extat, servetur." He added that the Western Church had only one patriarch (who by divine law was head of the others), while the Eastern Church had many: "Occidentalis enim ecclesia unum habet vere patriarcham, reliquorum patriarcharum iure divino principem, qui est universalis ecclesiae supremus pontifex. Ecclesia orientalis a temporibus apostolorum usque ad nos suos numerat patriarchas, quorum alii disiuncti a Romana sede sunt, alii autem coniuncti, sub primatiali Romani pontificis regimine constituti."

[121] Ibid., 52:672: "Expostulo ut haec hierarchia servetur, quae antiquissimo iure canonico constituta est; hoc expostulo non ad labefactandum Romanum primatum, sed ad hoc ut eius iurisdictio suprema non solum ad orientales unitos, verum etiam ad disiunctos tandem aliquando se porrigat. Ad quod plurimum conferet hoc venerabile concilium, si in definiendis iis, quae sunt de ratione primatus, curabit servare iura, ritus, disciplinam, caeremonias et consuetudines, quae in orientalibus ecclesiis ab apostolorum temporibus vigent, quaeque ipsi Romani pontifices inviolabiliter custodiri et conservari decreverunt." The patriarch offered several historical examples of councils and popes sanctioning the patriarchal system.

[122] Ibid., 52:673. Cf. the letter quoted by the patriarch at ibid., 52:674, wherein certain anonymous Greek Melkites threatened schism should the patriarch cede any of his rights or customs.

> maintaining hierarchy, liturgy, and custom, if they should see all the things that are in this third chapter [of the schema]? If they heard the relevant canons, should they not fear that the Apostolic See appears to break the stipulation of the synod of Florence, to forget its promises, to disregard the canons and decrees of the general councils, and to infringe as it wills?[123]

The patriarch ended by stating two main points: the popes have always acted up to the present time in the sense of the decree of Florence; the conservation of rights, liturgy, privileges, and ancient customs has always been promised and stipulated for any union. Hence, he asked that there be no conciliar anathemas, that the decree simply renew the statements of Florence, and that a disciplinary decree be placed in a proper part of the third chapter stating that the rights, offices, and privileges of the patriarchs were to be preserved.[124]

In these two speeches, Patriarch Youssef explicitly affirmed that the Eastern Church possessed a proper juridic autonomy within the Church as a whole. While the Roman pontiff possessed full, ordinary, and immediate jurisdiction over the Church, he refrained from exercising this relative to the Eastern sees.[125] Further, the Eastern Church possessed its own

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[123] Ibid., 52:675: "Numquid putamus, Graecos in aeternum a nobis divisos fore? [...] Numquid etiam istis Graecis, qui unionis decretum ut basim praeferunt, nos hoc decretum de primatu Romani pontificis ita imminutum offerre audebimus? Quid de veterum canonum auctoritate dicemus? quid de promissionibus a sancta sede factis de servanda hierarchia, liturgia et consuetudine, si omnia quae in hoc tertio capite sunt, ipsi videant? Si relativos canones audiant, nonne timendum est ne apostolica sede stipulationem Florentinae synodi frangere, suarum promissionum oblivisci, generalium conciliorum canones et decreta contemnere et pro libito infringere videatur?" For a response to this objection, arguing that there was no real hope for any union with Greek non-Catholics at that time, see the speech of Archbishop Spiridone Maddalena of Corfù at the Fifty-fifth General Congregation, May 20, 1870: Mansi, 52:151–155. A response to this latter speech was given by Bishop Sándor Bonnaz of Csanád-Temesvár at the Sixtieth General Congregation, May 28, 1870: Mansi, 52:302–305.

[124] Seventy-first General Congregation, June 14, 1870: Mansi, 52:676: "Ex hisce omnibus haec duo omnino concludi possunt: 1º quod sancta sedes relate ad ecclesias orientales, et summi pontifices a concilio Florentino usque ad nos semper cum iisdem ecclesiis egerint in sensu decreti florentini; 2º quod conservatio iurium, liturgiae, privilegiorum et antiquarum consuetudinum semper promissa et adstipulata fuit in actibus cuiuscumque unionis. Non est igitur mirandum si agens de hoc tertio capite coram vobis, eminentissimi ac reverendissimi patres, enixis precibus imploro, 1º ut intuitu Graecorum decretum de primatu Romani pontificis conficiatur sine anathemate; 2º ut hoc decretum nil aliud sit, nisi renovatio illius quod in illo concilio editum est; 3º ut aliquo congruo loco huius tertii capitis inducatur decretum disciplinare ab eo concilio datum, quo servari iubentur iura et munia et privilegia antiquorum patriarcharum."

[125] The patriarch's argument, likely unwittingly, reflected the statement made by Benedict XIV in *De Ritibus. Quae Intersit Differentia Inter Latinos et Graecos*, in *Benedicti XIV Papae Opera Inedita*, ed. Franciscus Heiner (Friburgi Brisgoviae: Herder, 1904) 59 (8.5.42): "[...] satis sit notum, quam caute Romani Pontifices procedant, ne Graeci

proper "rights, rites, discipline, ceremonies, and customs" that merited (and had obtained) the protection of the Roman pontiffs. To issue a text concerning papal primacy that made no reference to these Eastern particularities would both open the way to future interventions by the pope into the internal life of Eastern Catholic communities and render Eastern non-Catholics averse to union with Rome because of the likelihood of such interventions in their own communities. However, the patriarch's understanding of what the popes had promised to protect—the entirety of the discipline and hierarchical system of the East—varied from that present in the preconciliar commission—only the liturgical rites. Thus, his proposals to alter the schema were not approved.[126]

3.3.2.2. Chaldean Patriarch Joseph VI Audo

Patriarch Joseph VI Audo of Babylon also supported Eastern disciplinary autonomy at the council.[127] His intervention came early in the council sessions, at the sixteenth general congregation during the debate on the disciplinary schemata *De Episcopis, de Synodis, et de Vicariis Generalibus* and *De Sede Episcopali Vacante*.[128] Recognizing that the goal of the texts

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Orientales sub Constitutionibus licet Generalibus comprehendantur, quamvis eaedem Occidentales comprehendant, quotiescumque per eas ritibus et moribus Ecclesiae Graecae approbatis praeiudicium afferi possit."

[126] The patriarch, who voted *non placet* at the general congregation of July 13, 1870 and was absent from the public session approving it, made his submission to *Pastor aeternus* in a letter sent to Pius IX on February 8, 1871 from Cairo. An excerpt from this letter is found in Mansi, 53:942. In his letter he cited the clause from Florence, *salvis omnibus iuribus et privilegiis patriarcharum*, which prompted a response Cardinal Barnabò of July 15, 1871, found in Mansi, 53:943, wherein the cardinal stated that the pope could not but use his power for the good of the faithful, "avendo sempre in vista quello che nelle singole circostanze giudicherà più espediente nel Signore."

[127] A biography is found in Patelos, 268–285. Note the comments of Hajjar, "The Synod in the Eastern Church," 62: "At the council itself, the Chaldean Patriarch Audo and the Melchite Patriarch Gregory Youssef reacted with clarity and courage [against efforts to impose Latin uniformity]."

[128] Sixteenth General Congregation, January 25, 1870: Mansi, 50:513–516.

was to render discipline for the most part uniform throughout the entire Church, he noted to the council fathers:

> In fact, when the first schemata on discipline were read to me, I was able to gather from them, despite my own humble nature, that the proposition of their author was found to be dwelling on this idea, that for the Western and Eastern Churches one and the same discipline be put in place and ordered, that is, one and the same body of ecclesiastical law be produced for each of the Churches. Perhaps the most eminent consultors thought that little or no difference existed between the laws, customs, and rites of each Church. [...] In fact, who does not know the very great difference and distance to be found between the laws, privileges, and customs (not only civil but also ecclesiastical and indeed Catholic) of each Church, and that they differ from each other as greatly as the sunrise from the sunset, as one recovering from sickness from one actively waging war?[129]

While Audo did refer to the promises of the popes to conserve Eastern discipline,[130] he also cited the practical issues involved in imposing such disciplinary uniformity. In light of the poor circumstances of his own community—an uneducated clergy, the lack of churches in many areas because of the Muslim rulers forbidding their construction—the patriarch asked the council fathers to

> judge if it would ever be possible that such a desolate nation could be assimilated to the most flourishing Churches of our Western brothers, and if it could be ruled by one and the same rule. In fact, it seems to me that not even those Western Churches are to be governed usefully all and everywhere in the same way and with similar rules. How much more, then, is that the case with our Eastern Churches, which are different in all things and through all things from the Western Churches?[131]

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[129] Ibid., 50:514: "Cum antem [*sic*] lecta equidem fuerint mihi prima de disciplina schemata, quantum mediocri meo ingenio ex ipsis colligere potui, propositum auctoris illorum in illud versari comperi, ut tum pro occidentalibus tum pro orientalibus ecclesiis una eademque disciplina componatur ac praescribatur, id est, unum ac idem pro utrisque ecclesiis iuris ecclesiastici corpus efficiatur. Fortasse consultores clarissimi parum vel nullum intercedere discrimen inter utrarumque ecclesiarum iura, consuetudines ac ritus cogitabant. [...] Et revera quis nescit maximum discrimen ac distantiam inter iura, privilegia, et consuetudines non solum civiles sed etiam ecclesiasticas et quidem catholicas inveniri utriusque ecclesiae; adeoque tantum distant ab invicem quantum ortus ab occasu, atque convalescens aegrotus a strenue belligero?"

[130] Ibid., 50:516.

[131] Ibid., 50:515: "His omnibus hucusque praemissis, iudicate, patres reverendissimi, si unquam possibile sit ut talis desolata natio fratrum nostrorum occidentalium florentissimis ecclesiis assimilari, atque una eademque regula dirigi possit; imo neque ipsae ecclesiae occidentales, ut mihi videtur, omnes et ubique, et eodem modo, et similibus regulis utiliter dirigendae sunt: quanto magis ergo nostrae orientales ecclesiae, quae in omnibus et per omnia ab occidentalibus diversae sunt?"

He further argued that while the Eastern faithful would freely embrace whatever the council defined dogmatically, they would not do the same concerning discipline.

> For all know quite well that the Eastern peoples are so tenacious in the rites, customs, and privileges of the ancient discipline of their Churches, that something even of little importance can scarcely be suffered to be changed without a great tumult and grave scandals, which, whenever they occur, are suppressed only with detriment to souls.[132]

According to Audo, the poor state of his nation and the inevitable uproar of his people opposed the outside imposition of any disciplinary changes.

The patriarch then turned to what was to be done about discipline, as he frankly admitted that the Churches of his own patriarchate did, in fact, need juridic reform.

> 1) Not all canons of discipline can be applied to individual Churches indiscriminately, since they differ among themselves very much in laws, rites, privileges, and customs; this discrepancy has always been approved and confirmed by the Church.
>
> 2) It follows that, for each nation and patriarchate, the reform must be done such that the method is appropriate for their respective circumstances, and this can be obtained only though national councils.
>
> 3) For this end, our most holy lord Pope Pius IX, happily reigning, and this venerable senate of the Catholic Church must be beseeched for their permission to assign a time and place so that, from the various disciplinary schemata that are applicable to us, we may compose a new canon law from our ancient canons and constitutions, which we would offer to the examination and approval of the most reverend fathers.[133]

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[132] Ibid.: "Omnes enim optime sciunt quod orientales populi ita in antiquae disciplinae ritibus, consuetudinibus ac privilegiis eorum ecclesiae adeo tenaces sunt, ut vix aliquid etiam parvi momenti mutari patiantur sine magno tumultu et gravibus scandalis; quae quoties fiunt, non sine animarum detrimento supprimuntur."

[133] Ibid.: "Verumtamen habita ratione ad circumstantias, quae ad aedificationem, non autem ad destructionem conducere valeant, consequens est: 1º ut non omnes disciplinae canones singulis ecclesiis indiscriminatim applicari possint; quia ecclesiis iuribus, ritibus, privilegiis et consuetudinibus inter se vel maxime discrepant: quae vero discrepantia semper probata ac confirmata fuit ab ecclesia. Consequens est 2º quod pro unaquaque natione et patriarchatu ita facienda est reformatio, ut ratio habeatur ad respectiva adiuncta; et nonnisi per concilia nationalia id obtineri posset. 3º Ad hoc deprecandus est sanctissimus dominus noster Pius papa IX feliciter regnans, atque iste venerandus ecclesiae catholicae senatus, ut data venia nobis assignentur locus et tempus, ut ex huius concilii Vaticani schematibus disciplinaribus, quae nobis applicabilia sunt, et ex nostris antiquis canonibus et constitutionibus novum ius canonicum componamus, quod patrum reverendissimorum examini, et deinde approbationi praebeamus." See also the response of Cardinal Capalti to the patriarch's argument, recounted by Lajos Pásztor, "Concilio Vaticano I. I verbali della deputazione per la disciplina ecclesiastica," in *Miscellanea in onore di Monsignor Martino Giusti, Prefetto dell'Archivio Segreto Vaticano*, Collectanea Archivi Vaticani 6 (Vatican City: Archivio Vaticano, 1978) 2:225–227, cited in Pablo Gefaell, "Il Diritto Canonico Orientale nei lavori del Concilio Vaticano I," 53 note 98: "[...] historicae loquendo, semper putavi dualitatem disciplinae inter Orientalem et Occidentalem Ecclesiam nullum habere fundamentum. [...] [A]liae sunt leges rituales, aliae

The same procedure could be followed by each patriarchate.[134]

Patriarch Audo's speech defended the autonomy of the Eastern communities but also admitted the problematic state of Eastern discipline that had been cited in the preparatory commission. His proposed solution—that each nation and patriarchate reform their law in light of the conciliar disciplinary schemata, with the council fathers themselves approving the new composition—was a clever attempt to maintain autonomy and a distinct discipline for each Eastern community while also correcting the supposedly chaotic state of that discipline with the authority of the ecumenical council. However, the lengthy work that would be involved—especially for communities like the Chaldeans that were in such a poor state—along with the fear that such a method of operation would reduce the ecumenical council for the East to a collection of particular synods[135] would likely have prevented its adoption.

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disciplinares quae nihil cum ritibus commune habent. [...] Attamen aliud est loqui de stricto iure, aliud vero loqui de eo quod ex prudentia, et non ex extricto iure, exigi potest. Adhuc sunt Orientales in conditione extraordinaria, et fieri nequit, ut post plura secula, quibus non vixerunt nisi sub antiquis canonibus, illico debeant observare totam disciplinam comunem."

[134] Sixteenth General Congregation, January 25, 1870: Mansi, 50:515: "Idipsum de aliis etiam patriarchatibus puto esse dicendum." Note that the quotation of Audo's speech given in Daniele Faltin, "La Codificazione del Diritto Canonico Orientale," in *La Sacra Congregazione per le Chiese Orientali nel Cinquantesimo della Fondazione (1917–1967)*, ed. Sacred Congregation for the Eastern Churches (Grossaferrata/Rome: San Nilo, 1969) 122–123, referencing a law that "toti Ecclesiae orientali applicari queat," is erroneous; Žužek, "Common Canons and Ecclesial Experience," 220 note 15, attributes this error to an inexact citation of the speech made by Acacius Coussa. After the speech, the patriarch was invited to an audience with Pius IX, at which the pope berated him; see Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," 451–454; Patelos, 444–445. Like Patriarch Youssef, Patriarch Audo voted *non placet* on the schema concerning papal primacy and infallibility at the general congregation of July 13, 1870 and was absent from the public session approving it. He made his submission to *Pastor aeternus* in a letter sent to Pius IX on July 29, 1872 from Mosul (Mansi, 53:943). The contents of this letter, as well as the response of Pius IX (apostolic letter *Gratias agere*, November 16, 1872: *Iuspont*, 1/6 part 2:162–164 and Mansi, 53:944–946), will be dealt with below.

[135] Cf. the comments of Secretary Cretoni at the Twenty-first *Congressus*, September 3, 1869: Mansi, 50:31*–32*: "Conchiuse il segretario con un trilemma: O si vuol fare nel futuro concilio una disciplina sola comune all'Oriente e all'Occidente, o una disciplina per l'Occidente ed un altra per tutte le chiese orientali; o finalmente una per l'Occidente e tante per l'Oriente quante sono le chiese di colà che si differenziano tra loro nel rito. La terza ipotesi non merita d'esser discussa, nè potrà venir in mente a nessun vescovo; altrimenti il concilio ecumenico si ridurrebbe per l'Oriente ad una raccolta di sinodi particolari."

3.3.2.3. Romanian Bishop Joseph Papp-Szilàgyi

Bishop Joseph Papp-Szilàgyi of Gran Varadino spoke several times to the council fathers concerning Eastern discipline.[136] In an early intervention on the schema *De Vita et Honestate Clericorum*,[137] he described the Church as consisting of symbol (i.e., creed), code, and ritual.[138] Although the creed must be one, "since there is only one God, one faith, one baptism, one Church,"[139] the same could not be said of code or ritual. In fact, the bishop argued that Eastern Catholics already had a determined code, distinct from that of the West, which spoke clearly and conclusively; although unstated in his speech, this "code" consisted of the norms approved in canon 2 of the Council of Trullo.[140] Noting that the Roman pontiffs had repeatedly sworn that Eastern discipline would be conserved, Papp-Szilàgyi asked that the following clause relative to the faithful and clergy of the Eastern Church be added at the end of *De Vita et Honestate Clericorum*:

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[136] A biography is found in Patelos, 228–234. Aside from the speeches cited below, see also his comments on the proposed small catechism at Mansi, 51:526, asking that ritual differences be noted in the text, through consultation with a council of twelve Latin and Greek bishops selected by the council.

[137] Seventeenth General Congregation, January 27, 1870: Mansi, 50:543–546; cf. Žužek, "Common Canons and Ecclesial Experience," 220–221, summarizing his speech. According to Rosario F. Esposito, *Leone XIII e l'Oriente cristiano: studi storico-sistematico*, Multiformis sapientia 17 (Rome: Edizioni Paoline, 1961) 515–516, the discussion of this schema early in the council caused the pro- and anti-uniformity blocs of Eastern council fathers to form.

[138] Seventeenth General Congregation, January 27, 1870: Mansi, 50:544: "[Christi] ecclesiae partes constitutivae sunt *symbolum*, *codex* et *rituale*."

[139] Ibid.: "Symbolum habemus commune: symbolum enim unum est, quoniam unus Deus tantum est, una fides, unum baptisma, una ecclesia."

[140] Ibid.: "Videtis ergo, sancti concilii patres, quod nos orientales catholici habemus nostrum determinatum codicem, qui clare et determinate loquitur." He cited the norms contained in the schema *De Vita et Honestate Clericorum*, noting that the sanctions observed by the Eastern Church were much more severe than those of the Western Church. Cf. the proposals made by him and Archbishop Ioan Vancsa to the council at Mansi, 53:622–628, where in §2 the prelates argued that many of the provisions of the various schemata were already covered by Eastern law. On Papp-Szilàgyi's identification of the "codex Ecclesiae orientalis catholicae" with what was approved by c. 2 of Trullo, see Žužek, "Common Canons and Ecclesial Experience," 214–216. The Greek text and Latin translation of this canon are found in Mansi, 11:939–942.

> With the approval of the sacred synod, we declare that bishops of the Eastern Church are not impeded by this our constitution from regulating ecclesiastical discipline according to the canons included in the code of the Eastern Church as they have been regulated of old and in its own manner.[141]

Likewise, Papp-Szilàgyi raised concerns about attempting to establish a uniform law concerning the recitation of the Divine Office, noting the disorganized state of the texts of the Divine Office in the Eastern Church.[142] Hence, he asked that there be added to the relevant schema the clause: "but for Catholics of the Eastern rite, they must satisfy this constitution according to their own custom and diocesan law."[143]

In a later speech offering emendations to the schema on papal primacy and infallibility,[144] Papp-Szilàgyi reminded the council fathers of the differing ways the Roman pontiff legislated:

> The Roman pontiff is the rector and governor of the universal Church of Christ; therefore, he issues laws, even disciplinary laws, for the whole Church. But it must be observed that, relative to discipline, the Roman pontiffs have acted one way towards the

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[141] Ibid.: "[...] hinc ad calcem schematis addendum esse puto, et etiam ut id fiat rogo, videlicet relate ad fideles et clerum orientalis ecclesiae: *Sacra approbante synodo, declaramus episcopos orientalis ecclesiae per hanc nostram constitutionem minime impediri, ut disciplinam ecclesiasticam secundum canones, codice ecclesiae orientalis complexos, porro quoque atque suo modo moderentur.*" At ibid., 50:545, Papp-Szilàgyi explained that *suo modo moderentur* referenced the summary judicial procedure used in the East, without the solemnities imposed in the Latin Church since Gregory IX; thus, he implicitly appealed to the Pamphilian jurisprudence.

[142] Cf. the speech of Stefano Stefanopoli, Greek Titular Archbishop of Philippi, at the Twenty-first General Congregation, February 4, 1870: Mansi, 50:640, referencing the Pamphilian jurisprudence to explain why Eastern clerics did not feel bound to the Western laws concerning the recitation of the Divine Office.

[143] Seventeenth General Congregation, January 27, 1870: Mansi, 50:545–546: "Ideo ego optarem huic capiti II addendum esse quoad ritus catholicos: *Orientalis ritus autem catholicis huic constitutioni iuxta suum morem ac legem dioecesanam satisfacere debere.*" The speech as a whole seems to have had a beneficial effect on the council fathers, at least according to the French ambassador present; see Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," 454–455.

[144] Sixty-ninth General Congregation, June 11, 1870: Mansi, 52:601–605. See especially ibid., 52:604, where he suggested the following sentences replace the controversial paragraphs on papal supremacy: "*Haec est catholicae veritatis doctrina a qua deviare salva fide et salute nemo potest.* [...] *Haec tamen Romani pontificis inter episcopos primatus potestas non excludit aut supprimit potestatem regiminis propriam episcoporum, qui positi sunt iuxta Apostolum a Spiritu sancto regere ecclesiam Dei, et ad hoc Spiritum sanctum in consecratione episcopali obtinent; proinde episcopi Romano pontifici coniuncti, et ei qua totius gregis dominici principali pastori subordinati, non tantum particulares suos greges potestate iuris divini regunt et gubernant, verum etiam cum summo pontifice sollicitudinem totius ecclesiae sustinent, atque cum eodem pontifice pro tota ecclesia legislatores et iudices sunt; adeoque regimen ecclesiae in episcopatu cum summo pontifice primate suo consistit, seu regimen ecclesiae est Petroapostolicum.* [...] *Qua ratione etiam salva sunt iura et privilegia patriarcharum orientalium, quemadmodum in concilio Florentino continetur.*" He had also offered comments on this topic in an earlier speech: Sixtieth General Congregation, May 28, 1870: Mansi, 52:309–312.

> Eastern Church and another way towards the Western Church. For while the Roman pontiffs in the West have regulated discipline with decretals, in the East they have established discipline through confirmation of ecclesiastical canons and laws enacted in general councils celebrated in the East. These laws of the Church, approved by the Roman pontiff, constitute the discipline of the Eastern Church, even today.[145]

This distinction was threatened by the schema proposed to the council fathers:

> Something else that occurs in this second paragraph is the reference to discipline; there is no doubt that this clearly is aimed also at the discipline of the Eastern Church, namely that this discipline can also be changed through the plentitude of pontifical power, or be assimilated entirely to the discipline of the Latin Church. Eastern discipline and Western discipline are one in this respect, in that each discipline is Catholic; for the laws of the Church, the canons of the universal councils approved by the supreme Roman pontiff, which cannot but be Catholic, make up the discipline of the Eastern Church. The Eastern Church and Western Church are two sisters, who differ from one another in outer form and appearance, as I differ in outer form from you all; nevertheless, they are two sisters, they are equals and daughters of the same sweet mother Church.[146]

In contrast with his earlier speech, Papp-Szilàgyi admitted that Eastern discipline, as contained in the Eastern code, was not entirely complete and needed perfecting, and the Greek Church could therefore adopt the provisions of the various schemata concerning the visitation of dioceses, episcopal vicars, *sede vacante*, and vicars capitulary. However, the key point was that *Eastern* discipline was being perfected:

> Therefore we will perfect our discipline in our provincial synods with the approval of the Holy Apostolic See, but prudently and with circumspection, without disturbance of souls, since you yourselves know quite well that Greeks tenaciously adhere to the traditions of their fathers. But, I say, we ourselves shall do what is opportune for the increasing

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[145] Ibid., 52:602: "Romanus pontifex est rector et gubernator universalis Christi Ecclesiae: ergo leges fert pro tota ecclesia etiam disciplinares. Quoad quod observari debet, quod Romani pontifices relate ad disciplinam aliter versati fuerint relate ad ecclesiam orientalem et aliter relate ad ecclesiam occidentalem. Dum enim Romani pontifices in Occidente decretalibus rem disciplinae moderabantur, in Oriente disciplinam stabiliverunt per confirmationem canonum et legum ecclesiasticarum in generalibus conciliis in Oriente celebratis statutarum; quae leges ecclesiae per Romanum pontificem approbatae constituunt disciplinam ecclesiae orientalis hodie quoque."

[146] Ibid., 52:603: "Aliud quod occurrit in hac secunda paragrapho est commemoratio disciplinae, haud dubie etiam tendentiose ad disciplinam ecclesiae orientalis, ut nimirum illa possit de plenitudine potestatis pontificiae etiam mutari, aut disciplinae ecclesiae latinae ex toto assimilari. Disciplina orientalis et occidentalis ecclesiae una est eo respectu, quia et una et alia disciplina catholica est. Disciplinam enim orientalis ecclesiae faciunt ecclesiae leges, canones universalium conciliorum per summum Romanum pontificem approbatorum, quae non catholica esse non possint. Ecclesia orientalis et occidentalis sunt sorores duae, quae externa forma et specie ab invicem differunt, sicut a vobis externa forma differo; sed tamen sunt sorores, sunt aequales eiusdem dulcis matris ecclesiae filiae."

> understanding of our people and clergy; a jump in logic is not given in physical science, nor in moral science.[147]

While Papp-Szilàgyi still presupposed an already-extant Eastern code, he now suggested that it needed perfecting through legislation issued at the local level by provincial synods.

Like the two patriarchs referenced previously, Papp-Szilàgyi strove to defend Eastern discipline and autonomy. However, instead of referring to an abstract Eastern discipline, the bishop cited an already-existing Eastern code that spoke "clearly and conclusively." By referencing something so concrete, the bishop had hoped that the council would thereby refrain from altering Eastern discipline; any changes deemed necessary were to be undertaken by the Eastern communities themselves, thereby maintaining autonomy.[148] Unfortunately, there were two main flaws in this argument. First, Papp-Szilàgyi was forced to admit that the Eastern code was not complete and required "perfecting." By stating that the Greek Church would accept the provisions of the schemata on the visitation of dioceses, episcopal vicars, *sede vacante*, and vicars capitulary to further this goal, one could argue that the other schemata could function in the same way, especially if one considered the contemporary Eastern discipline to be corrupt as a whole.[149] Second, the Eastern "code" that Papp-Szilàgyi cited would have been recognized as law only by those Eastern communities that had been in communion with Constantinople at the time of the Council of Trullo; "non-Byzantine" Christians, such as the Chaldeans, Syrians, and

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[147] Ibid.: "Ergo nos perficiemus nostram disciplinam in synodis nostris provincialibus cum approbatione sanctae sedis apostolicae, prudenter tamen, circumspecte, sine conturbatione animorum, quoniam scitis vos valde bene quod Graeci mordicitus adhaereant paternis suis traditionibus. Sed dico, faciamus nos ipsi opportuna pro crescente populi nostri et cleri intelligentia: saltus nec in natura physica nec in morali datur."

[148] Cf. the petition of the Romanian bishops in Mansi, 53:622–628, esp. 623–624: "Hinc declaramus sincere nulla ratione esse consultum, ut sacro-sanctum concilium Vaticanum aliquid in iis mutandum enunciet, quae ritum aut disciplinam canonicam ecclesiae ritus graeci a sanctis patribus in codice iuris ecclesiae huius depositam concernunt."

[149] Cf. Žužek, "Common Canons and Ecclesial Experience in the Oriental Catholic Churches," 215 on the bishop's contention that Latin law constituted *ius suppletorium* where the Eastern code was lacking.

Copts, would not have necessarily considered the law approved at Trullo to be binding on them.[150]

3.3.2.4. Romanian Archbishop Ioan Vancsa

Archbishop Ioan Vancsa of Făgăraş şi Alba Iulia joined his confrere Bishop Papp-Szilàgyi by giving a speech upholding the existence of an Eastern code of law against those wanting to impose disciplinary uniformity.[151] Likewise distinguishing several constitutive parts of the Church,[152] he spoke about the "code" of the Christian East:

> Any of you, most reverend fathers, should be able to understand how much importance is in the ecclesiastical code, chiefly for the Greek Church (which was Catholic when it constituted this code), if you perceive not only that the code regulates the manner of leading the public and private life of the priesthood and of all ecclesiastical persons, but also that the same code governs the public ecclesiastical life of the faithful, directs all discipline, and moreover establishes numerous rules for divine cult itself and also the rite itself. Hence it happens that the Greek Church always has attributed importance to its code, and has made sure that it has secured the code for itself with the authority of the general councils at which it was present.[153]

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[150] Felix Cappello, "Ius Ecclesiae latinae cum iure Ecclesiae orientalis comparatum," *Gregorianum* 7 (1926) 491: "Praeterea animadvertisse iuvabit, Codicem Trullanum, proprie et accurate loquendo, respicere dumtaxat fideles ritus graeci seu byzantini, non autem syros, coptos et armenos"; cf. Žužek, "Common Canons and Ecclesial Experience," 215: "This teaching of Papp-Szilàgyi concerning the force of the «Trullan Code»—unexceptionable from the catholic point of view—was not shared by the whole of the «Ecclesia orientalis catholica»." Rome later came to reject the idea that a true Eastern code already existed; see Letter of the Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite to the Bishop of Făgăraş şi Alba Iulia, April 30, 1881: *Fonti* 1/10:643 (cited in Žužek, "Common Canons and Ecclesial Experience," 216, as well as Bucci, 100): "Qua in re illud quoque animo observabatur ... Codicem proprie dictum canonum orientalium nullum hucusque fuisse ab Apostolica Sede approbatum; et propterea canones disciplinam Ecclesiae universalis spectantes etiam Patrum orientali schismate vetustiorum per se maiori non pollere auctoritate, quam singuli ipsi Patres mereantur; non posse autem, undequaque affirmari ipsos legum ecclesiasticarum proprio et rigoroso sensu sumptarum vi pollere."

[151] Sixty-third General Congregation, June 2, 1870: Mansi, 52:380–386. He also asked that the proposed small catechism respect Eastern rites and usages; see his comments on the constitution *De Parvo Catechismo* in Mansi, 51:516. A biography of the bishop is found in Patelos, 224–228.

[152] Sixty-third General Congregation, June 2, 1870: Mansi, 52:381. He listed four constitutive parts: symbol (the truths of faith and morals), code, ritual, and hierarchy.

[153] Ibid., 52:383: "Quantum codici ecclesiastico insit momentum, cumprimis illi ecclesiae graecae, quae fuit catholica dum hunc codicem conderet, quillibet [*sic*] vestrum, reverendissimi patres, poterit intelligere, si mecum perspexerit in illo codice non tantum sacerdotii et omnium ecclesiasticarum personarum privatam et publicam vitam et agendi rationem regulari; verum etiam fidelium publicam vitam ecclesiasticam eodem codice gubernari, totam

Such security was the basis for many nations entering communion with the Roman See, including the archbishop's own Romanian nation. Hence, upending this basis would cause great grief among the Eastern faithful:

> Most reverend fathers, I admit that we are not discussing points of ecclesiastical discipline in particular—for we are discussing the principle expressly laid out for moderating the entirety of discipline, which is said to be extended to all without distinction of rite. And indeed this is precisely what offers the great cause of anxiety to those whose public Christian life has been governed according to the norm of the statutes of the universal Church up to now.[154]

According to the archbishop, imposing uniform discipline would undermine the juridic autonomy of the East by replacing the Eastern code with a possibly foreign discipline.

In another speech twelve days later,[155] the archbishop proposed several *modi* for the third chapter of the schema on papal primacy and infallibility.[156] During his remarks, he responded to the comments Giovanni Cardinal Pitra[157] had made in the previous general congregation.[158] The

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disciplinam dirigi, quin immo in illo codice plurimas tum ipsius cultus divini tum etiam ritus ipsius regulas stabiliri. Hinc evenit ut ecclesia graeca semper suo codici tribuerit momentum, eumque auctoritate conciliorum generalium, quibus ipsa interfuit, sibi assecurare fecerit."

[154] Ibid., 52:384: "Sed, reverendissimi patres, non agitur de punctis disciplinae ecclesiasticae in specialibus concedo; nam agitur de principio disciplinam totam moderandi expresse exposito, quod dicitur extensum iri ad omnes sine discrimine ritus. Et reapse hoc est praecise quod magnam anxietatis causam praebebit illis, quorum vita christiana publica ad normam statutorum ecclesiae universalis adusque gubernata fuit."

[155] Seventy-first General Congregation, June 14, 1870: Mansi, 52:690–697.

[156] Among these was a request that the whole citation from the Council of Florence be included in the text of the decree, arguing that it would not derogate from the primacy of the pope: ibid., 52:691–692.

[157] Cardinal Pitra had earlier made a collection of Eastern disciplinary laws by order of Pius IX; see the *praefatio* to the *Codex Canonum Ecclesiarum Orientalium* in *AAS* 82 (1990) 1049. This collection (published as Giovanni Battista Pitra, *Iuris Ecclesiastici Graecorum Historia et Monumenta Iussu Pii IX. Pont. Max.*, 2 vols. [Rome: Typis Collegii Urbani/Typis S. Congregationis de Propaganda Fide, 1864–1868]) was influenced by the mistaken equality of Latin law and universal law that also affected the decisions of the preconciliar commission. Thus, Pitra's statement at 1:ii: "[I]us illud, quod canonicum dicimus, quod in evangelio divinisque oraculis altas radices egit, adeo in Ecclesia latina floruit et adolevit, ut ad illam robustam decretalium, ut aiunt, maturitatem, firmitatemque provectum, tolli iam non possit, quin orbis prius fundamenta avellantur. Sed enim per totum orientem alius rerum aspectus. Nihil igitur mirum Pontificem Romanum, feliciter regnantem, quum multa et magna de altera orbis parte moliretur, quum veritatem illic latius propagandam, quum orientalium negotia novis curis excitanda, confovendos ritus, corrigendos mores, disciplinam restituendam meditaretur, prius de legibus Ecclesiae colligendis edendisque cogitavisse."

cardinal had contended that the Greek code[159] appealed to by Vancsa was not of the same level as creed, hierarchy, and sacrament.[160] Further, aside from the disciplinary canons of Nicaea I and Sardica, the Roman Church never approved any of the other disciplinary canons present in the Greek code; such canons "only had the force of local law and the strength of ancestral custom where it was and remained in use."[161] The cardinal claimed that the single corrective power for the confused nature of the Greek canons[162] was the Roman pontiff's oversight of all ecclesiastical discipline:

> Prudent antiquity saw the dangers, and so, with the venerable Bishop Hosius as leader, the synod of Sardica issued those celebrated sanctions, to which it is entirely necessary that I return, and strive with all my power to commend them to your diligence. From its firm right of appeal to the Apostolic See both from the East and from the West (whence in all matters the Roman determination is the last and supreme one), it has happened that the Roman pontiff sits as arbiter and judge for the Eastern Church and the Western Church. But, so that he should prudently settle Eastern matters according to the laws of those very peoples and his own conscience, he has the right to review these laws, examine them, and apply them to the given matter. Therefore, not only are Eastern canons entirely within his power, but in addition constitutions for the Eastern Churches, whether dogmatic or disciplinary, pertain to his judgment at least in the manner that that supreme master of law, Benedict XIV, explained once and again with learned words in his classic work *De Servorum Dei Beatificatione* and in the constitution *Allatae sunt*. His very words: "The subjects of the four patriarchs of the East ... are bound ... to new

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[158] The cardinal's speech was at the Seventieth General Congregation, June 13, 1870: Mansi, 52:643–650. Vancsa specifically referenced Cardinal Pitra's speech in his own speech at Seventy-first General Congregation, June 14, 1870: Mansi, 52:694: "Favete benigne, reverendissimi patres, ut reflexe ad ea, quae ab eruditissimo et eminentissimo cardinali hesterna in congregatione generali dicta inteligere potui [...]."

[159] At the Seventieth General Congregation, June 13, 1870: Mansi, 52:645, the cardinal specifically stated that he was not going to deal with the Copts, Ethiopians, Armenians, Syrians, and Chaldeans, and would stick to the Greek code. His statement thus subtly referenced the aforementioned problem that the "Eastern code" cited by the Romanian bishops was not truly "Eastern," but respected as a code only those Eastern communities who had been in communion with Constantinople at the time of Trullo.

[160] Ibid.: "Sed parcant mihi fratres orientales, si eousque non veniam, ut codicem disciplinae orientalis habeam tamquam unum ex quatuor ecclesiae cardinibus, qui eodem gradu stet ac symbolum, hierarchia, sacramenta. Ita, si bene intellexerim, illustrissimus Fogarasiensis archiepiscopus."

[161] Ibid.: "Corpus ergo canonum graecorum praeter nicaenos et sardicenses vim tantum legis localis et robur avitae consuetudinis hic habet ubi in usu fuit et mansit." He added that the popes never approved the canons as a whole, but upheld some, tolerated others, suspended others, and reprobated others. The collectors of the Greek canons added nothing to their authority, since they had been private men.

[162] Cf. ibid., 52:646–647, describing how various "schismatic" patriarchs and civil authorities changed the canons at will.

> pontifical constitutions in three cases: first in the matter of the dogmas of faith; second if the pope explicitly makes mention of the said persons in his constitutions and makes determinations concerning them; third if he makes determinations about them implicitly in the same constitutions, as in the cases of appeals to a future council."[163]

Cardinal Pitra thus used the Pamphilian jurisprudence, which had recognized a negative autonomy on the part of the Christian East, to justify papal intervention in Eastern discipline. The jurisprudence admitted that the pope could enact disciplinary norms for the East at least in those specified circumstances; the confusion of Eastern discipline demanded such intervention.

In his response, Archbishop Vancsa frankly admitted that there were some issues with the Greek code as it then existed.

> And indeed first of all I recognize that it is true that in the Greek code there are contained such things that cannot be approved, and to which we Catholic prelates cannot assent, just like we have never done, and here and now we will publicly declare that only those things are retained by us that do not offer offense to the unity of faith or the instruction of morals. But as for those things that the holy Catholic fathers have beneficially established in councils, whether general, or local but nevertheless accepted by the whole Greek Church, I cannot see why we should not adhere to them.[164]

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[163] Ibid., 52:647: "Pericula vidit prudens antiquitas, ideoque, venerabili Osio duce, a Sardicensi synodo emanarunt celebres illae sanctiones, ad quas omnino necessarium est ut redeam, omnibusque viribus enitar, ut eas vestrae commendem diligentiae. Ex ipso et inconcusso iure provocationis ad sedem apostolicam tum ab Oriente tum ab Occidente, unde cunctis in negotiis romana sententia ultima et suprema est, eo ipso fit ut Orientem inter et Occidentem Romanus pontifex arbiter sedeat et iudex: verum ut orientalia negotia iuxta ipsorum populorum leges et ex sua conscientia prudenter componat, ius habet has leges recensendi, examinandi, et pro re data explicandi. Non solum igitur penes ipsum sunt canones orientales, sed ipsius sententiae et constitutiones sive dogmaticae, sive disciplinares ad ecclesias orientales eo saltem modo pertingunt, quem disertis verbis exposuit semel et iterum summus iuris magister Benedictus XIV, tum in classico opere *de servorum Dei beatificatione*, tum in constitutione *Allatae sunt*. En illius verba: 'Subditi quatuor patriarcharum Orientis ... ligantur ... novis pontificiis constitutionibus in tribus casibus: primo in materia dogmatum fidei; secundo si papa explicite in suis constitutionibus faciat mentionem et disponat de praedictis; tertio si implicite in iisdem constitutionibus de eis disponat, ut in casibus appellationum ad futurum concilium.'"

[164] Ibid., 52:695: "Et quidem primo verum esse agnosco, in codice graeco contineri talia quae minime approbari possunt, quibusque nos praesules catholici assentiri eo minus possumus, quod sicut numquam fecimus, ita et hic publice declarabimus, illa solum a nobis retineri, quae nec fidei unitati nec morum instituto officiunt. Quare autem eis, quae sancti patres catholici in conciliis sive generalibus sive topicis, ab universa tamen ecclesia graeca acceptatis, salubriter statuerunt, non adhaereamus, perspicere non possum."

The archbishop rejected the cardinal's argument that no disciplinary canons outside of Nicaea I and Sardica had been approved by the Apostolic See.[165] However, he offered no opposition to the cardinal's argument on papal power based on the Pamphilian jurisprudence.

Like Papp-Szilàgyi, Archbishop Vancsa was forced to admit the insufficiency of the Eastern code. While he offered a strong argument that more canons in the Eastern code than just those of Nicaea I and Sardica had been approved by the Apostolic See, he still acknowledged that other canons could not be approved. Such a confusion of canons in this code would have reinforced the idea of confusion in Eastern discipline itself. That the situation had lasted for this long reflected poorly on the individual communities' capability and desire to correct the situation, and supported Cardinal Pitra's argument that only the pope could enact a true reform.

3.3.2.5. Armenian Patriarch Anthony Petros IX Hassun

While the four Eastern hierarchs cited above defended, in various ways, the distinct disciplinary system and the juridic autonomy of the Eastern communities, such a defense was not unanimous among Eastern prelates at the council.[166] Patriarch Anthony Petros IX Hassun of Cilicia,[167] joined by several other Armenian prelates,[168] strongly defended efforts to establish

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[165] Ibid., 52:695–696.

[166] Žužek, "Common Canons and Ecclesial Experience," 221: "As I have already said, at the First Vatican Council there was no «coalition of eastern bishops» against the line proposed by Monsignor Valerga excluding the «diversitas» in discipline between East and West. On the contrary, among the eastern bishops themselves there were some who could ardently advocate the «unicitas disciplinae»." Patelos, 545 states that the Eastern hierarchs were united only concerning Eastern bishops having control of the Latin missionaries in their dioceses.

[167] A biography is found in Patelos, 236–246.

[168] See the written observations on the schema *Super Missionibus Apostolicis* given in the name of the patriarch and four other Armenian prelates in Mansi, 53:113–117. The comments, among other things, asked it to be made clear that Eastern bishops enjoyed the same rights over monks as their Latin counterparts (I) and that Eastern bishops and pastors would assume the care of Latin faithful in Eastern areas without Latin hierarchs (VI) (a similar comment was made by Chaldean Archbishop Paul Hindi of Gazireh—see ibid., 53:61). See also the speech of Placidus Casangian,

disciplinary uniformity throughout the Church, likely being influenced by the uproar in his own community over the restructuring of discipline concerning the election of patriarchs and bishops carried out by Pius IX.[169] The patriarch's various interventions emphasized the pope's ability to change Eastern discipline on his own authority, in opposition to the Armenian schismatics arguing that the pope could not so act without the intervention of the relevant patriarch or nation. Thus, the patriarch petitioned that chapter eleven of the schema *De Ecclesia Christi* be emended to state explicitly that the Roman pontiff could, by his own authority, alter Eastern discipline:

> [The patriarch] observes in this chapter and in the related three canons that there is not found, in explicit and open words, a defined primacy of jurisdiction of the supreme pontiff extended and exercised in the whole Church, West and East equally, not only in matters of faith and morals, *but also in ordering and reforming ecclesiastical discipline, both canonical and liturgical*; for men, seizing as their riotous pretext the constitution *Reversurus* of Pius IX, entirely deny this last point, and seduce the souls of the simple.[170]

The schema was later altered to include clauses responding to the patriarch's comments.[171]

Armenian Archbishop of Antioch, at the Thirteenth General Congregation, January 21, 1870: Mansi, 50:430–432, asking that the distinction between Latin Churches and at least the Armenian Churches concerning the rules for *sede vacante* be removed, so that the vicar capitular would be chosen by a group of pastors and other ecclesiastical men as was prescribed for Latin Churches lacking a chapter, not by the patriarch. Note that this change was not supported by Armenian Bishop Stephen Melchisedechian of Erzurum at first part of the Sixteenth General Congregation, January 25, 1870: Mansi, 50:505; however, he explicitly supported unified law concerning physical (and not merely moral) residence of bishops in their sees: "[A]rbitror autem, ut una eademque lege catholici omnes episcopi cuiuscumque gentis vel ritus teneantur. Et hoc non ut ego episcopus ritus orientalis indulgentiore isto iure utar; verum quia censeo, nihil magis proficere ad unitatem fidei et concordiam animorum conservandam, quam unitatem canonicae disciplinae, salvis semper ritibus et peculiaribus quibusdam usibus a sancta sede approbatis: et eam unitatem iam ex nunc in schematibus decretorum sapienter et utiliter institutam gaudeo, et synodalibus decretis roborandam confido."

[169] This occurred with the apostolic constitution *Reversurus* (see below, 3.4.1). For an overview of the problems that the Armenians were suffering at this time due to *Reversurus*, see the speech of Armenian Bishop Stephen Melchisedechian of Erzurum at the first part of the Sixteenth General Congregation, January 25, 1870: Mansi, 50:503–506.

[170] No. 64 of *Observationes in Caput XI Schematis De Ecclesia Christi*: Mansi, 51:967: "*Hassun patriarcha Ciliciensis Armenorum* (nº 87).—Alius reverendissimus pater observat in hoc capite et in relativis tribus canonibus non inveniri explicitis et apertis verbis definitum iurisdictionis primatum summi pontificis extendi et exerceri in universa ecclesia occidentalis aeque ac orientalis ritus, non solum in rebus fidei et morum, *sed etiam in ordinanda et reformanda ecclesiastica disciplina tam canonica quam liturgica*; hoc enim ultimum turbulenti homines occasione capta constitutionis Pii IX *Reversurus* omnino negant, et simplicium animas seducant."

[171] Compare the section of the original schema *De Ecclesia Christi* at Mansi, 51:543–545 to that of the schema on the primacy of the pope at Mansi, 52:5–6, particularly the addition of the phrases "cuiuscumque ritus et dignitatis" and "non solum in rebus ad fidem et mores, sed etiam quae ad disciplinam et regimen ecclesiae, per totum orbem diffusse, pertinent."

In a speech to the council responding to the arguments of Patriarch Youssef, Patriarch Hassun rejected the idea that the patriarchates possessed a form of autonomy that could infringe on the authority of the Roman pontiff.[172] Rebuffing Youssef's claim that the Eastern *typus* of the Church was the pentarchy, he stated:

> Innumerable are the proofs that can be brought forward for supporting [the unity of the supreme rule of the Church in the Roman pontiff]. Thus, it is wonderfully established that the autonomy of patriarchal rule in the ancient ages of the Church had in no way been recognized by the notable patriarchs and bishops of the Eastern Church. Rather, it will become easily apparent to one considering ecclesiastical history that evidence of the exercise of the supreme authority of the Roman pontiff is already rather clear from the apostolic age in those famous Churches of the East, just as in the Western Church. As much as the most holy patriarchs of the East were honored by the Holy See, so much did they reverently and clearly offer the allegiance of their obedience in a solemn way to the same Apostolic See, and did not retain for themselves immunity as the single surety of their salvation, or believe the patriarchal system of the Eastern Church as the characteristic type and the single defense and condition of their existence.[173]

The famous clause "salvis videlicet privilegiis omnibus, et iuribus eorum" of the Council of Florence only referenced the ecclesiastical law privileges of the patriarchs, and in no way limited the power of the pope; thus, since the current schema dealt only with dogmatic matters, the clause was properly omitted from the text.[174] Hassun added:

> The Roman pontiffs could not have and cannot confirm the so-called autonomy of the Eastern Churches by any agreement and deprive themselves of their supreme authority, essentially inherent in their primacy, to pastor and govern these and other Churches, lest

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[172] Fifty-seventh General Congregation, May 23, 1870: Mansi, 52:192–202.

[173] Ibid., 52:196: "Innumera essent documenta, quae in hanc rem afferi possent; quibus mirifice statuitur autonomiam patriarchici regiminis in antiquis ecclesiae saeculis ab inclytis illius ecclesiae orientalis patriarchis et episcopis nullo modo cognitam fuisse. Immo ecclesiasticam historiam apprime perpendenti facile apparebit, Romani pontificis supremae auctoritatis exercitii monumenta iam ab aevo apostolico in praeclaris illis Orientis ecclesiis luculentiora esse, quam in ecclesia occidentali; sanctissimosque illos Orientis patriarchas, quo magis a sancta sede honorati erant, eo magis suae sincerae obedientiae obsequium solemniori modo eidem apostolicae sedi reverenter et luculenter exhibuisse, quin immunitatem tamquam unicam tabulam salutis sibi retinuerint, vel patriarchicum systema orientalis ecclesiae characteristicum typum et suae existentiae unicum propugnaculum et conditionem crederent."

[174] Ibid., 52:199, 200; cf. the comments of Charles-Emile Freppel, Bishop of Angers, at the Seventy-first General Congregation, June 14, 1870: Mansi, 52:697–698. A response to these arguments was made by Archbishop Jean-Baptiste-François-Anne-Thomas Landriot of Reims at the Sixty-seventh General Congregation, June 9, 1870: Mansi, 52:561–567. However, this speech prompted a further rebuttal; see the comments of Bishop Salvatore Magnasco of Bolina at the Sixty-ninth General Congregation, June 11, 1870: Mansi, 52:621–625.

> they want to be accused of betraying their ministry by the supreme prince of pastors, Jesus Christ.[175]

The patriarch noted that Pius IX explicitly stated in the letter *In suprema* that he would aid in the reordering of Eastern discipline, but he did not state anything about protecting patriarchal rights or autonomy in that letter or elsewhere:

> It has been shown that our same most holy lord [Pius IX] did not ever teach anything in one of so many of his apostolic constitutions about patriarchal rights or privileges limiting the apostolic primacy, or about that autonomy that is unworthily asserted to be the base and foundation of Catholic Churches.[176]

The patriarch ended by arguing that the number of those returning to communion was greater, and the faith of those returning stronger, when the dogma of papal primacy was more clearly asserted.

Particular circumstances seem to have influenced Patriarch Hassun's statements concerning Eastern juridic autonomy at the First Vatican Council. Not only did his election as patriarch depend on papal confirmation, but the contemporary structuring of his patriarchal office resulted from papal legislation.[177] Ironically, in order to maintain his own patriarchal authority over the Armenians, he had to support an explicit statement of papal authority over the East. In addition, Hassun interpreted the concept of autonomy as described by Patriarch Youssef to be some form of constraint on the authority of the Roman pontiff; thus, the popes would be "betraying their ministry" if they ever accepted such autonomy. It was unclear to Hassun (and

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[175] Fifty-seventh General Congregation, May 23, 1870: Mansi, 52:200: "Nullo pacto potuisse aut posse Romanos pontifices, ne proditi sui ministerii a supremo pastorum principe Christo Iesu argui vellent, assertam autonomiam ecclesiarum orientalium confirmare, seque privare suprema potestate ipsi primatui essentialiter inhaerente easdem ecclesias sicuti caeteras pascendi et gubernandi."

[176] Ibid., 52:201: "Exploratum est, eumdem sanctissimum dominum nostrum ne in una quidem tot suarum apostolicarum constitutionum aliquid unquam docuisse vel de iuribus vel de privilegiis patriarchicis limitantibus apostolicum primatum, vel de illa autonomia quae catholicarum ecclesiarum basim et fundamentum esse immerito asseritur."

[177] Again, see below, 3.4.1, on the apostolic constitution *Reversurus*.

likely other council fathers) how some form of Eastern juridic autonomy could be admitted together with papal supremacy as defined in the schema.

3.3.2.6. Syrian Archbishop Cyrille Behnam Benni

Archbishop Cyrille Behnam Benni of Mosul was perhaps the most outspoken advocate of disciplinary uniformity among the Eastern prelates present at the First Vatican Council.[178] In his very first speech to the council,[179] he told the council fathers, "Finally, I have seen the day dawn and a new age arise for the various Eastern Churches, inasmuch as work is undertaken for restoring a determinate and certain disciplinary order for those Churches of the Easterners."[180] Citing biblical verses describing Jerusalem being freed of its bonds and the light of God shining on her whose citizens had been blind,[181] the archbishop considered how the council could aid the poor Eastern communities:

> With what method could you aid the Churches of the Easterners? For it is certain that they cannot persevere as they are now; so many things are uncertain and indeterminate, which, if we want to speak in truth, are governed arbitrarily. I think it is impossible to return to the full observance of every single canon, since not all the canons can fit with the present state of things, and the Eastern Churches themselves, Catholic or schismatic, recede from them in many matters. I certainly would not want everything to be brought together with the customs and rites of the Latins—let each Church remain in its rite. But why could they not agree at least on the principal points of discipline, as they agreed once before? This is that unity of discipline that I, full of happiness, see in the present schemata. I endeavor to demonstrate with a few words that this is not only possible, but indeed necessary.[182]

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[178] A biography is found in Patelos, 362–366.

[179] Twentieth General Congregation, February 3, 1870: Mansi, 50:596–602.

[180] Ibid., 50:596: "Namque tandem aliquando diem illucescere novamque aetatem variis orientalibus ecclesiis exoriri perspexi, quatenus videlicet opera navatur ad determinatum atque certum ordinem disciplinarem restituendum in supradictis orientalium ecclesiis."

[181] Is 52:2, 60:1, 59:10.

[182] Twentieth General Congregation, February 3, 1870: Mansi, 50:597: "Qua autem ratione succurrere poteritis orientalium ecclesiis? Etenim certum est, eas non posse perdurare quales modo sunt: quam plurima incerta atque

The archbishop gave four reasons supporting the necessity of uniform discipline, at least in the principal matters. First, the distinction between East and West had to be removed; it was unknown in the ancient Church, even though the variety of rites was greater at that time than it was at the time of the council: "Thus it is clear to all that there were various and particularly diverse rites, but one and the same discipline, equal in every way at least in substantial matters, saving any particular customs."[183] Second, the canonical collections of different Churches already contained mostly the same material. Third, these same collections did not bear the name of the nation that used them, suggesting the universality of disciplinary laws. Fourth, even heretics, retaining an idea of the universality of discipline, observed the disciplinary canons of the ecumenical councils whose dogmatic teaching they rejected.

> Therefore, diversity, at least in principal points of discipline, saving (as I said above) certain local customs, was entirely unknown in the Church in ancient times, and only with the lapse of time and the occasion of nefarious schisms, especially that of Photius, was this diversity introduced.[184]

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indeterminata sunt, quae, si vere loqui velimus, arbitrario reguntur. Ad antiquissimos mores et ad plenam observantiam omnium et singulorum canonum redire, impossibile existimo; quia non omnes possunt convenire cum praesenti rerum statu, et ipsae orientales ecclesiae, sive catholicae, sive schismaticae, ab illis in multis recesserunt: neque certe vellem omnia ad Latinorum mores et ritus componi. Maneat unaquaeque ecclesia in suo ritu: cur autem non potuerunt convenire in praecipuis saltem disciplinae capitibus, quemadmodum olim conveniebant? Haec est ea disciplinae unitas quam totus laetus intueor in praesentibus schematibus: hanc non solum possibilem, verum etiam necessariam esse paucis demonstrare aggredior." Cf. his comments at ibid., 50:598 (also cited in Žužek, "Common Canons and Ecclesial Experience," 221): "Oh! quam pulchra est idea, reverendissimi patres, ut quemadmodum universa catholica ecclesia idem evangelium habet, eamdemque fidem profitetur, ita etiam habeat, saltem in praecipuis disciplinae capitibus, unitatem; quoniam disciplina, ut sanctissimus dominus noster Pius papa IX in recentiori quadam sua constitutione monebat, est verae fidei sepimentum ac tutela firmissima." The cited constitution is *Cum eccclesiastica disciplina*, §1; this constitution will be discussed below (3.4.2).

[183] Twentieth General Congregation, February 3, 1870: Mansi, 50:597: "Itaque varios maximeque diversos fuisse ritus, disciplinam aequalem saltem in substantialibus, salvis quibusdam locorum consuetudinibus, fuisse, omnibus compertum est."

[184] Ibid., 50:598: "Diversitas igitur saltem in praecipuis disciplinae capitibus, salvis, ut superius dixi, quibusdam locorum consuetudinibus, profecto antiquitus in ecclesia prorsus ignota fuit; et nonnisi temporis lapsu et nefandorum schismatum occasione praesertim Photiani fuit inducta." He spoke later of restoring ("restituatur") uniform discipline.

Behnam Benni argued that uniformity in discipline "would remove this rampart, this unfortunate wall, which separated East from West; it would destroy it and take it from our midst; it would entirely erase this most odious distinction between Greek and Latin, between Eastern and Western."[185] The archbishop did not consider diversity in discipline as beneficial but, like the members of the preconciliar commission, as a disastrous effect of the schism.[186]

The archbishop then proceeded to refute "certain difficulties offered in this hall,"[187] namely, the arguments of Patriarch Audo. First, establishing uniformity would not impede reunion with the schismatics. Discipline was being changed, not the rites; it was the latter that would cause extreme calamity in the Churches of the East.[188] Further, what the council was undertaking was a correction, not a destruction of laws.

> Thus the intent of the schemata, it is clear, is not the abolition of the rights of our Churches, nor the abolition of our received customs, nor the destruction of our rites, which as most ancient and sacrosanct are to be observed holily and religiously; rather, it is the declaration and confirmation of our true rights, the approval of our old customs, the excellent conservation of our rites, as most clearly is noted from the exceptions placed in

[185] Ibid.: "Tota igitur gloria relicta manet huic concilio Vaticano ut hunc aggerem removeat, hunc parietem infaustum, qui orientem ab occidente separabat, destruat, atque de medio tollat: hanc odiosissimam distinctionem inter graecum et latinum, inter orientalem et occidentalem penitus deleat." Cf. Jan Krajcar, "Benedetto XIV e l'Oriente Cristiano," in *Benedetto XIV (Prospero Lambertini), Convegno Internazionale di studi storici sotto il patrocinio dell'Arcidiocesi di Bologna, Cento, 6–9 Dicembre 1979*, ed. Marco Cecchelli (Ferrara: Centro Studi «Girolamo Baruffaldi», 1981) 1:500, noting: "Una rigida divisione dei riti poteva facilmente contribuire alla costruzione di un muro artificiale tra i fedeli della stessa fede." For an example of the archbishop's practical attempts to remove this distinction, see his written animadversions on the schema *Super Missionibus Apostolicis* in Mansi, 53:83–84. He listed five arguments in favor of explicitly granting power over apostolic missionaries to Eastern bishops (the schema only referenced Latin bishops having such power); three of these specifically mentioned *unificatio* (1, 3, 4), and his ending statement on this topic read: "Proinde enixe peto ut tum in hoc schemate, tum in quocunque alio quaevis vel levis exceptio aut restrictio, *exceptis semper ritibus*, omnino de medio tollatur; et ita omnes quid unum essemus sub uno summo pastore, quod toto animo Dominus noster Iesus Christus a Patre suo postulabat." He also noted the problem of having multiple hierarchs in the same territory, asking that the rule of Lateran IV of one bishop for one city be reestablished (ibid., 53:84–85).

[186] Patelos, 492 notes the very non-Eastern orientation of the speech, wondering whether the archbishop's speech was composed by himself or by Propaganda. The French ambassador present at the speech thought it was "inspiré ou plutôt fait à la Propagande"; see Hajjar, "L'épiscopat catholique oriental et le 1er concile du Vatican," 455.

[187] Twentieth General Congregation, February 3, 1870: Mansi, 50:598–599: "Memini quidem nonnullas difficultates in hac aula prolatas fuisse contra hanc disciplinae unitatem."

[188] Cf. his comments in his later speech at the Sixty-seventh General Congregation, June 9, 1870: Mansi, 52:559, arguing that main threat to disciplinary uniformity came from those agitators "revocantes ad ritum et cum eo confundentes et dogma et disciplinam, quam velint impugnare."

> the schemata for the benefit of the Churches of the Eastern rite. The whole difficulty [of the patriarch's objection], then, is found in the fact that canonical discipline is not differentiated from the discipline of rites, nor rights from the correction of abuses.[189]

In addition, Easterners, both Catholics and "schismatics," had introduced innovations over time,[190] so it was hypocritical for the Eastern prelates to object to the innovations proposed at the council. The laity would not become "fanatical and turbulent" over changes that generally affected only clerics,[191] and the extent of clerical ignorance in certain areas was exaggerated and did not logically entail that the reform could not be carried out, or had to be carried out only by that very clergy.[192] Hence, the archbishop argued, he saw no reasonable cause why the reform was not expedient, but in fact saw many things in its favor.[193]

In a later speech, the archbishop spoke in opposition to another patriarch, this time Patriarch Youssef.[194] Noting that he and the patriarch "have been joined by bond of friendship since early age, and enjoyed the same teachers in this dear city," the archbishop nevertheless

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[189] Twentieth General Congregation, February 3, 1870: Mansi, 50:599: "Schematum itaque finis, ut patet, non est nostrarum ecclesiarum iurium, nec receptarum nostrarum consuetudinum abolitio, nec nostrorum rituum destructio, qui ut antiquissimi et sacrosancti sancte et religiose servandi sunt; sed potius est verorum iurium declaratio et confirmatio, veterumque consuetudinum approbatio, rituum perexcellens conservatio: ut luculentissime innotescit ex exceptionibus in schematibus interiectis pro ecclesiis rituum orientalium. Tota difficultas igitur in eo posita est quod non distinguitur inter disciplinam canonicam et rituum, inter iura et abusuum correctionem."

[190] He specifically cited changes to the customs concerning abstinence from certain types of food, impediments to marriage due to connection in the first grade of affinity, and adaptations made to rites based on Latin usages: ibid., 50:599–601.

[191] Ibid., 50:601: "Respondeo hic agi non de ritibus immutandis vel abolendis, nec de iuribus et privilegiis derogandis; sed tantummodo de canonibus disciplinaribus instaurandis, qui cum generatim viros ecclesiasticos respiciant, non video cur offendere debeant laicos." The archbishop suggested that the changes could even please the laity, since the new norms would undo the poor administration of some clerics who arbitrarily decided their cases; he suggested that such arbitrariness was the reason so many Eastern non-Catholics asked to become Latin upon their reception into communion. He further noted that Eastern prelates already used Latin law or moral texts in trials.

[192] Ibid.: "Tertia difficultas obiecta contra praedictam disciplinae unitatem est ignorantia cleri, certe nimis exagerata; ob quam asserebatur non expedire disciplinae unificationem. Difficultas allata, iuxta meam opinionem, ita formulari potest: orientalis clerus ignorantia laborat; ergo disciplinae reformatio vel non est facienda, vel reformanda est ab illo ipso clero. Posito itaque quod antecedens verum sit; consequens summopere falsum est."

[193] Ibid.: "Proinde, reverendissimi patres, nullam video rationabilem causam ob quam iure meritoque asseri possit, hanc disciplinae unificationem non expedire; quin imo plures circumstantiae nimis favorabiles videntur."

[194] Sixty-seventh General Congregation, June 9, 1870: Mansi, 52:551–561.

stated that he could not approve of the patriarch's statements: "If Plato is my friend, if Socrates is my friend, much more is truth my friend."[195] The archbishop, based on the testimony of Pope St. Leo the Great, argued that

> patriarchs are not constituted as certain heads or highest vertices governing the Church by their own whim, but as certain principal members of the mystical body of Christ, through whom the care of the universal Church comes together to the one see of Peter, so that nothing should recede from its head, the Roman pontiff.[196]

The idea of a patriarchal Church came from the apostolic origin of certain Churches that had no parent and acted as mother for other Churches. Since the current Catholic patriarchal Churches did not meet these criteria, their leaders were "patriarchs" only by the dispensation of the Apostolic See. Moreover, the rights and privileges of any bishop were of human law. Hence, patriarchal privileges were weighed out by ecclesiastical laws; they could be reduced or abolished by the supreme power of the Church, and this supreme power resided in the pope.[197]

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[195] Ibid., 52:552: "Ast ignoscat mihi quaeso reverendissimus patriarcha Melchitarum, si ab eiusdem placitis discessero, et ea quae hic pronuntiavit, nullo pacto me probare posse declarem. Equidem amicitiae foedere ab ineunte aetate iuncti fuimus, iisdem doctoribus in hac alma urbe usi sumus: mihi autem si est Plato amicus, Socrates amicus, magis amica veritas."

[196] Ibid., 52:553–554: "Igitur gravissimo sancti Leonis Magni testimonio patriarchae non sunt constituti ut capita quaedam seu vertices summi ecclesiam arbitratu suo gubernantes, verum ut praecipua quaedam membra mystici corporis Christi, per quae universalis ecclesiae cura conflueret ad unam Petri sedem, ut nihil umquam a suo capite, id est a Romano pontifice, dissideat." He had cited chapter 11 of letter 14 of St. Leo the Great, sent to Anastasius of Thessalonica (dated 446; the text can also be found in Mansi, 5:1185 [note that the original printing misnumbered pages, so it appears there at 5:1285]): "De qua forma episcoporum quoque orta est distinctio, et magna ordinatione provisum est, ne omnes sibi omnia vindicarent, sed essent in singulis provinciis singuli, quorum (id est metropolitanorum) inter fratres haberetur prima sententia, et rursus quidam, in maioribus urbibus constituti sollicitudinem susciperent ampliorem, per quos unam Petri sedem universalis ecclesiae cura conflueret, et nihil usquam a suo capite dissideret."

[197] Sixty-seventh General Congregation, June 9, 1870: Mansi, 52:554: "Cumque hae conditiones in hodiernos catholicos patriarchas minime quadrent, illi e veteri ecclesiarum ordinatione veraciter dici nequeunt patriarchae, sed ex sola apostolicae sedis dispensatione, a qua omnis dignitas et potestas orta est. Iam vero iura aut privilegia quorumlibet episcoporum iuris humani esse, non divini, notum est, atque expresse haec non ante multos dies admissa fuisse gaudeo. Exinde haec sequuntur: 1º privilegia patriarchalia ex legibus ecclesiasticis esse dimetienda [...]; 2º eadem privilegia suprema ecclesiae potestate posse minui vel etiam aboleri, prout rerum adiuncta exegerint; 3º hanc supremam potestatem inesse Romano pontifici." The archbishop added that those who asserted that patriarchal privileges limited papal primacy never enumerated exactly what these privileges were, nor proved their existence as required by logic ("ille qui asserit probare teneatur"). Concerning the consideration of the rights/privileges of bishops to be of mere ecclesiastical law, see the request of Patriarch Youssef, Patriarch Audo, and two other bishops that the canons connected to the third chapter be omitted, at Mansi, 52:1096; one reason was

The archbishop stated that the claim that previous councils approved patriarchal privileges was groundless.[198] In particular, the archbishop argued that the famous statement of the Council of Florence supposedly protecting the rights of the patriarchs was limited only to the disciplinary matter of precedence among them.[199]

> But it has been said regarding this clause of the decree of Florence, and you, most reverend fathers, have heard with me, that the Eastern Church has always considered it as a defense of its autonomy, as a pledge of its immunities, as security for all its institutions. Regarding this proposition let me respond in a scholastic manner: if it concerns the Melkites, let it pass away; if it concerns Catholics, I deny it; if it concerns manifest or occult heretics or schismatics, I concede it.[200]

The archbishop, like the Armenian patriarch, rejected the idea of Eastern autonomy in disciplinary matters in a Catholic context; only schismatics asserted for themselves such autonomy. The Catholic patriarchs were not heads of autonomous entities, but rather were simply principal members of the Church assisting the Roman pontiff in his care for the whole Church.

While the archbishop argued that all mention of patriarchal privileges should be omitted in the conciliar texts,[201] he did note one "privilege" that the Eastern Church had possessed since the schism, and that the popes had not been able to take away:

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because there were those "qui asserere ausi sunt, episcopos, archiepiscopos, primates atque patriarchas nihil aliud esse nisi simplices officiales et adiutores papae, ut docent Fagnanus, cardinalis De Luca, aliique."

[198] The full discussion is found in Sixty-seventh General Congregation, June 9, 1870: Mansi, 52:554–558.

[199] Ibid., 52:557. Behnam Benni noted that the reference of Patriarch Youssef to the Florentine determination that full jurisdiction was attributed to the Roman pontiff "just as" (*ita ut*) was found in the acts of the ecumenical councils was not the received reading; rather, it was "as also" (*quemadmodum etiam*). Hence, the jurisdiction of the pope was not limited to those powers described in previous councils, but could be expanded.

[200] Ibid., 52:558: "Sed de hac clausula decreti Florentini dictum est, et vos, reverendissimi patres, mecum audistis, quod ecclesia orientalis eam ut propugnaculum suae autonomiae, ut pignus suarum immunitatum, ut securitatem tandem omnium suarum institutionum esse, arbitrata semper est. De qua propositione liceat mihi scholastice respondere: Transeat, si agitur de Melchitis; nego, si de catholicis; concedo, si de haereticis vel de schismaticis manifestis vel occultis."

[201] Ibid.: "Immo abusus qui exorti sunt et augeri possunt, exigere videntur ut clarioribus quo fieri possit verbis, primatus pontificius eiusque praerogativae exponantur, reiecta qualibet mentione patriarchalium privilegiorum."

> This privilege, if you wish to know, most reverend fathers, is poverty, is ignorance, is dejection, is a confusion of all things; our fathers were miserable, and we are more miserable and born into misery: for "our fathers ate a bitter grape, and the mouths of the children were stricken dumb." God grant that what the supreme pontiff began may be fulfilled happily and universally, by which means alone that horrible privilege may be abolished![202]

The archbishop ended his speech by arguing that a clear definition of the primacy of the Roman pontiff would not have adverse effects among Eastern Catholics (provided that the bishops and clergy upheld the definition) and would aid in the return of Eastern non-Catholics to communion with Rome.[203]

Archbishop Behnam Benni argued for the imposition of some form of disciplinary uniformity throughout the Church, echoing in many ways the positions of prominent members of the preconciliar commission. Uniformity of discipline would return the Church to its state prior to the schism and remove the juridic uncertainty and arbitrariness then present in the East. The claims of autonomy and privileges that were raised against the imposition of some uniformity of discipline were based on false claims and smacked of schismatic thinking. While patriarchs were principal members of the Church, their rights and privileges were of ecclesiastical law and in no way could limit the authority of the Roman pontiff. Thus, the archbishop understood "autonomy" in the same way as Patriarch Hassun, incapable of existing alongside papal primacy of jurisdiction.

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[202] Ibid.: "Hoc privilegium vero si nosse velitis, reverendissimi patres, est inopia, est ignorantia, est abiectio, est confusio omnium rerum; miseri fuerunt patres nostri, et nos miseriores et in miseria nati: *Patres nostri* enim *comederunt uvam acerbam, et dentes filiorum obstupuerunt* [Jer 31:29]. Faxit Deus ut quod summus pontifex auspiciatus est, feliciter et universaliter adimpleatur; qua solum ratione infaustum illud privilegium poterit abolere!"

[203] Ibid., 52:559–561. He specifically warned of persons confusing rite and discipline in an effort to cause rebellions, and said that any Eastern Catholic bishop who should claim that the definition of primacy was forced upon them by the Latins would be a new Mark of Ephesus, an Eastern bishop who had rejected the decrees of the Council of Florence.

3.3.3. Results of the Council

The comments of the Eastern council fathers related above show the deep divergences in the understanding of Eastern autonomy. Even among the fathers who defended autonomy, there was no clear conception of its exact nature. The two Romanian hierarchs appealed to an already-extant Eastern disciplinary code, which implied the existence of a proper Eastern autonomy, yet many non-Byzantine communities would reject such a code as applicable to the entire East and, as the prelates themselves were forced to admit, the code needed additions in many areas. Patriarch Youssef appealed to the patriarchal system extant in the East, but other council fathers considered such a system as explained by Youssef to limit papal authority; thus, it had to be rejected.[204] Patriarch Audo, admitting the argument that Eastern discipline needed to be reformed, urged the council fathers to allow each Eastern nation and patriarchate to reform their law based on the council schemata, but the existence of multiple disciplines, no matter how clearly articulated, would have perpetuated juridic confusion in the minds of many.

The lack of a clear and consistent defense of Eastern autonomy at the council would have resulted in the imposition of uniform discipline in many matters. Luckily for the Eastern communities, the First Vatican Council did not approve any of the disciplinary schemata. However, the approved definition of papal primacy, while not directly altering Eastern discipline, retained the expansive wording on the authority of the pope objected to by the Eastern

[204] Cf. Forty-fourth General Congregation, May 19, 1870: Mansi, 52:113, where Patriarch Youssef tried to oppose this objection by emphasizing that he did not place any limits on papal rights other than those assigned by Christ.

council fathers, and omitted the text of the Council of Florence on patriarchal rights and privileges.[205] The text of the constitution *Pastor aeternus* declared:

> And so, supported by the clear witness of holy scripture, and adhering to the manifest and explicit decrees both of our predecessors the Roman pontiffs and of general councils, we promulgate anew the definition of the ecumenical council of Florence, which must be believed by all faithful Christians, namely, that the apostolic see and the Roman pontiff hold a world-wide primacy, and that the Roman pontiff is the successor of blessed Peter, the prince of the apostles, true vicar of Christ, head of the whole church and father and teacher of all christian people. To him, in blessed Peter, full power has been given by our lord Jesus Christ to tend, rule and govern the universal church. All this is to be found in the acts of the ecumenical councils and the sacred canons.
>
> Wherefore we teach and declare that, by divine ordinance, the Roman church possesses a pre-eminence of ordinary power over every other church, and that this jurisdictional power of the Roman Pontiff is both episcopal and immediate. Both clergy and faithful, of whatever rite and dignity, both singly and collectively, are bound to submit to this power by the duty of hierarchical subordination and true obedience, and this not only in matters concerning faith and morals, but also in those which regard the discipline and government of the church throughout the world. [...]
>
> So, then, if anyone says that the Roman pontiff has merely an office of supervision and guidance, and not the full and supreme power of jurisdiction over the whole church, and this not only in matters of faith and morals, but also in those things which concern the discipline and government of the church dispersed throughout the whole world; or that he has only the principal part, but not the absolute fullness, of this supreme power; or that this power of his is not ordinary and immediate both over all the faithful and each of the churches and over all and each of the pastors and faithful: let him be anathema.[206]

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[205] The appeals of Eastern prelates and others asking for some amelioration of this stark definition of papal primacy were rejected; see the comments and responses found throughout the *relatio* given by Bishop Frederico Zinelli of Treviso at the Eighty-third General Congregation, July 5, 1870: Mansi, 52:1100–1117, such as nn. 12, 65, and 66.

[206] First Vatican Council, *Pastor aeternus*, chapter 3: text and translation in Tanner 2:813–815: "Quapropter apertis innixi sacrarum litterarum testimoniis, et inhaerentes tum praedecessorum nostrorum Romanorum pontificum, tum conciliorum generalium disertis, perspicuisque decretis, innovamus oecumenici concilii Florentini definitionem, qua credendum ab omnibus Christi fidelibus est, sanctam apostolicam sedem, et Romanum pontificem in universum orbem tenere primatum, et ipsum pontificem Romanum successorem esse beati Petri principis apostolorum, et verum Christi vicarium, totiusque ecclesiae caput, et omnium christianorum patrem ac doctorem existere; et ipsi in beato Petro pascendi, regendi ac gubernandi universalem ecclesiam a domino nostro Iesu Christo plenam potestatem traditam esse; quemadmodum etiam in gestis oecumenicorum conciliorum et in sacris canonibus continetur. Docemus proinde et declaramus, ecclesiam Romanam, disponente Domino, super omnes alias ordinariae potestatis obtinere principatum, et hanc Romani pontificis iurisdictionis potestatem, quae vere episcopalis est, immediatam esse: erga quam cuiuscumque ritus et dignitatis pastores atque fideles, tam seorsum singuli quam simul omnes, officio hierarchicae subordinationis, veraeque obedientiae obstringuntur, non solum in rebus, quae ad fidem et mores, sed etiam in iis, quae ad disciplinam et regimen ecclesiae per totum orbem diffusae pertinent. [...] Si quis itaque dixerit, Romanum pontificem habere tantummodo officium inspectionis vel directionis, non autem plenam et supremam potestatem iurisdictionis in universam ecclesiam, non solum in rebus, quae ad fidem et mores, sed etiam in iis, quae ad disciplinam et regimen ecclesiae per totum orbem diffusae pertinent; aut eum habere tantum potiores

The constitution established that the pope had authority over faithful "of any rite and dignity," even concerning "the discipline and government of the church dispersed throughout the whole world." The lack of reference in the schema to moral limitations—while the pope could act, he ought not to in certain circumstances—raised the threat of papal interventions into the disciplinary structure of the Eastern communities, as Patriarch Youssef had noted. Any legitimate concerns raised about possible excessive interventions of the Roman pontiff into the ecclesial life of Eastern communities could henceforth interpreted as a desire to limit papal authority and suggestive of schism.[207] Two situations in the latter half of the pontificate of Pius IX clearly show the conflicts arising from the excessive emphasis of papal authority over every part of the Church.

3.4. Two Major Interventions of Pius IX in the Affairs of Eastern Catholics

3.4.1. *Reversurus* and the Armenians[208]

Pope Pius IX had taken some interest in the Armenian Catholic community in the first half of his pontificate, establishing suffragan dioceses for the primatial see of Constantinople[209]

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partes, non vero totam plenitudinem huius supremae potestatis; aut hanc eius potestatem non esse ordinariam et immediatam sive in omnes ac singulas ecclesias, sive in omnes et singulos pastores et fideles: a[nathema] s[it]."

[207] Cf. the following quote of Joseph Hajjar, *Les chrétiens uniates du Proche-Orient* (Paris: Éditions du Seuil, 1962) 290, found in Patelos, 56: "Au surplus selon la conception commune, il [Pius IX] regardait tout vestige ou signe d'autonomie et de divergence disciplinaire orientales comme un facteur de schisme. Il versait dans le sens de ses conseillers intimes qui visaient à l'unification de la discipline ecclésiastique ne garantissant aux uniates que le maintien strict du rite liturgique."

[208] For historical information on the controversy, see Salvatore Manna, "Il Vicino Oriente e i Retroscena della Bolla «Reversurus» (1867)," *Sapienza* 24 (1971) 454–470; Patelos, 55–61. Manna, *Chiesa Latina e Chiese Orientali*, xxiv argues that *Reversurus* and *Cum ecclesiastica disciplina* (see below, 3.4.2) were no doubt inspired by Patriarch Valerga.

[209] Pius IX, apostolic constitution *Universi dominici*, April 30, 1850: *Iuspont*, 1/6 part 1:93–94. See also idem, apostolic constitution *Assidua Romanorum*, May 9, 1864: *Iuspont*, 1/6 part 1:430–431, establishing an Armenian see at Erzurum.

and attempting to quell controversies developing in the community over writings on certain national religious questions.[210] However, the pope's most extensive intervention into the life of the Armenian Catholic community took place in 1867.

In 1866, the Armenian bishops elected the primate of Constantinople, Anthony Hassun, as patriarch of Cilicia.[211] When the prelates asked the pope to confirm the election, they additionally requested that he join the office of primate of Constantinople with that of the patriarch of Cilicia.[212] The following year, Pius IX agreed to this request in his apostolic constitution *Reversurus*, abolishing the primatial and archiepiscopal title of the Church of Constantinople, perpetually uniting the province of Constantinople to the patriarchate of Cilicia, and ordering the new patriarch and his successors to reside at Constantinople and to govern that see with ordinary jurisdiction.[213] However, the pope did not stop with these determinations.

> But so that this entirely new constitution of the Armenian patriarchate may benefit the good of souls, and in order to repel and keep at bay the gravest damage that customarily arises from an uncertain or less than aptly constituted ecclesiastical discipline, we, by our own will [*motu proprio*], with certain knowledge and through the plentitude of apostolic power, with the present letters constitute and sanction certain particular points of discipline (saving nevertheless the rites of the Easterners instituted by the holy fathers and approved by this Apostolic See) to be observed inviolably in the said patriarchate for all future time.[214]

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[210] Pius IX, encyclical letter *Neminem vestrum*, February 2, 1854: *Iuspont*, 1/6 part 1:214–222. Even prior to the pontificate of Pius IX, the Armenian Catholic community had been in some turbulence, especially concerning matters of the liturgy; see Frazee, 233. Some background on this turbulence is found in Gregory XVI, letter *Inter gravissimas*, February 3, 1832: *Iuspont*, 1/5:31–34.

[211] The letter of the Armenian prelates to the pope requesting confirmation, dated September 15, 1866, is found in *Iuspont*, 1/6 part 1:453–454 note 1.

[212] Pius IX, apostolic constitution *Reversurus*, July 12, 1867, §9: *Iuspont*, 1/6 part 1:456. The office of primate of Constantinople was created with Pius VIII, apostolic letter *Quod iamdiu*, July 6, 1830: *Iuspont*, 1/4:729–731.

[213] Pius IX, *Reversurus*, §§10–11: *Iuspont*, 1/6 part 1:456.

[214] Ibid., §12: "Quo vero haec ferme nova patriarchatus Armeni constitutio in bonum cedat animarum, atque ut gravissima damna, quae ex incerta vel minus apte constituta ecclesiastica disciplina solent derivari, propulsentur atque arceantur, motu proprio, certa scientia ac de apostolicae potestatis plenitudine praecipua quaedam eiusdem disciplinae capita (salvis tamen ritibus Orientalium a Sanctis Patribus institutis et ab hac Apostolica Sede probatis) in memorato patriarchatu perpetuis futuris temporibus inviolabiliter observanda, tenore quoque praesentium constituimus atque sancimus."

The legislation that Pius IX provided for the Armenians in this constitution completely restructured the manner in which bishops and patriarchs would be elected in the future.[215] The most notable provisions limited participation in patriarchal elections to bishops,[216] restricted the exercise of jurisdiction by the patriarch until he was confirmed by the pope and received the pallium from him,[217] and removed the ability of the patriarch and synod to select bishops, only allowing them the right to offer three names to the pope, who would make the choice himself. [218]

The language used by the pope in this document describing the Armenian ecclesiastical discipline as "incerta vel minus apte constituta," although not explicitly stated as such here, referred to his earlier letter *In suprema*, where he made the more general statement that he would be present to aid Eastern faithful in composing and ordering their uncertain and less than aptly constituted discipline.[219] Thus, *Reversurus* was not intended simply as a specific and limited

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[215] Ibid., §§14–22: *Iuspont*, 1/6 part 1:457–458. Aside from this restructuring, the pope also suppressed a certain illegitimately-erected chapter that infringed on episcopal and patriarchal rights; see ibid., §13: *Iuspont*, 1/6 part 1:456–457.

[216] Ibid., §§14–15: *Iuspont*, 1/6 part 1:457. The provision, intended to exclude other clergy and laity from direct involvement, applied to the election of patriarchs and patriarchal vicars *sede vacante*.

[217] Prior to confirmation, the patriarch could not be enthroned and did not possess any jurisdiction, even by procuratorial or vicarious title: ibid., §16. After confirmation but prior to reception of the pallium, he could not consecrate bishops, convoke a council, confect chrism, dedicate churches, or ordain clerics: ibid., §17. The origin of this latter rule of *Reversurus* appears to be a letter of the Sacred Congregation for the Propagation of the Faith of December 1, 1837 sent to the Greek Melkites, found in *Collectanea S. Congregationis de Propaganda Fide, seu Decreta Instructiones Rescripta pro Apostolicis Missionibus* (Rome: Typographia Polyglotta S. C. de Propaganda Fide, 1907) 1:496–497 (#863) (cf. Acacius Coussa, *Epitome Praelectionum de Iure Ecclesiastico Orientali* [Typis Monasterii Exarchici Cryptoferratensis, 1948] 1:250, referencing this decision in relation to a question about the power of the Maronite patriarch prior to reception of the pallium).

[218] Pius IX, *Reversurus*, §21: *Iuspont*, 1/6 part 1:457–458. If necessity or the distances involved so required, only three bishops needed to be present with the patriarch; the others could send in a list of their votes. The acts of the synod had to be sent to the Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite for review. The pope retained the right to name someone outside those proposed by the synod in the event that the three men chosen were not considered worthy: "Non dubitamus autem, quin iidem Episcopi dignos ac vere idoneos viros proponere studeant, ne umquam cogamur nos vel successores nostri pro eiusdem apostolici ministerii officio alium, licet ab eis non propositum, episcopali dignitate augere, et vacanti ecclesiae praeficere."

[219] Pius IX, *In suprema*, §3: *Iuspont*, 1/6 part 1:49: "Quare cum inter alia relatum ad nos sit, in regimine ecclesiastico vestrarum nationum quaedam esse, quae ob anteacti temporis calamitatem *incerta adhuc manent vel minus apte constituta*, libenter equidem aderimus auctoritate nostra apostolica, ut ad normam sacrorum canonum, servatisque SS. Patrum institutis, rite omnia componantur et ordinentur" (emphasis added).

intervention; rather, it was to be the start of a broader reform of the discipline of all Eastern communities. He admitted such towards the end of *Reversurus*:

> But while we determine these things for the election of Armenian bishops, we do not at all forget the remaining patriarchates of the Eastern rite, for whom we shall also take care to regulate this gravest matter of the election of bishops as soon as possible, as we have already made known openly to our venerable brothers the patriarchs of the Maronites and of the Melkites and to other Eastern prelates staying in Rome at the present.[220]

He further elaborated at the consistory formally confirming Hassun as patriarch:

> Although some of those [Eastern] Churches, with the inspiration of divine grace, have returned to Catholic unity as regards dogmatic doctrine, nevertheless, because of the uncertainty of circumstances and times, ecclesiastical discipline, from corruption and contempt of which errors and heresies have been accustomed to arise, could not be restored entirely in all those Churches. [...] Not only are we not at all ignorant that, in the ecclesiastical rule of the Eastern Churches, there are some things that, because of the calamity of the aforementioned time, have remained as yet uncertain, or less than aptly constituted, as we stated in our noted encyclical letter given to the Easterners [*In suprema*], but we, vehemently solicitous for the good of those Churches, will also be certainly present with every effort that all be rightly composed and ordered to the norm of the sacred canons, observing the institutes of the holy fathers.[221]

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[220] Pius IX, *Reversurus*, §22: *Iuspont*, 1/6 part 1:458: "Dum autem haec pro Armenorum Antistitum electione decernimus, haud obliviscimur reliquorum patriarchatuum ritus orientalis, pro quibus etiam hoc gravissimum de Episcoporum electione negotium quamprimum moderandum curabimus, uti iam venerabilibus fratribus nostris Patriarchis Maronitarum et Melchitarum aliisque orientalibus praesulibus Romae in praesentia commorantibus palam ediximus." Both Pablo Gefaell, "Il Diritto Canonico Orientale nei lavori del Concilio Vaticano I," 41 and Olivier Raquez, "Rapports avec les Églises Orientales: A. Les Églises grecque, syrienne, caldéenne et copté," in *Sacrae Congregationis de Propaganda Fide Memoria Rerum* (Rome/Freiburg/Vienna: Herder, 1976) 3/2:16 state that Melkite Patriarch Youssef was informed about the proposal at a meeting of July 7, 1867. While not saying anything then, the patriarch did make known his opposition to the plan first in a letter of December 7, 1867 to the pope, then in a later letter to Cardinal Barnabò, Prefect of Propaganda. A summary of the interactions of Youssef with Rome on this matter is found in Patelos, 71–77; see especially p. 72, where it is stated that Youssef claimed that the Armenian patriarch had been reduced to the state of a simple metropolitan. For his part, the Maronite Patriarch Paul Peter Massad noted to the pope that *Reversurus* was contrary to the norms establish by Benedict XIV (i.e., the Synod of Mount Lebanon); see R. F. Esposito, 270; Pablo Gefaell, "Il Diritto Canonico Orientale nei lavori del Concilio Vaticano I," 42; Patelos, 20.

[221] Pius IX, allocution *Cum ex hac*, July 12, 1867: *Iuspont*, 1/6 part 1:460–461: "Etsi vero aliquae ex illis ecclesiis ad catholicam unitatem quoad dogmaticam doctrinam, divina adspirante gratia, redierint; tamen rerum ac temporum vicissitudine nondum in omnibus illis ecclesiis potuit omnino restitui ecclesiastica disciplina, ex cuius corruptela et despectu errores et haereses solent oriri. [...] Cum autem minime ignoremus in ecclesiastico orientalium ecclesiarum regimine quaedam esse, quae ob anteacti temporis calamitatem incerta adhuc manent, vel minus apte sunt constituta, veluti in memorata nostra encyclica epistola ad Orientales data monuimus, tum nos de illarum ecclesiarum bono vehementer solliciti omni certe studio aderimus, ut ad sacrorum canonum normam, servatis sanctorum patrum institutis, rite omnia componantur et ordinentur."

Pius IX admitted that the popes certainly wanted liturgical discipline to be maintained unaltered, provided it was not adverse to good morals or ecclesiastical decency.[222] However, as Pius IX's own actions indicated, the popes could alter other ecclesiastical discipline in order to "restore order" to the Eastern communities after the calamities of the past had supposedly damaged their discipline and made it so corrupted.

This papal intervention into the discipline of the Armenian Catholic communities, while supported by the new patriarch, was not accepted by all. Four bishops, along with a group of laity, rose against the patriarch and his vicar, claiming that the patriarch's election was illegitimate. They constituted for themselves an "Independent Armenian Catholic Church," which, according to the pope, was a contradiction in words. Later, they even elected another patriarch, leading to the excommunication of those who were the source of the conflict.[223]

Several of the pope's interventions in dealing with this situation shed light on his understanding of their right of the Eastern communities to govern themselves. A letter to apostolic delegate to Constantinople early in the schism indicates that the pope felt the Armenian

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[222] Cf. ibid.: "Nostri certe Praedecessores Orientalium Ecclesiarum ritus fidei morumque sanctitati et ecclesiasticae honestati minime adversos, integros inviolatosque servari voluerunt; ac Nos ipsi id confirmavimus Nostris Encyclicis Litteris [*In suprema*] die sexta ianuarii anno millesimo octingentesimo quadragesimo octavo ad Orientales datis. At necesse omnino est, ut ab omnibus sacrorum Antistitibus, et Sacerdotibus liturgica propriae Ecclesiae disciplina sedulo observetur, et nunquam illa singulorum Antistitum arbitrio relinquatur, sed determinata sit ab huius Apostolicae Sedis auctoritate. Nemini certe unquam licuit, aut licet, ipsam liturgiam ullo modo vel leviter immutare, innovare, imminuere, quemadmodum praesertim statuerunt, ac docuerunt suis Apostolicis Litteris Benedictus decimus quartus [*Demandatam*] et Gregorius decimus sextus [*Inter gravissimas*], quas Litteras et regulas in illis praescriptas suprema quoque Nostra Apostolica auctoritate confirmamus, et ab omnibus Orientalibus Ecclesiis religiosissime observari mandamus."

[223] Pius IX, letter *Non sine gravissimo*, February 24, 1870, §1: *Iuspont*, 6/2:64–66 (on the uprising and the "Independent Armenian Catholic Church"); idem, encyclical letter *Ubi prima*, March 11, 1871: *Iuspont*, 1/6 part 2:113–114 (on the election of the other patriarch, Jacob Petros IX Bahatiarian; his use of "Petros IX" thereby denied the legitimacy of the election of Patriarch Anthony Petros IX Hassun); idem, bull *Apostolicam nostram*, June 14, 1872: *Iuspont*, 1/6 part 2:151–152 (on the excommunication of the leaders). Cf. the letter of Antonio Pluym, apostolic delegate, to the Armenian Catholics, November 2, 1870: *Iuspont*, 1/6 part 2:63–65 note 1, giving an overview of the controversy. A brief review of these events is found in Patelos, 525–526.

Catholic community only had a right to their liturgical rite; it had no right to its own discipline, and had to obey the mandates of the Roman pontiff in this regard.

> So that these things [confirming Armenians who remained in communion and calling back those who left] may be properly done, it is necessary, venerable brother, that you recall to mind and inculcate in those faithful committed to your care that it pertains to Catholic faith that full power and authority to tend, rule, and govern the universal Church has been handed over by our Lord Jesus Christ to the Roman pontiff in blessed Peter; the full and free exercise of this authority cannot be circumscribed and enclosed by territorial or national boundaries. All who glory in the Catholic name must not only communicate with the Roman Pontiff in faith and dogmas, but also must be subject to him in rite and discipline.
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> In this matter, you are not to omit teaching all Armenian Easterners how great is the difference between discipline and rite; the confusion of these things disturbs the mind of the faithful and does not cease offering occasion for many unjust controversies, and all those who do not fear impeding or diminishing the beneficial action and power of the Apostolic See towards the Eastern Churches abuse it in order to enkindle hatred against that see. Indeed, we with our predecessors have declared that the Eastern rites be observed, as often as they neither oppose Catholic faith and unity, nor derogate from ecclesiastical decency. But in fact it does not impede this rule that, especially in those things that pertain to ecclesiastical rule, canonical discipline agree everywhere, at least in regard to the principal points, and that it be restored where it is uncertain or has collapsed.[224]

He explained this also to the Armenian Catholics of the patriarchate:

> But note most especially that the confusion between rites and discipline is not to be engendered among you, a confusion that the schismatics slyly try to introduce among the

[224] Pius IX, *Non sine gravissimo*, §§4–5: *Iuspont*, 1/6 part 2:66: "Ut autem haec rite perficiantur, necessarium est, ven. frater, fidelibus tuae curae commissis in mentem revoces atque inculces, ad catholicam fidem pertinere, Romano Pontifici in beato Petro pascendi, regendi et gubernandi universalem Ecclesiam a Domino nostro Iesu Christo plenam potestatem auctoritatemque esse traditam; cuius plenum ac liberum exercitium nullis territorialibus aut nationalibus limitibus potest circumscribi et coerceri; et omnes qui catholico nomine gloriantur, non solum debere cum illo communicare quoad fidem et dogmata, verum etiam subesse quoad ritus et disciplinam. Qua in re ne praetermittas Armenios omnesque Orientales edocere, quantum discriminis disciplinam inter et ritum intercedat, cuius utriusque rei confusio illorum fidelium mentem perturbat, pluribus iniustisque querimoniis occasionem praebere non cessat, eaque maxime abutuntur ad conflandam contra Apostolicam Sedem invidiam ii omnes, qui salutarem eiusdem Sedis actionem et vim in Orientales Ecclesias impedire aut imminuere minime verentur. Equidem nos una cum praedecessoribus nostris orientales ritus servandos esse declaravimus, quoties neque fidei et unitati catholicae repugnent neque ecclesiasticae derogarent honestati. Quod quidem minime impedit, quominus, in his praesertim quae ecclesiasticum regimen respiciunt, canonica disciplina quoad praecipua saltem capita ubique cohaereat, et ubi incerta vel collapsa fuerit, restituatur." Cf. Bassett, 60–61, summarizing the main points of this letter. Concerning "praecipua saltem capita," the pope was likely influenced by Patriarch Valerga who, as noted above, had made a similar statement at the Third *Congressus*, November 15, 1867: Mansi, 49:1000–1001: "Converrebbe stabilire (così egli) che gli articoli principali di disciplina fossero comuni ad ambedue le chiese, fuori quelli che oppongonsi al rito e alle specialità che più o meno prossimamente a quello si riferiscono."

> souls of the simple so that they may be stirred up against this Holy See, which, they claim, looks to remove little by little the old Eastern rites of the Church and provide the Latin rite for them instead. For if the Roman Pontiffs have always strove so that unity in discipline reflects the unity of the Church, at least as pertains to the principal points, nevertheless they decreed that all rites that do not detract from right faith or decency must be observed. For this defection recently condemned by us certainly does not pertain to rites, but to discipline; unless the Vicar of Christ can moderate discipline everywhere, the rule of the whole Church has been committed to him in vain. Therefore, the defection also maintains the character that abandons that right faith about the divine primacy of the Supreme Pontiff, which Catholics ought to hold.[225]

The pope wished to assure the Armenians that their rites would be protected and not latinized, even though their discipline had been altered.

As the schism continued, Pius IX offered another defense of all his actions in the lengthy encyclical letter *Quartus supra*.[226] After recounting the history of the Armenian schism, the pope stated what he considered to be the schismatics' claims against his authority:

> They do not dread to accuse us and the Apostolic See. They claim that we went beyond the limits of our power and have presumed to strike our scythe into another's crop, since we decreed that certain points of discipline be observed in the Armenian patriarchate. They likewise claim that the Churches of the East must observe a single communion and unity of faith with us, but they need not be liable to the apostolic power of blessed Peter in those things that pertain to discipline.[227]

According to Pius IX, such a claim was contrary to Church history and, after the definition of the Vatican Council, heretical; indeed, denying papal primacy undermined the foundations and

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[225] Pius IX, encyclical letter *Quo impensiore*, May 20, 1870, §5: *Iuspont*, 1/6 part 2:86: "Advertite vero potissimum ne vobis ingeratur confusio rituum et disciplinae, quam isti callide nituntur inducere in simplicium animos, ut eos concitent in hanc S. Sedem, quam eo demum spectare iactant, ut paulatim, veteribus orientalibus ecclesiae ritibus obliteratis, iis latinum ritum sufficiat. Nam si Romani Pontifices studuere semper, ut unitati Ecclesiae responderet uniformitas disciplinae, quoad praecipua saltem capita, ritus tamen omnes, qui nec a recta fide, nec ab honestate deflecterent, servandos censuerunt. Defectio vero mox a nobis reprobata ritus certe non spectat, sed disciplinam; quam nisi Christi Vicarius moderari possit ubique, frustra totius Ecclesiae regimen ei erit commissum: adeoque eam etiam praefert indolem quae ab illa recta fide desciscat, quam de divino summi Pontificis primatu catholicos tenere oportet." See also idem, *Ubi prima*, §3: *Iuspont*, 1/6 part 2:113.

[226] Pius IX, encyclical letter *Quartus supra*, January 6, 1873: *Iuspont*, 1/6 part 2:168–185.

[227] Ibid., §13: *Iuspont*, 1/6 part 2:173: "Nos enim et Apostolicam Sedem criminari veriti non sunt, quasi, fines potestatis nostrae supergressi, in alienam messem falcem iniicere praesumpserimus, cum quaedam disciplinae capita in Armenio patriarchatu servanda ediceremus; perinde ac si orientalium ecclesiae solam nobiscum fidei communionem et unitatem servare deberent, apostolicae autem B. Petri potestati in his quae pertinent ad disciplinam non essent obnoxiae."

prerogatives of all Churches, including the patriarchal Churches.[228] Further, claims of the infringement of "national rights" [229] had no validity in the Church:

> For if one only considers civil matters, those things are in the power of the supreme prince, whose duty is to judge and decree on them rightly as he thinks is expedient to the utility of his subjects. But if this is to be understood as pertaining to ecclesiastical matters, everyone knows that no national rights or rights of the people pertaining to the Church, her hierarchy, and Catholic arrangements have ever been recognized. For even if races and peoples everywhere have come into the Church, nevertheless God united all in the unity of His name, under him whom He has placed over all, the supreme pastor, Blessed Peter the prince of the Apostles, such that, as the Apostle advised, there is no longer Gentile and Jew, barbarian and Scythian, slave and free, but Christ is all and in all.[230]

The pope had the right to intervene by virtue of his supreme jurisdiction, and had the obligation to do so to protect the faith: "As discipline is the towline of faith, there was need for the Apostolic See, through its own right and duty, to restore it."[231] He stated that, through his actions, the Catholic faith, the liberty of the Church, and the authority of bishops would be preserved and increased.[232]

The basis for the pope's actions both before and during the schism rested on the distinction (*discrimen*) between rite and discipline. The former was understood only in a

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[228] Ibid, §§13–15.

[229] Ibid., §§16, 36: *Iuspont*, 1/6 part 2:173–174, 180. See ibid., §§37–48: *Iuspont*, 1/6 part 2:181–184, specifically replying to the accusations that the rights of the Ottoman emperor were being infringed.

[230] Ibid., 36: *Iuspont*, 1/6 part 2:180: "Si enim de civilibus tantum agatur, ea in potestate sunt supremi Principis; cuius est de illis rite diiudicare ac decernere, prout ad subditorum utilitatem expedire censuerit. Si forte autem de ecclesiasticis res intelligenda sit, nemo unus ignorare potest, nulla nationalia seu populorum iura in Ecclesiam eiusque hierarchiam et ordinationes catholicos umquam novisse. Et si enim undique gentes ac nationes in Ecclesiam confluxerint, omnes tamen in unitate sui nominis ita Deus adunavit sub eo, quem universis praefecit, supremo Pastore B. Petro Apostolorum Principe, ut iam non sit, uti monebat Apostolus, Gentilis et Iudaeus, Barbarus et Scytha, servus et liber, sed omnia et in omnibus Christus [Col 3:11]."

[231] Ibid., §20: *Iuspont*, 1/6 part 2:176: "Cum vero fidei retinaculum disciplina sit, ut ad eam sarciendam incumberet Apostolica Sedes pro suo iure ac officio opus erat."

[232] Ibid., §35: *Iuspont*, 1/6 part 2:180: "Profecto si res attente introspiciantur, apparebit, quaecumque in nostra constitutione sancita sunt, omnia ad catholicae fidei conservationem, et incrementum, nec non ad veram Ecclesiae libertatem, auctoritatemque Episcoporum vindicandam conspirare; quorum iura et privilegia quae in Apostolicae Sedis firmitate solidantur, roborantur, conquieseunt, Romani Pontifices, supplicantibus Episcopis cuiusque dignitatis, gentis vel ritus, contra haereticos vel ambitiosos, strenue semper defenderunt."

liturgical and sacramental sense, and the Eastern communities could be said to have a "right" to observe the rite insofar as the popes had ordered it to be observed provided it was not contrary to faith or morals. From the view of Pius IX, to extend such a "right" to discipline limited papal authority.[233] Indeed, it seemed to admit a claim of autonomy or "national rights," which could not exist within the Church. In addition, the pope felt that he was not just capable but obliged to render discipline uniform throughout the Church, at least in its principal points, so that "unity in discipline" would reflect "the unity of the Church"; discipline was the "towline" of the faith, and corruption in the former led to corruption of the latter through heresy. Thus, to aid in the ordering and clarification of the discipline of the Eastern communities, described earlier in *In suprema*, did not signify the strengthening of each individual discipline and the affirmation of autonomy but rather the unification of all discipline, at least as concerned the principal points, and the consequent reduction of the capacity for the individual communities to establish their own discipline.[234]

3.4.2. *Cum Ecclesiastica Disciplina* and the Chaldeans[235]

In *Reversurus*, Pius IX had indicated his desire to promulgate similar legislation for other Eastern Catholic communities, specifically noting that he had consulted with the Greek Melkite and Maronite patriarchs, among others. While the pope never issued legislation for either the

[233] Cf. Bassett, 61: "The Armenians who had objected to the Pope's sweeping latinizations were condemned as deniers of the Primacy of the Vicar of Christ."

[234] The pope's line of reasoning was not convincing to the Armenian schismatics, and it was only in the following pontificate that the schism ended; see Leo XIII, encyclical letter *Paterna caritas*, July 25, 1888: *Acta Leonis XIII*, 8:267–275.

[235] For summaries of the interactions of Pius IX with the Chaldean Catholic community, see R. F. Esposito, 287–289, 311–312; Patelos, 62–69; Raquez, 3/2:33–37.

Greek Melkites or the Maronites, he did do so for the Chaldeans in 1869 with the apostolic constitution *Cum ecclesiastica disciplina*.[236] The legislation was not entirely unexpected; Patriarch Joseph VI Audo had indicated to the pope that he was prepared to accept whatever provisions would be made for his Church, in particular regarding the election of bishops.[237] However, the patriarch seems not to have consulted with his synod concerning the matter, and he later reversed his position.[238]

Echoing the statements of *In suprema* and *Reversurus*, the pope wrote of his desire to "order matters more accurately where discipline was uncertain or less than aptly constituted, and restore it where it had collapsed or had perhaps been obliterated by the harshness of times, saving their rites instituted by the holy fathers and approved by this Apostolic See."[239]

> In this matter we have thought that the decrees of the canons of the fathers be weighed, and the precepts of our predecessors be measured, so that what the necessity of the present times requires for the utility of the Church, with the aid of diligent consideration, we temper as much as possible, such that we do not seem to exceed the form of the ancient rules entirely, and at the same time help to repair ecclesiastical discipline. For just as there are some things that cannot be removed for any reason, so also are there many things that, in consideration of the times or the necessity of the circumstances, ought to be changed, but indeed with the grace of God working and acting ever to that end.[240]

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[236] Pius IX, apostolic constitution *Cum ecclesiastica disciplina*, August 31, 1869: *Iuspont*, 1/6 part 2:32–35.

[237] Patelos, 64–65. Cf. Pius IX, brief *Supremi apostolatus*, March 22, 1869, §2: *Iuspont*, 1/6 part 2:25–26. In this brief, the pope appointed a Chaldean archbishop, chosen from names sent to him by the patriarch. *Reversurus* was cited by the pope as an example of his diligence and vigilance that Churches be governed by qualified bishops. This event would be referenced in *Cum ecclesiastica disciplina* itself at §4: *Iuspont*, 1/6 part 2:33.

[238] Patelos, 284 and Raquez, 3/2:36. On his later reversal, see below.

[239] Pius IX, *Cum ecclesiastica disciplina*, §1: *Iuspont*, 1/6 part 2:32: "Cum ecclesiastica disciplina verae fidei sepimentum sit ac tutela firmissima, quippe quae sacro cohareat dogmati, et ad eius puritatis conservationem maxime conducat, iamdudum nobis erat in animo hanc potissimum in ecclesiis orientalibus accuratius ordinare, ubi incerta ac minus apte esset constituta; ubi vero collapsa et fortasse etiam temporum asperitate obliterata, instaurare, salvis tamen earum ritibus a SS. Patribus institutis et ab hac Apostolica Sede probatis." Cf. idem, *In suprema*, §3: *Iuspont*, 1/6 part 1:49; idem, *Reversurus*, §12: *Iuspont*, 1/6 part 1:456.

[240] Pius IX, *Cum ecclesiastica disciplina*, §2: *Iuspont*, 1/6 part 2:33: "Qua in re ita canonum paternorum decreta libranda ac praedecessorum nostrorum praecepta metienda existimavimus, ut quae in Ecclesiae utilitatem praesentium temporum necessitas deposcit, adhibita consideratione diligenti, quantum potest fieri sic temperaremus, ut nec in totum formam veterum videremur excedere regularum, et simul reparandae ecclesiasticae disciplinae consuleremus. Sic ut enim quaedam sunt quae nulla possunt ratione convelli, ita multa sunt quae aut pro

The legislation contained in this constitution contained almost exactly the same norms given to the Armenians in *Reversurus*, in particular those concerning the reservation of the choice of bishops to the pope, with the synod simply granted the right to send three names for consideration.[241]

The promulgation of *Cum ecclesiastica disciplina* provoked reactions among the Chaldeans similar to those that arose among the Armenians after *Reversurus*. The pope soon wrote to Emmanuel Asmar, the Chaldean bishop of Zaku, about his concerns that the Chaldean patriarch was being influenced by these reactions.

> These things that, occurring among the Armenians, we have grieved over and reproved, we have sadly learned are carried also into that Church of the Chaldean rite. And we are distressed more strongly that he who occupies the stronger see among you as granted by our authority [Patriarch Audo] does not resist such errors; rather, as has been told to us, he has allowed himself to be surrounded by ill-advising men who, while they constantly say that they are, as they say, defenders of patriarchal rights, have tried to divert his soul—which we knew and found once to be solicitous about Catholic truth and obedient to this Apostolic See—away from Catholic truth itself, and have tried to dissociate it from this Apostolic See. Thus it happens that some there dismiss the acts and censures of the Apostolic See as being of little worth, impugn the canonical institution of bishops who have been constituted by us even with their proposition by our venerable brother the patriarch himself, and dare to oppose the authority and the dogmatic constitutions of the ecumenical Vatican Council, as though one can resist the authority of the ecumenical councils with impunity and without loss of faith—this has never happened in the Catholic Church and never will happen.[242]

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consideratione aetatum aut pro necessitate rerum oporteat immutari, operante scilicet et proficiente usque in finem gratia Dei."

[241] Ibid., §5: *Iuspont*, 1/6 part 2:33–34. This section contains seven articles; article vi specifically concerns the choice of bishops. Reviewing all the articles, the main change from *Reversurus* was the omission of a norm concerning the election of a patriarchal administrator *sede vacante*. Before this document, latinizing legislation had been virtually imposed on the Chaldeans by Benoît Planchet, pro-apostolic delegate of Mesopotamia, who presided over a Chaldean synod held in 1852; see Hajjar, "The Synod in the Eastern Church," 61–62, also mentioning a similar situation with the Syrians in 1853–1854.

[242] Pius IX, letter *Litteras fraternitatis*, April 27, 1872: *Iuspont*, 1/6 part 2:149–150: "Haec autem, quae apud Armenios facta et doluimus et reprobavimus, modo etiam in istam chaldaici ritus ecclesiam invehi dolentissime accepimus. Et nos vehementius angit, quod qui demandatam sibi auctoritate nostra potiorem inter vos sedem occupat, erroribus huiusmodi minime resistat: immo etiam, uti ad nos relatum est, circumduci se patiatur a malesuadis hominibus, qui dum se patriarchalium uti aiunt iurium defensores dictitant, illius animum, quem sollicitum de catholica veritate tuenda, et erga hanc Apostolicam Sedem obsequentem olim novimus et experti sumus, ab ipsa veritate catholica avertere, et ab hac Apostolica Sede dissociare conantur. Quo fit, ut Apostolicae

Concerns also arose with the letter the patriarch sent to the pope professing his adherence to the constitution *Pastor aeternus*. After confessing his adherence to the decrees and constitutions of Vatican I, and in particular the dogmatic definition of papal infallibility, the patriarch had added:

> But I do this with the reservation of retaining all the rights, distinctions, privileges, favors, uses, and traditions that the ancient patriarchs of the East have enjoyed, both general and particular, without any change or any difference. And I do this in union with all the fathers of the Catholic Church, namely the Western and Eastern patriarchs and bishops.[243]

The pope responded to the patriarch by emphasizing that the conciliar definition of papal primacy was in continuity with the teaching of the Church fathers and the definition issued at the Council of Florence.[244] The heads of the principal sees did enjoy some honor and power, but these were based on ecclesiastical law, not divine law.[245] He further warned the patriarch about the schism occurring among the Armenians of Constantinople and how they were trying to induce the Chaldeans to join them.[246]

These already strained relations between the patriarch and the pope broke down over the problem of Malabar, in India. Patriarch Audo had claimed jurisdiction over the Malabars who followed the Chaldean rite, sending Bishop Thomas Rokos to minister to them in 1860; however,

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Sedis acta et censuras nonnulli istic parvipendant; Episcoporum, qui ipso etiam proponente ven. fratre Patriarcha a nobis constituti sunt, canonicam institutionem impugnent; quin et oecumenici Concilii Vaticani auctoritati et dogmaticis constitutionibus refragari audeant, perinde ac si oecumenicorum conciliorum auctoritati impune et sine fidei iactura resisti posset; quod nunquam in Ecclesia catholica factum est, neque umquam fiet." The Syrians also began to be affected by the same problems as the Armenians, with schismatics calling upon the civil authority; see Pius IX, letter *Litteras a te*, September 22, 1875, §1: *Iuspont*, 1/6 part 2:283.

[243] Patriarch Audo, letter of July 29, 1872: Mansi, 53:943: "Ciò fò però colla riserva di ritenere tutti i diritti, distinzioni, privilegi, grazie, usi e tradizioni, di cui han goduto gli antichi patriarchi d'Oriente, si generali come particolari senza alcun cambiamento o alcuna differenza. E questo faccio per unirmi anch'io a tutt'i padri della s. chiesa cattolica, patriarchi cioè e vescovi orientali ed occidentali."

[244] Pius IX, apostolic letter *Gratias agere*, November 16, 1872, §2: *Iuspont*, 1/6 part 2:162.

[245] Ibid., §3: *Iuspont*, 1/6 part 2:162–163: "Episcoporum vero (quibus iure divino communis dignitas est) distinctio et discretio potestatis iure ecclesiastico invecta fuit, [...] et revera ab eo [Petro] eiusve successoribus maiores sedes habuere quidquid rite obtinent honoris et potestatis "

[246] Ibid., §4: *Iuspont*, 1/6 part 2:163. A neo-schismatic spirit had already affected the see of Diarbekir over the choice of Peter Timothy Attar as bishop; see ibid., §5.

the patriarch had to recall Bishop Rokos after being ordered to do so by the pope, who stated that the land of Malabar was not part of the Chaldean patriarchate, instead being entrusted to a Latin vicar.[247] In the early 1870s, the patriarch again sent a bishop to Malabar, John Elias Mellus,[248] and once again the pope ordered this bishop to be recalled by the patriarch.[249] This time Patriarch Audo did not obey this order, instead sending a letter to the members of the Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite in defense of his actions.[250] The patriarch argued that the Roman pontiffs had only required unity in faith and morals and obedience to the Roman pontiffs, promising that Eastern privileges and customs would be maintained.[251]

> It is through this system so sweet that the Catholic religion has flourished in the East, a system that your eminence knows gives all the Eastern patriarchs the right to institute bishops, to govern the bishops and archbishops, to hold national synods, etc. Hence one sees that the consecration [of Bishop Mellus] that I performed was a thing inherent in my patriarchal power. And, as the exercise of that power was not previously an encroachment on the authority of the Supreme Pontiff, it cannot be such now. It is a power that has been unanimously recognized by doctors of the Church through the centuries, confirmed by the general councils, and implemented in the Church of God up to the present day. Therefore, I have not exceeded the limits of my power because of the consecrations in question, nor do I deserve any blame.

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[247] See Pius IX, letter *Perlibenter vestras*, September 5, 1861: *Iuspont*, 1/6 part 1:335–336; idem, letter *Hisce literis*, September 5, 1861: *Iuspont*, 1/6 part 1:336; idem, letter *Nuper nobis*, September 26, 1862: *Iuspont*, 1/6 part 1:383–384. A history of the controversy is found in Patelos, 274–283.

[248] Cf. Pius IX, encyclical letter *Speculatores super universum*, August 1, 1874, §5: *Iuspont*, 1/6 part 2:246. According to ibid., §3: *Iuspont*, 1/6 part 2:245–246, the patriarch had petitioned Propaganda repeatedly to lift the prohibition on sending a bishop to Malabar; they refused by letters of March 23, 1865 and September 30, 1873.

[249] Ibid., §§2–3: *Iuspont*, 1/6 part 2:244–245. The pope noted that the Malabars had agreed to obey only a prelate sent by the Apostolic See and immediately subject to the pope, and recalled his prior rejections of the Chaldean patriarch's pleas that he be able to send a Chaldean bishop into Malabar.

[250] Patriarch Joseph VI Audo, letter *J'ai reçu*, February 20, 1875: *Iuspont*, 1/6 part 2:276–278 note 1.

[251] Ibid.: *Iuspont*, 1/6 part 2:276 note 1: "En effet le Saint Siège Apostolique et les Pontifes Romains ont solennellement promis aux Nations Orientales de leur conserver leurs privilèges et leurs coutumes anciennes, leur en donnant toutes les assurances ainsi qu'on le voit dans leurs decrets et leurs bulles que nous gardons jusqu'aujourd'hui. Les Souverains Pontifes n'ont jamais exigé des nations orientales autre chose que l'union avec le Saint Siège dans la foi et en ce qui concerne la morale et l'obeissance au Souverain Pontife, connaissant la grande ténacité des Orientaux pour tout le reste."

> It is very true that I have declared, and declare again, that since my childhood I have been obedient to the Holy Apostolic See and very respectful towards it, and have always adhered inviolably to all that the Holy Roman Church teaches as an article of faith. But must I deprive myself of my patriarchal privileges for it? To this I have never consented, nor will I ever consent. I do not want to do a thing that would result in infinite evils, spiritual and temporal, which would throw our nation into rebellion and separation from the Holy See of Rome and be the cause of troubles throughout the East.[252]

The patriarch also rejected the constitution *Cum ecclesiastica disciplina*, asking the members of the congregation to prove that he accepted it.[253] It is clear from this response that the patriarch held a very expansive understanding of his rights as patriarch. The acts of the pope concerning the election of bishops and the denial of his jurisdiction over the faithful in Malabar contravened his inherent rights to govern his community.

Pope Pius IX was not pleased with these excuses for what he thought was a rejection of his universal ordinary power; indeed, he was affected "with much grief and sorrow" and held that the patriarch's "heart was a far way away" from his own, despite the blandishments in the

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[252] Ibid.: "C'est par ce régime si doux que la religion catholique a prospéré en Orient, régime qui, Votre Eminence le sait bien, donnait à tous les Patriarches Orientaux le droit d'instituer les Evèques, de gouverner les Evèques et les Archevèques, de tenir des Synodes Nationaux, etc.... etc.... D'ou l'on voit que la consécration que j'ai faite était une chose inhérente à mon pouvoir patriarchal. Et de méme que l'exercise de ce pouvoir n'était pas auparavant un empiètement sur l'autorité du Souverain Pontife, de méme il ne peut l'être maintenant. C'est un pouvoir qui a été unanimement reconnu par les docteurs dans tous les siècles, confirmé par le Conciles généraux et mis en vigueur dans l'Église de Dieu jusqu'à nos jours. Par consèquent je n'ai pas outrepassé les limites de mon pouvoir en faisant les consécrations en question ni ne mérite aucun blâme. Il est très-vrai que j'ai déclaré et je déclare encore avoir été depuis mon enfance soumis au Saint Siège Apostolique et très-respectueux envers lui, et avoir toujours adhéré inviolablement à tout ce que la Sainte Église Romaine enseigne comme article de foi. Mais dois-je pour cela me dépouiller de mes privileges patriarcaux? A cela je n'ai jamais consenti ni ne consenterai jamais. Je ne veux pas faire une chose dont résulteraient des maux infinis, tant au spirituel qu'au temporel, qui jetterait notre Nation dans la rébellion et la séparation du Saint Siège de Rome, et causerait des troubles dans tout l'Orient."

[253] Ibid., 277 note 1: "Vous dites que j'ai approuvé l'idée du Saint Pere relativement à la question de l'institution des Evèques. Je ne me souviens pas de l'avoir fait jamais, ni ne sais comment cela aurait en lieu: Avez-vous quelqu'ecrit de ma main à ce sujet? Avez-vous jamais entendu de ma bouche semblable parole? Non assurement, Eminence. Comment donc vous etes-vous avisé de m'adresser la Bulle relative à cette question? Vous savez qu'aussitôt que j'eu ai en connaissance, je me suis empressè d'en refuser l'acceptation, parce que je prévoyais les graves et funestes conséquences qui en résulteraient, et dont la principale eút été de tomber sous le coup de l'indignation de notre Souverain Ottoman, lequel profiterait de cette condescendence pour m'imposer certaines prescriptions trés-funestes à ma dignitè pastorale et à ma liberté spirituelle et pour venir ensuite usurper les biens de nos églises, à mon grand dépit. Au contraire, tant que je tiens mes privilèges dans mes mains, le Gouvernement ne nous troublera pas et il n'y aura pas de danger pour nous d'être molestes par les oppresions susdites."

patriarch's letter.[254] Threatening the patriarch with canonical sanctions,[255] the pope recounted the alleged crimes of the patriarch, among which was consecrating bishops not having communion with the Apostolic See contrary to apostolic orders, namely the constitution *Cum ecclesiastica disciplina*.[256]

> We cannot hide that a great sadness affects us, and grave scandal affects the faithful, because in order to excuse your disobedience to our apostolic constitution *Cum ecclesiastica disciplina* you try to undermine its force and efficacy, asserting that it was not accepted by you, and that this [non-acceptance] could be done without damage to faith, since this constitution would concern merely disciplinary matters, not dogmatic ones. But how can it be admitted that, save the divine constitution of the Church, the force and efficacy of apostolic constitutions depend on the acceptance of the bishops or anyone else, or that those pertaining to discipline, not faith, can be rejected without consequences?[257]

The real source of this "disobedient" behavior was the patriarch's incorrect understanding of papal primacy:

> To admit that the primacy of jurisdiction [of the Roman pontiff] has been constituted by divine law, and to oppose to it what you call patriarchal rights instituted by ecclesiastical ordinance, such that the current Roman Pontiff cannot derogate from them for reason of times, places, and situations, is certainly not Catholic; and entirely intolerable for a Catholic bishop is any reservation of his rights or privileges, by which he intends that

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[254] Pius IX, letter *Responsum*, September 15, 1875, §1: *Iuspont*, 1/6 part 2:277: "Responsum a te redditum [...] multo nos dolore et moerore affecit: ex eo enim intelleximus adhuc cor tuum a nobis longe esse, etsi verbis honorem nobis redderes."

[255] Ibid., §§1–2: *Iuspont*, 1/6 part 2:278–279.

[256] Ibid., §5: *Iuspont*, 1/6 part 2:279–280. The pope explained that the patriarch had consecrated as bishops certain presbyters (Elias, Matthew, Cyriacus, Philip) without following the procedure laid out in *Cum ecclesiastica disciplina*; see ibid., §§2, 6: *Iuspont*, 1/6 part 2:278, 280; idem, encyclical letter *Quae in patriarchatu*, September 1, 1876, §§13, 15: *Iuspont*, 1/6 part 2:312, 313.

[257] Pius IX, *Responsum*, §11: *Iuspont*, 1/6 part 2:280–281: "Dissimulare autem non possumus, magnam nobis afferri tristitiam et grave scandalum fidelibus, cum ad excusandam tuam inobedientiam Apostolicae nostrae constitutioni, quae incipit *Cum ecclesiastica*, huius vim et efficaciam infirmare conaris asserendo a te acceptatam non fuisse; id vero citra fidei dispendium fieri potuisse, eo quod eadem constitutio non dogmaticis sed mere disciplinaribus accensenda sit. Quomodo vero admitti potest, salva divina Ecclesiae constitutione, vim et efficaciam apostolicarum constitutionum ab acceptatione Episcoporum vel aliorum quorumcumque pendere; eas vero quae disciplinam, non fidem, resipciant, impune reiici posse?" The patriarch's assertion that he did not accept the reforms would be rebutted in Pius IX, *Quae in patriarchatu*, §7: *Iuspont*, 1/6 part 2:308, where the pope stated that the patriarch sent several letters indicating that he did not disagree with the proposed reforms, and even sent nominations to the pope for two Chaldean sees.

> they are removed from the supreme, full, and legitimate governance and power of Blessed Peter and his successors.[258]
>
> When in your letter of adherence to the decrees of the Vatican Council, which you wrote on June 29, 1872, you declared that you wished that all those, as you say, patriarchal rights and privileges be reserved to you and confirmed, we had not been able to conceive that you wanted to establish a limitation or condition on that Catholic profession given by you, for neither can be squared with Catholic truth and unity.[259]

Just as the patriarch could not limit papal jurisdiction through a claim of his rights, so could he not arrogate papal authority to himself by asserting a worldwide jurisdiction based on rite, in an attempt to justify his actions in Malabar:

> Ecumenical and universal power over all faithful, anywhere in the world, of the same rite is accustomed to be claimed by the Nestorian patriarchs and other schismatic patriarchs, who, having broken the bonds by which they had been joined to this Apostolic See, recognize no superior. This has never been conceded or permitted to Catholic prelates by the legitimate canons or by pontifical constitutions.[260]

Pius IX considered the patriarch's understanding of patriarchal rights and privileges un-Catholic; it limited papal jurisdiction and made patriarchal jurisdiction pope-like.[261]

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[258] Pius IX, *Responsum*, §8: *Iuspont*, 1/6 part 2:280: "Primatum vero iurisdictionis admittere iure divino constitutum, eique patriarchalia uti ais iura, ecclesiastica ordinatione instituta opponere, queis Romanus Pontifex pro temporum, locorum causarumque ratione derogare nequeat, catholicorum certe non est: et catholico Episcopo indigna prorsus est quaelibet iurium seu privilegiorum suorum reservatio, qua intendat eadem ipsa supremae plenae ac legitimae B. Petri eiusque successorum ordinationi et potestati subducere."

[259] Ibid., §12: *Iuspont*, 1/6 part 2:281 "Quare cum in litteris adhaesionis tuae decretis Concilii Vaticani quas dedisti die XXIX. iulii an. MDCCCLXXII., declarabas tibi iura omnia, ut aiebas, et privilegia patriarchalia te velle reservata et conservata, existimare non potuimus, voluisse te limitationem vel conditionem catholicae illi professioni a te editae statuere: neutrum enim cum catholica veritate vel unitate componi potuisset." The pope had thought these statements concerned "true Catholic doctrine about patriarchal privileges"; see ibid., §10: *Iuspont*, 1/6 part 2:280: "Ad quos [tuos episcopos] si etiam misisses exemplum memoratae nostrae epistolae, ipsi profecto intellexissent, tuam reservationem nobis probatam non fuisse, traditamque a nobis de patriarcharum privilegiis veram catholicam doctrinam ex iisdem nostris litteris hausissent." Cf. Pius IX, *Quae in patriarchatu*, §11: *Iuspont*, 1/6 part 2:310, stating that he chose to understand the statement of the patriarch as a "desiderium" rather than an "iniquam conditionem, aut limitationem."

[260] Pius IX, *Responsum*, §13: *Iuspont*, 1/6 part 2:281 "Oecumenicum vero et universalem potestatem in omnes, ubivis terrarum sint, eiusdem ritus fideles, consueverunt sibi arrogare nestoriani aliique schismatici Pratriarchae [*sic*], qui, disruptis vinculis queis huic Apostolicae Sedi coniuncti erant, superiorem non agnoscunt. Catholicis autem Praesulibus id numquam concessum aut permissum fuit a legitimis canonibus, neque a pontificiis constitutionibus." Additionally, there was no evidence that such jurisdiction was promised to the patriarch by anyone; see ibid., §14: *Iuspont*, 1/6 part 2:281–282.

[261] For comments on the pope's understanding of the nature of patriarchal rights, see Wilhelm de Vries, "La S. Sede ed i patriarcati cattolici d'Oriente," *Orientalia Christiana Periodica* 27 (1961) 346–348.

Patriarch Audo persisted in his acts, even sending another bishop named Philip to India.[262] As a result, in 1876 Pius IX threatened him with excommunication, specifically noting:

> Utterly and entirely intolerable are these grave acts, namely that despite the opposition and prohibition of the successor of Blessed Peter Prince of the Apostles, from whom, as St. Innocent I wrote to the Council of Carthage, *emerges the episcopacy itself and all authority of its name*, someone (whatever dignity he enjoys) believes that he can choose, consecrate, and institute bishops, and that he can exercise jurisdiction in places where the Roman Pontiff has expressly declared that he has no jurisdiction.[263]

Writing to the Chaldean community itself in the same year, Pius IX reviewed its chaotic state[264] and turned to his own efforts to restore discipline among the Chaldeans:

> Since matters held themselves thus, we ordered to be provided for the Chaldean Church what for a long time the Apostolic See and we ourselves had held desirable—that we restore ecclesiastical discipline, which was entirely uncertain, collapsed, and even obliterated because of the harshness of the times, always saving its rites, which are recognized as having been instituted by the holy fathers and approved by this Apostolic See.[265]

Once again, the pope echoed the language of *In suprema*; while the Eastern rites were to be maintained, discipline had to be reformed.[266]

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[262] Cf. Pius IX, *Quae in patriarchatu*, §15: *Iuspont*, 1/6 part 2:313.

[263] Pius IX, letter *Inter ea*, March 17, 1876, §1: *Iuspont*, 1/6 part 2: *Iuspont*, 1/6 part 2:290: "Gravia haec profecto sunt et prorsus intoleranda, ut scilicet contradicente et prohibente successore B. Petri Apostolorum Principis, a quo, uti ad Concilium Chartaginense scribebat S. Innocentius I. praedecessor noster, *ipse episcopatus et tota auctoritas nominis huius emersit*, credat aliquis, quacumque demum fulgeat dignitate, se posse episcopos eligere, consecrare, instituere; vel iurisdictionem in locis exercere, in quibus nullum ius eum habere Romanus Pontifex expresse declaravit."

[264] Pius IX, *Quae in patriarchatu*, §2: *Iuspont*, 1/6 part 2:307: "Siquidem paulatim evanuit accurata canonum disciplina, periit gravitas Pontificum, hominum Deum non timentium ambitio in ecclesiasticas dignitates insiliit, hereditariae patriarcharum successionis opprobium invectum fuit, et catholica doctrina nedum antiquis iam ferme obsoletis, sed etiam novis erroribus adeo infecta est, ut ipsum etiam christianum nomen iam iam ferme delendum videretur."

[265] Ibid, §7: *Iuspont*, 1/6 part 2:308: "Cum ita se res haberent, quod iamdudum Apostolica Sedes et nos ipsi in votis habueramus, chaldaicae Ecclesiae prospiciendum duximus, ut ecclesiasticam disciplinam, quae incerta prorsus, collapsa, et etiam propter temporum asperitatem ferme obliterata erat, instauraremus, salvis tamen eius ritibus, qui a SS. Patribus instituti et ab hac Apostolica Sede probati fuisse dignoscerentur."

[266] The pope suspended the patriarch from the exercise of jurisdiction in any diocese lacking a legitimate pastor and threatened the other bishops involved with major excommunication; see ibid., §§22–25: *Iuspont*, 1/6 part 2:316–317. Three of the consecrated bishops were to incur major excommunication if they did not leave the diocese to which they were illegitimately appointed within forty days; one of the co-consecrators of the second group of bishops was likewise threatened unless he rejected his actions and those of the patriarch. The apostolic delegate to Mesopotamia

As was true for the Armenians, Pius IX strongly affirmed the doctrine of papal jurisdictional primacy over all individual members of the faithful and their groups, regardless of rite, in matters of faith and morals as well as discipline and governance. The pope viewed Patriarch Audo's claims to patriarchal rights not as a defense of the inherent autonomy of his community but instead as a limitation or conditioning of his own supreme authority; such claims therefore tended towards both schism and heresy in light of *Pastor aeternus*. The Chaldean Catholic community had no special juridic autonomy, no "right" to its own proper discipline as it did for its liturgical rite; the "disordered" state of the discipline required papal intervention to correct the situation with the imposition of some disciplinary uniformity, irrespective of whether the Chaldean hierarchs wanted such intervention. Further, attempts by the patriarch to exercise jurisdiction outside of the specific areas recognized by the Roman pontiff as pertaining to the Chaldean patriarchate appeared to usurp papal authority, akin to the claims of universal authority made by "schismatic" patriarchs.

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was granted authority to install presbyters as administrators of the vacant dioceses: Pius IX, brief *Gravissimum*, September 5, 1876: *Iuspont*, 1/6 part 2:318–319; Pius IX, letter *Solatio nobis*, June 9, 1877: *Iuspont*, 1/6 part 2:337–338. The patriarch eventually relented of his actions. However, this caused an uproar from some of his subjects; these persons sent letters to the Ottoman government, which subsequently tried to stir rebellion against the patriarch. As a result, two bishops rose against the patriarch, with one even invading the patriarchal see and trying to seize the office itself. See Patriarch Joseph VI Audo, letter *Adventum quinquagesimi*, April 20, 1877: *Iuspont*, 1/6 part 2:365 note 1. The bishops were Matthew of Amadiyah and Cyriacus of Zaku, two of the four bishops illicitly consecrated in contravention of *Cum ecclesiastica disciplina*; Cyriacus attempted to seize the patriarchal see. Patriarch Joseph VI Audo died on March 14, 1878 with this situation unresolved. Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 308–309: "[Pius IX's] act of suppressing the Armenian Catholic province of Constantinople and subjecting it to the patriarchate of Cilicia, and the imposition of the Latin discipline on this province, and later the same way of treating the Chaldean Catholic Church prove that he sought unification of discipline as far as possible, and it was not considered part of rite, which he deemed important to keep intact." Interestingly, the specific provisions of *Cum ecclesiastica disciplina*, as well as those *Reversurus*, began to be derogated in particular cases very quickly. As concerns the Chaldeans, see Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite, decree *Postquam*, August 24, 1877: *Iuspont*, 1/6 part 2:366 note 1, where the congregation permitted the patriarch and bishops choose one person for each of four vacant Chaldean sees, to be presented to the Apostolic See for confirmation. The acts concerning the grant to the Armenian patriarch of a similar derogation are given in idem, "Dubbi proposti e risoluzioni prese dalla S. Congregazione nella generale adunanza dei 1 Decembre 1876," decree *Ad enixas*, December 6, 1876, and instruction *È stata proposta*, November 7, 1876, all in *Iuspont*, 1/6 part 2:366–367 note 1.

3.5. Conclusion

In 1848, within two years of the start of his pontificate, Pius IX had promised the Eastern communities that he would conserve their rites while assisting with the reform of their discipline. The form such assistance would take crystallized in the 1860s as the imposition of disciplinary uniformity—generally applying Latin law to the East, although admitting certain, limited exceptions. From this viewpoint, the variety of discipline in the East was juridic chaos, a result of the schism preventing the Eastern communities from sharing in the development of discipline that occurred in the West. This chaos was continued through the application of the Pamphilian jurisprudence, which was understood not as a real rule of jurisprudence but simply as an opinion of theologians and canonists that could be rejected. While the sudden suspension of the First Vatican Council in 1870 prevented a broad application of these principles, a partial "reform" of the discipline of the Armenian and Chaldean Catholic communities did take place with the promulgations of *Reversurus* and *Cum ecclesiastica disciplina*.

The attempts to impose disciplinary uniformity, as well as the actual impositions of the two aforementioned documents, were opposed by several Eastern hierarchs. They argued that Eastern communities had some right to their proper discipline distinct from the Latins and conforming to the needs of their people, and that the communities themselves constituted such discipline through their laws and customs. Unfortunately, these prelates were unable to state clearly how such autonomy could exist without infringing on papal jurisdictional supremacy as defined in *Pastor aeternus*. Patriarchal rights could not be appealed to, as they were said to be of ecclesiastical law and ultimately subject to the determinations of the pope; a claim of national rights brought the threat of nationalism into the Church, where "there is no longer Gentile and

Jew, barbarian and Scythian, slave and free" (Col 3:11); appeal to the existence of a true Eastern code of law was rejected as it contained schismatic elements and was never formally approved. At every turn, claims of autonomy ran into the doctrine of papal primacy affirmed at the First Vatican Council and, because of the underdeveloped understanding of these communities as true ecclesial entities rather than simply groups of people following the same liturgical rite, there was no clear way to avoid such an Eastern autonomy–papal primacy collision.

With the ascension of Leo XIII, the threat of disciplinary uniformity greatly lessened, and the Pamphilian jurisprudence was once again affirmed in curial praxis. Further, the fear of losing their particular disciplines led many Eastern Catholic communities to undertake establishing their own codes of law, thereby affirming their relative autonomy within the Catholic Church. Eventually, Roman authorities would even begin to formulate a common Eastern code, distinct from the code issued for the benefit of the Latin Church. This dissertation turns next to this era of codification.

CHAPTER 4

The Affirmation of the Pamphilian Jurisprudence and the First Attempt to Codify Eastern Law

4.1. Introduction

The purpose of this chapter is to review and analyze how the recognition of Eastern juridic autonomy developed from 1878 to 1958, that is, from the pontificate of Leo XIII through that of Pius XII. At the beginning of this period, the Pamphilian jurisprudence was affirmed in curial praxis, contrary to the desires of those who had prepared the agenda on Eastern matters for the First Vatican Council. This jurisprudence would eventually be used as the basis for the first canon of the 1917 *Codex Iuris Canonici,* limiting the application of most of the canons of that code to the Latin Church. This codification of Latin law subsequently prompted a review of Eastern law; while many Eastern communities had held synods and attempted their own codifications, others did not, and a decision was eventually made to compile a single code for all the different Eastern communities. Throughout this entire period, various opinions on how to organize Eastern law—some tending towards uniformity in the whole Church, some preferring a law for each community, and some opting for a single law for the East—influenced the codification process.

This chapter is divided into three sections. The first section will review the affirmation of the Pamphilian jurisprudence in curial praxis during the pontificates of Leo XIII and Pius X. The second section will analyze the legal force of the 1917 *Codex Iuris Canonici* relative to Eastern communities, review important canons in that code bearing on Eastern juridic autonomy, and discuss papal and curial actions during the pontificate of Pius XI that altered the applicability

of particular canons towards Eastern faithful. The third section will review the proposed *Codex Iuris Canonici Orientalis*, focusing on the origin and development of this project, several significant canons, and how this codification altered understanding of Eastern juridic autonomy.

4.2. The Affirmation of the Pamphilian Jurisprudence

4.2.1. Ecclesiological Underpinnings: The Teaching of Leo XIII

Like his predecessor Pius IX, Pope Leo XIII (formerly Vincenzo Gioacchino Raffaele Luigi Pecci) took a great interest in Eastern matters. While some of his actions were necessitated by the unsettled situations among the Chaldeans and Armenians,[1] others were prompted by a desire to restore communion with Eastern non-Catholic communities[2] and to provide better for those Eastern communities that were already in communion.[3] The pope's actions were greatly

[1] Rosario F. Esposito, *Leone XIII e l'Oriente cristiano: studi storico-sistematico*, Multiformis sapientia 17 (Rome: Edizioni Paoline, 1961) 416 comments on what Leo XIII faced when he became pontiff: "Sul piano religioso poi abbiamo a suo luogo notato il clima di tensione creatosi in seno a quasi tutte le comunità orientali che si ritenevano incomprese o poco stimate, alcune delle quali, in seguito alla *Reversurus* ed alla *Cum ecclesiastica disciplina*, avevano persino riassaporato l'amaro calice dello scisma, mentre le decisioni del Concilio Vaticano non erano state meno controproducenti né presso gli Orientali né presso il mondo protestante." It appears that Leo XIII derogated provisions from both *Reversurus* and *Cum ecclesiastica disciplina*, providing that the relevant synods needed only to select one ecclesiastic for a vacant see; in his statements in apostolic letter *Ex officio*, October 1, 1894: *Acta Leonis XIII*, 14:328–329 (concerning the Chaldean see of Amadiyah) and apostolic letter *Ex officio*, October 1, 1894: *Acta Leonis XIII*, 14:333–334 (concerning the Chaldean see of Salmas), the pope spoke of a derogation made for the Armenians in 1887 that was extended to the Chaldeans on January 15, 1889. For more on Leo XIII and the Armenians, see R. F. Esposito, 215–222; for his relations with the Chaldeans, see ibid., 285–308.

[2] The pope established a curial office for this purpose; see Leo XIII, *motu proprio Optatissimae*, March 19, 1895: *Acta Leonis XIII*, 15:80–82 (the title of this document names the office the *Commissio pontificia ad reconciliationem dissidentium cum Ecclesia fovendam*). This office was mentioned in the curial reform instituted by Pius X (apostolic constitution *Sapienti consilio*, June 29, 1908, cap. 6, n. 8: *ASS* 41 [1908] 432); at that time it was joined with the Sacred Congregation for the Propagation of the Faith. Michael W. Dziob, *The Sacred Congregation for the Oriental Church*, Canon Law Studies 214 (Washington, D.C.: Catholic University of America, 1945) 80–81 notes that for the years 1912–1919 the *Annuario Pontificio* listed no officials as part of this commission. Thus, it appears this office *de facto* did not outlive the pontificate of Leo XIII, as was stated in the speech of Augustin Cardinal Bea at the Thirtieth General Congregation of Vatican II, November 30, 1962: *Acta Synodalia*, 1/3:711. Cf. R. F. Esposito, 627–630, speaking about the pope's preoccupation with attaining union with non-Catholics, and particularly Eastern non-Catholics.

[3] For documentary highlights of Leo XIII relative to Eastern communities, both Catholic and non-Catholic, see Josephus Schweigl, "De unitate Ecclesiae orientalis et occidentalis restituenda, documentis S. Sedis ultimi saeculi

influenced by his focus on ecclesiology.[4] According Rosario F. Esposito, author of an extensive work on Leo XIII and the Christian East, the pope's ecclesiology is best described as "unionistic" and even "peace-making"; such ecclesiology, which was concerned not simply with non-Catholic communities but even with non-Christians, entailed manifestations of "concessions that did not touch the nucleus of faith or morals" and emphasized charity as the bond of unity in the Church, even "among Christian communities very dissimilar among themselves in their traditions, formations, and mentalities."[5] Because of this ecclesiological viewpoint, the pope came to adopt the model of the "mystical body" to describe the Church.

Leo XIII elaborated on his "mystical body" model in his 1896 encyclical *Satis cognitum*.[6] Instead of simply presenting the traditional understanding of the Church as a perfect society joined by the externally-verifiable bonds of creed, sacraments, and governance,[7] the pope paralleled these external elements with an internal one—the Spirit dwelling within the Church.[8]

(1848–1938) illustrata," *Periodica* 28 (1939) 217–222; a summary of the pope's actions is found in Michael Vattappalam, *The Congregation for the Eastern Churches: Origins and Competence* (Vatican City: Libreria Editrice Vaticana, 1999) 53–55. R. F. Esposito, 9 states that there are about 240 public documents of Leo XIII concerning the East; he provides a list of documents at 702–712.

[4] R. F. Esposito, 412: "La forte prevalenza del tema ecclesiologico presso Leone XIII è testimoniata anzitutto da questo, che anche gli altri tema teologici sono trattati in funzione dell'ecclesiologia"; cf. ibid., 15: "Non a torto egli è stato definito il Dottore dell'Ecclesiologia del sec. XIX." According to ibid., 412 note 4, the pope's consideration of ecclesiological issues predated his pontificate, citing several pastoral letters he issued as archbishop of Perugia.

[5] Ibid., 418–419: "La qualifica dunque che meglio d'ogni altra s'addice all'Ecclesiologia di Leone XIII è quella di *Ecclesiologia Unionistica* o anche *Pacificatrice*. Oltre a portare sempre richiami sostanziali—ora impliciti ora espliciti—all'unità ed a manifestare semper pensieri di pace e mai d'afflizione, e le migliori disposizioni a tutte le concessioni che non intacchino il nucleo della fede o della morale, gli scritti leoniani accentuano sovente alcuni temi per i quali si nutriva una particolare sensibilità nel mondo acattolico e che sembrano particolarmente indicati ance per allargare nel mondo pagano l'influsso cristiano. L'unionismo e l'irenismo leoniano infatti non sembrano potersi esaurire nell'unione delle varie confessioni cristiane, ma tendono all'unione di tutta l'umanità nell'ovile di Cristo. Ciò va detto, ad esempio, [...] per la funzione da Leone attribuita alla carità, intelaiatura dell'unità nella Chiesa e tra le comunità cristiane anche piú dissimili tra loro per tradizioni, formazione, mentalità."

[6] Leo XIII, encyclical letter *Satis cognitum*, June 29, 1896: *ASS* 28 (1895–1896) 708–739. For an extensive analysis of this document, see R. F. Esposito, 420–456.

[7] Cf. chapter 2 of Robert Bellarmine, "De Ecclesia Militante Toto Orbe Terrarum Diffusa," in Robert Bellarmine, *De Controversiis Christianae Fidei Adversus Huius Temporis Haereticos* (Venice: Ioannes Malachinus, 1721) 2:53.

[8] Note particularly Leo XIII, *Satis cognitum*: *ASS* 28 (1895–1896) 709: "Hac ratione atque hoc principio Ecclesia genita: quae quidem, si extremum illud quod vult, caussaeque proximae sanctitatem efficientes spectentur, profecto

Thus, the Church was a body composed of both external and internal elements.[9] Further, the pope's focus on ecclesiastical unity did not devolve into a desire for uniformity in ecclesiastical discipline; while he emphasized that faithful and bishops had to be subject to the Roman pontiff in governance, he mentioned nothing about rendering discipline uniform throughout the Church.[10] Indeed, looking to the biblical references of the Church being the Body of Christ cited in the encyclical, legitimate variety would be understood not as an impediment to the unity of the Church, but a necessary part of it:

> Rather, living the truth in love, we should grow in every way into him who is the head, Christ, from whom the whole body, joined and held together by every supporting ligament, with the proper functioning of each part, brings about the body's growth and builds itself up in love.[11]

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est spiritualis: si vero eos consideres, quibus cohaeret, resque ipsas quae ad spiritualia dona perducunt, externa est necessarioque conspicua."

[9] Ibid., 710–711: "Nimirum alterutram esse posse Iesu Christi Ecclesiam tam repugnat, quam solo corpore, vel anima sola constare hominem. Complexio copulatioque earum duarum velut partium prorsus est ad veram Ecclesiam necessaria, sic fere ut ad naturam humanam intima animae corporisque coniunctio. Non est Ecclesia intermortuum quiddam, sed corpus Christi vita supernaturali praeditum. Sicut Christus, caput et exemplar, non omnis est, si in eo vel humana dumtaxat spectetur natura visibilis, quod Photiniani ac Nestoriani faciunt; vel divina tantummodo natura invisibilis, quod solent Monophysitae: sed unus est ex utraque et in utraque natura cum visibili tum invisibili; sic corpus eius mysticum non vera Ecclesia est nisi propter eam rem, quod eius partes conspicuae vim vitamque ducunt ex donis supernaturalibus rebusque ceteris, unde propria ipsarum ratio ac natura efflorescit. [...] Istam igitur et visibilium et invisibilium coniunctionem rerum, quia naturalis atque insita in Ecclesia nutu divino inest, tamdiu permanere necesse est, quamdiu ipsa permansura Ecclesia." Such a conception was amenable to Eastern ecclesiology; see R. F. Esposito, 453–454. Esposito cites Stanisław Tyszkiewicz, *La sainteté de l'Église Christoconforme. Ebauche d'une Ecclésiologie unioniste* (Rome: Pontificium Institutum Orientalium Studiorum, 1945) 27–55, 66–67, who specifically notes the ecclesiological theandry present in the pope's ecclesiology, and how this conformed to "dissident" Eastern theology of the time.

[10] Cf. Leo XIII, *Satis cognitum*: *ASS* 28 (1895–1896) 723: "Hoc igitur sine ulla dubitatione est officium Ecclesiae, christianam doctrinam tueri eamque propagare integram atque incorruptam. Sed nequaquam in isto sunt omnia: imo ne finis quidem, cuius caussa est Ecclesia instituta, officio isto concluditur. Quandoquidem, ut Iesus Christus pro salute humani generis se ipse devovit, atque huc, quae docuisset quaeque praecepisset, omnia retulit, sic iussit Ecclesiam quaerere in veritate doctrinae, quo homines cum sanctos efficeret, tum salvos.—Verum tanti magnitudinem atque excellentiam propositi consequi sola fides nullo modo potest: adhiberi necesse est cum Dei cultum iustum ac pium, qui maxime sacrificio divino et sacramentorum communicatione continetur, tum etiam sanctitatem legum ac disciplinae.—Ista igitur omnia inesse in Ecclesia oportet, quippe quae Servatoris munia in aevum persequitur: religionem, quam in ea velut *incorporari* ille voluit, mortalium generi omni ex parte absolutam sola praestat: itemque ea, quae ex ordinario providentiae consilio sunt instrumenta salutis, sola suppeditat." Just and pious cult and sanctity of discipline and laws are both necessary for the Church; however, he did not state that either must be uniform in the Church.

[11] Eph 4:15–16 (*New American Bible*, revised translation), cited in Leo XIII, *Satis cognitum*: *ASS* 28 (1895–1896) 714. The translation cited here is used henceforth for biblical passages concerning the mystical body.

> As a body is one though it has many parts, and all the parts of the body, though many, are one body, so also Christ.[12]
>
> Now you are Christ's body, and individually parts of it.[13]

While one Body, the Church was composed of various parts, not identical among themselves but each functioning in its own way towards building the Church up. Such diversity in the Catholic Church would follow necessarily from the nature of the Church as *Catholic*, able to "receive and unify very different forms of thought and human sentiment" and, one should add, discipline and governance structures, without leading to total absorption.[14]

The recognition of unity in diversity had been apparent in the apostolic letter *Orientalium dignitas*, issued in 1894, one and a half years prior to *Satis cognitum*.[15] In this letter, the pope stated:

> It is a cause of joy for us that an emerging hope is fostered daily more and more [of the return of Eastern non-Catholics], and we firmly insist on such a beneficial undertaking, so that we can wholly carry out whatever can be hoped for through the providence of the Apostolic See, with the removal of the causes of hatred and suspicion and the promotion of the best aids of reconciliation. We believe it to be most outstanding to add our spirit

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[12] 1 Cor 12:12, cited in Leo XIII, *Satis cognitum*: *ASS* 28 (1895–1896) 713.

[13] 1 Cor 12:27, cited in Leo XIII, *Satis cognitum*: *ASS* 28 (1895–1896) 710.

[14] Jean Calvet, *Le Problème catholique de l'Union des Èglises* (Paris: Gigord, 1921) 44, as translated in R. F. Esposito, 563: "[Roma] sa che la diversità delle Chiese è necessaria a causa della diversità delle razze, e che uno dei caratteri piú sorprendentu del cattolicesimo è proprio quello di essere cattolico, cioè infinitamente plastico per ricevere ed unificare le piú diverse forme del pensiero e del sentimento umano. [...] Dopo le assicurazioni solenni di Leone XIII, dopo la larghissima personalità ch'è stata lasciata alle Chiese unite d'Oriente, non è possibile alimentare su questo punto il minimo equivoco: l'unione non è l'assorbimento." This "mystical body" concept, as applied to the Catholic East, was not very prevalent in previous ages. However, note Sacred Congregation for the Propagation of the Faith, decree *Relatis per emum*, November 16, 1783: *Iuspont*, 2:399, wherein the aid to be offered by the Latin bishop of Babylon to Eastern hierarchs was justified on the basis of the "mystical body" concept—when one part of the body is sick, another part should help: "Aequum enim et consentaneum est necessario caritatis vinculo, quo catholica ecclesia simul est alligata, et in unum corpus compacta, cuius membra mutuo sese regere, ac fovere debent, quumque alterum eorum aegrum est, ac debile, ab altero subsidium, et solamen expectare et accipere iuxta Pauli sententiam (1 ad Cornth. 12, v. 13, 14, 26)."

[15] Leo XIII, apostolic letter *Orientalium dignitas*, November 30, 1894: *Acta Leonis XIII*, 14:358–370. Cf. William W. Bassett, *The Determination of Rite*, Analecta Gregoriana 157 (Rome: Gregorian University Press, 1967) 66–67, who states that the studies prepared at Vatican I were reviewed prior to the writing of *Orientalium dignitas*, and that "the intention of the encyclical was to establish a fundamental discipline for all the oriental rites in the Near East."

> and cares for the protection of the proper discipline of the Easterners, which we have always esteemed.[16]

After lauding in particular the liturgical rites of the Eastern faithful,[17] the pope added that Eastern discipline was just as important for the life of the Church:

> Therefore, since this variety of liturgical matter and of Eastern discipline, approved in law, besides other praises, is turned to so great an honor and utility of the Church, therefore should elements of our office extend so that it be rightly constituted that no inconvenience from Western ministers of the Gospel, whom the love of Christ urges to those peoples, imprudently oppose it.[18]

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[16] Leo XIII, *Orientalium dignitas*: *Acta Leonis XIII*, 14:360: "Inchoatam spem quotidie magis foveri periucundum accidit Nobis, certumque est, opus tam salutare enixius insistere; ut, quidquid ex Apostolicae Sedis providentia expectari possit, admodum expleamus, quum submovendis simultatis vel suspicionis causis, tum optimis quibusque reconciliationis praesidiis admovendis.—Praestantissimum id esse existimamus, ad incolumitatem disciplinae Orientalium propriae, cui valde semper tribuimus, animum curasque adiicere." A desire to remove "the causes of hatred and suspicion" likely led the pope to issue several promises to defend patriarchal rights; see idem, apostolic letter *Praeclara*, June 20, 1894: *Acta Leonis XIII*, 14:201: "Neque est cur dubitetis, quidquam propterea vel Nos vel successores Nostros de iure vestro, de patriarchalibus privilegiis, de rituali cuiusque Ecclesiae consuetudine detracturos. Quippe hoc etiam fuit, idemque est perpetuo futurum in consilio disciplinaque Apostolicae Sedis positum, propriis cuiusque populi originibus moribusque ex aequo et bono non parce tribuere.—At vero redintegrata nobiscum communione, mirum profecto quanta Ecclesiis vestris dignitas, quantum decus, divino munere, accedet"; idem, *motu proprio Auspicia rerum*, March 19, 1896: *Acta Leonis XIII*, 16:76: "Nec enim quemquam fugere potest quantum deceat et omnino expediat, apud catholicos nullum dignitati patriarchali deesse ex eis praesidiis ornamentisque, quibus illa abunde utitur apud dissidentes"; idem, letter *Omnibus compertum*, July 21, 1900, I: *ASS* 33 (1900–1901) 66: "Quoad Patriarchalia iura, privilegia, munera, praerogativas nihil detractum volumus aut imminutum."

[17] Cf. Leo XIII, *Orientalium dignitas*: *Acta Leonis XIII*, 14:360–361: "Siquidem in rituum orientalium conservatione plus inest quam credi possit momenti. Augusta enim, qua varia ea rituum genera nobilitantur, antiquitas, et praeclaro est ornamento Ecclesiae omni, et fidei catholicae divinam unitatem affirmat. Inde enimvero, dum sua praecipuis Orientis Ecclesiis apostolica origo testatior constat, apparet simul et enitet earumdem cum Romana usque ab exordiis summa coniunctio. Neque aliud fortasse admirabilius est ad *catholicitatis* notam in Ecclesia Dei illustrandam, quam singulare quod ei praebent obsequium dispares caeremoniarum formae nobilesque vetustatis linguae, ex ipsa Apostolorum et Patrum consuetudine nobiliores." For the manner in which the pope's promotion of Eastern rites differed from his predecessors, see R. F. Esposito, 587: "Il pontefice, cioè, non si limitò a proteggere ed a rispettare i riti orientali: questa è una posizione di per sé negativa, che, salvo eccezioni del tutto rare, era sempre stata implicita nella linea d'azione del Pontificato Romano. L'aspetto piú nuovo è in questo, che Leone XIII riprese e promosse con uno zelo e con una precisione scientifica fuori dell'ordinario la linea di quei pontefici che entrarono più particolarmente nel merito positivo del problema, raggiungendovi peraltro degli aspetti che ci sembrano sconosciuti alla storia della Chiesa che lo precede."

[18] Leo XIII, *Orientalium dignitas*: *Acta Leonis XIII*, 14:361–462: " Quoniam igitur haec rei liturgicae disciplinaeque orientalis iure probata varietas, praeter ceteras laudes, in tantum decus utilitatemque Ecclesiae convertitur, eo non minus pertineant muneris Nostri partes oportet, recte ut sit consultum, ne quid incommodi imprudenter obrepat ab occidentalibus Evangelii administris, quos ad eas gentes Christi caritas urget." Edward Farrugia, "Re-Reading *Orientalium Ecclesiarum*," *Gregorianum* 88 (2007) 354 calls *Orientalium dignitas* "a turning-point in the fortunes of the Catholic Eastern Churches," and emphasizes that the pope saw the importance of preserving not only the Eastern rites but also Eastern *discipline*.

Anticipating his later statements in *Satis cognitum*, the pope ended *Orientalium dignitas* with references to the Church as the Body of Christ:

> Then if the clerical orders should truly unite their souls, efforts, and action with fraternal charity, that most desirable day will dawn, certainly with the aid and leadership of God, when, with all coming together *in the unity of faith and knowledge of the Son of God*, fully and completely *the whole body, joined and held together by every supporting ligament, with the proper functioning of each part, brings about the body's growth and builds itself up in love*. Without doubt she alone can boast of being the true Church, in whom most closely *the one body and one spirit* coheres.[19]

Leo XIII held that diversity not only in rites but also in discipline was a mark of honor for the Church, and was legitimate insofar as it was approved by the Apostolic See and fit the model of differently functioning parts of the single, unitary body that was the Church.

While these expressions affirming diversity in unity in the Catholic Church came in the latter half of the pontificate of Leo XIII, this philosophy was present throughout his pontificate. Disciplinary diversity *per se* was not understood to be harmful to the Church, and there were no significant efforts to induce Eastern communities to follow the law of the Latin Church. Some of the clearest evidence of this recognition of diversity in unity was the validation of the Pamphilian jurisprudence in curial praxis.

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[19] Leo XIII, *Orientalium dignitas*: *Acta Leonis XIII*, 14:368: "Tum vero si ordines cleri animos, studia, actionem caritate vere fraterna sociaverint, certe, favente et ducente Deo, dies maturabitur auspicatissima, qua, occurrentibus omnibus *in unitatem fidei et agnitionis Filii Dei* [Eph 4:13], plene ex eo perfecteque *totum corpus compactum, et connexum per omnem iuncturam subministrationis, secundum operationem in mensuram uniuscuiusque membri, augmentum corporis facit in aedificationem sui in caritate* [Eph 4:16]. Ea nimirum gloriari unice potest Christi vera esse Ecclesia, in qua aptissime cohaereat *unum corpus et unus spiritus* [Eph 4:4]."

4.2.2. *Dubium* Concerning the Apostolic Constitution *In suprema*

On June 10, 1882, Leo XIII promulgated the apostolic constitution *In suprema*.[20] This constitution required all bishops and territorial abbots to apply a *Missa pro populo* on Sundays and feasts of precept.[21] A doubt quickly arose: did the legislation apply to Eastern bishops as well? A mere four months after *In suprema* was promulgated, the Sacred Congregation for the Propagation of the Faith issued an encyclical letter to apostolic delegates in the East concerning this matter.

> Our most holy lord Leo XIII in the constitution *In suprema* of June 10 of the current year instituted the obligation of all bishops to apply a *Missa pro populo* on feast days. The most eminent fathers, therefore, at the general meeting of the past July 24, brought for examination the theme *on the obligation of applying the* Missa pro populo *among the Easterners* as concerns bishops and pastors [*parrochi*]. According to the opinion expressed by the sacred forum, there is expressed to your lordship what follows:
>
> It does not escape your reverend's notice that, according to the decretal of Innocent III in the Fourth Lateran Council, *Licet graecos*, and according to the explanation given for the same decretal in the congregation of theologians held in 1631 at the residence of Cardinal Pamphili, the *sanior pars* of the doctors, including Lambertini (Benedict XIV), followed the opinion that the Easterners are not included in apostolic constitutions except in these three cases: 1º in points of Catholic faith and doctrine; 2º when the material itself shows inclusion, inasmuch as it is not an ecclesiastical law but a declaration of divine and natural law; 3º when, although the matter concerns disciplinary arrangements, the Easterners are expressly named there. The sanction of the Holy See has not yet been added to this doctrine of theologians and canonists; nevertheless, it is certain that Easterners hold from time immemorial as a theoretical and practical opinion that they are

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[20] Leo XIII, apostolic constitution *In suprema*, June 10, 1882: *ASS* 14 (1881) 529–536. (Note that *ASS* volumes sometimes only indicate the year that the volume began; hence, this "1881" volume contains a document dated 1882.)

[21] Ibid., 534: "His itaque omnibus diu multumque consideratis, auditisque Venerabilium Fratrum Nostrorum S. R. E. Cardinalium Concilii Tridentini interpretum sententiis, decernimus et declaramus, omnes et singulos Episcopos, quacumque dignitate, etiam Cardinalitia, auctos, item Abbates iurisdictionem quasi episcopalem in Clerum et populum cum territorio separato habentes, in Dominicis aliisque festis diebus, qui ex praecepto adhuc servantur, et qui ex dierum, de praecepto festorum numero sublati sunt, omni exiguitatis redituum excusatione aut alia quavis exceptione remota, ad Missam pro populo sibi commisso celebrandam et applicandam teneri." The feasts removed from the list of precept feasts ("et qui ex dierum, de praecepto festorum numero sublati sunt") were celebrated only *in choro*; see Charles Augustine (Bachofen), *A Commentary on the New Code of Canon Law*, 3rd ed. (St. Louis/London: B. Herder, 1919) 2:363.

not included in disciplinary constitutions except according to the previous rationale, and this opinion has never been condemned by the Holy See.

Even with this theory presumed, it is first of all clear that all bishops, even Eastern ones, are certainly included in the cited constitution of the Most Holy Father, *In suprema*, from the fact that it declares divine law concerning the obligation of the *Missa pro populo*. For *by force of the pastoral office*, bishops of any rite are certainly obliged *by divine law* to apply the Mass. Therefore, this is not a point of changeable discipline that can be altered or abolished according to different rites, or altered or abolished through any contrary custom. Such an act would be nothing other than an erroneous abuse when it concerns the obligation of bishops *personally* applying the holy Sacrifice *pro populo*. However, if it concerns the number of Masses that must be offered on any feast day, this is not the case; this number is determined by ecclesiastical law in applying divine law, and so any diversity or provision is not excluded according to diverse circumstances.

Coming now to pastors, *from hypothetical divine law* pastors are obliged to apply the *Missa pro populo*. However, it must be noted that hypothetical divine law is also dispensable, for the gravest reasons, by the supreme pontifical authority, being able to limit parochial obligations in cases not necessary *per se* for the good of souls. With every diligence, therefore, your lordship shall return to verifying if there exist among the Easterners of your delegation true pastors, considering that for such a determination there are not required all the formalities prescribed by the law of the Latin Church, but it is necessary that certain communities of the faithful have been stably circumscribed by the authority of the bishop, such as have the right to have a priest as their proper pastor, the sort that by virtue of the office committed to him by the bishop in such a community must exercise the *munus pastorale* with jurisdiction in the internal forum by virtue of his office, with administration of the sacraments, with preaching of the word of God. Removability *ad nutum* is not *per se* a sign of the lack of parochial rights. Also, the administrator, sent by the bishop for a determinate or indeterminate time, has all the obligations of a pastor (when dealing with a true parish). The lack of an income does not dispense from the obligation in question, as it is encompassed in the pastoral office even prescinding from benefice income. On the other hand, when it does not concern pastors, but simple missionaries, not true parishes but simple missions, they do not have any obligation to apply a *Missa pro populo*.[22]

[22] The following quotation, on which the translation above is based, comes from an amalgamation of the Latin text of Sacred Congregation for the Propagation of the Faith, encyclical letter *SSmus D. N. Leo XIII*, November 8, 1882: *ASS* 24 (1891–1892) 391–392, and the Italian text (added in brackets) found in *Fontes*, 7:473–474 (#4899): "SSmus D. N. Leo XIII exarabat Constit. *In suprema* diei 10 Iunii currentis anni quoad obligationem cunctorum Episcoporum applicandi Missam pro populo diebus festis. [Gli Emi. PP. pertanto nella Generale Adunanza dei 24 luglio p. p. tolsero ad esame il tema *Sull'obbligo dell'applicazione della Messa* pro populo *fra gli orientali* così rispetto ai Vescovi, come riguardo ai parrochi, e secondo la mente esternata dal Sacro Consesso si partecipa alla S. V. quanto segue:] Haud latet R. V. quod, iuxta decretalem Innocentii III in Concilio Lateranensi IV, *Licet graecos*; et iuxta explicationem eidem datam in congregatione Theologorum, habita anno 1631 coram Cardinali Pamphili, sanior Doctorum pars, haud ipso excepto Lambertinio, (Benedictus XIV), in sententiam iverit, Orientales non comprehendi in Constitutionibus apostolicis, nisi tribus hisce casibus. 1. In punctis fidei et doctrinae catholicae. 2. Ubi ipsa materia ostendit comprehensionem, in quantum, nedum est lex ecclesiastica, sed declaratio legis divinae et naturalis. 3. Quando, etsi agatur de ordinationibus disciplinaribus, Orientales ibi expresse nominantur. Doctrinae huic Theologorum et canonistarum adhuc sanctio s. Sedis non accessit; certum tamen est, Orientales habere ab

The congregation decided that the obligation for bishops to celebrate a *Missa pro populo* was of divine law, and so bound both Western and Eastern bishops.[23] However, the number of Masses required to fulfill the obligation was of ecclesiastical law and, therefore, could be determined by particular discipline. The same obligation applied to pastors, but this could be dispensed; further, the elements necessary to be constituted as a true pastor varied according to particular discipline.

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immemorabili ceu sententiam theoreticam et practicam non comprehendi in constitutionibus disciplinaribus, nisi praedicta ratione, et hanc suam sententiam nunquam fuisse damnatam a s. Sede. Hac posita theoria, liquidum est primo, quod omnes Episcopi, etiam Orientales certe comprehenduntur in citata Constitutione ss. Patris *In suprema*, eo quod ipsa declarat ius divinum quoad obligationem Missae *pro populo*: nam *vi pastoralis officii*, certo obligantur, *de iure divino*, Episcopi, cuiuslibet ritus, ad eam applicandam. Quamobrem non est punctum mutabilis discipl. quodque immutari possit aut aboleri iuxta diversos ritus, immutari aut aboleri quacunque de contraria consuetudine; quae nil aliud esset quam erroneus abusus, quando agitur de obligatione Episcoporum *in se* litandi s. Sacrificium *pro populo*, minime vero si agatur de numero Missarum, quae offerri debent quolibet die festo. Numerus hic determinatur a lege ecclesiastica in applicatione legis divinae; et proinde non excluditur, iuxta diversa adiuncta, omnis diversitas et dispensatio. [—Venendo ora ai parrochi, *ex iure divino hypothetico* sono i parrochi obbligati all'applicazione della Messa *pro populo*. Deve però notarsi che il diritto divino ipotetico è anche dispensabile, per gravissime ragioni, dalla suprema autorità pontificia, potendo questa limitare i doveri parrocchiali nelle cose non necessarie *per se* alla salute delle anime. Con ogni diligenza pertanto la S. V. tornerà a verificare se esistano fra gli orientali della sua Delegazione vere parrocchie, ritenendo che a tale determinazione non si richieggono tutte le formalità prescritte dalle leggi della Chiesa latina, ma basta che per autorità del Vescovo siano stabilmente circoscritte certe comunità di fedeli, le quali abbiano il diritto di avere un sacerdote come *proprio pastore*, il quale *vi officii ipsi ab Episcopo commissi in hac tali communitate* debba esercitare *munus pastorale* colla giurisdizione *in foro interno vi ipsius officii*, coll'amministrazione dei sagramenti, colla predicazione della parola di Dio. L'amovibilità *ad nutum* non è *per se* un segno della mancanza di diritto parrocchiale. Anche l'amministratore, messo dal Vescovo per un tempo determinato o indeterminato, ha tutti i doveri del parroco (purchè si tratti di vera parrocchia). Nè la mancanza di rendite dispensa dell'obbligo in parola, essendo questo compreso nell'*officio* pastorale, anche prescindendo dai frutti del Beneficio. Per contrario quando non si tratta di parrochi, ma di semplici missionari, nè di vere parrocchie, ma di semplici missioni, non evvi alcun obbligo di applicare la Messa *pro populo*.]" "Hypothetical" divine law means that the office of pastor is of ecclesiastical law, but by this law a pastor has the care of souls and thus comes under the divine law obligation "in a certain sense"; see Charles J. Koudelka, *Pastors, their Rights and Duties according to the New Code of Canon Law*, Canon Law Studies 11 (Washington, D.C.: Catholic University of America, 1921) 42.

[23] A similar determination, without reference to the Pamphilian jurisprudence, had been made in 1863: Sacred Congregation for the Propagation of the Faith, *Se l'obbligo*, March 23, 1863: *Iuspont*, 2:633. The determination stated that the law of the Western Church ("chiesa occidentale") obliging bishops and pastors to apply a *Missa pro populo* also applied to the same persons of the Eastern rite ("rito orientale"), that the determination of these days was to be determined by reasonable laws and customs in force in the relevant dioceses, but in absence of such laws/customs they should be told the law of the Western Church (which nevertheless was not extended to them in this case) and see what would be best for them, in each case offering the Holy See those determinations they deemed necessary.

In their letter, the members of the congregation respected the non-application of Western discipline to Eastern communities. It noted that Latin legal formalities for establishing canonical parishes and naming pastors did not apply to Eastern communities; therefore, the apostolic delegates had to look to the actual roles in which priests served in order to determine whether they were legally pastors. Likewise, the congregation admitted disciplinary diversity concerning the number of Masses *pro populo* to be applied on feast days. In each case, the congregation did not impose or presuppose disciplinary uniformity, and it did not express any desire that the Eastern communities adopt Latin law on these matters.

However, the congregation significantly changed the wording of the Pamphilian jurisprudence. The text of the original decision listed the following cases where censures contained in apostolic constitutions reserving cases to the pope and the Apostolic See applied to Greeks and other subject to the sees of the schismatic patriarchs:

> 1º In matter of the dogmas of faith; 2º if the pope explicitly makes mention of the said subjects of the patriarchal sees in his constitutions and makes determinations concerning them, as in the case of schismatics in the bull *In Coena Domini*; 3º if he makes determinations concerning them in the same constitutions implicitly, as in the cases of appeal to a future council, and providing arms to infidels, and in other similar matters.[24]

This basic form was retained even by Benedict XIV, who only omitted the example given for the second case and (two of three times) one of the examples for the third case. However, this form was altered in the letter of the Sacred Congregation for the Propagation of the Faith to:

> 1º In points of Catholic faith and doctrine; 2º when the material itself shows inclusion, in as much as it is not ecclesiastical law but a declaration of divine and natural law; 3º

[24] Transcript of particular congregation of Sacred Congregation for the Propagation of the Faith of June 4, 1631 in Mansi, 50:36* note 1: "1º In materia dogmatum fidei; 2º si papa explicite in suis constitutionibus faciat mentionem, et disponat de praedictis subditis patriarchalium sedium, ut in casu schismaticorum bullae Coenae; 3º si implicite in eisdem constitutionibus de eis disponat, ut in casibus appellationis ad futurum concilium, et deferentium arma ad infideles, et similibus."

> when, although the matter concerns disciplinary arrangements, the Easterners are expressly named there.[25]

The phrasing for each of the three cases was altered, suggesting that the congregation's members did not review the original text and perhaps were articulating the praxis of the congregation at the time.[26] Most notable of these alterations was the omission of specific reference to an "implicit" case. In its place one finds a reference to a "declaration of divine and natural law" that itself "shows inclusion" of the Eastern faithful. On the one hand, the replacement of the implicit case with that concerning divine and natural law could be understood as an attempt to determine more clearly what "implicit" actually meant; as was explained earlier, the meaning of "implicit" was open to ambiguity, especially considering the explanation given by Benedict XIV.[27] On the other hand, one must note that the letter uses *expresse* in the other case, while the original decision used *explicite*. As the term "express" includes both implicit and explicit,[28] the ambiguity concerning the implicit case could be said to remain.

Despite its rephrasing, the congregation's use of the Pamphilian jurisprudence, along with some recognition of its validity among the Eastern faithful by virtue of being an opinion held from time immemorial, provided the juridic basis for recognizing some legitimate diversity in discipline between East and West, and suggested the existence of some autonomy for these Eastern communities, insofar as they themselves could determine what this discipline was. This

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[25] Sacred Congregation for the Propagation of the Faith, *Sanctissimus Dominus*: *ASS* 24 (1891–1892) 391–392: "1. In punctis fidei et doctrinae catholicae. 2. Ubi ipsa materia ostendit comprehensionem, in quantum, nedum est lex ecclesiastica, sed declaratio legis divinae et naturalis. 3. Quando, etsi agatur de ordinationibus disciplinaribus, Orientales ibi expresse nominantur."

[26] Supporting the argument that the original text was not reviewed is the statement that the Pamphilian jurisprudence was an explanation of *Licet graecos*, when that was only one of several documents reviewed by the 1631 particular congregation.

[27] See above, 2.3.3.

[28] George Nedungatt, *The Spirit of the Eastern Code* (Rome/Bangalore: Centre for Indian and Inter-religious Studies/Dharmaram Publications, 1993) 102: "In fact, 'express' can be either explicit or implicit."

praxis opposed the trend of the previous pontificate of Pius IX that held disciplinary diversity as undesirable and opposed to the unity of the Church.

4.2.3. *Dubium* Concerning the Bull *Apostolicae Sedis*

In 1885, three years after the encyclical letter *In suprema*, the Holy Office had its turn to apply the Pamphilian jurisprudence. A question was raised concerning the applicability to Eastern faithful of the 1869 bull *Apostolicae Sedis* of Pius IX, which had revised *latae sententiae* censures in the Church.[29] The Sacred Congregation for the Propagation of the Faith made known the response of the Holy Office:

> A doubt has been offered: whether the Easterners are subject to the constitution *Apostolicae Sedis* published by Pius IX of happy memory on October 12, 1869. The Supreme Congregation of the Holy Office, with the successive approval of his Holiness of our Lord, has determined what follows in its *Feria IV* meeting of July 15 of the current year [1885]:
>
> "1. Nothing has been changed for the faithful of the Eastern rites regarding censures and their reservations by the constitution *Apostolicae Sedis*.
>
> "2. These same faithful are subject to all censures issued by the Apostolic See in matter of dogmas and in constitutions in which something is determined implicitly regarding them, namely where the matter itself demonstrates that they are included, insofar as it does not concern a merely ecclesiastical law, but natural and divine law is declared."
>
> The said Supreme Congregation, therefore, wishes that, through the means of the most reverend apostolic delegates, these determinations be made known to all patriarchs, archbishops, and bishops of the Eastern rite included in their respective delegations, and that they be reminded that "those faithful are subject by name not only to the censures, but also to the apostolic reservations established in the constitution of Benedict XIV, *Sacramentum Poenitentiae*, and in the constitutions against those joined to the Masonic sect and other similar sects."[30]

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[29] Pius IX, bull *Apostolicae Sedis*, October 12, 1869: *ASS* 5 (1869–1870) 305–331. For an explanation of this legislation, see Michael O'Riordan, "Apostolicae Sedis Moderationi," *The Catholic Encyclopedia*, special edition, ed. Charles G. Herbermann et al. (New York: The Encyclopedia Press, 1913) 1:645–646.

[30] Sacred Congregation for the Propagation of the Faith, encyclical letter *Essendo stato*, August 6, 1885: *Fontes*, 7:513 (#4910): "Essendo stato promosso il dubbio se gli orientali siano soggetti alla Costituzione *Apostolicae Sedis*

This determination returned the Pamphilian jurisprudence to its original context—the applicability to Eastern faithful of censures and reservations issued by the Apostolic See. The Holy Office stated that the same forms of censures applied to Eastern faithful despite the revision of *Apostolicae Sedis*. Thus, censures concerning faith and morals applied to Eastern faithful, as did those matters where they were "implicitly" included. "Implicit" was specifically defined as when "natural and divine law is declared." Such phrasing was clearer than that used in the letter of 1882, where the word "implicit" was never actually used. On the other hand, the response of the Holy Office did not refer to "explicit" inclusions; instead, one finds references to specific instances when censures and reservations were applied by name to Eastern faithful. While, contrary to the response of 1882, this response did not contain any reference to a law possessed by the Eastern communities themselves, it nevertheless affirmed these communities' negative autonomy, at least as concerned censures and reservations issued by the Apostolic See.

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pubblicata dalla f. m. di Pio IX, in data dei 12 ottobre 1869, la Suprema Congregazione del S. Offizio con successiva approvazione della Santità di N. S. ha dichiarato quanto seque nella feria IV, 15 luglio corrente anno: «1. Per Constitutionem *Apostolicae Sedis* nihil esse innovatum circa censuras earumque reservationes pro fidelibus rituum orientalium. 2. Eosdem fideles subiici omnibus censuris ab Apostolica Sede latis in materia dogmatum et in Constitutionibus in quibus implicite de iis disponitur, nempe ubi materia ipsa demonstrat eos comprehendi, quatenus non de lege mere ecclesiastica agitur, sed ius naturale et divinum declaratur». Vuole poi la sudd. Supr. Congregazione che per mezzo dei Rmi Delegati Apostolici siano notificate queste disposizioni a tutti i Patriarchi, Arcivescovi e Vescovi di rito orientale compresi nella rispettiva loro Delegazione, e che si ricordi loro: «illos fideles subiici nominatim nedum censuris, sed etiam Apostolicis reservationibus latis in Const. Benedicti XIV, *Sacramentum Poenitentiae*, et in Constitutionibus contra sectae massonicae aliisque similibus addictos»." For an interesting discussion of this decision's impact on the censures of the Ruthenian/Ukrainian community, see Joannes Bilanych, *Synodus Zamostiana an. 1720 (eius celebratio, approbatio et momentum)*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 11 (Rome: PP. Basiliani, 1960) 64–66. For a discussion of this response in the context of the penalties contained in 1917 *CIC*, see John A. Duskie, *The Canonical Status of the Orientals in the United States*, Canon Law Studies 48 (Washington, D.C.: Catholic University of America, 1928) 129–132. See also the comments of Joseph Mattam, "The Binding Force of the Papal Constitutions and the Disciplinary Decrees of Ecumenical Councils on the Orientals," in *The Malabar Church: Symposium in honour of Rev. Placid H. Podipara C.M.I.*, Orientalia Christiana Analecta 186, ed. Jacob Vellian (Rome: Pontificium Institutum Orientalium Studiorum, 1971) 253. Note in this text that Mattam misdates the response to 1869, thereby making it seem that it was issued slightly prior to *Apostolicae Sedis* itself.

4.2.4. Extension of Legislation Concerning Trafficking in Mass Offerings

Certain forms of trafficking in Masses were becoming a problem in the life of the Church in the latter half of the nineteenth century.

> Notwithstanding the severe penalties with which Pope Pius IX punished trafficking in Mass stipends, his measures did not succeed in uprooting the detestable practice. Booksellers and merchants continued to organize public collections of stipends and retain the money as payment for books, wines, etc., which they delivered to the clergy, who would complete the bargain by saying the required Masses.[31]

A decision from the Sacred Congregation of the Council in 1874 had authorized the possible imposition of penalties against those engaging in such trafficking.[32] However, as the mere threat of penalties did not stop this trafficking, the same congregation in May 1893 instituted specific censures against those engaging in this practice.[33] Several months later, the Sacred Congregation for the Propagation of the Faith announced that the pope extended these canonical sanctions to Eastern faithful.

> Although holy mother Church has striven for the removal of abuses that have arisen concerning the celebration of the Mass, and has strictly ordered that, with all fraud and negligence removed, full faith be observed for a pious will of benefactors or of those disposing of their goods, and that total and prompt prayers be offered for the souls of the dead, nevertheless it must be deplored, especially in our age, that a disgusting commerce has been drawn into such a holy matter. Indeed, it has happened through the malice of some men that, in order to sell ephemerides, books, and other goods more easily, they dare to collect Mass offerings and commit their celebration to a cleric, with such goods in place of a payment, and this notwithstanding the contrary resolutions issued in 1874 by the Sacred Congregation of Cardinal Interpreters of the Council of Trent with the approval of Pope Pius IX of holy memory. Earlier, our most holy lord Leo XIII, desiring to remove such detestable abuses from the Christian state, and opportunely looking to

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[31] George L. Leech, *A Comparative Study of the Constitution "Apostolicae Sedis" and the "Codex Iuris Canonici"*, Canon Law Studies 15 (Washington, D.C.: Catholic University of America, 1922) 85.

[32] Sacred Congregation of the Council, "Responsio ad Nonnulla Dubia," September 9, 1874: *ASS* 8 (1874–1875) 107–109.

[33] Sacred Congregation of the Council, decree *Vigilanti studio*, May 25, 1893: *ASS* 26 (1893–1894) 56–59. The specific censures were: for priests, suspension *a divinis*, reserved to the Holy See and incurred *ipso facto*; for non-priest clerics, the same type of suspension from received orders and being rendered *inhabilis* for receiving further orders; for laity, excommunication *latae sententiae* reserved to the bishops (ibid., 58).

> avoid so great an evil, with the counsel of the said congregation, ordered not only that the aforementioned resolutions be recalled to memory, but also that they be fortified with salutary ecclesiastical punishments, as one can observe in the appended decree. Since such abuses are also present among the clergy and faithful of the Eastern rite, his holiness, through his paternal solicitude over all Churches of the world, at the suggestion of the most eminent prefect of this Sacred Congregation, orders that that decree be extended to the clergy and faithful of the Eastern rite, and those things contained in it be observed exactly by all. Therefore, it will be for your Excellency to bring the dispositions contained in the said decree to the notice of the flock entrusted to your care in the best way possible, to order that they be observed most fully by all, and finally to be vigilant that no one deviates from their observance.[34]

Although the Pamphilian jurisprudence was not explicitly cited in this decree, it was certainly the basis for the legal determinations contained therein. The original ecclesiastical censures imposed by Leo XIII against such trafficking of Masses did not, of their nature, apply to the East, insofar as they did not concern a matter of divine law, nor did the matter pertain to dogmas of faith. Thus, in order to act against such abuses creeping into the East, the pope issued an explicit extension of the decree's censures to the East. Although this was an act applying law initially established for the West to Eastern faithful, it was based on the recognition of the negative juridic autonomy of the East.

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[34] Sacred Congregation for the Propagation of the Faith, decree *Licet sancta*, August 18, 1893: *Fontes*, 7:531–532 (#4927): "Licet sancta mater Ecclesia evellendis abusibus, qui circa Missarum celebrationem irrepserint iugiter incubuerit, atque districte mandaverit, ut, omni sublata fraude ac negligentia, piae disponentium seu benefactorum voluntati plena servaretur fides, defunctorum animabus integra et prompta praestarentur suffragia, perdolendum tamen est hac nostra praesertim aetate in re tam sancta turpe mercimonium inductum fuisse. Siquidem nonnullorum hominum malitia factum est ut ad ephemerides, libros aliasque merces facilius vendendas ipsi Missarum eleemosynas colligere atque pretii loco earumdem celebrationem clero committere ausi fuerint; idque minime obstantibus contrariis resolutionibus, anno 1874 a S. Congregatione Cardinalium Concilii Tridentini Interpretum editis, Pio Papa IX s. m. approbante. Porro SSmus D. N. Leo Papa XIII, detestabiles huiusmodi abusus e christiana republica evellere, ac opportune tanto avertendo malo prospicere cupiens, de consilio antea laudatae S. Congregationis nedum praedictas resolutiones in memoriam revocare, sed et salutaribus eccclesiasticis poenis easdem munire mandavit; prouti in adnexo decreto perspicere datum est. Cum autem istiusmodi abusus etiam inter orientalis ritus clerum et fideles invaluerint, eadem Sanctitas Sua pro paterna sua sollicitudine in omnes mundi ecclesias, referente Emo Praefecto dictae S. Congregationis, praecepit ut decretum ipsum ad clerum et fideles ritus orientalis extenderetur, ac ea quae in ipso continentur ab omnibus adamussim servarentur. Curae igitur erit amplitudinis Tuae, dispositiones in memorato decreto contentas, meliori quo fieri potest modo, ad notitiam gregis, tuae curae concrediti, deferre; et mandare ut plenissime ab omnibus observentur; ac tandem invigilare, ne quis ab earumdem observantia deflectat."

4.2.5. The Curial Debate on *Ne temere* and Eastern Catholics

Pope St. Pius X, who succeeded Leo XIII, greatly involved himself in canonical matters during his pontificate. In one of his most important legal determinations, in 1907 he instructed the Sacred Congregation of the Council to issue the decree *Ne temere*.[35] This decree declared valid only those marriages "that are contracted before the pastor [*parochus*] or local ordinary, or a priest delegated by either, and at least two witnesses" according to the rules contained within the decree.[36] The decree would go into effect throughout the world on Easter (April 19) 1908, thereby rendering the juridic situation of canonical marriage form uniform, as opposed to the previous norms of the decree *Tametsi* of the Council of Trent, which as a rule became operative only through promulgation in individual parishes.[37]

After this new juridic structure for the canonical form of marriage was established, the apostolic delegate for Egypt and Arabia sent to the Sacred Congregation of the Council this *dubium*: "Whether Greeks and other Catholics of the other Eastern rites are bound by the discipline of the decree *Ne temere*."[38] On the one hand, the decree bound "all those baptized into the Catholic Church and those converted to her from heresy or schism (even if the former or the latter have afterwards defected from her) as often as they should enter into betrothal or marriage

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[35] Sacred Congregation of the Council, decree *Ne temere*, August 2, 1907: *ASS* 40 (1907) 525–530. The decree was issued at the special mandate of Pius X: "Praesentibus valituris de mandato speciali SSmi D. N. Pii PP. X, contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus" (ibid., 530).

[36] Ibid., III: *ASS* 40 (1907) 527–528: "Ea tantum matrimonia valida sunt, quae contrahuntur coram parocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus, iuxta tamen regulas in sequentibus articulis expressas, et salvis exceptionibus quae infra n. VII et VIII ponuntur."

[37] Council of Trent, Session 24, November 11, 1563, *Canones super reformatione circa matrimonium*, cap. 1: text in Tanner 2:757: "Decernit insuper, ut huiusmodi decretum in unaquaque parochia suum robur post triginta dies habere incipiat, a die primae publicationis in eadem parochia factae numerandos."

[38] Sacred Congregation of the Council, "Dubiorum circa decretum de sponsalibus et matrimonio," February 1, 1908: *ASS* 41 (1908) 81–82: "[...] num disciplina decreti *Ne temere* adstringantur graeci ceterique catholici aliorum rituum orientalium." Note that the year given in the text for this meeting of the congregation, 1907 (ibid., 109), cannot be correct as the text refers to the fact that *Ne temere* has already been promulgated.

among themselves."[39] In fact, a proposal for implicitly excluding Eastern communities from its application was not adopted.[40] On the other hand, according to the Pamphilian jurisprudence, Eastern faithful were not bound by apostolic laws except in matters of the dogmas of faith, when the material itself implicitly included them, or when they were explicitly named; none of these seemed to be the case with *Ne temere*.

The apostolic delegate who sent the *dubium* argued that scandal would arise among the faithful concerning marriages between Catholics and non-Catholics[41] if *Ne temere* was not applied to Eastern Catholics.

> So if the aforementioned decree of the [Sacred Congregation of the] Council does not also oblige the Easterners, a great confusion will be generated concerning mixed marriages, very common in this part of the East, and there will rise an inevitable scandal from the differing appraisement of these marriages that must be made by Latins on the one hand and Easterners on the other. The former will say and will have to say, according to the tenor of the decree, that mixed marriages contracted by Catholics with heretics or baptized non-Catholics [outside of canonical form] are invalid; the Easterners, according to the ancient discipline, will say and will have to say the contrary. Hence an immense scandal [would arise] among the faithful of this place, hence an inextricable confusion of consciences. To prevent such grave evils of no less serious consequences, would it not be appropriate to impose explicitly on all the Eastern Catholics the common discipline of the Church, ordained in this decree?[42]

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[39] Sacred Congregation of the Council, *Ne temere*, XI §1: *ASS* 40 (1907) 530: "Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant."

[40] Carlo Lombardi, a defender of the bond who was consulted by the congregation during the drafting phase, had suggested the following form for ending the document: "Decretum hoc in universo orbe quoad omnes omnino (qualibet exceptione remota) *ecclesias ritum latinum sequentes* absque ulterioris promulgationis necessitate vigere incipiet post sex menses ab eius editione seu die.... quoad Europam atque insulas adiacentes; post annum vero seu die.... in reliquis orbis partibus" (emphasis added); see Sacred Congregation of the Council, "Relatio Actorum": *ASS* 40 (1907) 555.

[41] See Sacred Congregation of the Council, *Ne temere*, XI §2: *ASS* 40 (1907) 530: "Vigent [leges] quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus, sponsalia vel matrimonium contrahunt; nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum."

[42] Sacred Congregation of the Council, "Dubiorum circa decretum de sponsalibus et matrimonio," February 1, 1908: *ASS* 41 (1908) 82–83: "Se dunque il mentovato decreto dei Concilio non obbligherà anche tutti gli Orientali, nascerà una grave confusione intorno ai matrimonii misti, frequentissimi in queste parti d'Oriente, e insorgerà un inevitabile scandalo dal diverso apprezzamento di quei matrimonii che si dovrà fare dai Latini da un lato e dagli Orientali dall'altro, mentre i primi diranno e dovranno dire, a tenore del decreto, che i matrimonii misti contratti da cattolici con eretici o acattolici battezzati, sono invalidi; e gli Orientali, stando all'antica disciplina, diranno e dovranno dire il contrario. Quindi uno scandalo immenso fra i fedeli dello stesso luogo, quindi una confusione inestricabile nelle

While the delegate seems to have admitted that the decree did not *per se* apply to Eastern Catholics, he nevertheless argued in favor of extending the "common" discipline of the Church to them to prevent scandal.

Basilio Pompili, the consultor to whom the congregation gave this *dubium*, responded in the following manner:

> The delegate notes that he had a discussion about this matter with a Greek Melkite priest constituted in a dignity, who upholds a negative response from the fact that no mention of Easterners is made in the decree, and the delegate himself, albeit reluctantly, adheres to this opinion, since he remembers that the Apostolic See does not want to press the observance of its constitutions on Easterners unless it is expressly stated. Truly the matter holds itself so openly that it does not need a lengthy explanation. It should be enough to recall what Benedict XIV wrote in his work *De Ritibus*, published by Francis Heiner in 1904, in the last chapter *De regimine Italo-graecorum*. In this chapter, after he spoke about the question, "Whether Greeks are bound to venerate those who have been canonized by the Roman pontiff," he opined that this question opened the way to examining another general controversy, namely, "Whether Eastern Greeks are obliged to observe and retain pontifical constitutions, whether promulgated during general councils or outside of them." Thus, after recounting the opinion of certain doctors, he notes: "When meeting of learned men was held for the examination of this controversy on July [*sic*] 4, 1631 at the palace of Cardinal Pamphili, who afterwards was raised to the supreme pontificate and took the name Innocent X, the matter was concluded and pronounced in the following manner: *The subjects of the four patriarchs of the East are not bound by new pontifical constitutions, except in three cases: first, in the matter of the dogmas of faith; second, if the pope explicitly makes mention of the said persons in his constitutions and makes determinations concerning them; third, if he makes determinations concerning them in the said constitutions implicitly, as in the cases of appeals to a future council.*"
>
> But none of these three cases seems to be applicable in this matter. This is further confirmed from the fact that in many matters, and even as pertains to diriment impediments, the discipline of the Eastern Churches concerning marriage differs from that in force in the Latin Church, nor, as far as I know, does the Holy See think that Easterners are otherwise bound in this matter by pontifical constitutions, except as the matter touches the dogmas of faith. Moreover, from the acts of this sacred congregation that preceded this decree, it is clear enough that it was not the intention of the legislator that, at least now, Easterners also be bound to receiving the new discipline.

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coscienze. A prevenire siffatti mali gravi di non meno gravi conseguenze, non sarebbe forse del caso d'imporre a tutti gli Orientali cattolici esplicitamente la disciplina comune della Chiesa, ordinata in quel decreto?"

> Nevertheless, as I noted above, the Reverend Lord Father Delegate to Egypt and Arabia appears to bear this fact poorly. [...] What must be thought about the counsel [offered by the apostolic delegate to impose *Ne temere* on the East] shall be judged by your eminences. It should be enough for me to note that we are dealing with a very grave matter, regarding which I cannot offer any type of opinion without rashness, as I do not have more complete information concerning places and persons.[43]

Based on this statement, the members of the congregation determined that *Ne temere* did not *per se* apply to Catholics of the Eastern rite.[44]

> Indeed, in this case one is concerned with disciplinary laws, which Eastern Catholics are not bound to observe except when express mention is made of them. Moreover, the eminent fathers, in issuing the decree *Ne temere*, refrained with wise counsel from naming the Latin Church or excluding the Greek Church for, besides the fact that the decree itself could perhaps be extended in time to Easterners, they did not want to offer a pretext to Catholics of the Latin rite, but living with the Greeks, to consider themselves exempt from the obligation of this law.[45]

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[43] Ibid., 81–83: "Primo loco occurrit dubium a R. P. D. Delegato Apostolico Aegypti et Arabiae propositum, videlicet num disciplina decreti *Ne temere* adstringantur graeci ceterique catholici aliorum rituum orientalium. Delegatus refert se de hac re sermonem habuisse cum sacerdote graeco melchita in dignitate constituto, qui negativam tuetur sententiam eo quod de Orientalibus in decreto nulla fiat mentio, et huic sententiae ipse Delegatus quamvis aegre adhaeret, quia memorat Sedem Apostolicam nolle suarum Constitutionum observantiam apud Orientales urgere, nisi id expresse dicatur. Revera rem ita se habere in apertis est, nec longa eget demonstratione. Satis sit recolere quae scribit Benedictus XIV in suo opere *De Ritibus, edito anno 1904 a Francisco Heiner, in capite novissimo, De regimine Italo-graecorum*, in quo postquam locutus fuerit de quaestione: «num Graeci ad venerandos eos, qui canonizati a Romano Pontifice sunt, teneantur», animadvertit hanc quaestionem ad aliam generalem controversiam examinandam, viam aperire, scilicet «num Graeci Orientales ad observandas et retinendas Pontificias Constitutiones obligati sint, sive eae intra Generalia Concilia, sive extra eadem sint promulgata». Postquam igitur aliquorum doctorum sententiam memorasset, refert: «Super huiusmodi controversiae examine cum die 4 Iulii [*sic*] an. 1631 doctorum virorum Congregatio in palatio Cardinalis Pamphilii, qui postea ad Summum evectus Pontificatum Innocentii X nomen assumpsit, habita fuisset, sequenti modo conclusum et pronunciatum est: *Subditi quatuor Patriarcharum Orientis non ligantur novis Pontificiis Constitutionibus nisi in tribus casibus: 1º in materia dogmatum fidei; 2º si Papa explicite in suis Constitutionibus faciat mentionem et disponat de praedictis; 3º si implicite in iisdem Constitutionibus de iis disponat, ut in casibus appellationum ad futurum Concilium*». Porro nullum ex his tribus casibus in themate videretur haberi. Quod etiam ex eo confirmatur quia in pluribus, et etiam quoad impedimenta dirimentia, disciplina circa matrimonium Ecclesiarum Orientalium discrepat ab ea quae viget in Ecclesia Latina, nec, quod sciam, S. Sedes alias in hac materia Orientales ligatos censuit Pontificiis Constitutionibus, nisi res dogmata fidei attingeret. Praeterea ex actis huius S. C., quae decretum praecesserunt, satis colligitur non eam fuisse intentionem legislatoris ut saltem nunc etiam Orientales ad novam disciplinam suscipiendam adigerentur. Id tamen, ut superius innui, aegre ferre videtur R. P. D. Delegatus Aegypti et Arabiae [...]. Quid de hoc consilio sentiendum sit iudicabunt EE. VV. Mihi satis sit animadvertere hic agi de gravissimo negotio, super quo opinionem qualemcumque pandere sine temeritate haud possem, quin pleniores informationes locorum et personarum habeam."

[44] Ibid., 108, 109: "*An decreto* Ne temere *adstringantur etiam catholici ritus orientalis.* [...] *Negative*."

[45] Ibid., 109 note 1: "Sane in casu agitur de legibus disciplinaribus, quas observare non tenentur catholici orientales, nisi expressa mentio de ipsis fiat. Sapienti praeterea consilio Emi Patres, in decreto *Ne temere* exarando, sese abstinuerunt ab Ecclesia latina nominanda vel graeca excludenda; nam, praeterquam quod decretum ipsum suo tempore etiam ad Orientales extendi fortasse potuerit, ansam non praebuerunt catholicis latini ritus, apud Graecos tamen commorantibus, se exemptos censendi ab huius legis obligatione."

In light of the consultor's hesitation concerning the extension of *Ne temere* to the East, the congregation's members deferred that matter to the Sacred Congregation for the Propagation of the Faith, "to which has been granted the power of determining whether, when, and how it would be expedient to extend the decree to Catholics of the Eastern rite."[46]

Besides determining that *Ne temere* did not apply to Eastern Catholics, the congregation also studied a *dubium* concerning marriages between a Latin Catholic and Eastern Catholic—would the parties would be bound to the canonical form indicated in *Ne temere* because the Latin Catholic was so bound, or would they be exempt from this form by virtue of the "indivisibility" of the contract, through which a privilege possessed by one party (in this case, the Eastern Catholic not being bound to form) transferred to the other party (the Latin Catholic so bound).[47] Two consultors[48] to whom the congregation gave this *dubium* to study did not adhere to the division of rites given in *Allatae sunt*, nor did they consider the East as a single juridic unit. Rather, in their responses they divided the East into juridic communities based on their marriage laws.[49] The first *votum*, submitted by Paul Smolikowski, listed nine separate communities,[50]

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[46] Ibid., 108, 109: "*Utrum ad eosdem decretum extendere expediat.* [...] *Ad S. Congregationem de Propaganda Fide.* [Note 2:] Huic Congregationi proinde facta est potestas decernendi num, quando et quomodo decretum ad catholicos ritus orientalis extendere expediat."

[47] Ibid., 83: "[*U*]*trum pars quae non tenetur (saltem quoad validitatem) ad celebrandum coram Ecclesia, communicet hoc suum quasi privilegium alteri comparti, quae teneretur*, ovvero: *utrum pars, quae tenetur, trahat ad se partem, quae per se non teneretur*." The question had actually been pointed out in the drafting phase by the defender of the bond Carlo Lombardi, who had suggested abolishing any possible exemption: "[I]mmo ad certo comprehendendum quoque casum matrimonii inter v. g. virum latini, qui tenetur sub nullitate, et mulierem ritus orientalis, quae non tenetur sub nullitate, talia adhiberem verba, quae *casum quemlibet absque ulla exceptione contineant*"; see Sacred Congregation of the Council, "Relatio Actorum": *ASS* 40 (1907) 559.

[48] The members of the congregation had obtained an opinion from the first consultor to whom they gave the question (Basilio Pompili), but they deferred a resolution and decided to contact two others: see Sacred Congregation of the Council, "Dubiorum circa decretum de sponsalibus et matrimonio," February 1, 1908: *ASS* 41 (1908) 110.

[49] For a summary of the laws on marriage form in the Eastern Catholic Churches just prior to the promulgation of *Crebrae allatae*, see Stephen C. Gulovich, "Matrimonial Laws of the Catholic Eastern Churches," *The Jurist* 4 (1944) 212–245.

while the second, submitted by Enrico Benedetti, listed twelve.[51] Such distinctions focused on the entities that were capable of issuing, or at least receiving legislation, and not on the liturgical rite, whether considered as general traditions as in *Allatae sunt* or as more particular liturgical groupings.

A third consultor,[52] Pietro Vidal, SJ, did not specifically discuss Eastern law on marriage, focusing instead on whether the exemption from canonical form for mixed marriages in Germany, established in 1906 by Pius X in the decree *Provida*,[53] continued under *Ne temere*. However, in his comments he did distinguish Eastern law from other types of law:

> This exception [of *Provida*] is *merely local* and not personal, so a German outside of the territory of Germany, even for the excepted case of mixed marriage, is bound by the decree *Ne temere*. [...] Another exception concerns the Easterners. It is clear that this fact has been admitted, that Easterners are not bound by merely disciplinary laws, even universal ones, unless something is established expressly in those laws about them, or express mention is made of them, or the law is implicitly extended to them as well because of the subject matter, as happens when a pure declaration of divine or natural law is given [...]. Moreover the Easterners themselves profess that they are not bound by the law of the chapter *Tametsi* [...]. But this exception for the Easterners is not merely local,

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[50] Cf. Sacred Congregation of the Council, "Dubiorum circa decretum de sponsalibus et matrimonio," March 30, 1908: *ASS* 41 (1908) 253: "Talis praxis et talis modus sentiendi est penes catholicos Rumenos [1], Armenos [2], Graeco-Melchitas [3], Syro-Chaldaeos [4]. Alicubi tamen in Oriente dispositiones Synodi Tridentinae introductae sunt, ut apud Italo-Graecos [5], apud Ruthenos in Austriaco [6], apud Syros [7] et Maronitas in Imperio Turcorum [8] et apud Syros in Indiis Orientalibus [9]" (numbering added).

[51] Ibid., 260–267. A listing of eleven communities is found at ibid., 267: "*a*) Rutheni [1], Italo-Graeci [2], Maronitae [3] decreto *Tametsi* moderantur. Melchitae [4], Armeni [5], Syri puri [6], Chaldaei [7], Copti [8], reliqui graeci (puri [9] et Bulgari [10]) invalidas tenent nuptias absque benedictione sacerdotali contractas. *b*) Rumeni [11] impedimentum clandestinitatis inter impedimenta recensent" (numbers added). The Syro-Malabars [12] do not have their own heading, but it is stated at ibid., 267: "Quoad vero Syro-Malabarenses nihil est observandum cum ipsi praeter linguam liturgicam, in omnibus sint latini ac latinae Ecclesiae legibus regantur." Note also that at ibid., 261, he considers the "Ruthenian" eparchies in the Kingdom of Hungary to be in a different juridic situation than those in Galacia Austria: "Hi vero qui habitant Hungariam non tenentur legibus Synodorum Zamoscenae et Leopoliensis, neque per quantum scimus, ullum apud eos extat concilium vel synodus." The Kingdom of Hungary included the areas now subject to the Slovakian, Croatian-Serbian, Ruthenian, and Hungarian Catholic Churches *sui iuris*—the eparchies of Prešov [Eperies], Križevci, Mukacheve, and (in 1912) Hajdúdorog (Pius X, apostolic letter *Christifideles graeci ritus*, June 8, 1912: *AAS* 4 [1912] 429–435), respectively. As these eparchies were not subject to the synods of Zamosc and Lviv, they had to be considered separately from the others; one could say they were *sui iuris* relative to the other Ruthenians.

[52] Ibid., 252: "[...] huiusmodi votum a duobus Consultoribus expostulatum fuit, et tertium additum super aliis eadem in materia dubiis ad hanc S. C. oblatis."

[53] Pius X, decree *Provida*, January 18, 1906: *ASS* 39 (1906) 81–84. For a brief discussion on *Provida* and *Ne temere*, see John Creagh, *A Commentary on the Decree "Ne Temere"* (Baltimore: J. F. Hurst Co., 1908) 73–74.

> but rather *personal*, for not merely Easterners of a certain region, but *all* Easterners are free from the observance of merely disciplinary laws.[54]

The consultor held that the exemption of Eastern faithful from disciplinary laws to be personal, unrelated to the physical location of the person at a given moment.

The discussion concerning *Ne temere* concerned not only negative autonomy—that Eastern faithful were not bound by the decree—but also touched heavily on positive autonomy—discussing the norms of the individual Eastern communities concerning the necessity of canonical form for the validity of marriage. Despite some lingering biases (one notes that the apostolic delegate who sent the *dubium* had considered *Ne temere* "common" law, suggesting the legal state of the Eastern communities was "uncommon" or anomalous), the individual communities were recognized as possessing a proper law on a matter as important in the life of the Church as the validity of marriage. The extensive analysis of these laws reflected the desire for legal clarity present since the era of the First Vatican Council, particularly found in appeals for a codified law. While the Apostolic See was not looking to codify the laws of the Eastern communities specifically, it was engaged during this period in formulation a new code of canon law. Although its canons would, for the most part, apply only to the Latin Church, the code nevertheless had a significant impact on the development of Eastern juridic autonomy.

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[54] Sacred Congregation of the Council, "Dubiorum circa decretum de sponsalibus et matrimonio," March 30, 1908: *ASS* 41 (1908) 272: "[...] illam exceptionem esse *mere localem* non personalem: quo posito Germanicus extra territorium Germaniae, etiam pro casu excepto matrimonii mixti, tenetur ad formam decreti *Ne temere*. [...] Altera exceptio est de orientalibus; constat enim esse rem admissam Orientales legibus mere disciplinaribus etiam universalibus non ligari, nisi in his aliquid expresse de ipsis Orientalibus statuatur, aut expressa eorum mentio fiat, aut implicite pro subiecta materia ad illos quoque lex extendatur, ut accidit cum datur mera declaratio iuris divini aut naturalis (S. C. P. F. 8 Nov. 1882; Benedictus XIV Const. *Etsi Pastoralis* 26 Maii 1742). Ceterum ipsi Orientales profitentur se non teneri legi capitis *Tametsi* (Cfr. Papp-Szilagyi, *Enchiridion iuris eccl. orientalis*, pag. 274). At illa Orientalium exceptio iam non est mere localis, sed potius *personalis*, non enim Orientales alicuius regionis, sed *omnes* Orientales sunt liberi a legibus mere disciplinaribus observandis."

4.3. The 1917 *Codex Iuris Canonici*

The requests expressed at the First Vatican Council that ecclesiastical laws be codified did not go unheeded.[55] By the *motu proprio Arduum sane munus*, Pius X instituted a pontifical commission to meet the desires of prelates and cardinals "that the laws of the whole Church, issued up to the present time, be placed into a clear order and be collected into one body, removing those that were abrogated or obsolete, and better adapting others, as needed, for our present times."[56] After over a decade of review, the commission, under the leadership of Pietro Cardinal Gasparri, prepared a draft for Pope Benedict XV, who had succeeded Pius X after his death in 1914.[57] By the apostolic constitution *Providentissima Mater Ecclesia* of May 27, 1917, Pope Benedict XV promulgated the 1917 *Codex Iuris Canonici*.[58]

4.3.1. Canon 1 and the Juridic Nature of the Code

The *motu proprio Arduum sane munus* quoted above established the role of the codification commission to put in order "the laws of the whole Church" ("universae Ecclesiae

[55] On such hopes, see Giorgio Feliciani, "Il Concilio Vaticano I e la Codificazione del Diritto Canonico," *Ephemerides Iuris Canonici* 33 (1977) 115–143 and Pietro Cardinal Gasparri, "Praefatio," in *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, praefatione emi Petri Card. Gasparri et indice analytico-alphabetico auctus* (Rome: Typis Polyglottis Vaticanis, 1918) xxv–xxix.

[56] Pius X, *motu proprio Arduum sane munus*, March 19, 1904: *ASS* 36 (1903–1904) 550: "At illustres Ecclesiae Praesules, iique non pauci etiam e S. R. E. Cardinalibus, magnopere flagitarunt ut universae Ecclesiae leges, ad haec usque tempora editae, lucido ordine digestae, in unum colligerentur, amotis inde quae abrogatae essent aut obsoletae, aliis, ubi opus fuerit, ad nostrorum temporum conditionem propius aptatis." The translation above presumes that *universae* modifies *Ecclesiae*. However, *universae* could just as easily modify *leges*—"all the laws of the Church."

[57] For a review of the history of this first codification project, see Gasparri, "Praefatio," xxviii–xxxiv.

[58] Benedict XV, apostolic constitution *Providentissima Mater Ecclesia*, May 27, 1917: *AAS* 9/2 (1917) 5–8. The 1917 *CIC* would acquire force of law on Pentecost (May 19) of 1918: "Ut autem omnes, ad quos pertinet, probe perspecta habere possint huius Codicis praescripta antequam ad effectum adducantur, edicimus ac iubemus ut ea vim obligandi habere non incipiant nisi a die Pentecostes anni proxime venturi, idest a die decima nona mensis Maii anni millesimi nongentesimi duodevicesimi" (ibid., 8).

leges"). Nothing elsewhere in the *motu proprio* indicated that the commission's role was explicitly limited to the Latin Church. The promulgatory text found in *Providentissima Mater Ecclesia* likewise did not limit the authority of the code to the Latin Church:

> Therefore, having invoked the aid of divine grace, confiding in the authority of the blessed apostles Peter and Paul, with certain knowledge and the plentitude of apostolic power with which we have been endowed, by this our constitution that we wish to be valid in perpetuity, we promulgate the present code just as it has been published, and determine and order that it afterward have *the force of law for the whole Church*, and entrust it to your guard and vigilance for its observance.[59] [Emphasis added]

Both texts suggest that this code, considered as an entire unit and from a purely juridic viewpoint, was understood to be a general, universal code, at least capable of applying to Eastern faithful as well as Latins.[60]

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[59] Benedict XV, *Providentissima Mater Ecclesia*: *AAS* 9/2 (1917) 8: "Itaque, invocato divinae gratiae auxilio, Beatorum Petri et Pauli Apostolorum auctoritate confisi, motu proprio, certa scientia atque Apostolicae, qua aucti sumus, potestatis plenitudine, Constitutione hac Nostra, quam volumus perpetuo valituram, praesentem Codicem, sic ut digestus est, promulgamus, vim legis posthac habere pro universa Ecclesia decernimus, iubemus, vestraeque tradimus custodiae ac vigilantiae servandum." Compare with the promulgatory text of the 1983 *CIC* in John Paul II, apostolic constitution *Sacrae disciplinae leges*, January 25, 1983: *AAS* 75/2 (1983) xiii–xiv: "Itaque divinae gratiae auxilio freti, Beatorum Apostolorum Petri et Pauli auctoritate suffulti, certa scientia atque votis Episcoporum universi orbis adnuentes, qui nobiscum collegiali affectu collaboraverunt, suprema qua pollemus auctoritate, Constitutione Nostra hac in posterum valitura, praesentem Codicem sic ut digestus et recognitus est, promulgamus, vim legis habere posthac *pro universa Ecclesia latina* iubemus ac omnium ad quos spectat custodiae ac vigilantiae tradimus servandum" (emphasis added).

[60] The general nature of the title also suggests universality of application; note Antoine Joubeir, *La Notion Canonique de Rite: Essai historico-canonique*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 14 (Rome: Basilian Fathers, 1961) 52: "[...] ne pourrait-on pas penser que c'est aussi pour avoir trop uni Patriarche des Latins et Souverain Pontife que l'Église latine a donné à son Code, qui aurait dû rester un Code particulier, le titre général de Code de droit canon?..." Thus, stating that the 1917 *CIC* was simply a proper "Latin code" is not entirely precise, especially in consideration of the canons that would apply to Eastern faithful by virtue of c. 1. Note, for example, Néophytos Edelby and Ignace Dick, *Les Églises Orientales Catholiques: Décret «Orientalium Ecclesiarum»*, Unam Sanctam 76 (Paris: Cerf, 1970) 114: "Le [1917] *Codex juris canonici* est un *droit particulier* autant que le droit de la plus petite des Églises orientales"; ibid., 250: "Quant au droit de l'ensemble de l'Église latine, dont le *Codex juris canonici* est aujourd'hui l'heureuse synthèse, il ne peut être appelé commun que par rapport au droit propre ou particulier des groupements inférieurs qui la constituent. Par rapport au droit commun de toute l'Église, le droit de l'Église latine est, selon la terminologie in usage, un droit *propre*." The authors at 252 do note that others considered the 1917 *CIC* as common ecclesiastical law: "Certains pensent aussi que le *Codex juris canonici* est un droit commun à toute l'Église, et que le droit oriental n'est qu'un droit propre ou particulier." Likewise, John A. Abbo and Jerome D. Hannan, *The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church*, 2nd rev. ed. (St. Louis/London: B. Herder, 1960) 1:4 is imprecise in asserting that "the Code was promulgated expressly for Catholics of the Latin rite," as can be seen from the language used in the promulgation.

What rendered this code a Latin code *de facto* was the legal presumption established in its first canon:

> Although in the *Codex Iuris Canonici* the discipline of the Eastern Church is also referenced often, this code nevertheless respects only the Latin Church, and does not oblige the Eastern Church unless it determines things that, by the very nature of the matter, affect the Eastern Church as well.[61]

This canon was sourced in the Pamphilian decision and the later juridic texts that used its jurisprudence.[62] It was, in fact, the first official approbation of this jurisprudence by a Roman pontiff in universal law.[63] This first canon established a presumption for the canons in the code[64]

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[61] 1917 *CIC* c. 1: "Licet in Codice iuris canonici Ecclesiae quoque Orientalis disciplina saepe referatur, ipse tamen unam respicit Latinam Ecclesiam, neque Orientalem obligat, nisi de iis agatur, quae ex ipsa rei natura etiam Orientalem afficiunt." Aemilius Herman, "De «Ritu» in Iure Canonico," *Orientalia Christiana Periodica* 32 (1933) 126 wisely notes that a simple reference to Eastern discipline in a canon of the 1917 *CIC* does not necessarily mean that that canon applied to Eastern faithful, nor that a canon without reference to Eastern discipline did not apply to them.

[62] The sources are found in *Codex Iuris Canonici Pii X. Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus: Praefatione, Fontium Annotatione, et Indice Analytico-Alphabetico ab emo Petro Card. Gasparri auctus* (Vatican City: Typis Polyglottis Vaticanis, 1948) in the footnote to c. 1 : "Benedictus XIV, const. «*Etsi pastoralis*», 26 maii 1742, §IX, n. V; ep. encycl. «*Allatae sunt*», 26 iul. 1755, §44; S. C. S. Off., 13 iun 1710; S. C. de Prop. Fide, 4 iun. 1631; litt. encycl. (ad Deleg. Ap. pro Oriente), 8 nov. 1882; litt. encycl. 6 aug. 1885; decr. 18 aug. 1893." The order of the texts is due to the precedence of the sources (pope, Holy Office, Propaganda) and not time or importance. Note that Franz X. Wernz and Petrus Vidal, *Ius Canonicum, Tomus I: Normae Generales*, 2nd ed. (Rome: Gregorian University, 1952) 109 attributes the basis of this canon to the fourth canon of Lateran IV (*Licet graecos*), although not explicitly listed as a source. Cf. the following commentaries on 1917 *CIC* c. 1 that specifically reference the Pamphilian jurisprudence directly or through one of the other sources cited by the canon: Charles Augustine, 72–73; H. A. Ayrinhac, *General Legislation in the New Code of Canon Law* (London/New York/Toronto: Longmans, Green and Co., 1930) 98; Udalricus Beste, *Introductio in Codicem*, 3rd ed. (Collegeville: St. John's Abbey, 1946) 52; Albertus Blat, *Commentarium Textus Codicis Iuris Canonici, Liber I: Normae Generales* (Rome: Typographia Pontificia in Instituto Pii X, 1921) 60; Amleto Cicognani, *Canon Law*, 2nd rev. ed., authorized English version (Westminster: Newman Bookshop, 1934) 453; Ioannes Ferreres, *Institutiones Canonicae iuxta Novissimum Codicem Pii X a Benedicto XV Promulgatum iuxtaque Praescripta Hispanae Disciplinae et Americae Latinae* (Barcelona: Eugenius Subirana, 1917) 1:40; Gommarus Michiels, *Normae Generales Iuris Canonici: Commentarius Libri I Codicis Iuris Canonici* (Lublin: Polonia Universitas Catholica, 1929) 1:41–42; Eduardus F. Regatillo, *Institutiones Iuris Canonici*, 7th augmented ed. (Santander: Sal Terrae, 1963) 1:30–31; Giovanni Řezáč, *Institutiones Iuris Canonici Orientalis (Ad usum privatum auditorum)* (Rome: PIO, 1961) 1:121–122; Arthur Vermeersch and Joseph Creusen, *Epitome Iuris Canonici cum Commentariis ad Scholas et ad Usum Privatum: Tomus I: Libri I et II Codicis Iuris Canonici*, 8th ed., rev. by Aemilius Bergh and Iosephus Grego (Paris/Bruges: Desclee de Brouwer, 1963) 68; Wernz-Vidal, 109.

[63] Regatillo, 1:31 notes that while the Pamphilian jurisprudence was considered as a general norm prior to this point, "usque ad Codicem decisio S. Sedis clara et expressa defuit."

[64] 1917 *CIC* c. 1 did not, in itself, apply to legislation outside the code. Note Wernz-Vidal, 110: "*Codex talem expressam sanctionem continet* quoad Codicis praescripta, nihil dicens de futuris legibus post Codicem promulgandis." A similar comment is made by Herman, "De «Ritu» in Iure Canonico," 138: "De se sane ad has [leges quae post promulgationem Codicis I. C. prodierunt vel prodibunt] non se extendit can. 1 C. I. C., qui solum

that the individual canons would only oblige the Latin Church; only if the very nature of the matter (*ex ipsa rei natura*) affected the Eastern Church did a specific canon apply to Eastern faithful.[65] The application of the Pamphilian jurisprudence to the canons of the code indicates the code as a whole was "general" legislation, just as the Pamphilian jurisprudence had been applied to "general" apostolic constitutions.[66]

Because any canon of the code could apply to Eastern faithful insofar as the code was juridically universal, and only an application of canon 1 could determine which canons' applicability was restricted to the Latin Church, there was great confusion over the specific canons that applied to Eastern faithful *ex ipsa rei natura*. John A. Duskie notes that the wording of the canon "is sufficiently comprehensive to include all possible cases, but it is very often difficult to become definite and practical."[67] George Gallaro and Dimitri Salachas add that "the expression *ex ipsa rei natura* was very ambiguous in the past, after the promulgation of the 1917 code, because it referred also to Latin laws which were merely ecclesiastical in nature that were applied to the Eastern faithful against their tradition."[68] Because of this ambiguity, canonical commentators of the era of the 1917 code cited a great variety of canons as applying to Eastern faithful. Besides those types of laws included under the Pamphilian jurisprudence—canons

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canones in Codice I. C. contentos respicit." However, he believes that since c. 1 fits with prior praxis, later laws can be judged according to it. Compare 1917 *CIC* c. 1, speaking of "ipse [codex]," with *CCEO* c. 1492, which establishes a presumption concerning simply "leges a suprema Ecclesiae auctoritate latae."

[65] The formulation found in Lorenzo Lorusso, *Eastern Catholics and Latin Pastors: Issues and Canonical Norms*, English ed. John D. Faris (Washington, D.C.: CLSA, 2013) 30–31, that "Eastern faithful were not obliged in virtue of the canons, but obliged because of their content," is a bit unclear. It is better said that by virtue of the content of a canon, the canon itself obliged Eastern faithful.

[66] By being based on the Pamphilian jurisprudence, 1917 *CIC* c. 1 cannot be interpreted as expanding properly Latin law to the East. The Pamphilian jurisprudence does not extend Latin legislation to the whole Church, but restricts "general" legislation from applying to the Eastern communities; canon 1, based on this jurisprudence, functions in the same way.

[67] Duskie, 57.

[68] George Gallaro and Dimitri Salachas, "Interecclesial Matters in the Communion of Churches," *The Jurist* 60 (2000) 260.

concerning Catholic dogma or teaching on morals,[69] declaring divine positive or natural law,[70] or expressly applying to Eastern faithful, whether by the words of the law itself[71] or through explicit expansion to the East[72]—other classes of canons were given, often in an attempt to elucidate what could "implicitly" apply to Eastern faithful.[73] Among these were canons immediately pertaining to the spiritual good of individual souls,[74] those granting favors not opposed to Eastern discipline,[75] those concerning "ritual" ascription and "interritual" relations, at least as

[69] Duskie, 59–60, listing "matters of faith and Catholic doctrine" under the heading of divine positive law; Michiels, *Normae Generales Iuris Canonici*, 1:42; Regatillo, 1:31 (2º); Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:122–123; Vermeersch-Creusen, 70 (1a). See also Josephus Schweigl, "Utrum extraliturgica devotio erga SS. Cor Iesu inter Orientales neoconversos sit fovenda," *Periodica* 26 (1937) 11–17. Schweigl argues that the means of salvation and sanctification contained in encyclical letters are given for all Catholics regardless of rite, while disciplinary or liturgical measures contained in them do not. Hence, he argues that the devotion to the Most Sacred Heart of Jesus can be introduced and fostered in the East, since it is a means of salvation and not simply a matter pertaining to discipline or liturgy.

[70] Cicognani, 453–454; Duskie, 58–59, 60–61; Herman, "De «Ritu» in Iure Canonico," 126–127; Michiels, *Normae Generales Iuris Canonici*, 1:42; Regatillo, 1:31 (2º); Vermeersch-Creusen, 1:70 (I-b). Both Cicognani and Duskie include deductions from divine law under this heading.

[71] Cicognani, *Canon Law*, 456–457; Duskie, 61–63; Herman, "De «Ritu» in Iure Canonico," 127–129; Michiels, *Normae Generales Iuris Canonici*, 1:43; Regatillo, 1:31 (1º); Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:123. Cf. Vermeersch-Creusen, 1:73 (II-B), listing interritual law as a type where "Orientales explicite in C.I.C. comprehendunt."

[72] Regatillo, 1:31 (3º); cf. Cicognani, *Canon Law*, 455 note 26; Vermeersch-Creusen, 1:70 (I-h, I-i, I-k).

[73] Gulovich, "Matrimonial Laws of the Catholic Eastern Churches," 201 considers a fourth type of legislation as binding on Eastern faithful: "Bearing in mind the fact that the present [1917] *Codex Iuris Canonici* is a newly formulated restatement of laws which previously existed in the Church, it becomes inevitable that many of the canons incorporate legislation that is still binding upon the Orientals. In other words, while a given canon, by virtue of [1917 *CIC*] Canon 1, may not be binding upon the Orientals and may not be quoted as binding in any official instrument, the substance of the canon may prove applicable to the Orientals by inquiring into the source of the action." However, since such laws have force for the Eastern faithful only as they were previously applied to them, the laws of this "fourth type" should be considered rather as an application of law under the Pamphilian jurisprudence prior to the 1917 *CIC*.

[74] Cicognani, *Canon Law*, 457; Duskie, 63–64; Regatillo, 1:31 (4º); Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:123–124; Vermeersch-Creusen, 1:70 (I-d).

[75] Herman, "De «Ritu» in Iure Canonico," 135–138; Regatillo, 1:31 (included under 4º); Vermeersch-Creusen, 1:70 (I-c). However, Michiels, *Normae Generales Iuris Canonici*, 1:46–47 argues against a broad interpretation of this position: "[M]eo sensu, generaliter videtur negandum et ad principium commune canonis 1 reducendum, ita ut non possint frui favoribus per legem Codicis concessis, 'nisi agatur de favoribus qui ex ipsa natura rei etiam Orientales afficiunt,' quales sunt indulgentiae, quas Romanus Pontifex concedit non ut Ecclesiae Latinae Patriarcha, sed ut Ecclesiae universae Pastor, gratiarum divinarum distributioni praepositus." For the basis of including this type of canons, compare Sacred Apostolic Penitentiary, "De Indulgentiis quoad Fideles Ritus Orientalis," July 7, 1917: *AAS* 9/1 (1917) 399, declaring that faithful of the Eastern rites can obtain indulgences conceded by the pope by a universal decree, with Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite, "Dubia circa Constitutionem Apostolicam «Incruentum» quoad Orientales," *AAS* 8 (1916) 104–105, stating that the law of

concerned relations between the Latin Church and an Eastern community,[76] those concerning public order, at least when Eastern faithful were subject to Latin hierarchs,[77] strictly territorial laws,[78] and those implicitly including Eastern faithful through the subject of the canon being a specific matter of mutual concern to East and West.[79] Summarizing his own lengthy analysis in his *Canon Law*, Amleto Cicognani offers a rather broad interpretation of which laws of the 1917 code affected Eastern faithful:

> Hence our conclusion must be: This first Canon excludes from the jurisdiction of the Code those laws which exclusively concern the Oriental Church; but in no respect are Orientals exempt from the observance of the general laws of the Church or laws which regulate the relations between the various Oriental Churches with the central ecclesiastical authority [...], or the relations of the Oriental Churches with the Latin Rites [...].[80]

Cicognani appears here to have inverted the Pamphilian jurisprudence: Eastern faithful were bound to "the observance of the general laws of the Church"; they were exempt from "the jurisdiction of the Code" only when laws exclusively concerned them as Eastern faithful.

Benedict XV, apostolic constitution *Incruentum*, August 10, 1915: *AAS* 7 (1915) 401–404 permitting three Masses to be said on All Souls Day did not apply to Eastern faithful, and it was not proper that this Latin discipline be extended to them—thus, Eastern faithful could gain favors, so long as they were not opposed to their discipline. For an earlier example, see Benedict XIV, brief *In superiori*, December 29, 1755: *Opera Omnia* 17/2:297–299, forbidding Eastern faithful, and particularly the Armenians of Livorno, from celebrating three Masses on Christmas, as this was properly a rite of the Latin Church.

[76] Herman, "De «Ritu» in Iure Canonico," 132 (b), listing "mediate" application of canons to Eastern faithful through interactions with Latins, like the validity of a rescript issued by a Latin curial congregation to a member of the Eastern faithful; Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:123, giving the example of the validity of pontifical rescripts.

[77] Cicognani, *Canon Law*, 458; Duskie, 64; Michiels, *Normae Generales Iuris Canonici*, 1:44; Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:125.

[78] Cicognani, *Canon Law*, 457–458; Duskie, 64; Michiels, *Normae Generales Iuris Canonici*, 1:44; Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:125. All give the example of laws concerning burial when it concerns a Latin church. Abbo-Hannan, 1:4 combine the public order class with this one in speaking of "strictly territorial laws that involve the public welfare."

[79] Herman, "De «Ritu» in Iure Canonico," 129–132; cf. Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:123, speaking of implicit inclusion through the material treated in the canon, such as the canons on the ecumenical council.

[80] Cicognani, *Canon Law*, 459.

The reason for such confusion over the application of canons to Eastern faithful is based in the understanding of the 1917 code as universal law, although being *de facto* limited for the most part to the Latin Church. As Antoine Joubeir notes:

> The fusion of the universal law of the Church with the disciplinary part of the Latin rite confused the concepts. Cardinal Sérédi, who collaborated on the codification of Latin law, counted eighteen canons of the [1917] *CIC* that directly concerned the Easterners. The *Commentarius* of Book I of the [1917] *CIC* by Cicognani-Staffa counted more than five hundred... In addition, Capello had also given a very long list...[81]

Because the code was essentially general, universal law, any canon could theoretically apply to Eastern faithful; the limitation established in canon 1 was open to interpretation, which resulted in such widely varying lists of canons deemed applicable to Eastern faithful.

The 1917 code was mixed in terms of recognizing the juridic autonomy of the Eastern communities. On the one hand, the Pamphilian jurisprudence was codified as law. The codification of this jurisprudence clearly showed that a difference existed between the Latin communities and Eastern communities in the application of law—what applied to the former did not necessarily apply to the latter. It followed from the first canon that the "Latin Church" and the "Eastern Church" were juridically distinct and autonomous relative to one another. On the other hand, the laws of the code were not, in their essence, Latin laws, but universal laws generally limited in application to the Latin Church by virtue of its first canon. Canons in this code could be determined to apply *ex ipsa rei natura* to the Eastern communities, and commentators proposed rather varied lists of the canons they considered to be such. That so many canons could be included in this class threatened Eastern autonomy, limiting each community's ability to establish their own law in such matters.

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[81] Joubeir, 75: "La fusion du droit universel de l'Église avec la partie disciplinaire du rite latin embrouillait les idées; le Cardinal Sérédi, qui collabora dans la codification du droit latin, comptait 18 canons du C.I.C. qui regardaient directement les Orientaux; le *Commentaire* du I[er] Livre du C.I.C., de Cicognani-Staffa, en compte plus de 500... D'ailleurs, Capello avait lui aussi donné une liste bien longue..." At p. 74, Joubeir dates the beginning of this confusion to the thirteenth century.

4.3.2. The Juridic Nature of "Rite"

The 1917 code encapsulated previous jurisprudence concerning ascription to a rite. Canon 98 §1 stated:

> Among the various Catholic rites, a person pertains to that by whose ceremonies the person has been baptized, unless perchance baptism was conferred by a minister of a foreign rite either through fraud, or on account of grave necessity, when a priest of the proper rite could not be present, or through apostolic dispensation, when the faculty has been granted that someone may be baptized by a certain rite, but does not remain ascribed to it.[82]

This canon repeated the jurisprudence of Benedict XIV by declaring that a rite had some rights over a person to be baptized in certain specific circumstances, such that a person could be ascribed to that rite even if its ceremonies were not used for the baptism. Nevertheless, canon 98 §1 retained the general rule that a person would be ascribed simply to the rite "by whose ceremonies the person was baptized"; those circumstances where a rite clearly had rights over a person independent of the liturgical rite of baptism were listed only as exceptions.[83]

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[82] 1917 *CIC* c. 98 §1: "Inter varios catholicos ritus ad illum quis pertinet, cuius caeremoniis baptizatus fuit, nisi forte baptismus a ritus alieni ministro vel fraude collatus fuit, vel ob gravem necessitatem, cum sacerdos proprii ritus praesto esse non potuit, vel ex dispensatione apostolica, cum facultas data fuit ut quis certo quodam ritu baptizaretur, quin tamen eidem adscriptus maneret."

[83] Cf. Gommarus Michiels, *Principia Generalia de Personis in Ecclesia*, 2nd ed. (Paris/Tournai/Rome: Typis Societatis S. Ioannis Evangelistae, Desclée et Socii, 1955) 304: "Sensus genericus principii fundamentalis in can. 98 §1 statuti et iamprimus a Benedicto XIV non semel affirmati obvius est: ritus iuridico-legalis, ad quem originarie in Ecclesia Catholica pertinet, per se et directe determinatur ritu liturgico quo fuit baptizatus. [...] Formula canonis «ritus... cuius caeremoniis baptizatus fuit» a legislatore indubitanter adhibetur sensu proprio, *uti sonat*, ad indicandum scilicet illum ritum cuius caeremoniis quis *de facto* baptizatus fuit, et non ritum cuius caeremoniis de iure erat baptizandus. [...] [I]sta principia subalterna [in secunda parte paragraphi statuta] sane, in quibus, ad determinandum ritum legalem ad quem quis pertinet, attendi iubetur *proprius* baptizandi ritus liturgicus in collatione baptismi de iure regulariter servandus, a legislatore explicite proponuntur tamquam *exceptiones* principii generalis fundamentalis prius statuti." He nevertheless argues that conferral of baptism illegitimately, against the norm of 1917 *CIC* c. 756, constitutes fraud and therefore falls under the first exception, likely in light of the 1919 decision analyzed below. Bassett, 172 admits that "both the text and the context of the canon, together with the way the subordinate principles are expressed in relation to the general principle initially stated support this interpretation. The subalternate principles are listed as exceptions to the general rule that a person belongs to that rite in which he has been baptized. They could not be so considered unless the rite actually observed in Baptism were not conceived

While the wording of the canon would not change, the jurisprudence surrounding it would be developed so as to recognize that the ascription of children was determined independently from the rite of the ceremony.[84] In 1919, the Pontifical Commission for Authentically Interpreting the Canons of the Code received the *dubium* "whether those who, at the pleas of the parents, against the prescript of canon 756, are baptized by a minister of a different rite, pertain to the rite in which they were baptized, or to the rite in which, according to canon 756, they ought to have been baptized."[85] Canon 756 stated:

> §1. A child must be baptized in the rite of the parents.
>
> §2. If one of the parents pertains to the Latin rite, and the other to an Eastern rite, the child is to be baptized by the rite of the father, unless something else is stipulated by special law.
>
> §3. If only one of the parents is Catholic, the child must be baptized by that rite.[86]

The pontifical commission responded: "As the case has been explained, negative to the first part, affirmative to the second part," that is, the child pertained to the rite in which he or she should have been baptized, not the one in which he or she actually received baptism.[87] William W.

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as the fundamental determinant of ritual membership." Cf. Dimitri Salachas, "Problematiche Interrituali nei Due Codici Orientale e Latino," *Apollinaris* 67 (1994) 663: "[...] secondo il principio della legislazione precedente, stabilito dal c. 98, §1 del *CIC* 1917 e dal c. 6 del *CS* 1957, era il rito liturgico del battesimo che, di regola, determinava l'ascrizione ad un rito."

[84] On how an unbaptized infant could be bound by ecclesiastical law concerning ascription, see Bassett, 166–172. He comments at 167: "How can a non-baptized person be obligated by the Church to be baptized in a certain rite, when by the very fact of non-Baptism he is not subject to the jurisdiction of the Church? Furthermore, if the rite to which a person belongs is already determined, how can it be said that the rite is determined by Baptism?"

[85] Pontifical Commission for Authentically Interpreting the Canons of the Code, "Dubia Soluta in Plenariis Comitiis Emorum Patrum," October 16, 1919, n. 11: *AAS* 11 (1919) 478: "Utrum qui ad preces parentum, contra praescriptum canonis 756, a ritus alieni ministro baptizati sunt, pertineant ad ritum in quo sunt baptizati, vel ad ritum in quo, iuxta praescriptum canonis 756, baptizari debuissent."

[86] 1917 *CIC* c. 756: "§1. Proles ritu parentum baptizari debet. §2. Si alter parentum pertineat ad ritum latinum, alter ad orientalem, proles ritu patris baptizetur, nisi aliud iure speciali cautum sit. §3. Si unus tantum sit catholicus, proles huius ritu baptizanda est."

[87] Pontifical Commission for Authentically Interpreting the Codes of the Canons, "Dubia Soluta in Plenariis Comitiis Emorum Patrum," n. 11: *AAS* 11 (1919) 478: "Prout casus exponitur, negative ad 1^{am} partem, affirmative ad 2^{am}." Bassett, 201 (citing several commentators) considered this situation to be a case of fraud as mentioned in 1917 *CIC* c. 98 §1; it did not mean that any party was *culpable* of some fault, but merely that the party acted

Bassett comments: "This [response] confirms the fact that it is not so much the actual rite of Baptism, but what it should have been that is the necessary determinant of rite."[88] Thus, for the children of a Catholic, ascription lost its liturgical aspect in most cases, and became a primarily juridic function dependent on the ascription of one of the parents to a particular community.[89]

While canon 98 retained the problematic elements of apparent ascription to a primarily liturgical entity, insofar as the liturgical rite used for baptism was said to generally determine a person's ascription, the 1919 response established that the *law* determined the entity to which one was ascribed, paralleling an increasing focus on the canonical elements of "rite." It was increasingly recognized that one belonged not to a liturgical tradition, but to a community governed by its proper canonical discipline. Such recognition thereby supported the existence of a relative autonomy pertaining to such communities.

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illegitimately, that is, contrary to 1917 *CIC* c. 756. Cf. Alexius Petrani, *De Relatione Iuridica inter Diversos Ritus in Ecclesia Catholica* (Turin/Rome: Editorialis Marietti, 1930) 28: "Etiam ii, secundum responsum Commissionis Pontificiae die 16 octobris 1919 datum, qui contra praescriptum cn. 756, §1 ad preces parentum a ritus alieni ministro baptizati erant, non pertinent ad ritum, in quo de facto baptizati sunt, sed ad ritum, in quo baptizari debent. Et iuste sane, quia preces parentum aut sunt legitimae, et tunc habetur necessitas, aut illegitimae, et tunc aequiparandae sunt fraudi."

[88] Bassett, 174. In the words of Joseph F. Marbach, "Some Marriage Questions Concerning Orientals in This Country and in Canada," *The Jurist* 9 (1949) 18, the response, with its use of "debuissent," created a "right to a certain rite." Cf. Willibald Plöchl, "The Fundamental Principles of the Philosophy of Canon Law," *The Jurist* 4 (1944) 79: "The baptized person belongs to the rite according to which he *should* have been baptized" (emphasis added). The same author, in "Non-Solemn Baptism and the Determination of Rite," *The Jurist* 5 (1945) 359–388, further discusses the obligation due to a rite when baptism is carried out without a specific liturgical form used (e.g., baptism at a hospital using only the basic formula). Note especially his comments at p. 365: "The (legal) rite of a Catholic is not determined by the ceremonies of baptism, but the ceremonies—if they should have been observed—should be in conformity with the already determined rite of the *baptizandus*. To which rite a future Catholic will belong depends on the law, and in certain cases on the will of the *baptizandus* or of his parents."

[89] A case where the ceremonies would be presumed to determine ascription to a "rite" would be, for a child of at least one Catholic parent, if the rite of the parent(s) could not be established for certain. Adults, who had free choice in choosing their rite (cf. the later *CS* c. 12), would be presumed to be ascribed to the one by whose ceremonies the liturgical rite was conducted. The child of non-Catholic parents would be ascribed to the rite chosen by the parents, presumed to be the rite of the minister they chose for the baptism. It is important to note that these are cases of presumption, and could be overturned by contrary evidence. On these questions, see Bassett, 173, 193–194, 199.

4.3.3. The Sacred Congregation for the Eastern Church

On May 1, 1917, just prior to the promulgation of the 1917 code, Pope Benedict XV established the Sacred Congregation for the Eastern Church by the apostolic constitution *Dei providentis*, the main points of which would be repeated at canon 257.[90] The pope and his successors would preside as prefect over the congregation,[91] to which would be reserved "all those matters of any sort that pertain to persons, discipline, or rites of the Eastern Churches, even if they should be 'mixed,' namely those matters that also touch Latins by reason of subject or persons."[92] Further, "for the Churches of the Eastern rite, this Congregation would possess all

[90] Benedict XV, *motu proprio Dei providentis*, May 1, 1917: *AAS* 9/1 (1917) 529–531. Note that the document's introduction uses the concept of the mystical body, echoing Leo XIII: "Dei providentis arcano consilio locum obtinentes beati Petri Apostolorum Principis, quem Dominus Iesus animarum, suo redemptarum sanguine, Pastorem in terris summum perpetuumque constituit, omnem Nos adhibere vigilantiam et curam ut universae ac singulae non modo conserventur sed accrescant ecclesiae, ex quibus compactum et coagmentatum constat *unum corpus Christi mysticum*, seu Ecclesia Catholica, equidem pro apostolici officii conscientia studemus." The Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite would cease to exist at the end of November 30, 1917, with the new congregation extant from the following day (ibid., IV: *AAS* 9/1 [1917] 531; cf. Dziob, 85, noting that the new congregation would begin to exist prior to the effective date of the 1917 *CIC*). A review of *Dei providentis* and the legislation in the 1917 *CIC* is found in Vattappalam, 59–66. Note also that the establishment of the Pontificium Institutum Orientale was intended as a corollary to the establishment of this congregation: Benedict XV, *motu proprio Orientis Catholici*, October 15, 1917: *AAS* 9/1 (1917) 531–533; cf. Dziob, 85–86 and Vattappalam, 67–69. Regarding the nature of the earlier Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite under the prior curial reform, see Pius X, *Sapienti consilio*, cap. 6, n. 6: *ASS* 41 (1908) 432. Its powers were left untouched by this constitution, while those of the Sacred Congregation for the Propagation of the Faith were restricted by several reservations made to other dicasteries; see Dizob, 63–66 and Vattappalam, 47. However, that earlier Eastern congregation could no longer issue documents having authority equivalent to apostolic constitutions, since *all* congregations lost this power; see Dziob, 79–80 and Vattappalam, 51.

[91] Benedict XV, *Dei providentis*: *AAS* 9/1 (1917) 530: "Itaque deliberatum Nobis est pro unitis, qui dicuntur, orientalibus propriam Sacram Congregationem instituere, cuius Nosmet ipsi geramus, Nostrique deinceps successores, praefecturam"; 1917 *CIC* c. 257 §1: "Congregationi pro Ecclesia Orientali praeest ipse Romanus Pontifex." On how the pope being prefect came to affect the place where this congregation was listed in precedence, see Vattappalam, 60–61.

[92] Benedict XV, *Dei providentis*, III: *AAS* 9/1 (1917) 531: "Huic Congregationi reserventur omnia cuiusvis generis negotia quae sive ad personas, sive ad disciplinam, sive ad ritus Ecclesiarum orientalium referuntur, etiamsi sint mixta, quae scilicet sive rei sive personarum ratione latinos quoque attingant." 1917 *CIC* c. 257 §1 repeats this section verbatim. Cf. Dziob, 101–102, noting that the congregation, while having a broad competence, did not *de facto* exercise it in all cases, and ibid., 107–118 on the possibility of other congregations exercising jurisdiction over Eastern faithful under the 1917 *CIC*. This broad competence was similar to that exercised by the Sacred Congregation for the Propagation of the Faith prior to the 1908 curial reform; see ibid., 31–38.

the faculties that other Congregations have for the Churches of the Latin rite, but save the right of the Congregation of the Holy Office."[93]

According to Michael W. Dziob, the action of Benedict XV was "the final stage of development towards which the Sacred Congregation for affairs of the Oriental Rite had been progressing, namely, the establishment of a distinct Sacred Congregation for the Oriental Church."[94] Aside from the reservation made for the Holy Office, the new Eastern congregation had full and exclusive competence in the Roman Curia over all administrative Eastern matters, which were defined not by territory but by a personal element—rite.[95] In line with the Pamphilian jurisprudence, Eastern faithful and their communities were exempt from the exercise of curial jurisdiction except in the case of the Eastern congregation (express application) and the Holy Office (matters of faith). Thus, this distinction of competence in the Roman Curia, as well as the basis for the distinction, would support the negative autonomy of the Eastern communities.[96]

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[93] Benedict XV, *Dei providentis*, IV: *AAS* 9/1 (1917) 531: "Pro Ecclesiis ritus orientalis haec Congregatio omnibus facultatibus potiatur, quas aliae Congregationes pro Ecclesiis ritus latini obtinent, salvo tamen iure Congregationis S. Officii." 1917 *CIC* c. 257 §2 repeats this norm almost verbatim, with only minor adjustments in grammar and wording, as well as adding a reference to the 1917 *CIC* canon dealing with the Holy Office (c. 247). For the matters reserved to the Holy Office, see Dziob, 102–106. Ibid., 110–111 also argues that causes of beatification and canonization were not subject to the Eastern congregation insofar as they concerned judicial processes, while the congregation was only capable of carrying out administrative processes (Benedict XV, *Dei providentis*, V: *AAS* 9/1 [1917] 531 and 1917 *CIC* c. 257 §3; cf. Dziob, 118–123). However, the congregation had some basic authority over judicial matters; Vattappalam, 66 notes that the congregation "could indicate the tribunal for the case."

[94] Dziob, 83.

[95] Vittorio Peri, *Orientalis Varietas: Roma e le Chiese d'Oriente—Storia e Diritto canonico*, Kanonika 4 (Rome: PIO, 1994) 244–245 emphasizes that rite, and not territory, was recognized here as a legitimate way to circumscribe ecclesiastical, and especially pontifical jurisdiction.

[96] Note that there were still problems with recognizing a plurality of communities in the East, as the congregation used in its title the singular "Eastern Church," mirroring its use in canon 1 of the 1917 *Codex Iuris Canonici*. Cf. Peri, *Orientalis Varietas*, 242: "[C]onviene notare che per la prima volta affiora nel documento benedettino un'ecclesiologia, che vede constare la Chiesa Cattolica dall'insieme delle Chiese di rito orientale (cattoliche) e delle Chiese di rito latino (parimenti cattoliche). Le prime appaiono comprese nella Chiesa Orientale (la quale, con questa espressione al singolare darà il titolo ufficiale alla nuova Congregazione), mentre le seconde fanno parte della Chiesa Occidentale." See also René Metz, "Quel est le droit pour les Églises orientales unies à Rome?" *L'année canonique* 30 (1987) 393 on how such terminology contributed to silencing diversity. Additionally, the terminology used in *Dei providentis* was inconsistent; Eastern faithful and communities were referred to as *ecclesiae orientales*,

4.3.4. Application of Canons to the Eastern Faithful and Alteration of the Competence of the Sacred Congregation for the Eastern Church

In the decades after the promulgation of the 1917 code, curial dicasteries stated that several of its canons applied to the Eastern faithful, whether by declaring that canon 1 applied in a particular case or by explicitly extending a canon that originally applied only to the Latin Church to Eastern communities. In addition, the competence of the Sacred Congregation for the Eastern Church was increasingly restricted.[97]

4.3.4.1. Obligation of Receiving Easter Communion in One's Own Rite (Canon 866)

Canon 866 of the 1917 code established norms for the Christian faithful concerning reception of Communion in a rite other than their own:

> §1. The faculty is given to all faithful of any rite that, for the sake of piety, they may receive the Eucharistic Sacrament confected in any rite.
>
> §2. Nevertheless, it must be urged that the faithful satisfy the precept of Easter Communion in their own rite.

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orientales, *uniti orientales*, *Catholici orientales*, *Ecclesia Orientalis*, *ritus orientalis*, and *Ecclesiae orientalis ritus* Explicit recognition of a plurality of communities in the East in the name of the congregation would come in the reform of the Roman Curia carried out after the Second Vatican Council, with the renaming of the congregation as the *Sacra Congregatio pro Ecclesiis Orientalibus*: *REU* 41; cf. Vattappalam, 12, 56, 86.

[97] The following section focuses on laws that were extended to Eastern faithful as a whole. Note that there were some other laws that were applied to particular communities, not the entire East. One case was the expansion of 1917 *CIC* c. 1094 and those following (on marriage form) to the Italo-Greeks on May 26, 1930; see Richard A. Rosemeyer, "Roman Replies," *The Jurist* 20 (1960) 81, citing Dino Staffa, "De transitu ad alium ritum," *Apollinaris* 13 (1940) 185 note 2. Insofar as these more particular applications may not be widely known, and as this section deals with the general relationship between the 1917 *CIC* and all Eastern communities, these applications of canons to specific communities will not be discussed here.

> §3. Holy Viaticum must be received by those deathly sick in their own rite; but, in urgent necessity, it shall be licit to receive it in any rite.[98]

By using the phrase "all faithful of any rite" ("Omnibus fidelibus cuiusvis ritus"), canon 866 §1 would fall under the exception to the general rule of canon 1 that canons of the code applied solely to the Latin Church, and therefore would apply also to Eastern faithful. Could the same be said concerning §2 of the canon?

This question came to the attention of the Apostolic See due to a situation that occurred in Egypt. An Armenian bishop there had forbidden his faithful from receiving Easter Communion in churches of other rites, under threat of mortal sin. This prohibition had caused an uproar among other bishops in the area,[99] since canon 866 §2 did not forbid the faithful from receiving Easter Communion in another rite; the precept had to be urged ("suadendum"), but it was not illegal to act against it.[100] In 1922, the apostolic delegate to Egypt asked the Sacred Congregation for the Eastern Church about this issue. It responded:

> In response to your letter of February 25, in which your lordship offered certain doubts concerning the freedom (at least for Easterners) to receive Easter Communion in any rite and in any church, you are reminded that, by its own norm, the [1917] *Codex Iuris Canonici* does not oblige the Easterners, who continue to be governed on the basis of their own laws and customs, given or conceded at various times to the Easterners by the Holy See. Your lordship knows that these same dispositions of general law are not applicable to the Easterners except when they are expressly named. Therefore, the uproar caused by the measures taken by the Armenian bishop is not understandable, especially

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[98] 1917 *CIC* c. 866: "§1. Omnibus fidelibus cuiusvis ritus datur facultas ut, pietatis causa, sacramentum Eucharisticum quolibet ritu confectum suscipiant. §2. Suadendum tamen ut suo quisque ritu fideles praecepto communionis paschalis satisfaciant. §3. Sanctum Viaticum moribundis ritu proprio accipiendum est; sed, urgente necessitate, fas esto quolibet ritu illud accipere."

[99] The Latin bishops seem to have been the most opposed, since the response in Sacred Congregation for the Eastern Church, partial declaration *Circa la questione*, April 14, 1924: *Leges Ecclesiae*, 1:682–683 (#590) specifically refers to the Latin rite in its first question. It is unclear if bishops of other Eastern communities were involved.

[100] Duskie, 122: "The wording of the Code must be noticed, '*suadendum est*.' The phrase does not permit the same liberty as is given for the devotional Communion. The Church expects and desires that the faithful comply with their Easter duty in their proper rite. Should a person even deliberately act against the mind of the Church, he satisfies, nevertheless, the Paschal precept; hence, the exhortation cannot be enforced either under the threat of ecclesiastical penalty or guilt of sin."

> since those measures are in accord with the rules established in the apostolic constitution *Tradita ab antiquis*, which is still in force, *having never been revoked*.[101]

This decision did not quell the controversy in Egypt; thus, the congregation issued another response in 1924, repeating its prior comments on the matter.[102] Yet the problems with the diverse laws on Easter Communion in Egypt continued, finally prompting the congregation to alter its interpretation of the canon.

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[101] Sacred Congregation for the Eastern Church, partial letter *In riposta*, October 31, 1922: *Leges Ecclesiae*, 1:502 (#459): "In riposta alla Sua lettera del 25 febbraio scorso, in cui la S. V. esponeva alcuni dubbi relativamente alla libertà (almeno quanto agli Orientali) di ricevere la Comunione Pasquale in qualsiasi rito e in qualsiasi chiesa, Le ricordo, per Sua norma, che il Codice di diritto canonico non obbliga gli Orientali, che continuano a reggersi su la base delle leggi e delle consuetudini proprie, date o concesse in diversi tempi agli Orientali dalla S. Sede. Vossignoria ben sa che le stesse disposizioni delle leggi generali non sono applicabili agli Orientali se non quando vi non sono espressamente nominati. Non si comprende pertanto qui il rumore suscitato dalle misure prese dal Vescovo armeno, tanto più che esse sono conformi alle regole stabilite nella Costituzione apostolica *Tradita ab antiquis* [...], che è tuttora in vigore, *non essendo mai stata revocata*." The reference to Pius X, apostolic constitution *Tradita ab antiquis*, September 14, 1912: *AAS* 4 (1912) 609–617 concerns article 4 (p. 616), requiring faithful to receive Easter communion in one's own rite and from one's own pastor: "Quisque fidelium praecepto Communionis paschalis ita satisfaciet, si eam suo ritu accipiat et quidem a parocho suo: cui sane in ceteris obeundis religionis officiis addictus manebit." Note that Stephen C. Gulovich, "Mass and Communion According to the Oriental Rite in a Church of the Latin Rite," *The Jurist* 2 (1942) 51, states that the aforementioned article 4 merely *advises* one to make one's Easter duty in one's own rite if possible. As seen from the quote of article 4—specifically the use of "ita ... si"—this position is not tenable. Hence, Jerome Hannan, "Mass and Communion According to the Oriental Rite in a Church of Latin Rite," *The Jurist* 1 (1941) 151 (to whose article Gulovich was responding) is correct in stating that the aforementioned article 4 restricts the reception of Easter communion "to the forms of one's own Rite."

[102] Sacred Congregation for the Eastern Church, *Circa la questione*: *Leges Ecclesiae*, 1:682–683 (#590): "*Circa la questione della Comunione pasquale*, la S. C. non crede dover aggiungere altro, atteso che troppo esplicita è l'ultima dichiarazione fatta il 21 ottobre 1922 [...]: ivi è stato affermato e dichiarato che le regole stabilite nella Costituzione apostolica *Tradita ab antiquis* [...] sono tuttora in vigore, *non essendo mai state revocate*. Nella medesima lettera si diceva chiaramente, sempre a proposito della Comunione pasquale, che il Codice di diritto canonico non obbliga la Chiesa orientale, che continua a governarsi secondo le sue proprie consuetudini e le leggi date in diversi tempi dalla S. Sede agli Orientali. Pertanto ai due questi proposti dagli Ecc.mi Prelati nella sezione I, punto 1, che sono: 1º Si può insegnare impunemente che i fedeli dei riti orientali peccano mortalmente e non soddisfano affatto al precetto della Comunione pasquale, comunicandosi in rito latino? 2º Non converrebbe piuttosto avuto riguardo alle attuali condizioni di tutti i cattolici d'Egitto, d'impegnare i fedeli orientali con ogni sforzo paterno, a seguire la pratica indicata, in conformità del can. 866 citato? La Sacra Congregazione ha risposto come segue: Ad primum: *Affirmative*; Ad secundum: *Provisum in primo*." The same declaration maintained the non-application of Latin codal law to Eastern faithful in the matter of communion and confession in private homes: "Passando in seguito all'esame della seconda parte degli Atti della Conferenza episcopale, in quel che concerne la Confessione e la Comunione dei fedeli a domicilio, la Sacra Congregazione fa osservare che non si può adottare il nuovo criterio stabilito dal Codice latino, che non obbliga affato la Chiesa orientale. I Prelati Orientali possono senza alcun dubbio nel territorio di lor propria giurisdizione, regolare e disciplinare il ricevimento a domicilio dei Sacramenti, di lor proprio autorità, poichè i privilegi concessi dai canoni del Codice latino circa la Comunione privata a domicilio, non hanno vigore per gli Orientali, *nel territorio orientale*. Occorre dunque ai missionari latini il permesso dell'Ordinario o del parroco, per recare la Comunione anche se privata e di devozione, a domicilio."

> In a plenary meeting of the Sacred Congregation for the Eastern Church, held on January 26, 1925, in which certain doubts were discussed about the interpretation of canon 866, it was declared: "Both Easterners and Latins satisfy the precept of Easter Communion if they communicate in another rite."[103]

With this declaration, an Eastern bishop could no longer forbid his subjects from receiving Easter Communion in a church of another rite under threat of mortal sin.

This declaration raises three questions. First, what caused the congregation to issue a declaration contrary to two earlier responses? The jurisprudence would not have varied over the intervening three years. It was not declared, for example, that the obligation to receive Easter Communion in a church of one's own rite somehow pertained to divine law, nor was there an explicit declaration that the canon was extended to the Eastern faithful (the declaration speaks of "interpretation"). It appears that the constant complaints of bishops of other Catholic communities finally drove the congregation to respond to their complaints.

Second, what was the nature of this declaration of the congregation? Michael Vattappalam writes about the interpretation of canons of the code at this time:

> On 15 September 1917, Benedict XV instituted a Commission for the authentic interpretation of the canons of the Code (CIC 1917). Its competence was exclusive, but it was restricted to interpreting only the canons of the Code. With regard to the Eastern Churches, this Commission could interpret those canons which from the very nature of the matter affected also the Eastern Catholics. Other laws not included in the Code and issued by the [Eastern] Congregation with specific approval of the Roman Pontiff, were not interpreted by this Commission. The Eastern Congregation possessed the competence to interpret authentically the general laws of the Eastern Churches and particular laws issued by this Congregation.[104]

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[103] Sacred Congregation for the Eastern Church, partial resolution *In coetu*, January 26, 1925: *Leges Ecclesiae*, 1:735–736 (#630): "In coetu Plenario S. Congr. pro Ecclesia Orientali, die 26 Ianuarii, anni 1925 celebrato, in quo ad nonnulla dubia discussa circa interpretationem canonis 866, declaratum fuit: «tum orientales, tum latinos praecepto communionis paschalis satisfacere, si alieno ritu communicent»."

[104] Vattappalam, 66; cf. Dziob, 118.

The *motu proprio* that established the commission, *Cum iuris canonici*, clearly stated that this commission *alone* ("uni") interpreted canons authentically.[105] In the case in question, the Eastern congregation, discussing the *interpretation* of canon 866 ("nonnulla dubia discussa circa interpretationem canonis 866"), issued a declaration about how it would apply the canon to concrete circumstances henceforth. It appears, therefore, that this declaration could not constitute a true authentic interpretation of law, but only a declaration of curial praxis.

Third, setting aside the practical situation pressing for a change in the congregation's understanding of the canon, what juridic basis would exist for holding that canon 866 §2 also applied to the East? The declaration itself offers no juridic explanation. Mattheus Conte a Coronata argued that it was based on the nature of the matter, namely a concession of a favor.[106] Further, Amleto Cicognani argued:

> The reasons for this concession are apparent when we consider the trying circumstances in which the faithful at times find themselves in the Orient and in the Occident; and the Church in her maternal way wished to take these difficulties into account with respect to all concerned and make provision for them. No one then should be said to sin in using that concession, without prejudice however to the prescript of paragraph 3, which decrees that the Holy Viaticum must be received in one's own Rite, but in case of necessity it is lawful to receive it in any rite.[107]

Cicognani added, "it should not however be inferred that the ancient ecclesiastical discipline of the Oriental Church has suffered any detriment by this concession of the Code for greater freedom. The concession contains nothing of the sort."[108] However, even if the actual discipline

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[105] Benedict XV, *motu proprio Cum iuris canonici*, September 15, 1917, I: *AAS* 9/1 (1917) 483: "[...] Consilium seu Commissionem, uti vocant, constituimus, *cui uni ius erit Codicis canones authentice interpretandi*, audita tamen, in rebus maioris momenti, Sacra ea Congregatione cuius propria res sit, quae Consilio disceptanda proponitur" (emphasis added).

[106] Mattheus Conte a Coronata, *Institutiones Iuris Canonici ad Usum Utriusque Cleri et Scholarum*, 4th augmented ed. (Turin: Marietti, 1950) 1:3: "Canones, qui aliquem favorem concedunt omnibus cuiusvis ritus fidelibus, applicabiles sunt etiam Orientalibus, licet lex proprii ritus contraria esse videatur. Ita authentice soluta est controversia de permittenda perceptione Communionis paschalis ritus latinorum Orientalibus vi c. 866."

[107] Cicognani, *Canon Law*, 460.

[108] Ibid.

may not have suffered detriment by the recognition of this "favor" (a debatable point), the juridic autonomy of these communities did because of the restriction placed on Eastern bishops' ability to legislate for their own faithful in this matter.

4.3.4.2. Condemnation and Prohibition of Books (Canons 1396 and 1399)

The oversight of written materials concerning the faith has always been a concern of the Church. This oversight was entrusted to the General Inquisition under Pope Paul III in 1542, and thus became the competence of the Holy Office in the 1908 curial reform and in the 1917 code.[109] Canon 247 §4 of that code stated:

> To the same [Congregation of the Holy Office] pertains not only the duty to examine diligently the books given to it, to forbid them if it should be opportune, and to grant dispensations, but also to investigate *ex officio*, by the more opportune way, writings of any type being published that are to be condemned, and recall to the memory of ordinaries how they are religiously bound to take note of pernicious writings and denounce them to the Holy See in accord with the norm of canon 1397.[110]

Thus, the Holy Office was the competent dicastery to carry out the condemnation described in canon 1396: "Books condemned by the Apostolic See are to be considered forbidden in all places and in whatever language they are translated."[111]

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[109] On the history of censoring books in the Church, see Joseph Hilgers, "Censorship of Books," *The Catholic Encyclopedia*, special edition, ed. Charles G. Herbermann et al. (New York: The Encyclopedia Press, 1913) 3:519–527; A. Kanjirathinkal, *A Church in Struggle* (Bangalore: Dharmaram, 1994) 120–131.

[110] 1917 *CIC* c. 247 §4: "Ad eandem pertinet non solum delatos sibi libros diligenter excutere, eos, si oportuerit, prohibere, et dispensationes concedere; sed etiam ex officio inquirere, qua opportuniore licebit via, quae in vulgus edantur scripta cuiuslibet generis damnanda, et in memoriam Ordinariorum reducere, quam religiose teneantur in perniciosa scripta animadvertere eaque Sanctae Sedi denuntiare, ad normam can. 1397."

[111] 1917 *CIC* c. 1396: "Libri ab Apostolica Sede damnati ubique locorum et in quodcunque vertantur idioma prohibiti censeantur."

If the Holy Office retained its exclusive competence even concerning the Eastern faithful under canon 257 §2,[112] did a condemnation of a book issued by the Holy Office thereby apply to them? The question was proposed to the Sacred Congregation for the Eastern Church:

> Since it has been asked by several people, whether the Easterners are bound, like others, to the decrees of condemnation of books and journals issued by the Supreme Sacred Congregation of the Holy Office, and special mention should be made about the prohibition and penalties imposed against that called "*L'Action Française*," the Sacred Congregation for the Eastern Church declares that the said decrees apply to and oblige in the same way all the faithful of any rite, as these decrees pertain directly to the doctrine of the Church, rather than to discipline. For Holy Mother Church wishes to preserve and protect faith and morals by such decrees, and to this end the Code of law, in canon 1396, openly states and sanctions that books condemned by the Apostolic See are considered prohibited "in all places and in whatever language they are translated."[113]

The congregation declared that the acts of the Holy Office condemning specific books bound the Eastern faithful, stating as its justification that such condemnations pertained to the doctrine of the Church, and as such applied to Eastern faithful.[114]

After this declaration, another *dubium* arose concerning the prohibition of books and images *ipso iure* established in canon 1399.[115] Around 1944,[116] the Sacred Congregation for the

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[112] 1917 *CIC* c. 257 §2: "Quare pro Ecclesiis ritus orientalis haec Congregatio omnibus facultatibus potitur, quas aliae Congregationes pro Ecclesiis ritus latini obtinent, incolumi tamen iure Congregationis S. Officii ad normam can. 247."

[113] Sacred Congregation for the Eastern Church, declaration *Cum quaesitum*, May 26, 1928: *AAS* 20 (1928) 195–196: "Cum quaesitum fuerit a nonnullis, utrum Orientales teneantur, sicut ceteri, decretis damnationis *librorum et diariorum* a Suprema Sacra Congregatione S. Officii editis, et specialis mentio facta sit de prohibitione ac poenis irrogatis in illam quam dicunt «Action Française», Sacra Congregatio pro Ecclesia Orientali praefata decreta omnes cuiuscumque ritus fideles attingere seu eodem modo obligare, quippe quae potius quam disciplinam, directe spectent doctrinam Ecclesiae. Vult enim S. Mater Ecclesia huiusmodi decretis fidem ac mores servare atque tueri et ad hoc Codex iuris, canone 1396, aperte statuit ac sancit libros a Sede Apostolica damnatos *ubique locorum et in quodcumque vertantur idioma* prohibitos censeri." The condemnation of the newspaper of *L'Action Française* occurred in 1926: Sacred Congregation of the Holy Office, decree *Cum nonnulli*, December 29, 1926: *AAS* 18 (1926) 529–530 and Pius XI, chirograph *C'est de tout cœur*, January 5, 1927: *AAS* 19 (1927) 5–8; cf. Pius XI, declaration *Cum Beatissimus*, February 24, 1927: *AAS* 19 (1927) 185, allowing French bishops to permit their subjects to read the newspaper.

[114] Cf. Herman, "De «Ritu» in Iure Canonico," 127: "Licet enim ista praescripta in se iam non in mera doctrina exponenda sistant, tamen omnia tam intime connexa sunt cum doctrina et totam rationem habent in tuenda doctrina, ut ipsa quoque eodem modo ad Orientales et Occidentales pertinere videantur, cum congruum habeatur ubi eadem doctrina proponitur, eadem quoque auxilia ad tuendam doctrinam adhiberi."

[115] 1917 *CIC* c. 1399: "Ipso iure prohibentur: 1º Editiones textus originalis et antiquarum versionum catholicarum sacrae Scripturae, etiam Ecclesiae Orientalis, ab acatholicis quibuslibet publicatae; itemque eiusdem versiones in

Eastern Church issued the following declaration: "Since it has been asked whether faithful of an Eastern rite are bound to, besides canon 1396, canon 1399 as well, the Sacred Congregation for the Eastern Church has decided to respond: *Affirmative*."[117] Unlike the decision concerning canon 1396, no rationale was given by the congregation. However, since the congregation explicitly connected canon 1399 to canon 1396 and its application to Eastern faithful, the reasoning must be similar, namely that such prohibitions concerned the defense of doctrine, and therefore would also bind Eastern faithful. Therefore, each decision of the congregation was based on the determination of the Pamphilian jurisprudence that laws on matters of the dogmas of faith applied to Eastern faithful; however, as each decision concerned a canon of the code, their value as interpretations of law is questionable for the reasons explained in the previous section.

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quamvis linguam, ab eisdem confectae vel editae; 2º Libri quorumvis scriptorum, haeresim vel schisma propugnantes, aut ipsa religionis fundamenta quoquo modo evertere nitentes; 3º Libri qui religionem aut bonos mores, data opera, impetunt; 4º Libri quorumvis acatholicorum, qui ex professo de religione tractant, nisi constet nihil in eis contra fidem catholicam contineri; 5º Libri de quibus in can. 1385, §1, n. 1 et can. 1391; itemque ex illis de quibus in cit. can. 1385, §1, n. 2, libri ac libelli qui novas apparitiones, revelationes, visiones, prophetias, miracula enarrant, vel qui novas inducunt devotiones, etiam sub praetextu quod sint privatae, si editi fuerint non servatis canonum praescriptionibus; 6º Libri qui quodlibet ex catholicis dogmatibus impugnant vel derident, qui errores ab Apostolica Sede proscriptos tuentur, qui cultui divino detrahunt, qui disciplinam ecclesiasticam evertere contendunt, et qui data opera ecclesiasticam hierarchiam, aut statum clericalem vel religiosum probris afficiunt; 7º Libri qui cuiusvis generis superstitionem sortilegia, divinationem, magiam, evocationem spirituum, aliaque id genus docent vel commendant; 8º Libri qui duellum vel suicidium vel divortium licita statuunt, qui de sectis massonicis vel aliis eiusdem generis societatibus agentes, eas utiles et non perniciosas Ecclesiae et civili societati esse contendunt; 9º Libri qui res lascivas seu obscenas ex professo tractant, narrant, aut docent; 10º Editiones librorum liturgicorum a Sede Apostolica approbatorum, in quibus quidpiam immutatum fuerit, ita ut cum authenticis editionibus a Sancta Sede approbatis non congruant; 11º Libri quibus divulgantur indulgentiae apocryphae vel a Sancta Sede proscriptae aut revocatae; 12º Imagines quoquo modo impressae Domini Nostri Iesu Christi, Beatae Mariae Virginis, Angelorum atque Sanctorum vel aliorum Servorum Dei ab Ecclesiae sensu et decretis alienae."

[116] The declaration contains no date; it is in the first issue of *AAS* 36, published in 1944.

[117] Sacred Congregation for the Eastern Church, declaration *Cum quaesitum*: *AAS* 36 (1944) 25: "Cum quaesitum fuerit utrum fideles orientalis ritus teneantur, praeterquam can. 1396 C.I.C., etiam can. 1399, Sacra Congregatio pro Ecclesia Orientali respondendum censuit: *Affirmative*."

4.3.4.3. *Latae Sententiae* Excommunications Most Especially Reserved to the Holy See (Canons 2320, 2343 §1, 2367, and 2369)

The revised penal law of the 1917 code abrogated the constitution *Apostolicae Sedis* of Pius IX. However, the application of penal law in the code to Eastern faithful seemed to remain the same as had been previously interpreted in 1885—namely, that besides any penalties explicitly applying to Eastern faithful, the penalties concerning dogmas of faith and those concerning divine and natural law applied equally to East and West.[118] However, certain other penalties in the code, specifically some of the excommunications *latae sententiae* that were most especially reserved to the Apostolic See, did not seem to apply to Eastern faithful because the bases of the penalties did not clearly fit within the limits given by the 1885 interpretation. Thus, the Holy Office, with the mandate of the pope, declared their expansion to the East.

> Since from the express mandate of His Most Holy Lordship Pius XI, by divine providence pope, the question has been given to this Sacred Congregation of the Holy Office, whether the sanctions contained in canons 2320, 2343 §1, 2367, and 2369 of the [1917] *Codex Iuris Canonici*, by which certain delicts are punished by excommunication *latae sententiae* most especially reserved to the Holy See, be extended to the universal Church, the most eminent and reverend lord cardinals overseeing the protection of matters of faith and morals, all things maturely considered, having obtained the opinion of the Sacred Eastern Congregation and the Sacred Penitentiary, in plenary session on *Feria IV*, July 12, 1934, have decreed, entirely attentive to the extraordinary gravity of these delicts, that such sanctions be extended to the whole Latin Church and whole Eastern Church of any rite, and that the investigation of these same delicts be reserved to

[118] Sacred Congregation for the Propagation of the Faith, *Essendo stato*: *Fontes* 7:513 (#4910): "Eosdem [Orientales] fideles subiici omnibus censuris ab Apostolica Sede latis in materia dogmatum et in Constitutionibus in quibus implicite de iis disponitur, nempe ubi materia ipsa demonstrat eos comprehendi, quatenus non de lege mere ecclesiastica agitur, sed ius naturale et divinum declaratur." Cf. Duskie, 129–132. Thus, Herman, "De «Ritu» in Iure Canonico," 127 argues that several penal canons of the 1917 *Codex Iuris Canonici* also applied to Eastern faithful: "Ex hoc capite ['Non solum autem ipsae declarationes doctrinales sed etiam quae immediate pro tuenda doctrina disponuntur ad Orientales quoque pertinere videntur'] pertinent ad Orientales canones quoque qui censuras pro tuenda doctrina stabiliunt v.g. can. 2314, 2318, 2320, etc." See also John M. Costello, "Penal Legislation in the Code of Canon Law," *The Jurist* 4 (1944) 591: "[...] Orientals do not incur the penalties of general law except in regard to those laws which, from their very nature, affect even Orientals—for example, the crime of heresy"; Duskie, 131: "Hence, the Canons of the Code which inflict certain censures for crimes against faith or the unity of the Church, e.g., apostasy, heresy, schism or suspicion of heresy, embrace all Catholics."

> the Sacred Penitentiary as pertains to the internal forum, and to the Holy Office as concerns the external forum.[119]

The canons in question, the only penalties in the 1917 code most especially reserved to the Holy See, involved throwing away the Sacred Species, or stealing or keeping it for an evil purpose (c. 2320), physically attacking the Roman pontiff (c. 2343 §1), absolving or pretending to absolve an accomplice in a sin against the sixth commandment (c. 2367), and the direct violation of the sacramental seal by a confessor (c. 2369).[120]

As opposed to the declaration concerning canon 1396, the Holy Office here extended ("extendantur") the canons to Eastern faithful. The use of "extend" indicates that the Holy Office understood these penal canons as not applicable to Eastern faithful by the force of canon 1. Thus, Petrus Vidal argued that by using "extend," the decree "seems to confirm the opinion according to which Easterners are not bound by *penalties* issued for delicts against faith or morals *by force of the code*," and that for them "such penalties remain by force of the earlier law, whatever the new code establishes concerning those delicts."[121] Joannes Bilanych also stated:

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[119] Sacred Congregation of the Holy Office, decree *Cum ex expresso*, July 21, 1934: *AAS* 26 (1934) 550: "Cum ex expresso Ssmi D. N. Pii divina Providentia Pp. XI mandato ad Supremam hanc Sacram Congregationem Sancti Officii delata fuerit quaestio an sanctiones contentae in cann. 2320, 2343 §1, 2367, 2369 Codicis iuris canonici, quibus quaedam delicta excommunicatione latae sententiae specialissimo modo Sanctae Sedi reservata plectuntur, extendantur ad universam Ecclesiam, Emi ac Revmi Domini Cardinales rebus fidei morumque tutandis praepositi, omnibus mature perpensis, praehabitoque Sacrae Congregationis Orientalis et Sacrae Paenitentiariae Apostolicae voto, in plenario conventu habito Feria IV, die 12 Iulii 1934, decreverunt huiusmodi sanctiones, attenta omnino extraordinaria ipsorum delictorum gravitate, extendi ad universam Ecclesiam Latinam et Orientalem cuiuscumque ritus, atque eorumdem delictorum cognitionem quoad forum internum Sacrae Paenitentiariae, quoad forum externum Sancto Officio reservari." This decision received confirmation from the pope "suprema Sua auctoritate" on the day following the *Feria IV* meeting.

[120] Note that later the Holy Office, via a special faculty of the pope, established that a bishop "cuiusvis ritus vel dignitatis" who consecrated a bishop not nominated or confirmed by the Apostolic See, and the one who received consecration, even if forced by grave fear, incurred *ipso facto* excommunication reserved most especially to the Apostolic See: Sacred Congregation of the Holy Office, decree *Suprema Sacra*, April 9, 1951: *AAS* 43 (1951) 317–318. Unlike the four canons above, this decree actually altered the delict and punishment given in 1917 *CIC* c. 2370 (which included assisting priests, did not mention "grave fear," and involved an *ipso iure* suspension until the Apostolic See dispensed them); thus, this case was not an expansion of a 1917 *CIC* canon to the East but the establishment of a new law that encompassed both East and West.

[121] Wernz-Vidal, 112–113: "Huiusmodi poenae apud ipsos manent vi iuris praecedentis, quidquid de illis delicits statuat novus Codex. [...] Hoc decretum S. O. nobis confirmare videtur sententiam iuxta quam Orientales *poenis* in

> For the name of the document itself, namely "decree," and its motive ("entirely attentive to the extraordinary gravity of these delicts") clearly indicate that these canons did not respect Easterners earlier. For if only a doubt about this existed, the Congregation would not have used the form of a decree, but of a "response," "resolution," or "declaration." And so the aforementioned decree is nothing but an exception to the rule that Easterners are not bound by the penalties of the Code.[122]

These canonists held that penalties, being a disciplinary matter even if connected to faith and morals, could not apply to Eastern faithful by the force of the canons themselves. However, such an interpretation, although based on the use of "extendantur" by the Holy Office, appears to contradict the aforementioned 1885 Holy Office interpretation that determined that certain types of penalties issued by the Apostolic See did apply to Eastern faithful. Indeed, canon 2320 on desecration of the Sacred Species was cited by Aemilius Herman one year before the Holy Office declaration as a penal canon applicable to Eastern faithful by its very nature.[123] Such an act would appear to deny the presence of Christ in the Species, and therefore would concern dogma. Thus, the Holy Office appears to have contradicted its own jurisprudence.

Francesco Roberti considered this apparent contradiction in his *adnotationes* on the decree:

> The first question [whether these penal laws affect even faithful of any Eastern rite] concerns substantive law. It is truly clear to all that the [1917] *Codex Iuris Canonici* touches only faithful of the Latin rite (the "Latin Church," as is accustomed to be said somewhat improperly), not the faithful of the Eastern rite (the "Eastern Church"), and does not oblige the Eastern Church unless "it determines things that, by the very nature of the matter, affect the Eastern Church as well" (c. 1).
>
> It is beyond doubt that the preceptive norms corresponding to the cited canons affect all faithful *ex natura rei*; but it is another question whether Eastern faithful are punished by

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delicta contra fidem vel mores latis *vi Codicis* non teneri." Franz Wernz died in 1914; thus, this comment was made by Petrus Vidal in his revision of Wernz's work.

[122] Bilanych, 66: "Iam ipsum documenti nomen, scil. «decretum» et motivum eius («attenta... delictorum gravitate») clare indicant, quod illi canones prius Orientales non respiciebant. Si enim solum dubium circa hoc extaret, Congregatio non forma decreti, sed «Responsi», «Resolutionis» vel «Declarationis» usa fuisset. Et ita praefatum decretum non est nisi exceptio ab illa regula, quod Orientales poenis Codicis non adstringuntur."

[123] Again, see Herman, "De «Ritu» in Iure Canonico," 127: "Ex hoc capite pertinent ad Orientales canones quoque qui censuras pro tuenda doctrina stabiliunt v.g. can. 2314, 2318, 2320, etc."

> the same penalties. For a penalty, and much less a determined penalty, *in no way* follows *ex natura rei*, since penalties proceed from justice and are ordered rather for the utility of society. Therefore, before this response was given it had been doubted whether Easterners were bound by the laws regarding these crimes and their respective penalties.
>
> In fact, certain doctors, preceding the response recently given (we also sketched out this solution [...]), taught that Easterners were obliged by penal laws regarding crimes in the competence of the Holy Office. However, it must be noted that the four cited crimes do not all necessarily pertain to the competence of the Holy Office, but at least the real injury against the Roman pontiff is instead excluded, considering the nature of the crime. But regarding the others, this most recent response indicates a new norm has been constituted rather than an old one explained. Indeed, the sanctions are said to be *extended*, not *are declared as extending*, and the reason is taken not *from the very nature of the matter*, but rather *from the entirely extraordinary gravity of these delicts*.
>
> From this all, we conclude that the response introduces a new norm, although perhaps consonant with the style of the curia. This is completely understood if one is attentive to the progress of the new code being prepared for the faithful of the Eastern rites. Hence it is also clear that the response is not retroactive (c. 17 §2) and enjoys the accustomed *vacatio legis* (c. 9).[124]

Roberti argued that a new norm had been given concerning application of the penalties of the code to Eastern faithful. Prior to the extension of these penal canons, there had been some doubt about whether penalties of the code applied *ex natura rei* to Eastern faithful. Some had argued that those penalties within the competence of the Holy Office did apply to them. However, this

[124] *Adnotationes* of Francesco Roberti on the decree in *Apollinaris* 8 (1935) 30–31: "Prima quaestio [an etiam fideles cuiuslibet ritus orientalis afficerent] est iuris substantivi. Omnibus sane constat Codicem iuris canonici solos latini ritus fideles (Latinam Ecclesiam, ut minus proprie dici solet) attingere, non vero ritus orientalis (Ecclesiam Orientalem), nisi tamen *de iis agatur quae ex ipsa rei natura etiam orientales afficiunt* (c. 1). Porro vix dubium esse potest normas praeceptivas canonibus supra citatis respondentes *ex natura rei* universos fideles afficere; at alia quaestio est an fideles orientales iisdem poenis plectantur; poena enim et multo minus certa poena *nullo modo* sequitur *ex natura rei*, cum poenae ex iustitia procedant sed ordinentur potius pro societatis utilitate. Igitur ante datum responsum dubitari poterat num legibus de his criminibus et respectivis poenis orientales tenerentur. Verum doctores quidam responsum nuper datum praevenientes (ipsi quoque hanc solutionem adumbravimus, cfr. Roberti, *De delictis et poenis* I n. 57) docuerant orientales legibus poenalibus circa crimina de competentia S. Officii obligari. Attamen notandum est quattuor citata crimina non omnia necessario ad competentiam S. Officii pertinere, sed saltem iniuriam realem contra S. Pontificem, natura quidem, criminis spectata, potius excludi. De ceteris vero, novissimum responsum indigitat normam novam potius constitutam esse quam veterem explanatam. Siquidem sanctiones dicuntur ad orientales *extendi*, non autem extensae declarari, et ratio sumitur non ex ipsa rei natura, sed potius ex *omnino extraordinaria ipsorum delictorum gravitate*. Ex quibus omnibus concludimus responsum *novam normam*, etsi forte stilo Curiae consentaneam, inducere. Quod perfecte intelligitur si attendatur progressus novi pro fidelibus rituum orientalium Codicis apparandi. Unde etiam patet responsum non agere retrorsum (c. 17 §2) et gaudere consueto tempore vacationis (c. 9)." The phrases "extensae declarari" and "ipsa rei natura" are emphasized in the original text through spacing placed between the letters; hence, the use of italics in the translation.

response of the Holy Office indicated that such a rule was no longer valid. While the matter of one of those penalties extended to the East—attacking the Roman pontiff—did not pertain to the Holy Office, the others did; since the Holy Office *extended* these, they must not have applied to Eastern faithful prior to such an extension. This act suggests that the Holy Office was no longer interpreting the 1917 code in accord with the Pamphilian jurisprudence, and particularly its own interpretation from 1885. The reason suggested by Roberti—the progressing codification of Eastern law—may indeed be correct. As that Eastern codification progressed, the 1917 code was viewed increasingly as a solely Latin code; thus, the penalties of a Latin code would not apply *ex natura rei* to the East, but only through explicit extension. Therefore, this act suggests a very strict interpretation of canon 1, and a strong understanding of the negative autonomy of the East.

4.3.4.4. Acts Concerning the Sacred Congregation for the Eastern Church (Canon 257)

While the initial description of the administrative competence of the Sacred Congregation for the Eastern Church was rather broad—having all Eastern matters (even mixed) reserved to it, and possessing the faculties that the other congregations had for Churches of the Latin rite excepting only the Holy Office[125]— the powers of the congregation began to be restricted over time. The first restrictions concerned the Sacred Penitentiary, whose jurisdiction, according to canon 258 §1 of the 1917 code,

[125] Benedict XV, *Dei providentis*, III, IV, V: *AAS* 9/1 (1917) 531; 1917 *CIC* c. 257. Note that one part of the Holy Office's competence concerning Eastern faithful was later restricted. Pius XI authorized *ad cautelam* the Sacred Congregation for the Eastern Church to send marriage cases involving a respondent that was Catholic during the ceremony, but became non-Catholic after the case was initiated, directly to the Roman Rota without going through the Holy Office: Pius XI, partial indult, March 5, 1932: *Leges Ecclesiae*, 1:1380 (#1079).

> is limited to those things that pertain to the internal forum, even non-sacramental, so this tribunal grants favors, absolutions, dispensations, commutations, sanations, and condonations. Moreover, it examines questions of conscience and resolves them.[126]

In 1930, the Sacred Congregation for the Eastern Church received a *dubium* about the jurisdiction of the Sacred Penitentiary over Eastern faithful:

> Since it has been asked "whether, for those things that pertain to the internal forum, even non-sacramental, about which canon 258 of the *Codex Iuris Canonici* speaks, the faithful pertaining to the Churches of the Eastern rites must have recourse to the Sacred Apostolic Penitentiary," this Sacred Congregation, having consulted with his most eminent lordship the Cardinal Major Penitentiary, has decided to respond *Affirmative*.[127]

Five years later, the Apostolic See made another determination concerning the powers of the Sacred Penitentiary as they applied to Eastern faithful. Canon 258 §2 of the 1917 code had stated that it was the duty of the penitentiary

> to judge all things that pertain to the use and concession of indulgences, save the right of the Holy Office to look at those things that respect the dogmatic doctrine concerning those indulgences or concerning new prayers or devotions.[128]

The Sacred Congregation for the Eastern Church appears to have claimed this authority for itself as it concerned Eastern faithful, as in 1923 Pius XI authorized it to grant indulgences for a prayer for the salvation of Russia.[129] Additionally, after the Pontifical Commission for Russia was

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[126] 1917 *CIC* c. 258 §1: "Huius tribunalis iurisdictio coarctatur ad ea quae forum internum, etiam non sacramentale, respiciunt; quare hoc tribunal pro solo foro interno gratias largitur, absolutiones, dispensationes, commutationes, sanationes, condonationes; excutit praeterea quaestiones conscientiae easque dirimit."

[127] Sacred Congregation for the Eastern Church, "Dubium: De Competentia Sacrae Poenitentiariae Apostolicae circa Negotia Fori Interni Orientalium," July 26, 1930: *AAS* 22 (1930) 394: "Cum postulatum fuerit «utrum ad ea quae forum internum, etiam non sacramentale, respiciunt, de quibus in can. 258 Codicis iuris canonici, fideles ad Ecclesias rituum orientalium pertinentes recurrere debeant ad Sacram Poenitentiariam Apostolicam», Sacra haec Congregatio, collatis consiliis cum Emo D. Card. Poenitentiario Maiore, respondendum censuit *Affirmative*." Cf. Dziob, 114: "Wherefore it now seems evident that the meaning of canon 257, §1, is not as general as it may first appear to be, and that its real meaning is to be had only when it is applied to or taken in conjunction with the jurisdiction given to the Sacred Congregation by §2 and §3 of that canon."

[128] 1917 *CIC* c. 258 §2: "Eiusdem insuper est de iis omnibus iudicare quae spectant ad usum et concessionem indulgentiarum, salvo iure S. Officii videndi ea quae doctrinam dogmaticam circa easdem indulgentias vel circa novas orationes et devotiones respiciunt."

[129] Sacred Congregation for the Eastern Church, "Indulgentia ditatur precula quaedam ad Russiae salutem impetrandam," May 24, 1923: *AAS* 15 (1923) 295.

established in 1926,[130] it too obtained from the pope authorization to grant indulgences to Russians through the recitation of certain prayers.[131] In this latter case, the Cardinal Penitentiary merely gave his opinion on the matter; he did not act on his own authority.[132] On the other hand, the Sacred Penitentiary, of its own authority, had responded to a *dubium* concerning the ability of Eastern faithful to obtain indulgences without sending the matter to the then-extant Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite.[133] Thus, in 1935 Pius XI clarified which dicastery had general authority over indulgences:

> Our most holy lord Pius XI, by divine providence pope, in audiences on June 1 and 22, 1935, conceded respectively to the Cardinal Secretary of the Sacred Congregation for the Eastern Church and the Cardinal Major Penitentiary, has deigned to establish that faithful, even Eastern of any rite, are to approach the Sacred Penitentiary in those things that pertain to indulgences.[134]

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[130] Sacred Congregation for the Eastern Church, communication *Fino dal 20 giugno*: *AAS* 18 (1926) 62; cf. the *communicatio* in "Diarium Romanae Curiae": *AAS* 19 (1927) 112 on the persons named to the commission. Initially, this commission was established within the Sacred Congregation for the Eastern Church and possessed competence over any matter concerning Russian Catholics, whether they were in Russia or outside of it. This commission was made *sui iuris* in 1930; see Pius XI, *motu proprio Inde ab inito*, April 6, 1930: *AAS* 22 (1930) 153–154. However, in 1934 the commission was placed under the Sacred Congregation for Extraordinary Ecclesiastical Affairs and its powers limited only to Russians living in their homeland; see Pius XI, *motu proprio Quam sollicita*, December 21, 1934: *AAS* 27 (1935) 65–67. Dino Staffa, "De Sacrae Congregationis pro Ecclesia Orientali competentia post Litteras Apostolicas, Motu proprio datas, die 25 martii a. MCMXXXVIII," *Apollinaris* 11 (1938) 366 note 16 argues that *Quam sollicita* limited the powers of the commission to only Russians of the Latin Church. Dziob, 128–129 note 10 gives a summary of the history of this commission up to his time. An extensive analysis of the history and juridic nature of this commission is found in Peri, *Orientalis Varietas*, 249–296. The commission was officially suppressed only in 1993: John Paul II, *motu proprio Europae Orientalis*, January 15, 1993: *AAS* 85 (1993) 309–310.

[131] Pontifical Commission for Russia, decree *Precibus piorum*, May 27, 1929: *AAS* 21 (1929) 644.

[132] Ibid.: "[...] habito voto Emi Cardinalis Maioris Poenitentiarii [...]."

[133] Sacred Apostolic Penitentiary, "De Indulgentiis quoad Fideles Ritus Orientalis": *AAS* 9/1 (1917) 399; cf. Dziob, 115: "It is to be noted that this doubt was submitted to the Sacred Penitentiaria and not to the Sacred Congregation for the Oriental Church." Note, however, that the Sacred Congregation for the Eastern Church did not juridically exist at the time of the response of the Penitentiary (July 7, 1917).

[134] Sacred Congregation for the Eastern Church, notification *Ssmus Dominus*, July 21, 1935: *AAS* 27 (1935) 379: "Ssmus Dominus Noster Pius div. Prov. Pp. XI , in audientia dierum 1 et 22 mensis Iunii, anno 1935, Cardinali a Secretis S. Congregationis pro Ecclesia Orientali et Cardinali Paenitentiario Maiori respective concessis, statuere dignatus est, ut, fideles quoque orientales cuiuscumque ritus in iis quae Indulgentias respiciunt Sacram Paenitentiariam adeant."

Thus, after this response the Sacred Congregation for the Eastern Church no longer had any authority over matters that pertained to the Sacred Penitentiary and involved Eastern faithful.

An additional restriction on the congregation's competence concerned ecclesiastical universities. In his 1931 apostolic constitution *Deus scientiarum Dominus*, Pius XI established:

> The canonical erection and supreme moderation of any university and faculty of ecclesiastical studies, even in places and institutes that have been subjected to the Sacred Congregations for the Eastern Church and for the Propagation of the Faith, and even the faculties that are for the benefit of any religious family, are reserved to the Sacred Congregation for Seminaries and Universities of Studies.[135]

Thus, the Sacred Congregation for Seminaries and Universities of Studies joined the Holy Office and the Sacred Penitentiary in having exclusive administrative authority over Eastern faithful in certain matters, constricting the initial broad competence granted to the Sacred Congregation for the Eastern Church under *Dei providentis*.[136]

These alterations to the Eastern congregation's competence did not directly affect the autonomy of the Eastern communities themselves, but simply changed the relevant congregation that members of the Eastern faithful approached in certain limited situations. Indeed, these changes seem to have been made for primarily practical reasons. However, they did erode the special nature of the Eastern congregation; in light of the aforementioned reservations, other

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[135] Pius XI, apostolic constitution *Deus scientiarum Dominus*, May 24, 1931, I, art. 4: *AAS* 23 (1931) 248: "Canonica erectio et suprema moderatio cuiusvis Universitatis et Facultatis studiorum ecclesiasticorum, in locis quoque et Institutis quae Sacris Congregationibus pro Ecclesia Orientali et de Propaganda Fide subiecta sunt, atque etiam Facultatum quae sunt pro Religiosis Familiis quibuslibet, reservantur Sacrae Congregationi de Seminariis et Studiorum Universitatibus." Dziob, 113 calls this jurisdiction over such schools "exclusive and universal."

[136] Dziob, 108 argues that the Sacred Congregation for Extraordinary Ecclesiastical Affairs retained competence over "affairs submitted to it for examination by the Supreme Pontiff through the Cardinal Secretary of State—these are chiefly affairs connected with the civil laws and the agreements of the Holy See with the various nations," since "they are assigned by the pope to the other Sacred Congregation." Ibid., 118 also argues that the Pontifical Commission for Authentically Interpreting the Canons of the Code could also have jurisdiction over the Eastern Church, but only on the basis of the 1917 *CIC* canon being interpreted: if the canon in question was one that applied to the Eastern Church *ex ipsa rei natura* (1917 *CIC* c. 1), its interpretation would likewise bind Eastern faithful (for example, the *dubium* concerning cc. 98 and 756 cited previously). Otherwise, according to Vattappalam, 66, "the Eastern Congregation possessed the competence to interpret authentically the general laws of the Eastern Churches and particular laws issued by this Congregation."

"Latin" congregations could, in theory, be granted specific faculties over Eastern faithful simply for practical reasons. With such a "practical" attitude, the recognition of the distinct nature of the Eastern faithful and their communities—being subject to the pope and Apostolic See only in virtue of the former's supreme authority and not his authority over the Latin Church—was reduced; they were simply one group among many over which the Roman Curia exercised its authority.

In 1938, Pius XI revised the competence of the Sacred Congregation for the Eastern Church through the *motu proprio Sancta Dei Ecclesia*.[137] This document granted exclusive competence to the Eastern congregation over all faithful, including Latins, in certain regions that had earlier been subject to the Sacred Congregation for the Propagation of the Faith.[138] While the Eastern congregation's competence over Latins in these regions was limited by other dicasteries,[139] its competence over all Eastern faithful was limited only by the Holy Office, the Penitentiary, and the Sacred Congregation for Seminaries and Universities of Studies:

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[137] Pius XI, *motu proprio Sancta Dei Ecclesia*, March 25, 1938: *AAS* 30 (1938) 154–159.

[138] Pius XI, *Sancta Dei Ecclesia*, I: *AAS* 30 (1938) 157: "Sacra Congregatio pro Ecclesia Orientali, cui praeest ipse Romanus Pontifex, plenam et exclusivam iurisdictionem habet in regionibus quae sequuntur: in Aegypto et in peninsula Sinaitica, in Erythraea et in parte septentrionali Aethiopiae, in Albania australi, Bulgaria, Cypro, Graecia, Dodecaneso, Iran, Iraq, Libano, Palaestina, Syria, TransJordania, asiatica Turcarum republica et in Thracia Turcarum dicioni subiecta." Staffa, "De Sacrae Congregationis pro Ecclesia Orientali competentia," 365 notes that Eritrea and northern Ethiopia had already been placed within the exclusive competence of the congregation through earlier actions of the pope. Afghanistan was later added on August 7, 1950; see Sacred Congregation for the Eastern Churches, "Nel Primo Cinquantennio di Vita della Sacra Congregazione per la Chiesa Orientale," in *La Sacra Congregazione per le Chiese Orientali nel Cinquantesimo della Fondazione (1917–1967)*, ed. Sacred Congregation for the Eastern Churches (Grottaferrata/Rome: San Nilo, 1969) 4. Dziob, 124–130, Staffa, "De Sacrae Congregationis pro Ecclesia Orientali competentia," 363–364, and Vattappalam, 71 offer historical background on this decision. Staffa, "De Sacrae Congregationis pro Ecclesia Orientali competentia," 366–369 gives the number of faithful in these "exclusive" areas at the time.

[139] Pius XI, *Sancta Dei Ecclesia*, II: *AAS* 30 (1938) 157: "Quare in praefatis regionibus non solum pro fidelibus ritus orientalis, sed etiam pro fidelibus latini ritus eorumque hierarchia, operibus, institutis, piis societatibus, eadem Sacra Congregatio omnibus facultatibus potitur, quas aliae Congregationes pro fidelibus ritus latini extra illa territoria obtinent, incolumi tamen iure Congregationis S. Officii, ac integris manentibus quae huc usque reservata sunt S. Congregationi de disciplina Sacramentorum, S. Congregationi Sacrorum Rituum, S. Congregationi de Seminariis et Studiorum Universitatibus ac Sacrae Paenitentiariae." The restrictions appeared to be the same as those under which the Sacred Congregation for the Propagation of the Faith had operated; see Dziob, 133–135 and Raphael H. Song, *The Sacred Congregation for the Propagation of the Faith*, Canon Law Studies 420 (Washington, D.C.: Catholic

> Therefore, all matters of any type that refer to Eastern persons, discipline, or rite, are reserved to it, even if the matters are mixed, namely those matters that also touch Latins by reason of matter or persons. To it also are attributed for these faithful all those faculties that pertain to the congregations for faithful of the Latin rite, always saving the right of the Congregation of the Holy Office and remaining untouched those things reserved to the Sacred Congregation for Seminaries and Universities and the Sacred Penitentiary.[140]

The pope thus added to the law governing the Sacred Congregation for the Eastern Church explicit reservations for those two congregations.[141]

While not introducing further restrictions on its competence over Eastern faithful, the entrustment of "exclusive" regions to the Sacred Congregation for the Eastern Church by *Sancta Dei Ecclesia* altered the ecclesiology underlying its existence. Instead of acting only and exclusively as an aid in the exercise of the pope's supreme authority over Eastern faithful, the congregation now possessed authority over Latins on a territorial basis; in this latter case, the

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University of America, 1961) 110. Through this, Dziob, 136 and Vattappalam, 77 argue that the Sacred Congregation for the Eastern Church could not deal with matters of religious of the Latin Church *qua* religious, since such an exception existed for the Sacred Congregation for the Propagation of the Faith under 1917 *CIC* c. 252 §5. However, this is not explicitly listed as such in the *motu proprio*, so it could be questioned whether the same reservation was in place. Vattappalam, 77 argues that the exclusions of the Sacred Congregations for the Discipline of the Sacraments and of Sacred Rites were total for the Latin faithful, instead of being dependent on the earlier, limited exclusions made for Propaganda.

[140] Pius XI, *Sancta Dei Ecclesia*, III: *AAS* 30 (1938) 157–158: "Quare ei reservantur omnia cuiusque generis negotia, quae sive ad personas, sive ad disciplinam, sive ad ritum orientalem referuntur, etiamsi sint mixta, quae scilicet sive rei sive personarum ratione Latinos quoque attingant; eique pro his fidelibus omnes facultates attributae sunt, quae ad alias Congregationes pro fidelibus ritus latini pertinent, salvo semper iure Congregationis S. Officii et integris manentibus quae huc usque reservata sunt S. Congregationi de Seminariis et Studiorum Universitatibus et Sacrae Paenitentiariae." This description of competence was introduced with reference to Eastern faithful living outside of the "exclusive" regions: "Quoad fideles ritus orientalis, extra praefatas regiones commorantes, firma manet in omnibus Sacrae Congregationis pro Ecclesia Orientali competentia" (ibid.). However, see Dziob, 132: "In regard to [the jurisdiction of the congregation over Eastern faithful in the exclusive regions], the Sacred Congregation for the Oriental Church has the same powers which it enjoys for the faithful of the Oriental Rite everywhere." The restrictions given for the "exclusive" regions (see previous note) should be understood as pertaining only to Latin matters.

[141] The retention of the same reservations concerning Eastern faithful did cause a disequilibrium concerning indulgences. In the exclusive regions, the Eastern congregation, inheriting the faculties of the Sacred Congregation for the Propagation of the Faith, could issue indulgences for Latin Catholics; see Staffa, "De Sacrae Congregationis pro Ecclesia Orientali competentia," 374: "Sicut suis subditis S. C. de Propaganda Fide, ita S. C. pro Ecclesia Orientali fidelibus ritus latini in regionibus suae exclusivae iurisdictionis indulgentias concedere potest." However, because of the reservation of 1935, the Eastern congregation could not concede indulgences for Eastern faithful even in the exclusive regions: "[D]um S. C. pro Ecclesia Orientali, facultatum heres S. C. de Propaganda Fide, indulgentias et facultates indulgentiarum subditis latinis concedere potest, nequit easdem subditis orientalibus largiri" (ibid., 376).

congregation was assisting in the pope's exercise of authority over the Latin Church. There was no longer as clear a distinction in dicasterial competence between the pope's supreme authority and his more specific authority over the Latin Church as there had been under the initial structure established in *Dei providentis*. Once again, identifying matters as "Eastern" appears to have been simply one way to allot competence, implying nothing concerning the ecclesial significance of the matters involved.[142]

4.4. The *Codex Iuris Canonici Orientalis*

4.4.1. Prehistory of the Codification Project

As was noted in the previous chapter, the philosophy adopted by the preconciliar Commission on Missions and the Churches of the Eastern Rite in preparing documents to submit to the fathers of the First Vatican Council would have led to the imposition of disciplinary uniformity throughout the Church, at least in the principal matters. Several Eastern council fathers opposed such attempts at disciplinary uniformity, believing it to be a threat to the autonomy of their communities. While the disciplinary decrees were not approved at the council because of its sudden suspension, the threat of disciplinary uniformity remained in the minds of many Eastern hierarchs, especially considering the promulgation of *Reversurus* and *Cum ecclesiastica disciplina*. As a result, several communities undertook the work to codify their own law so as to prevent later attempts to impose disciplinary uniformity. As Ivan Žužek notes:

> [T]he Eastern Churches understood that to maintain their own identity and that each Church should be able to set itself in order, they needed a «Code of Laws», even if the threefold problem—«one Code, two Codes, or as many Codes as there are Rites»—

[142] For an analysis of this addition of territorial jurisdiction to a congregation originally defined by its personal jurisdiction, see Peri, *Orientalis Varietas*, 245–249.

> remained unresolved. What was beyond doubt for all was the fact that the approval of the supreme authority of the Church was required for these Codes to have any juridical force, since they would constitute the «norma iuris» not only for the faithful but also for the bishops and the patriarchs.[143]

The Romanian Church, whose prelates Ioan Vancsa and Joseph Papp-Szilágyi had argued at the council that a Greek ecclesiastical code already existed, experienced the convocation of three synods, in 1872, 1882, and 1900.

> At the Synod of Alba Iula, May 5th–14th, 1872, less than two years after the First Vatican Council, the bishops of that Church approved a «Code» which, in the judgment of Francis Xavier Wernz, presented one of the «optima specimina in quibus iuris antiqui Ecclesiae orientalis continua fit applicatio».[144]

This approach was common among Eastern communities at the time.

> Other Churches too followed the «third way», the principle of «tot codices quot ritus», and there is no doubt that this was also the approach of the Congregation for the Propagation of the Faith, under whose direction the various Synods were celebrated.[145]

Thus, in addition to the three Romanian synods, the Syrians held a synod in 1888, the Copts in 1898, the Ruthenians in 1891, and the Armenians in 1890 and 1911.[146] In this last-referenced synod,[147] the Armenians established the Pamphilian jurisprudence as a rule for their community:

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[143] Ivan Žužek, "Common Canons and Ecclesial Experience in the Oriental Catholic Churches," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 222. Cf. his similar comments in "L'idée de Gasparri d'un *Codex Ecclesiae Universae* comme «Point de Départ» de la Codification Canonique Orientale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 432: "Toutefois, les réactions que je viens de rappeler ont apparemment servi à quelque chose puisque dans la pratique, c'est la troisième voie qui était suivie: autant de Codes que de Rites, mais tous «approuvés» par le Saint-Siège, au moins sous la form d'un *nihil obstat* à leur publication. Des Codes de ce genre se trouvèrent formulés dans les synods des Églises Orientales particulières, à commencer par l'Église roumaine qui en célébra trois à Alba Julia (1872, 1882, 1890)." However, also note Edelby-Dick, 256, considering these synods in particular as the "sommet de la latinisation."

[144] Ivan Žužek, "Common Canons and Ecclesial Experience in the Oriental Catholic Churches," 222. The cited quote can be found in Francis X. Wernz, *Ius Decretalium, Tomus I: Introductio in Ius Decretalium*, 2nd emended ed. (Rome: Typographia Polyglotta S. C. de Propaganda Fide, 1905) 317.

[145] Žužek, "Common Canons and Ecclesial Experience," 223. Cf. Onario Bucci, "Storia e significato giuridico del Codex Canonum Ecclesiarum Orientalium," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010),* ed. Pontificio Consiglio per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 99: "L'Oriente Cattolico reagì fermamente a questo rifiuto [of their proper discipline] (solo apparentemente lenito dal fatto che il Concilio dovette interrompere i lavori) e fra il 1872 e il 1911 la Santa Sede subì pressioni fortissime da parte di cinque Chiese Orientali che codificarono il loro diritto."

But indeed it is also outside of all controversy that the power of establishing merely disciplinary laws pertains to the Roman pontiff, laws by which Easterners are obliged just like Westerners, since Peter was constituted by Christ not as the foundation of this or that Church, but of the whole Church, and since Peter received the keys not of the Western or Eastern empire, but of the kingdom of heaven, which certainly embraces all the faithful entirely. This one thing must be considered: whether the Roman pontiff, when he establishes disciplinary laws for the Church, intends to include in the same Easterners as well. For it is certain that Easterners are obliged by those disciplinary constitutions in which either they are expressly named, or the material is such that it affects them particularly; for there is present in each case both the power and the will to oblige. And it is no less certain that these same Easterners are obliged to those disciplinary constitutions directed to the universal Church, in which, although there is no special mention made of them, nor is there determination of material particularly concerning them, the Supreme Pontiff, to avoid or remove abuses, or to take away dangers to souls, orders, prohibits, or forbids something with penalties imposed. In these in fact, as they are interpretations of natural or divine law, it is most manifest that Easterners are also included, for actions are forbidden or ordered that, before the ecclesiastical law was issued, were connected by an intimate tie with the observance or violation of divine law, whether natural or positive, such that the ecclesiastical law was issued because the prohibited action is evil or dishonest in itself, or such actions contain a danger that could lead to evil, or an ordered action is necessary for observing divine law.

But if it concerns such prescriptions or prohibitions that pertain neither to the guardianship of faith or divine law, nor to the protection of good morals, namely of the type that—save the integrity of faith, the observance of divine mandates, and the decency of morals—can be omitted without danger to souls, Easterners are entirely exempt from

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[146] Žužek, "Common Canons and Ecclesial Experience," 223. Cf. "«Codificazione Canonica Orientale» (1926–1935)," *Communicationes* 26 (1994) 123; Acacius Coussa, "De Codificatione Canonica Orientali," in *Acta Congressus Iuridici Internationalis VII Saeculo a Decretalibus Gregorii IX et XIV a Codice Iustiniano Promulgatis, Romae 12–17 Novembris 1934* (Rome: Libraria Pontificii Instituti Utriusque Iuris, 1937) 4:509–512 note 56, listing the various synods. Note also that Pope Leo XIII had ordered the Greek Melkites to hold a synod to organize their law; see Leo XIII, letter *Omnibus compertum*, III: *ASS* 33 (1900–1901) 66: "Ad praecavendas futuras iurium contestationes, optime valitura est Synodi Nationalis celebratio. Quocirca, quemadmodum alias vobis commendavimus, ita nunc per praesentem epistolam praecipimus; ut huiusmodi Synodus quantocius convocetur, in qua de iuribus Patriarchae et episcoporum, de recta fidelium administratione, de cleri disciplina, de monachorum vel aliis piorum institutis, de missionum necessitatibus, de cultus divini decore, de sacra liturgia, de cognatisque agatur rebus, quae diligenter cautissimeque sunt reputandae ad maiorem Dei gloriam procurandam et Ecclesiae graeco-melchitae splendorem augendum. Uti penes alias orientales ecclesias Synodi nationalis celebratio maximo fuit emolumento pro negotiis componendis et ecclesiastica disciplina instauranda, ita vestrae Ecclesiae ex legum scriptarum elucubratione et promulgatione praeclaros fructus profecturos, Nobis iure merito pollicemur." A Greek Melkite synod was held in 1909 at Aïn Traz that created a code, but it never received approval from Rome, perhaps because of the absence of the papal legate (cf. Serge Descy, *Introduction a l'Histoire et l'Ecclésiologie de l'Église Melkite*, Histoire de l'Église en Orient: II. Antioche 1 [Beriut/Jouneih: Editions Saint Paul, 1986] 71), so the synodal legislation from the 1835 Synod of Aïn Traz remained in effect (Žužek, "L'idée de Gasparri,"433).

[147] The whole legislation from this synod is found in *Acta et Decreta Concilii Nationalis Armenorum Romae Habiti ad Sancti Nicolai Tolentinatis Anno Domini MDCCCCXI* (Rome: Typis Polyglottis Vaticanis, 1913). The synod was approved by Pius X *in forma communi* on June 25, 1913 after consultation with the Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite; the letter of approval is found in ibid., iii–iv.

these, since in issuing laws, the Church always uses that prudence that upholds the manner of legitimate habits and customs that had developed with different peoples. For an equal reason, laws by which ecclesiastical discipline is relaxed or dispensed, as would favor the need or utility of the Church, and concerning which a contrary custom has force with the Easterners, do not affect these Easterners, such that they are as yet bound to observe the ancient canons received by them, even if they are more severe, for these are not opposed to faith, good morals, or decency. Nevertheless, these canons can well be remitted for the good of these faithful by pontifical dispensation, since the canons have been issued for the good of the Church, not for its destruction.

But beyond the things already said, constitutions given to the whole Church are also at hand, which concern things that are simply outside of the discipline of the Eastern Church, that is, which are not opposed by written law, habits, or proper customs of the Easterners, constitutions by which are ordered things equally accommodated to Easterners as well as Westerners. For it is not right to understand Easterners to be bound by such constitutions, both because of the well-known arrangement with them, and because of the continual tolerance of the Roman pontiff by which he is presumed tacitly to have approved customs contrary to these constitutions, although the Easterners themselves have safely and laudably been able to bring into practice the rule proposed by those constitutions and add it to their own proper law. But if they should at any point accept such a rule and put it into use, it fully and completely obliges them not unlike the Westerners.[148]

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[148] Ibid., 108–110 (#146): "At vero extra controversiam quoque est, Romano Pontifici potestatem competere condendi leges mere disciplinares, quibus Orientales obligantur aeque ac Occidentales, cum Petrus a Christo fuerit constitutus, non huius vel illius, sed totius Ecclesiae fundamentum, cumque claves acceperit non imperii occidentalis vel orientalis, sed regni caelorum, quod utique omnes omnino complectitur fideles. Id unum est considerandum, an Romanus Pontifex, dum leges disciplinares condit pro Ecclesia, intendat iisdem comprehendere etiam Orientales. Iam vero certum est, Orientales obligari illis constitutionibus disciplinaribus, in quibus vel ipsi expresse nominantur, vel materia talis est, ut specialiter eos afficiat: adest enim in utroque casu tum potestas, tum voluntas obligandi. Neque minus certum est, eosdem Orientales obligari constitutionibus illis disciplinaribus ad universam Ecclesiam directis, in quibus, licet eorum specialis mentio non fiat, nec de materia illos specialiter concernente disponatur, Summus Pontifex, ad praecavendos vel tollendos abusus vel amovenda animarum pericula aliquid praecipit, vel interpositis poenis prohibet et interdicit. In his siquidem, utpote naturalis vel divini iuris interpretationibus, manifestissimum est, Orientales quoque comprehendi: namque vetantur vel praecipiuntur actiones, quae vel ante latam ecclesiasticam legem cum observatione aut violatione legis divinae sive naturalis sive positivae intimo nexu connexae sunt, ita ut lex ecclesiastica ideo lata sit, quod actio prohibita in se mala seu inhonesta sit, vel periculum contineat ne ad malum ducat, vel actio praecepta necessaria sit ad legem divinam servandum.—Quod si agatur de eiusmodi praescriptionibus aut prohibitionibus, quae neque ad fidei vel legis divinae custodiam, nec ad bonorum morum tutelam pertinent, eius videlicet generis, ut salva fidei integritate, mandatorum divinorum observantia ac morum honestate, sine animarum periculo omitti possunt, ab his profecto Orientales eximuntur, cum in ferendis legibus, ea semper prudentia usa sit Ecclesia, ut rationem haberet morum et consuetudinum legitimarum, quae apud diversas gentes invaluerant. Pari ratione, leges quibus ecclesiastica disciplina, Ecclesiae necessitate vel utilitate impellente, sapienter relaxatur seu dispensatur, quibusque contraria apud Orientales viget consuetudo, hosce non afficiunt, ita ut observare hactenus teneantur canones antiquos apud eos receptos, licet severiores: hi enim nec fidei, nec bonis moribus, nec honestati ecclesiasticae repugnant, bene tamen ipsorum fidelium commodo remitti possunt ex pontificia dispensatione, cum canones ad Ecclesiae salutem, non ad destructionem editi sint.—Sed praeter iam allatas, habentur etiam constitutiones ad universam Ecclesiam datae, in quibus de rebus disponitur, quae sunt mere praeter disciplinam Ecclesiae Orientalis, id est, quae neque iuri scripto, neque moribus seu consuetudinibus propriis Orientalium adversantur, quibus vero praescribuntur res Orientalibus aeque ac Occidentalibus accommodatae. Iam vero eiusmodi constitutionibus Orientales non teneri pronum est intelligere tum ex vulgata apud eos persuasione,

Not only was this declaration of the Armenians important for recognizing the validity and importance of the Pamphilian jurisprudence in upholding the negative autonomy of Eastern communities, it also affirmed their positive autonomy by referencing "written law, habits, or proper customs of the Easterners." Indeed, the entire legislation itself was an affirmation of positive autonomy; the Armenians, as well as the other Eastern communities that had synods, enacted laws for themselves. These particular communities were the units capable of establishing legislation, not part of an "Eastern Church" subject to the pope alone.

With the increasing focus of Eastern communities on organizing their law, canonical commentators adopted the viewpoint that the term "rite" used to denote them entailed not simply a liturgical element but a disciplinary element as well.[149] However, there remained confusion over what exactly the juridic nature of this discipline was. Some early reflections, based on canon 1 of the 1917 code, failed to classify Eastern law into any of the commonly recognized categories of law. In 1919, Philip Maroto wrote:

> In other matters [not covered by the 1917 *Codex Iuris Canonici*, whether by application of canon 1 or through use as supplementary law], Easterners are ruled by their proper discipline, although it may be contrary to the prescriptions of the new code. So Eastern law must certainly be said to be a rather particular law, since it has force only for a determined part of the Church—in fact, not one single law common to all Eastern Churches exists, but individual Churches are ruled by a law proper to them and distinct from others. Certainly it is "particular" for a reason different than the laws within the Latin Church are particular, since the latter are subjected to the universal or general law on which they depend. Contrariwise, Eastern law is almost autonomous—"almost," since Eastern law itself depends not only on divine law but also on the authority of the Roman pontiff and several general statutes that have been established by the Holy See for them.

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tum ex continua Romani Pontificis tolerantia, qua contrariam his constitutionibus consuetudinem tacite probasse praesumitur: tametsi regulam illis constitutionibus propositam tuto et laudabiliter ipsi Orientales in praxim deducere suoque proprio iuri adiungere valeant. Quam si semel acceptaverint et in usum deduxerint, eos plene et perfecte obligat non secus atque Occidentales."

[149] See the survey of canonical commentators given in Bassett, 82–87. These commentators differed on what the actual "rites" were—the general traditions (Greek, [East/West] Syrian, Armenian, Coptic) or their "subdivisions" (Ruthenian, Romanian, Maronite, etc.). However, Bassett identifies only nine commentators as simply equating "canonical rite" to the liturgical rite, whereas twenty-one others did not.

> Eastern laws could better be assimilated to concorditarian laws, but concorditarian law is truly limited and only determines a few particular points of ecclesiastical discipline in some nation, and further is connected by many things with common law; on the other hand, Eastern law in each Church orders the whole discipline of that Church and is only connected in a few things with the universal law of the Latin Church. Hence, Eastern law really must be called *sui generis*.[150]

In a similar manner, Amleto Cicognani reflected:

> The Oriental discipline remains then as a kind of *particular* law (and as a rule it follows Orientals wherever they may go), which can be compared in some way, but not in every particular, to the law of exempt religious orders, having its own laws and ancient customs, which have over and over again been ratified by the Holy See. It cannot be said to be wholly personal, since most frequently it is territorial in character. It is almost autonomous law. We say almost autonomous, for the discipline of the Oriental Churches is dependent on divine law, as well as on the authority of the Roman Pontiff. We should characterize it then as a *jus sui generis*. Each rite, province and diocese (eparchia) has its proper ecclesiastical discipline—not always clearly and distinctly defined—which the various Synods have enacted.[151]

Both Maroto and Cicognani failed to determine a precise category into which Eastern law fit; they could only say that it was a particular law *sui generis*. For Maroto, Eastern law was somewhat akin to concorditarian law, while for Cicognani it was somewhat akin to the laws of

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[150] Philip Maroto, *Institutiones Iuris Canonici ad Normam Novi Codicis* (Rome/Barcelona: Matriti, 1919) 1:165: "In ceteris orientales reguntur propria disciplina, quamvis haec contraria sit praescriptionibus novi Codicis. Quare ius orientalium est utique dicendum ius potius particulare, quia viget dumtaxat pro determinata parte Ecclesiae, imo ne unum quidem ius, commune omnibus Ecclesiis orientalibus, existit, sed singulae Ecclesiae reguntur proprio et ab aliis distincto iure; at certe particulare est diversa ratione ac iura intra Ecclesiam latinam particularia, quae subiiciuntur iuri universali seu generali a quo dependent; ius e converso orientale fere autonomum est: *fere* dictum est, quia reapse ius ipsum orientale non solum pendet a iure divino, sed etiam ab auctoritate Romani Pontificis et a nonnullis statutis generalibus quae a S. Sede pro ipsis orientalibus fuerunt sancita. Possent melius orientalia iura assimilari iuribus concordatariis; sed ius concordatarium est valde limitatum et solummodo determinat aliqua pauca capita disciplinae ecclesiasticae in aliqua natione, atque insuper pluribus connectitur cum iure communi; e contra ius orientale in unaquaque Ecclesia ordinat integram ipsius Ecclesiae disciplinam, et nonnisi paucis coniungitur cum iure universali Ecclesia [*sic*: read 'Ecclesiae'] latinae. Unde revera ius orientale *sui generis* esse dicendum est." Herman, "De «Ritu» in Iure Canonico," 106 lists Maroto among those "profundius inquirentes" into the nature of Eastern law. For comments on the fact that there was not one Eastern Church, but a plurality of Eastern Churches, see Adrian Fortescue, *The Uniate Eastern Churches: The Byzantine Rite in Italy, Sicily, Syria, and Egypt* (New York/Cincinnati/Chicago: Benziger Brothers, 1923) 7: "In the sense in which we speak of the Latin Church there are not one, but several Uniate Churches. A Latin is a Latin; but a Uniate may be a Byzantine, an Armenian, a Chaldean, or a Coptic Uniate. These various people have each their own rite and laws. There is no real unity between Uniates as distinct from Latins"; Sylvius Romani, *Institutiones Iuris Canonici, Volumen I: Jus Constitutionale* (Rome: Rassegna di Morale e Diritto, 1941) 54: "*Ecclesia orientalis* nomen est ideo usu introductum, cui tamen non persona, non entitas quaedam iuris respondet, sed numerus plurium ecclesiarum particularium, earum scilicet quae non latina lingua liturgica utuntur."

[151] Cicognani, *Canon Law*, 449.

exempt religious institutes. The failure of these comparisons came from the fact that Eastern law was recognized as almost autonomous, and no other body of ecclesiastical law exhibited the same near-autonomy. One sees here the fundamental misunderstanding of law within the Church noted by Antoine Joubeir: "The fusion of the universal law of the Church with the disciplinary part of the Latin rite confused the concepts."[152] Since these canonists did not recognize a type of law for the Latin Church equally "almost autonomous" as Eastern law was, the different Eastern disciplines became mere appendages to "universal" (mostly Latin) law.[153]

A notable change in understanding the nature of Eastern law took place with an article by Aemilius Herman published in 1933, "De «Ritu» in Iure Canonico."[154] Herman noted the problems previous commentators had in determining the nature of Eastern law, attributing it to their misunderstanding of what they considered to be universal or general law:

> Those [things said by canonists concerning the nature of Eastern law] up to now rely on the conceptions and system developed in the times when the Latin Church was equated with the universal Church and the Eastern Churches were considered as certain exceptions from the general rule. One who judges everything from Latin law must call Eastern law a law *sui generis*. But today it is clear that the universal Church is not

[152] Joubeir, 75: "La fusion du droit universel de l'Église avec la partie disciplinaire du rite latin embrouillait les idées."

[153] Cf. John D. Faris, *The Eastern Catholic Churches: Constitution and Governance According to the Code of Canons of the Eastern Churches* (New York: St. Maron Publications, 1992) 141: "As was the case with the hierarchical structures, the Eastern Catholic communities themselves were not adequately accommodated in the schematic model of the Church because the models were two-tiered and there was no place for them. Thus, they were often treated as appendages of the Catholic Church, which was mistakenly identified with the Latin Church. This ecclesiological approach might have been one of the factors which contributed to the unfortunate latinization which occurred in so many of the Eastern Catholic Churches. The Latin tradition was mistakenly identified as the only true Catholic tradition and, thus, to be truly Catholic, one had to be Latin. Denial of a rightful place contributed to the diminishment of an ecclesial personality and identity." See also Dziob, 83 and Vattappalam, 52 on the appearance that Eastern communities were a mere "supplement" to the Catholic Church.

[154] Bassett, 75 states that this article is the first introduction of "the notion of a juridical or canonical rite into the terminology of canon law," although he cites some forerunners at 84–85. Herman himself noted in his introduction: "Ad ritus Orientales ultimis his temporibus cum theologicarum disciplinarum cultores in genere tum iuris canonici scriptores maiorem quam prioribus temporibus attentionem direxerunt. Nonnulli libri recenter evulgati ex professo quaestionibus cum orientalibus ritibus connexis operam dederunt; alii praesertim, qui commentaria ad Cod. I. C. praebent, eas breviter saltem attigerunt. Nihilominus in illis quae ad ritum eiusque conceptum iuridicum in genere pertinent, hodie quoque alia controversa, alia omnino non explorata manent. Nos hac dissertatiuncula aliquas ex his quaestionibus proponere, obscuritates indicare, solutionem quae nobis praeplacet, indigitare in animo habemus, ut alii inde excitentur ad eas amplius et profundius tractandas" ("De «Ritu» in Iure Canonico," 96).

> formed by only the Latin Church with some Eastern add-ons, but all rites by the same reasoning are parts of the Catholic Church and enjoy the same rights.[155]

To correct this problem, Herman provided his own definition of "rite":

> Rite is an order of ecclesiastical law whereby not only liturgical matters but also the entire discipline of an individual part of the universal Church is structured. For rite is not the multitude of laws standing by themselves, but rather is the structured complex of laws and customs by which the whole ecclesiastical life of that part of the Church and its subjects is structured.[156]

Herman defined "rite" specifically as the entire structure of discipline governing a particular community of the Christian faithful.[157] This definition allowed him to make an important conclusion concerning the nature of Eastern law:

> Therefore it can be said to be proper and essential to rite that it primarily and *per se* undertake to structure the entire ecclesiastical life of its members, or at least the greater part of it. Most especially by this fact the concept of rite differs from the concept of particular law. Particular Churches—like Paris, Milan, Toledo, Vienna, etc.—have proper laws and customs, but those norms add to the common law of the Latin Church, interpret the norms of the common law, apply them or, where they are lacking, supplement them. Particular law orders these matters *secondarily*, which first and *per se* are ordered by the common law—today, primarily the [1917] *Codex Iuris Canonici*. But in the Eastern Churches there is not a common Eastern law, which has authority in all Eastern Churches in the same sense as the common Latin law in the Churches of the West. Hence, the law of individual rites must not be equated to particular Latin law, but to the common Latin law itself. Moreover, the Latin rite can be comprehended with the Eastern rites under the same concept, and so the definition given above is applied by the same rationale to the Latin rite and the Eastern rites.[158]

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[155] Herman, "De «Ritu» in Iure Canonico," 107: "Nihilominus ipsa adhuc nituntur in conceptionibus et systemate excogitatis illis temporibus quibus Ecclesia latina Ecclesiae universali aequabatur et Ecclesiae orientales tamquam exceptiones quaedam a regula generali considerabantur. Ius orientale ius sui generis dicere debet, qui omnia iudicat ex iure latino. Hodie vero constat Ecclesiam universalem non efformari sola Ecclesia latina cum aliquibus adiunctis orientalibus, sed omnes ritus eadem ratione partes Ecclesiae catholicae esse eisdemque iuribus gaudere."

[156] Ibid., 105: "Ritus est ordo iuris ecclesiastici quo non solum res liturgicae sed universa quoque disciplina unius partis Ecclesiae universalis ordinatur. Est enim non multitudo legum per se stantium, sed ordinatus complexus legum et consuetudinem [*sic*: read 'consuetudinum'] quo tota vita ecclesiastica illius partis Ecclesiae et subditorum eius ordinatur."

[157] Cf. Bassett, 75: "To belong to a rite, [Herman] observed, or to change from one rite to another means a great deal more than merely a change from one generic liturgical practice to another."

[158] Herman, "De «Ritu» in Iure Canonico," 105–106: "Id igitur ritui proprium et essentiale dici potest quod totam vitam ecclesiasticam suorum membrorum seu plerasque saltem materias primo et per se ordinare suscipit. Hac re potissimum conceptus ritus differt ab conceptu iuris particularis. Etiam Ecclesiae particulares ut Parisiensis, Mediolanensis, Toletana, Viennensis etc. habent leges et consuetudines proprias; sed istae normae accedunt ad ius commune Ecclesiae latinae, normas iuris communis interpretantur, applicant vel, ubi eae deficiunt, supplent. Ius

Through this understanding of the nature of Eastern canon law, Herman corrected the aforementioned opinions of canonists who could not readily classify what Eastern law was. Eastern law no longer appeared as an appendage or a particular law *sui generis*, but was understood as a type of law equal in nature to the law of the Latin Church.

To set out his interpretation clearly, Herman offered a list of four types of law having force within the Church:

> 1. *Universal law of the whole Church*, or super-ritual law, to which all rites are subject without distinction. This law is established by the supreme authority of the Church for the whole Church, and so binds Catholics as Catholics.
>
> 2. *Common law of the whole Eastern Church.* We have noted that there is not properly a common law in the Eastern Church in that sense whereby there is a common law in the Latin Church. For there is not one Eastern Church, but many Churches that are independent from one another and only are united under the supreme head of the universal Church. But since a certain number of sources have been received in all Eastern Churches, in this sense they can be comprehended by the name "common Eastern law."
>
> 3. *The law of individual rites.* This law for the Latin rite is above all contained in the [1917] *Codex Iuris Canonici*, although in the code there are some things that pertain to the universal Church. For the other rites, most has been collected in the acts and decrees of synods, but with some rites a recent written law is generally lacking. These rites are also ruled by ancient sources, usage, and custom.
>
> 4. *The particular law of individual rites.* As in Latin law, so also in Eastern rites one can oppose to the common law in force for the entire rite the particular law established for the individual dioceses. This is of little importance in rites that consist of only a few faithful, but with the Ruthenians and Romanians it must not be neglected.[159]

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particulare secundarie eas materias ordinat quae primo et per se iure communi ordinantur, hodie imprimis Codice Iuris Canonici. In Ecclesiis vero orientalibus non habetur aliquod ius commune orientale, quod eodem sensu in omnibus Ecclesiis auctoritatem habeat, atque ius commune latinum in Ecclesiis Occidentis. Unde ius singulorum rituum non est aequiparandum iuri particulari latino, sed ipso iuri communi latino. Propterea ritus latinus cum ritibus orientalibus sub eodem conceptu comprehendi potest, et sic definito supra data eadem ratione applicatur ritui latino atque ritibus orientalibus." Similar comments are made by Bassett, 246.

[159] Herman, "De «Ritu» in Iure Canonico," 107–108: "Idcirco ius Ecclesiae hodie hac ratione dividendum esse videtur 1. *Ius universale totius Ecclesiae* seu ius superrituale, cui omnes ritus sine distinctione subiciuntur. Hoc ius statuitur ab suprema auctoritate Ecclesiae pro tota Ecclesia ideoque catholicos ligat ut catholicos. 2. *Ius commune totius Ecclesiae Orientalis.* Monuimus sane non haberi ius commune in Ecclesia Orientali eo sensu quo ius commune habetur in Ecclesia latina. Non enim una Ecclesia Orientalis habetur, sed multae Ecclesiae quae ab invicem independentes sunt et tantum uniuntur sub supremo capite Ecclesiae universalis. Cum vero certus numerus

Herman considered these canonical "rites" to be the specific, "secondary rites," not the generic liturgical traditions.[160] Herman also argued that "rite" was a personal law: "For since the entire ecclesiastical life of the individual faithful is determined by rite, it is so closely connected with them that it cannot be changed without grave inconvenience, even if the faithful move to another territory."[161] Thus, outside of a territory where a proper hierarch held authority, members of a rite still had to follow that rite wherever they were throughout the world.[162]

These insights of Herman affirmed the relative autonomy of Eastern communities within the Catholic Church. Each community was defined by its own discipline, a discipline juridically equivalent to the discipline of the Latin Church. Each community would, therefore, have an innate capacity to establish its own discipline—its own proper, albeit relative, autonomy—even if the individual communities had not actually used this capacity, with their laws remaining disorganized. However, just as Herman published his article, a process was taking place in

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fontium apud omnes Ecclesias Orientales receptus sit, isti hoc sensu nomine iuris Orientalis communis comprehendi possunt. 3. *Ius singulorum rituum*. Quod ius pro ritu Latino imprimis C.I.C. continetur, licet in Codice nonnullis habeantur quae ad Ecclesiam universalem pertineant. Pro aliis ritibus plerumque collectum est in actibus et decretis synodorum; apud nonnullos vero ritus ius scriptum recens fere deficit: hi praeterquam fontibus antiquis, usu et consuetudine reguntur. 4. *Ius particulare singulorum rituum*. Quemadmodum in iure latino ita etiam in ritibus orientalibus iuri communi pro toto ritu vigenti ius particulare pro singulis dioecesibus stabilitum opponi potest. Quod parvi momenti est in ritibus qui paucioribus fidelibus constant, sed apud Ruthenos et Rumaenos non est negligendum."

[160] Ibid., 113: "Iam haec criteria applicantes primo stabiliemus ritus sensu iuris canonici pleno et perfecto non esse quinque illias species superiores ritus supra notatas sed species inferiores sub illis contentas, i.e. non ritus byzantinus, syrus etc. sed ritus ruthenus, ritus rumaenus, ritus syrus purus, ritus malabaricus etc." He noted only two juridic effects of the "superior species" of rites. First, he felt that a priest of one "inferior species" could celebrate in another "inferior species" derived from the same "superior species" without illicitly mixing rites (he used the example of a Slavic priest celebrating according to Greek liturgical books). Second, it helped determine a priest for members of an "inferior species" who did not possess a priest of their own (as an example, which is lacking in Herman's article, a Romanian priest would be a better pastor for a Ruthenian community than a Chaldean priest would).

[161] Ibid., 109: "Ritus non est tantummodo lex territorialis, sed *personalis*. Nam cum tota vita ecclesiastica singulorum fidelium ritu determinatur, ita arcte cum eis connexus est, ut sine gravi incommodo mutari nequeat, etiam si fideles in aliud territorium se transferant."

[162] See his extensive analysis concerning this question in ibid., 138–158. A shorter discussion of this general question is found in Duskie, 65–71; a discussion on how laws on sacraments affected Eastern faithful in the United States is found in ibid., 85–180.

Rome to codify Eastern canon law. Many of the decisions made during this process would result in limitations placed on the relative autonomy of the Eastern communities.

4.4.2. The Initiation of the Drafting Process and Determining the Number of Codes

After the promulgation of the 1917 code, prelates and clerics of several Eastern communities asked to adopt its legislation.[163] In addition, the Sacred Congregation for the Eastern Church at a plenary session on February 26, 1926 raised the question of promoting studies for an Eastern codification, but deferred further discussion to a later meeting.[164] Over a year later, at another plenary meeting of the congregation on July 25, 1927, the members reviewed a *foglio di ufficio* "Sulla Opportunità della Codificazione del Diritto Canonico

[163] Žužek, "L'idée de Gasparri," 436 states that the Georgians in 1926 asked for an application of the 1917 *CIC* to their community until an Eastern legislation was created, and that a synod of Syrian bishops in 1920 asked for the canons on marriage impediments be applied to them; a recounting of these requests is found in "«Codificazione Canonica Orientale» (1926–1935)," 122, 124, which also notes that the Chaldeans had made a translation of the 1917 *CIC* with proposals for the variances necessary to apply it to their community, that the Malabars had asked to follow that code's discipline, that the Greek Melkites asked for an extension of the canons on the prerogatives and privileges of bishops to them, and that the bishops of Eperies (Prešov), Mukacheve, and Hajdúdorog asked for the extension of the code to their dioceses. See also Žužek, "Common Canons and Ecclesial Experience," 224, noting that the Armenians in 1911 adopted in advance the penal law of the code.

[164] This plenary session met to consider possible convocation of a Greek Melkite synod; see "«Codificazione Canonica Orientale» (1926–1935)," 77: "In questa Plenaria, relativa a prgettata convocazione di un Sinodo Melchita e di istruzione da darsi a Mgr. Mogabgab neo-Patriarcha, gli Emi Padri della S.C. per la Chiesa Orientale avanzarono il quesito se, prima della convocazione di un Sinodo, non fosse piuttosto urgente promuovere studi per una Codificazione Orientale; e decisero che in altra adunanza tale quesito fosse proposto formalmente." The question had initially been discussed at a plenary meeting on February 22, held for the confirmation of Cyril Mogabgab as patriarch; see ibid., 121. Cf. Žužek, "L'idée de Gasparri," 436–438, summarizing these events. For comments during this timeframe on the need for an Eastern code, see Felix M. Cappello, "Ius Ecclesiae latinae cum iure Ecclesiae orientalis comparatum," *Gregorianum* 7 (1926) 489: "Perutile mihi videtur et iucundum sane accidit, comparatione instituta iuris Ecclesiae latinae cum iure Ecclesiae orientalis, praecipuas differentias occidentalem inter et orientalem disciplinam breviter exponere, varia eaque summa difformitatis capita referre, ut magis magisque inde momentum eniteat atque praestantia Codicis iuris canonici simulque necessitas cuique manifesta fiat, pro ipsis quoque Orientalibus, peculiaris Codicis legum ecclesiasticarum adornandi, quo universa canonica disciplina apud illos aptius promoveatur atque firmetur"; ibid., 509–510 "Ex hucusque dictis satis abundeque patet, nihil profecto accomodatius nihilque opportunius esse, quam ut ecclesiasticae Orientalium disciplinae, salvis quidem ritibus et vetustissimis moribus, peculiari Codice consulatur, quem rebus religiosis instituendis firmandisque summopere profuturum omnes iure confidunt. Novum sane arduum opus; sed quo plus difficultatis habet, eo magis est Apostolica Sede dignum."

Orientale,"[165] as well as a *votum* prepared by Pietro Cardinal Gasparri,[166] both written in favor of undertaking the codification of Eastern canon law.

Each of these documents raised the question of the nature of the proposed codification—whether there would be two codes, with the creation of a code for the East to match with the 1917 code (whose canons generally applied only to the Latin Church), or rather a single code for the whole Church. The *foglio di ufficio* had an addendum in which it was stated:

> There is presented the question whether it is convenient to render a single code for the Latins and Easterners, or one code for the Easterners distinct from the Latin code. Regarding making a distinct one, the Sacred Congregation thought:
>
> 1) That the Easterners prefer to have a single code with the Latins, as having a separate one could appear to them to be a sign of inferiority before the Latins;
> 2) That many dispositions of the Latin code are already applicable also to the Easterners.
>
> Moreover it must be noted that the redaction of a common code would not be difficult in a technical sense, since, according to the scheme of the current Latin code, one could insert into each chapter the dispositions for the Eastern Church, so that they are applied according to the following criteria:
>
> a) If a canon refers *expressly to the Easterners*, it does not oblige the Latins;
> b) If it refers *expressly to the Latins*, it does not oblige the Easterners;
> c) If a canon refers *expressly* neither to the Latins nor to the Easterners, it applies to both Churches, unless at the end of the chapter a provision is made—for example, "Canons 1350–1355 do not apply to the Easterners."[167]

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[165] "«Codificazione Canonica Orientale» (1926–1935)," 77; the *foglio di ufficio* is found as "Allegato I" at ibid., 121–129.

[166] This is "Allegato II" at ibid., 130–132. The members added their own comments to the *votum*; see ibid., 77.

[167] Ibid., 128–129: "Si presenta il quesito se convenga redigere un Codice unico per i Latini ed Orientali, oppure un Codice per gli Orientali distinto dal Codice latino. Circa il farne uno distinto la S.C. ritiene: 1. che gli Orientali preferiscano avere un Codice unico con i Latini, potendo loro sembrare come una nota di inferiorità di fronte ai Latini l'averne uno a parte; 2. che molte disposizioni del Codice latino sono già applicabili anche agli Orientali. Inoltre si fa notare che la redazione di un Codice comune non importerebbe difficoltà tecniche, in quanto, seguendo lo schema dell'attuale Codice latino, a ciascun capitolo potrebbero inserirsi le disposizioni per la Chiesa Orientale, di modo che si tengano presenti i seguendi criteri: *a*) se un canone si riferisce *espressamente agli orientali*, esso non obbliga i latini; *b*) se si riferisce *espressamente ai latini*, non obbliga gli orientali; *c*) se un canone non si riferisce *espressamente* né ai latini, né agli orientali, si applica ad entrambe le Chiese, a meno che in fondo al capitolo non vi sia la riserva per es. «i canoni 1350–1355 non si applicano agli Orientali»." There had been a suggestion that all patriarchs and metropolitans hold synods and send their acts to Rome, which would have become the basis for a general law for all "rites"; however, after conversations with Eastern prelates, it was determined that there was no guarantee that these synods would carry out the work properly (ibid., 127).

In his *votum*, Cardinal Gasparri noted the "confusion, uncertainty, and deficiency" of Eastern law at that time, "which makes spiritual governance impossible or certainly very difficult, with grave loss of souls."[168] On the other hand, Eastern codification would be an easy undertaking.

> So that one can be convinced [of the ease of codification], one needs to remember that the majority of Eastern canon law coincides with Latin canon law. I, to offer a guess, would say that four-fifths would be the same in two codes; thus, four-fifths of the work has already been done. Working with energy and having the printers at our call, I think that the work could be completed in about two years.
>
> To the question whether there should be a preference for a single code for the whole Church, or a distinct code for the Eastern Church, I myself state without any hesitation that I am in favor of a single code. The reasons are the following:
>
> 1) The unity of the Church would appear more evident to the eyes of all from a single code;
> 2) It is a good occasion to insert into the new common code for the whole Church those declarations that have been given by the commission for the interpretation of the Latin code, and also modifications of a few canons;
> 3) The Easterners themselves, as was stated in the *foglio* of the *ponens*, prefer a single code;
> 4) Since about four-fifths of the legislation in the two parts of the Church is identical, it is logical to make a single code.[169]

Gasparri argued that a single disciplinary code would be "an event of transcendental importance that would create an epoch in the history of the Church with incalculable benefits."[170]

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[168] Ibid., 130: "Lo stato attuale del diritto canonico orientale è la confusione, l'incertezza, la deficienza che rende impossibile o certamente molto difficile il governo spirituale con grave danno delle anime."

[169] Ibid., 130–131: "Per convincersene basti riflettere che la maggior parte del diritto canonico orientale coincide col diritto canonico latino; io, ad occhio e croce, come suol dirsi, calcolo che circa quattro parti su cinque sarebbero le stesse nei due Codici; perciò quattro parti sarebbero già fatte. Lavorando con energia ed avendo la stamperia a disposizione, io ritengo che il lavoro sarebbe compiuto in circa due anni. Al quesito se è da preferirsi un codice unico per tutta la Chiesa, ovvero un codice distinto per la Chiesa Orientale, io mi pronunzio senza alcuna esitazione per il codice unico. Le ragioni sono le seguenti: 1. L'unità della Chiesa apparisce più evidente agli occhi di tutti dal codice unico; 2. è questa una bella occasione di inserire nel nuovo Codice comune per tutta la Chiesa quelle dichiarazioni che furono date dalla Commissione per la interpretazione del Codice latino ed anche le modificazioni di alcuni pochi canoni; 3. gli stessi Orientali, come è detto nel foglio aggiunto alla Ponenza, preferiscono un codice unico; 4. poichè circa quattro quinti della legislazione nelle due parti della Chiesa sono identici, è logico fare un codice solo." It is rather interesting that Gasparri was so ready to alter the 1917 *CIC* a mere ten years after its promulgation. Gasparri repeated the means proposed in the *foglio di ufficio* to determine to whom specific canons applied, but added an option for referring to a specific Eastern community: "se un canone si riferisce *espressamente* ad una Chiesa Orientale, per es. ai Maroniti, non obbliga né gli altri orientali né i latini." For reflections on Gasparri's "four-fifths" comment, see Žužek, "L'idée de Gasparri," 440.

Having reviewed both Gasparri's *votum* and heard the report of Luigi Sincero, the cardinal secretary of the congregation, Pius XI at an audience on August 3, 1927 "not only recognized the *necessity* of the codification of Eastern law, but also declared its *urgency*."[171] The pope named Cardinals Gasparri and Sincero and Syrian Patriarch Ignatius Ephrem II Rahmani as members of a council directed to making preparations for codification; the pope himself was to be its president.[172]

After the council sent a circular letter to both Eastern bishops as well as Latin bishops in whose dioceses notable numbers of Eastern faithful lived[173] and reviewed the responses, the pope agreed to establish the Cardinalatial Commission for the Preparatory Work of the Eastern

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[170] "«Codificazione Canonica Orientale» (1926–1935)," 131: "Io forse mi faccio illusione, ma ritengo che un Codice disciplinare unico per tutta la Chiesa, sarebbe un avvenimento di una importanza trascendentale, che farebbe epoca nella storia della Chiesa, con un bene incalcolabile." Cf. Žužek, "L'idée de Gasparri," 430, who reproduces a letter (in French translation) written by Cardinal Gasparri on September 17, 1929, speaking of the immense advantage to the Church that a *Codex iuris canonici pro Ecclesia universa auctoritate Pii PP. XI promulgatus* would be.

[171] "«Codificazione Canonica Orientale» (1926–1935)," 77: "*Ex Audientia SSmi*, 3 Augusti 1927.—Il S. Padre, letto il voto dell'Emo Card. Pietro Gasparri Ponente e udita la relazione del Card. Segretario, non solo à riconosciuta la *necessità* della Codificazione del diritto Orientale, ma ne à dichiarata l'*urgenza*."

[172] Ibid., 78; Daniele Faltin, "La Codificazione del Diritto Canonico Orientale," in *La Sacra Congregazione per le Chiese Orientali nel Cinquantesimo della Fondazione (1917–1967)*, ed. Sacred Congregation for the Eastern Churches (Grottaferrata/Rome: San Nilo, 1969) 125; Giuseppe Cardinal Parecattil, "Salutatio Praesidentis Commissionis in Sacello Sixtino 18.III.1974," *Nuntia* 1 (1975) 9. The entire codification process is summarized in Sunny Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO*, Kanonika 15 (Rome: PIO, 2009) 27–46, focusing on any "guidelines" that may have governed the commission's work. For a history of the first process specifically focused on the way in which the proposed code would be divided, see "L'ordine sistematico dello *Schema Codicis Iuris Canonici Orientalis* nella sua evoluzione," *Nuntia* 26 (1988) 18–87. Žužek, "L'idée de Gasparri," 429–458 offers a description of the initial stages of codification. A description of the codification process up to 1934 is found in Coussa, "De Codificatione Canonica Orientali," 4:529–531. For other summaries, see Faltin, 121–137; John D. Faris, "The Codification and Revision of Eastern Canon Law," *Studia Canonica* 17 (1983) 452–456; idem, *The Eastern Catholic Churches*, 72–75; Amedeo Giannini, "Dottrina sulla Codificazione del Diritto Canonico Orientale," *Il Diritto Ecclesiastico* 48/1–2 (1992) 29–42; René Metz, *Le Nouveau Droit des Églises Orientales Catholiques* (Paris: Cerf, 1997) 28–34; idem, "Quel est le droit pour les Églises orientales unies à Rome?" 398–403; Nedungatt, *The Spirit of the Eastern Code*, 36–37; Ivan Žužek, "Les Textes Non Publiés du Code de Droit Canon Oriental," *Nuntia* 1 (1975) 23–31.

[173] "«Codificazione Canonica Orientale» (1926–1935)," 79. Copies of the letters (dated January 5, 1929) are found in ibid., 133–134 (Allegato III).

Codification.[174] At its first meeting on July 4, 1929, the initial discussion concerned the number of codes that would result from the codification process.

> The eminent fathers, first discussing the questions proposed in the *foglio di ufficio*, turned to the fundamental question, "Whether it is possible to render a common code as intended, either a single code for the universal church, or a single code for all the Easterners."[175]

Echoing the discussions held in preconciliar commission for the First Vatican Council, it was noted that the Eastern faithful were not united among themselves and held reciprocal animosity.[176] However, Cardinal Gasparri felt that these difficulties did not result in an impossibility to render their laws uniform; while they were divided among themselves, they were all called Catholics and recognized the authority of Rome.[177] Gasparri also commented on the juridic chaos that he thought existed in the East:

> No Eastern Church has such a legislation that merits this name, but only an incomplete one, with synods very outdated in different areas, and contradictions that are more or less

[174] Ibid., 86. This title was finalized by the pope on November 23, 1929, when he authorized the publication of the commission's existence (an Italian text was published in *l'Osservatore Romano* on November 27, 1929, which can be found in ibid., 93–94, with a Latin translation at 94–95; an undated notification *Cum quamplurimi* is found in the acts of Pius XI in *AAS* 21 [1929] 669—according to "«Codificazione Canonica Orientale» (1926–1935)," 94, this *AAS* issue was published on December 2, 1929). The commission appears to have been constituted with a papal decision of April 27, 1929, found in "«Codificazione Canonica Orientale» (1926–1935)," 79. At its first meeting of July 4, 1929, the commission styled itself the "Cardinalatial Commission for the preparatory studies of the codification of Eastern law" (ibid., 80). However, on July 13, 1929 the pope altered the title to "Commission for the Eastern Codification"; it was felt inexact to speak of "Eastern law," since there were rather Eastern *laws* (cf. ibid., 92). The cardinals chosen for the commission were Pietro Gasparri, Luigi Sincero, and Bonaventura Cerretti (ibid., 79), to whom was added Franz Ehrle (ibid., 86); Amleto Cicognani served as secretary (ibid., 93). Syrian Patriarch Rahmani could not be part of this commission because of illness (ibid., 78–79; Faltin, 125).

[175] "«Codificazione Canonica Orientale» (1926–1935)," 80: "Gli Emi Padri, prima di discutere le questioni proposte nel foglio di ufficio, si prospettano il quesito fondamentale «se sia possibile redigere un codice comunque s'intenda, o Codice unico pro universa Ecclesia, o Codice unico per tutti gli Orientali[»]."

[176] Ibid.: "[E] tale quesito è stato affacciato da alcuni per il fatto che gli Orientali non sono uniti tra di loro e nutrono reciproca animosità"; cf. the comments of Monsignor Serafino Cretoni at the Twenty-first *Congressus* of the preconciliar Commission on Missions and the Churches of the Eastern Rite, September 3, 1869: Mansi, 50:31*–32*.

[177] Ibid. On this difficulty, note the comments of Amleto Cicognani, "Prefazione," in *Fonti*, 1/8:2: "Non è possibile—e si comprende—ridurre tutti i riti orientali ad uno solo, e neppure unificare, a modo di esempio, l'antiocheno ed il caldeo, che pure hanno la stessa origine comune, alcuni grandi innografi comuni e la stessa lingua liturgica. Analogalmente si può porre il quesito se sia possibile ridurre ad un solo Codice le varie discipline orientali; e sebbene qui possa apparire, per quanto difficile, in qualche modo possibile un insieme uniforme di regole disciplinari, lasciando però al diritto particolare il compito di salvaguardare usanze e osservanze del tutto speciali, a dare tuttavia una risposta soddisfacente s'imponeva e s'impone un profondo esame delle fonti."

> alike. Because of this, the Easterners consider themselves distressed. In the [1917] *Codex Iuris Canonici*, there are some canons, like canons 2, 4, and 5, which end up satisfying the Easterners, through the respect for rite and for centennial privileges and customs that are not corruptions of law. These reasons favor either a single code for the Catholic Church, or at least a Code for the East, or even a Code for each Church of the East, in the worst case scenario.[178]

Cardinal Sincero favored a single code for the whole Church, noting that the responses received from Eastern bishops and priests up to that time, although not being explicit, were in favor of a single code for the universal Church,

> and namely uniformity of discipline, save the rite in its entirety and each rite, and removing from this single code whatever regards this or that particular Church, and each Church collecting the proper laws and particular customs in synodal or provincial legislation, as very many dioceses, provinces, and some regions have done in the West after the code.[179]

After some further discussion, the members agreed:

> All the observations made are in favor of codification with a single code, from which the various Churches would take what regards them, and which each would complete with its own proper synod or council.[180]

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[178] "«Codificazione Canonica Orientale» (1926–1935)," 81: "[...] nessuna Ch. Orientale ha una legislazione tale, che meriti questo nome, ma soltanto monca, con Sinodi abbastanza sorpassati in diversi punti, e contradizioni che più o meno si assomigliano; per cui gli Orientali stessi sentono il disagio; = nel Codice J. C. vi sono alcuni canoni, come il 2, 4, 5 che finiscono coll'accontentare gli Orientali, per il rispetto al rito, e ai privilegi e consuetudini centenarie che non siano corruptela juris: ragioni queste che persuadono o un codice unico per la Chiesa Cattolica, o almeno un Codice per l'Oriente, o anche un Codice per ogni Chiesa di Oriente, nella peggiore delle ipotesi." Cf. Duskie, 55–56: "The uniform and comprehensive Code of ecclesiastical discipline which regulates the faithful of the Latin Church is a fortunate characteristic. This identity of discipline is in marked contrast to the Oriental Churches which have no uniform Code. [...] [H]owever, a regrettable feature of Oriental legislation seems to be that it is not sufficiently complete and extensive to embrace even some of the more practical juridical cases of frequent occurrence." See also Žužek, "L'idée de Gasparri," 431–432, connecting Gasparri's statement with the "trilemma" stated by Secretary Cretoni in the Vatican I preconciliar commission.

[179] "«Codificazione Canonica Orientale» (1926–1935)," 81: "Gli Emi Sincero e Cerretti convengono pienamente in queste ragioni, ed il primo aggiunge che dalle molte risposte sinora avute da Vescovi e sacerdoti orientali sembra risultare, sebbene in generale non ne parlino esplicitamente, che essi desiderano un codice unico pro universa Ecclesia; e cioè uniformità di disciplina, salvo il rito nella sua interezza e ciascun rito, e salvo ad estrarre dall'unico Codice ciò che riguarda nel particolare questa o quella Chiesa» [*sic*] e raccogliere ciascuna Chiesa le proprie leggi e consuetudini particolari in Legislazione Sinodale o Provinciale, come del resto in Occidente hanno fatto, dopo il Codice, moltissime diocesi, provincie e qualche regione." Cf. ibid., 83, where the commission decided to respond to a request from the Greek Melkite patriarch to hold a synod to codify their law by stating that the codification and the synod were two distinct works, with the synod coming after codification to organize the particular laws of the Melkites.

[180] Ibid., 81: "Dopo minuta discussione, gli Emi convengono nella decisione seguente: «Tutte le osservazioni fatte sono in favore della Codificazione con un codice unico, da cui le varie chiese prenderanno ciò che le riguarda, e che completeranno a parte con proprio Sinodo o Concilio»."

Their decision would be presented to Pius XI at a meeting of July 23, 1929.

Despite the general support of the members of the commission for a single code for the whole Church, the pope told the cardinals that the commission's decision was to be subjected to further study, which could give new views and help the matter mature.[181] Nevertheless, the cardinals on February 24, 1930 repeated their desire for a single code.

> The most eminent fathers, particularly on the basis of those things proposed by the most eminent cardinal president [Gasparri], agreed [...]: to maintain as a point of departure that a code for the Eastern Church, distinct and separate from the code for the Latin Church, would not be composed, but a single code for the whole Church, in which due account would be taken of the particular discipline of the Eastern Church.[182]

However, the pope decided differently, as he stated at an audience on March 1, 1930.

> The Holy Father makes many exceptions to the starting point—to prepare the codification on the study of the [1917] *Codex Iuris Canonici*, albeit with the criteria established in the letter of November 8, 1929.[183] He notes that the idea of a single code is good, for reasons of unity. However, in this case one can come to this point, but not start from it as, given prejudices, suspicions, and other factors, it would appear, or at least be interpreted by many—certainly by those not well disposed—to be an imposition of the Latin code, and then Latin discipline. The method proposed could lend itself to that interpretation.[184]

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[181] Ibid., 87: "Ciò posto, il Santo Padre in merito alle deliberazioni prese e voti espressi nell'adunanza del 4 corr., si è degnato pronunciarsi come segue: Ad 1^{m}: Conferma il parere degli Emi Padri sulla possibilità della Codif. Orientale. Quanto però al punto di un Codice unico o di più codici, un ulteriore studio potrà dare nuove vedute e maturare le cose."

[182] Ibid., 97: "Gli Emi Padri, in base specialmente alle proposte dell'Emo Card. Presidente, convengono su queste decisioni: 1) tenere come punto di partenza che non si tratta di comporre un codice per la Ch. Or., distinto e separato dal codice per la Ch. Latina; ma un solo Codice per tutta la Chiesa, nel quale si debbono tenere nel debito conto le particolarità disciplinari della Ch. Orientale."

[183] Ibid., 92, giving a report of the meeting on that day, states: "Si invia al membri della «Commiss. di sac. Or. per la Cod.» l'invito a voler studiare il liber I Codicis I.C. suggerendo le modificazioni, aggiunte, citazioni che loro sembrano utili e necessarie per le esigenze delle chiese orientali."

[184] Ibid., 99: "Il S. Padre fa molte eccezioni sul punto di partenza, di preparare la Codificazione sullo studio del Codex J.C., sia pure coi criteri stabiliti nella lettera dell'8 nov. 1929. Osserva che è bella l'idea di un solo codice, per ragione dell'unità: ad essa, in caso, si potrà anche giungere, ma non è da cominciare da ciò, che, stante i pregiudizi, i sospetti ed altri coefficienti, può sembrare o almeno essere interpretato da molti—certo da quelli poco bene disposti—un'imposizione del codice, e quindi della disciplina latina. Il sistema proposito si può prestare a siffata interpretazione." Cf. Néophytos Edelby, "Unity or Plurality of Codes: Should the Eastern Churches Have a Special Code?" in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 41, calling the pope's action a "vigorous intervention." The canons of the 1917 *CIC* did remain the basis for the Eastern codification process, although Faltin, 130 argues that the modifications introduced into this base text were of an Eastern nature.

Gasparri promptly abandoned his idea of a single universal code.[185]

The *iter* whereby the pontifical commission finally determined that a distinct Eastern code would be created, as opposed to a single code for the whole Catholic Church, indicates that even at this relatively late date, Roman officials did not have a full appreciation of the juridic autonomy of Eastern communities. Cardinal Sincero did not distinguish their particular law under a proposed universal code from the particular law of Latin regions, provinces, and dioceses under the Latin code.[186] While Cardinal Gasparri considered a separate code for the East or separate codes for each community as options, he held the general unification of most discipline in the Church through a single code (albeit with special provisions to limit certain canons to certain communities) to be the most desirable option.[187] Indeed, Gasparri held that four-fifths of the law in the Latin code was, in fact, the same as in Eastern canon law.[188] It seems that only canon 1 limited the application of this law to the Latin Church. Thus, instead of understanding the 1917 code as a purely Latin code, to be complemented by an Eastern code, he held it as the basis for a universal code; by some alterations and additions, it could easily be applied to the whole Church. Furthermore, the pope imposed a two-code system not because the juridic

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[185] Cf. "«Codificazione Canonica Orientale» (1926–1935)," 117, concerning a report sent to the pope on July 12, 1930: "In attuazione delle Auguste [*sic*] direttive avute nell'Udienza del 1º e 2 Marzo, che cioè si evitasse ogni ombra e sospetto di latinizzazione, e quindi non si pensasse ad un solo Codice per la Chiesa universale, e si lasciasse la più ampia libertà ai Delegati Or. non solo di dire quel che volevano, ma anche nel modo da loro preferito, tenendo presenti le loro leggi, tradizioni e Sinodi, previlegi, riti, lingua, il Card. Gasparri abbandonò subito l'idea per un codice unico; (—per esso difatti si ànno gravi difficoltà: si metterebbe lo scompiglio pei latini; l'avvicinamento del Patriarca al Papa in alcune cose non è compreso dai latini, ecc.—) [...]." Gasparri also affirmed the distinction between East and West in a letter of September 15, 1930 to the Eastern episcopacy (ibid., 146; a partial French translation is found in Joseph Hajjar, "Quelques Jalons Modernes de la Codification Canonique Orientale," *Apollinaris* 35 [1962] 236 and René Metz, "La seconde tentative de codifier le droit des Églises orientales catholiques au XX^{e} siècle (1972 à ...): Latinisation ou identité orientale?" *L'année canonique* 23 [1979] 298–299). Cf. Žužek, "L'idée de Gasparri," 454: "La promptitude avec laquelle il l'abandonna, aussitôt connu l'«auguste vouloir du Pape» qui lui était contraire, fait grand honneur à Gasparri."

[186] Cf. "«Codificazione Canonica Orientale» (1926–1935)," 81.

[187] Cf. ibid.

[188] Cf. ibid., 130–131.

autonomy of Eastern communities in some way demanded it, but because practical reasons at that moment suggested this path. As Sunny Kokkaravalayil notes:

> [A] distinct common code for the Eastern Catholic Churches was conceived of as a provisional solution, until the time was ripe for the ideal single code for the entire Church. The "ideal" solution was postponed in order to avoid a possible misinterpretation as the imposition of the Latin law on the Easterners.[189]

From the pope's viewpoint, it was not the ecclesial autonomy of the East that demanded a separate code, but rather the circumstances of the times.

4.4.3. The First Eastern Codification and its Impact on Eastern Juridic Autonomy

Although a single code for the whole East had been envisioned by those involved in the codification process, no such code (provisionally called the *Codex Iuris Canonici Orientalis*[190]) was issued prior to the Second Vatican Council. Rather, about three-fifths[191] of the canons drafted by the Pontifical Commission for the Redaction of the *Codex Iuris Canonici Orientalis*[192]

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[189] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 96. Cf. "«Codificazione Canonica Orientale» (1926–1935)," 119 (concerning an audience held with the pope on July 12, 1930): "Nella lettera accompagnatoria ai Vescovi, si potrà accennare ai punti 1), 3), 4), 5) e anche 8), sopra esposti, rilevando che ci si tiene alla *distinzione* fra Oriente e Occidente, distinzione però che non è divisione, ma *unità*, ed è da farsi notare bellamente che è nell'interesse loro, come di tutti, l'unità: è l'unità della Chiesa, che à riverbero vasto—e deve averlo—nella stessa disciplina."

[190] The title is found in Sacred Congregation for the Eastern Church, notification *Augustus Pontifex*, July 17 1935: *AAS* 27 (1935) 306 and 307. It is noted in John Paul II, apostolic constitution *Sacri canones*, October 18, 1990: *AAS* 82 (1990) 1039–1040 that *Codex Iuris Canonici Orientalis* was put in quotations in the cited notification to indicate that although it was the best title found up to then, it was still provisional "donec melior inveniretur." Cf. Nedungatt, *The Spirit of the Eastern Code*, 42 and Ivan Žužek, "Incidenza del *Codex Canonum Ecclesiarum Orientalium* nella storia moderna della Chiesa universale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 319–320 note 129 on its provisional nature. Discussion concerning this old title relative to the title of the *CCEO* is found in "Resoconto dei lavori dell'Assemblea Plenaria dei Membri della Commissione del 3–14 novembre 1988," *Nuntia* 29 (1989) 30–34.

[191] 1572 out of 2666 canons, although some commentators give a total of 1574, 1575, or 1590; see Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 31; Nedungatt, *The Spirit of the Eastern Code*, 195 note 6; Ivan Žužek, "Les Textes Non Publiés du Code de Droit Canon Oriental," 24. The reason for the promulgation of canons of the code in parts is not known for certain; see Metz, *Le Nouveau Droit*, 31–32.

[192] After the preliminary work carried out by the earlier pontifical commission was completed, the pope established this "Pontificia Commissio ad Redigendum «Codicem Iuris Canonici Orientalis»" on July 17, 1935: Sacred

were issued through four apostolic letters *motu proprio*: *Crebrae allatae* of 1949,[193] establishing for the Eastern faithful the juridic structure governing marriage, including the imposition of canonical form;[194] *Sollicitudinem Nostram* of 1950,[195] constituting procedural law; *Postquam Apostolicis Litteris* of 1952,[196] containing the law on religious orders and their members, temporal goods, and the definition of words; and *Cleri sanctitati* of 1957,[197] containing the law on the Eastern rites and personal law, which included the canons on governance in patriarchates, eparchies, and other ecclesiastical circumscriptions.

Congregation for the Eastern Church, *Augustus Pontifex*: *AAS* 27 (1935) 306–308. The cardinal members of this new commission were Luigi Sincero (president), Eugenio Pacelli, Giulio Serrafini, and Pietro Fumasoni-Biondi. For a brief description of this commission, see Lorenzo Lorusso, "Il riconoscimento della pari dignità nella comunione cattolica: il decreto *Orientalium Ecclesiarum* e il Codice dei Canoni delle Chiese Orientali," *Angelicum* 83 (2006) 455.

[193] Pius XII, *motu proprio Crebrae allatae*, February 22, 1949: *AAS* 41 (1949) 89–119. For comparative studies of *Crebrae allatae* and equivalent Latin legislation, see J. D. Conway, "A Comparative Glance at the Latin and the Oriental Marriage Discipline," *The Jurist* 9 (1949) 316–325; Stephen C. Gulovich, "The Motu Proprio *Crebrae Allatae*," *The Jurist* 10 (1950) 334–356; Timothy McNicholas, "Matrimonial Legislation of the Oriental and Latin Churches," *The Jurist* 22 (1962) 174–204. Louis Rohban, "Codification du Droit Canonique Oriental," *Apollinaris* 65 (1992) 249 explains the reason that the law on marriage was promulgated first: it was the section most urgently needed, both because Western tribunals required a reference to judge the marriages of those Eastern faithful subject to them, and because the then-newly established Middle Eastern countries required clear and precise "personal statutes" of religious communities to execute sentences civilly that had been handed down by a religious court.

[194] *CA* c. 85. This canon also required the priestly blessing for validity in most cases; *CA* c. 89 implicitly allowed the omission of a priestly blessing in marriages legitimately entered into before only witnesses. A desire to impose uniformity among the Eastern communities regarding marriage form and impediments had been expressed by Pius XI; see "«Codificazione Canonica Orientale» (1926–1935)," 118 and Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 32.

[195] Pius XII, *motu proprio Sollicitudinem Nostram*, January 6, 1950: *AAS* 42 (1950) 5–120. For a comparative study of *Sollicitudinem Nostram* and equivalent Latin legislation, see Thomas J. Tobin, "Trials—Eastern and Latin," *The Jurist* 12 (1952) 66–91, 190–231.

[196] Pius XII, *motu proprio Postquam Apostolicis Litteris*, February 9, 1952: *AAS* 44 (1952) 65–152. Canons 1–231 governed religious orders and their members, cc. 232–301 covered temporal goods and their administration, and cc. 302–325 concerned the definition of words. For a commentary on this document, see Aemilius Herman, "De Motu Proprio «Postquam Apostolicis» d. 9 Febr. 1952 ad Ecclesias Orientales Dato," *Monitor Ecclesiasticus* 77 (1952) 233–260.

[197] Pius XII, *motu proprio Cleri sanctitati*, June 2, 1957: *AAS* 49 (1957) 433–603. For a comparative study of *Cleri sanctitati* and equivalent Latin legislation, see Meletius M. Wojnar, "The Code of Oriental Law *De Ritibus Orientalibus* and *De Personis*," *The Jurist* 19 (1959) 212–245, 277–299, 413–464. For a discussion of the legal language used in all four apostolic letters *motu proprio*, see Alexander Szentirmai, "The Legal Language of the New Canon Law of the Oriental Churches," *The Jurist* 22 (1962) 39–70.

In the last document to be promulgated, *Cleri sanctitati*, one obtains some understanding of how Pius XII viewed his actions unifying discipline in the East:

> Moreover, although several synods laudably tried something in order to provide enough in this matter for the pursuits of their community, a single and common body of ecclesiastical laws—complete, certain, accommodated to the current circumstances of events and times, and universal—was desired more and more daily by the Eastern Churches. This would be like a complete and certain system of discipline and an efficacious aid of sanctity for all, and at the same time would constitute a new and clear bond of connection among all the Eastern Churches; properly undertaken, this body of law could not be effectively advanced and sanctioned except by the one supreme and universal authority of the Roman Pontiff and his apostolic solicitude. After this body of law should finally be issued and matched with the [1917] *Codex Iuris Canonici*, surely a great similarity or even equality of canons and institutes would shine forth for the whole Catholic Church, which in every time and place, while it preserves legitimate habits and customs of peoples, contends by provident laws given with maternal solicitude to effect a more lively faith, a more active charity, and a stronger bond of union of the faithful with their legitimate sacred pastors and of all with the Vicar of Christ, the Roman Pontiff, to the greater glory of Christ the Servant and unto the building of his mystical Body.[198]

One notes a certain ecclesiological tension in these statements. On the one hand, the new law would constitute a bond among the Eastern Churches; on the other hand, such a similarity of canons with the 1917 code showed bonds of unity throughout the *whole* Church, with particular habits and customs simply being preserved within the greater system. Moreover, the only authority competent to establish disciplinary uniformity in the East was stated to be "the one

[198] *CS*, introduction: "Ceterum, quamquam nonnullae Synodi aliquid laudabiliter tentarunt ut propriae communitatis studiis in hac re satis facerent, desiderabatur quotidie magis ab Orientalibus Ecclesiis unum ac commune corpus legum ecclesiasticarum, integrum, certum, hodiernis rerum temporumque adiunctis accommodatum atque universale. Quod veluti integra certaque ratio disciplinae et auxilium efficax sanctitatis omnibus foret, simulque novum ac praeclarum vinculum coniunctionis inter Orientales omnes Ecclesias constitueret quod sane inceptum nonnisi ab una suprema et universali Romani Pontificis auctoritate eiusque apostolica sollicitudine efficienter et promoveri et sanciri poterat. Hoc legum corpore edito aliquando et cum Codice Iuris Canonici conlato, magna profecto eluxisset similitudo ac vel etiam aequalitas canonum atque institutorum pro universa Catholica Ecclesia, quae omni tempore et loco, dum legitimos populorum mores et consuetudines servat, simul, providis datis legibus materna sollicitudine contendit ut vividiorem fidem, actuosiorem caritatem fortiusque fidelium cum legitimis sacris Pastoribus omniumque cum Christi Vicario, Romano Pontifice, unionis vinculum efficiat ad maiorem Servatoris Christi gloriam in eiusque mystici Corporis aedificationem." Note the reference to the mystical Body, echoing Leo XIII. Support of "ordering" the various confusing laws of the different Eastern communities had been expressed by some canonical commentators; see Gulovich, "The Motu Proprio *Crebrae Allatae*," 335–336 and Wernz-Vidal, 108 and 111.

supreme and universal authority of the Roman Pontiff and his apostolic solicitude."[199] Antoine Joubeir noted the dangers of the pope unifying Eastern discipline through his own pontifical authority:

> The moment when Eastern canon law becomes entirely pontifical law, it seems more logical no longer to consider that the supreme pontiff ordinarily makes law only for the Latins, and to declare that all Catholics are subject to apostolic decrees and constitutions, at least when these decrees and constitutions are not limited expressly or by the material they treat.[200]

By issuing a common law for the Eastern communities, the pope recognized the juridic autonomy of the East, at least when taken as a single unit—the "Eastern Church." Yet by doing so, the more important Eastern disciplinary norms became pontifical law, and were no longer laws or customs of the individual Eastern communities. Thus, Joubeir feels that this intervention upended the Pamphilian jurisprudence—as the Catholic East was now governed for the most part by pontifical law, it should no longer be the general rule that pontifical law did not bind the Eastern faithful.

The laws contained in these four documents are very extensive, and a detailed analysis of all individual provisions cannot be undertaken here. Rather, four particular points will be reviewed in the following sections: the juridic nature of "rite" as presented in the Eastern

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[199] An ecumenical council could also do so, although the introduction to *CS* does not explicitly reference this capacity, likely because of how rare such events are in the life of the Church. Obviously, the question here is not whether the pope has the authority to unify Eastern discipline (he obviosuly does) but whether he ought to do so. Cf. Marius Rizzi, "De personis iuxta novum ius orientale," *Apollinaris* 31 (1958) 91: "Etenim, unus Summus Pontifex, vi supremae et universalis potestatis, componere poterat Ecclesiarum Orientalium unionem, quas ecclesiologia polycephala, synodalis, nationalis iamdiu diviserat. Orientalibus Ecclesiis inter se divisis sed iam concordiae, coniunctionis et unitatis studiosis, unus Romanus Pontifex de plentitudine supremae suae potestatis communem legem dare poterat." On the inability of a specifically Eastern hierarch to constitute a common Eastern law, see Wernz-Vidal, 114: "[I]nter varios Patriarchas Orientales, nullus est qui supra omnes alios habeat potestatem eosque adigat ad certas communes leges in respectivo patriarchatu observandas."

[200] Joubeir, 55: "[...] du moment que le droit canon oriental est devenu tout entier un droit pontifical, il semblerait plus logique de ne plus considérer que le Souverain Pontife, ordinairement, fait la loi seulement pour les Latins et de déclarer que tous les catholiques sont soumis aux décrets et constitutions apostoliques à moins que ces décrets et ces constitutions ne soient limités ou expressément ou par la matière qu'ils traitent."

codification, the juridic autonomy of the individual Eastern communities, the competence of the Sacred Congregation for the Eastern Church, and certain unpromulgated canons.

4.4.3.1. The Juridic Nature of "Rite"

Although the four apostolic letters did use the phrases "Eastern Church" or "Eastern Churches" to designate the individual Eastern communities, an individual Eastern community was generally called a "rite."[201] Canon 303 §1, 1º of the *motu proprio Postquam Apostolicis Litteris* described[202] "rite":

> The *Eastern rites about which these canons make determinations* are the Alexandrian, Antiochene, Constantinopolitan, Chaldean, and Armenian, and other rites that the Church recognizes expressly or tacitly as *sui iuris*.[203]

This description recognized explicitly as "rites" those listed by Benedict XIV in *Allatae sunt* (with "Coptic" termed "Alexandrian," "Greek" called "Constantinopolitan," and the separation of "Syrian" into Chaldean and Antiochene[204]), but also stated that others existed. In both cases, these rites were recognized as *sui iuris*.[205]

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[201] The first pontifical commission felt the need to discuss "rite" and "discipline" to make a clear distinction between the two; see "«Codificazione Canonica Orientale» (1926–1935)," 85 (*l*).

[202] "Described" rather than "defined"; Bassett, 88–89 states that "no definition of rite was attempted" because of the complexity of the problem and the lack of clarity from the sources for the code. Cf. Joubeir, 22: "Non seulement on n'y trouve aucune définition, mais encore cette énumération indistincte des rites peut mener à des confusions."

[203] *PAL* c. 303 §1, 1º: "*Ritus orientales de quibus canones decernunt* sunt alexandrinus, antiochenus, constantinopolitanus, chaldaeus et armenus, aliique ritus quos uti sui iuris expresse vel tacite agnoscit Ecclesia." Interestingly, this canon has no sources listed in the text with annotations published in 1958: Pontifical Council for Rendering the *Codex Iuris Canonici Orientalis*, *Litterae Apostolicae motu proprio Datae de Religiosis, de Bonis Ecclesiae Temporalibus, de Verborum Significatione pro Ecclesiis Orientalibus Adnotationibus Fontium Auctae* (Rome: 1958) 92–93.

[204] Bassett, 75 states that this separation first occurred in the 1932 *Statistica con Cenni Storici della Gerarchia e del Fedeli di Rito Orientale* of the Sacred Congregation for the Eastern Church, and "has been accepted as definitive by liturgists, historians and canonists."

[205] Cf. Herman, "De Motu Proprio «Postquam Apostolicis»," 259, stating that the "alii ritus" are equal in importance to the five "primary" rites listed, yet they also pertain ("pertinent") to one of the primary rites.

This description reflects differing ways of thinking about Eastern communities without any attempt to resolve possible contradictions. One notes that the canon used "rite" rather than "Church" (or even "*natio*"); such usage continued the tendency to view these communities primarily on the basis of their liturgical usages. On the other hand, the use of *sui iuris* to describe "rite" indicates that the entity being so termed was a physical or moral/juridic person, not a complex of liturgical norms (nor even a complex of general discipline).[206] Only individual Eastern communities, not liturgical traditions, exhibited this *sui iuris* characteristic.[207] Because of this juridic overlay on the liturgical, the specific listing of "rites" in the canon is incoherent: of the five "rites" *sui iuris* explicitly listed in the canon (again, derived from the listing of *Allatae sunt*), only one—the Armenian—could possibly constitute a true juridic community as implied

[206] Bassett, 89–90, 242. Sunny Kokkaravalayil, "The Guideline *Riti e Chiese Particolari* Applied in CCEO. History and Appraisal," in *Le Chiese* sui iuris*: Criteri di individuazione e delimitazione*, ed. Luis Okulik (Venice: Studium Generale Marcianum, 2005) 33 states that *sui iuris* "signifies the hierarchical independence of a particular Church from other particular Churches" although also entrusted to the oversight of the pope. However, note that the following commentators, whose books were published after *CS*, still considered liturgical language or the liturgy in general as at least partially constitutive of a "rite" (usually stating that the Latin Church was that which used the Latin liturgical language): Abbo-Hannan, 1:3: "The Latin Church comprises the Catholics who belong to the Patriarchate of the West; it regards the pope as its patriarch and follows the Latin rite. To the Oriental Church, whose liturgical languages are not Latin, those Catholics belong who, under the Holy See, obey the Eastern patriarchs"; Emile Jombart, *Manuel de Droit Canon*, new edition (Paris: Beauchesne et ses Fils, 1958) 27: "En général, *il ne concerne l'Église latine* (C. 1), c'est-à-dire, l'ensemble des Églises qui ont le latine pour langue liturgique et l'évêque de Rome pour patriarche"; Regatillo, 1:30: "Ergo *Ecclesia latina* est ea pars Ecclesiae catholicae quae linguam latinam in sua liturgia adhibet. *Orientalis*, quae propriam liturgiam habet, in eaque utitur lingua vulgari antiqua; ac praeterea speciales gradus hierarchiae, ut patriarchatum cum vera iurisdictione; et regimen seu disciplinam peculiarem" (he states that each of the four rites of *Allatae sunt* is presided over by a patriarch, continuing the confusion between liturgical tradition and juridic entity); Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:9: "Dicitur ius orientale in oppositione ad occidentale vel latinum, quod proprium est Ecclesiae latinae, scil. in cuius sacra liturgia lingua latina est in usu praeceptivo, vel saltem liturgia est romana."

[207] Bassett, 92–106 argues strenuously that the use of *ritus* in the four apostolic letters *motu proprio* almost always concerns the specific Eastern communities, not the liturgical traditions. The only exception he admits is reference to a specific liturgical act, such as one finds in *CA* c. 85 §1: "Ea tantum matrimonia valida sunt quae contrahuntur ritu sacro, coram parocho, vel loci Hierarcha, vel sacerdote cui ab alterutro facta sit facultas matrimonio assistendi et duobus saltem testibus, secundum tamen praescripta canonum qui sequuntur, et salvis exceptionibus de quibus in cann. 89, 90" (Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 311 notes that such a liturgical application is "very limited"). Cf. Ivan Žužek, "Presentazione del «Codex Canonum Ecclesiarum Orientalium»," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 124, who contrasts the formulation of *PAL* c. 303 §1, 1º with that of the *CCEO*, the latter clearly stating that it is not the generic traditions that are *sui iuris*, but the Churches. Clement Pujol, "Distinctio inter «Ritum» et «Iurisdictionem»," *Periodica* 70 (1981) 195 feels the need to state that the explicit naming of the "ritus-fontes" in this canon does not oppose the declaration of *OE* 3 that all rights enjoy equal dignity.

by the phrase "sui iuris."[208] Thus, the canon itself seemed self-contradictory; it listed four things as "rites" that in no way could be "rites" as described in the rest of the canon.[209]

This continuing overlay of liturgical elements on a concept of "rite" that was becoming increasingly juridical also affected the language used in the canons on ascription. Canon 6 of *Cleri sanctitati* retained much of the language of canon 98 §1 of the 1917 code:

> §1. Among the various rites, one pertains to that by whose ceremonies one was legitimately baptized.
>
> §2. If baptism was conferred by a minister of a different rite on account of grave necessity when a priest of the proper rite could not be present, or on account of some other just cause with the permission of the proper hierarch, or on account of fraud, the one baptized is then held to be ascribed to that rite by whose ceremonies the person should have been baptized.[210]

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[208] Bassett, 89–90: "These are not the liturgical rites, because, as the canon states, they are «*sui iuris*.» In legal terminology, «*sui iuris*» can be applied only to a juridically independent and self-subsistent physical or moral person. It can hardly be applied to a system of laws. Of the five rites explicitly named four could not possibly be considered as an actually existing autonomous group, and the fifth, the Armenian, can, not because of its liturgy, but because it is a single community having no derivatives." Similar comments are found at Joubeir, 26–27, 83–84. Cf. Nedungatt, *The Spirit of the Eastern Code*, 114 note 34: "In CICO, 'traditions' were confused with 'rites,' and/or 'Churches,' as may be seen, for example, in [*PAL* c. 303 §1, 1º]. This list of *ritus Orientales* does not follow the alphabetical order but the order of precedence of the patriarchal sees (cf. CCEO c. 59: 'sedes patriarchales'), thus giving proof of confusion between 'rite' and 'Church' or 'patriarchal sees.'"

[209] For an example of the effect of such confusion concerning what a "rite" was, see Victor J. Pospishil *Code of Oriental Canon Law: The Law on Marriage* (Chicago: Universe Editions, 1962) 20. Pospishil held that transfers between "rites" requiring apostolic permission were only those between the liturgical traditions: "While, e.g., in the section concerning the interritual relationship, especially the transfer from one rite to another, the term rite can more strictly be conceded only to the five original rites, in other sections it is used in such a way as to be applicable to the last subdivision of a rite." Pospishil used "disciplines" to describe the modern Churches *sui iuris*, although he admits that it "could be called in some instances with equal justification a rite" (ibid., 19). Bassett, 100–102 argues against this position, as does Romaeus W. O'Brien in his review of Pospishil's *Interritual Canon Law Problems in the United States and Canada* (Chesapeake City: St. Basil's, 1955), in *The Jurist* 15 (1955) 353. It seems that Pospishil would change his opinion after Vatican II; see his *Orientalium Ecclesiarum, The Decree on the Eastern Catholic Churches of the II Council of Vatican: Canonical–Pastoral Commentary* (New York: Fordham University, 1965) 12: "From this enumeration of rites have been omitted groups of Eastern Catholics such as Copts, Ethiopians, Maronites, Malabarians, and others, who very often have been called and treated in documents of the Holy See as autonomous rites. This intentional omission is the reason why we consider the enumeration of c. 303 #1 as merely a historical reminiscence with no practical consequences."

[210] *CS* c. 6: "§1. Inter varios ritus ad ilium quis pertinet, cuius caeremoniis legitime baptizatus fuit. §2. Si baptismus a ritus diversi ministro vel ob gravem necessitatem cum sacerdos proprii ritus praesto esse non potuit, vel ob aliam iustam causam de licentia proprii Hierarchae, vel ob fraudem collatus fuit, ita baptizatus illi ritui adscriptus habeatur cuius caeremoniis baptizari debuit."

This canon appeared to retain the notion that the liturgical ceremony had a juridic effect, such that the canonical rite was determined by the liturgical rite used.[211] However, one notes that, in comparison with Latin canon 98 §1, the word "legitime" was added to the description of the conferral of baptism.[212] Further, the "exceptions" of Latin canon 98 §1 indicated by the word "nisi" became a second section in *Cleri sanctitati* canon 6, with the added statement of an implicit obligation ("baptizari debuit"—"should have been baptized"). These additions seem to be based on the 1919 response of the Sacred Congregation for the Eastern Church mentioned above.[213] Thus, although the liturgical ceremony would at first glance appear to determine ascription, it was rather the law (hence, "legitime" and the obligation implicit in "debuit") that determined ascription by prescribing by what ceremonies one should be baptized.[214] If these two

[211] Thus, Rohban, 257 notes that the canon "était tombé dans une ambiguïté," with §1 appearing to make ritual ascription be a consequence of the liturgical rite used for baptism, but §2 indicating that "rite" somehow has a force over a person even antecedent to baptism. Cf. Luis Okulik, "L'Evoluzione Terminologica nel Diritto Canonico Orientale della Chiesa Cattolica: Da 'Ritus' a 'Ecclesia Sui Iuris,'" *Kanon* 21 (2010) 59–60, comparing this law to the current *CCEO* norms.

[212] 1917 *CIC* c 98 §1: "Inter varios catholicos ritus ad illum quis pertinet, cuius caeremoniis baptizatus fuit [...]." Note that Pius X, *Ea semper*, June 14, 1907, cap. 4, art. 36: *ASS* 41 (1908) 10 had also used *legitime*: "Infantes ad eius parochi iurisdictionem pertinent, cuius ritu sunt legitime baptizati, cum per baptismum fiat suscepti ritus latini vel rutheni professio, ita ut ad latinum ritum spectent qui latino ritu baptizati sunt; qui vero ritu rutheno sunt baptizati, in ruthenorum numero sint habendi. Excipitur casus quando iis baptismus alieno ritu collatus fuerit ob gravem necessitatem, cum nimirum morti proximi fuerint, vel in loco, in quo parentes tempore nativitatis mirabantur, parochus proprii ritus non adesset; tunc enim ad parochum ritus, quem parentes profitentur, pertinebunt, iuxta superius statuta." However, this legislation was limited only to the Ruthenians living in the United States. Further, the phrasing used here is adopted from Benedict XIV, constitution *Etsi pastoralis*, May 26, 1742, §2, n. 11: *Bullarium Benedicti XIV* 1:76. Thus, although *legitime* is used, the entire text has a heavy liturgical emphasis, and *legitime* also appears to reference only the explicit *exception* ("Excipitur...") mentioned in the second sentence. There is no indication in *Ea semper* of the canonical rite having total rights over a person irrespective of the liturgical rite used in baptism, as opposed to *CS* c. 6. On the more general mirroring of *Etsi pastoralis* and *Ea semper*, see Victor J. Pospishil, "The Ukrainians in the United States and Ecclesiastical Structures," *The Jurist* 39 (1979) 382: "The Ruthenian bishop's legal situation was defined in the decree *Ea semper* of June 14, 1907, which recalled the provisions of *Etsi pastoralis*, the constitution of Benedict XIV of May 26, 1742, for the Byzantine Rite Catholics of Greek and Albanian ancestry in Italy"; W. Becket Soule, "Canonical Status of Eastern Catholics in the Diaspora and the Drafting of the Code of Canons of the Eastern Churches," *Kanon* 22 (2012) 133: "The operation of the Ruthenian Church in the United States was defined by the decree *Ea semper* (18 July 1907), which restated in most significant ways the provisions of *Etsi pastoralis*."

[213] "Seem," since the decision is not listed among the sources for *CS* c. 6.

[214] Bassett, 169: "The relationship of the ceremonies of solemn Baptism to the determination of rite is not that of a cause to an effect, as some authors have said, but that of an external and canonically accepted sign to the things signified. This sign is valid only in the normal circumstances wherein Baptism is received according to the

were at odds, the law took precedence over the ceremony.[215] Although the canon still referenced the liturgical ceremony, the law itself would determine to which "rite" a person pertained. While such an evolution was beneficial from a jurisprudential standpoint, there still remained a practical problem—the proposed Eastern norm equivalent to canon 756 of the 1917 code, determining the rite by which a child had to be baptized, was never promulgated.[216]

The wording of the promulgated canons still suggested that the liturgical rite was a constitutive element of an Eastern community (*PAL* c. 303 §1, 1º) and generally determined ascription to such a community (*CS* c. 6). However, the insights arising from actual praxis—that the community possessed a *juridic* identity and as such possessed a legal claim over certain persons to be baptized—were also reflected in the wording of these canons, with the use of "sui iuris" (*PAL* c. 303 §1, 1º), "legitime," and "debuit" (*CS* c. 6). The juridic nature of these communities, from which flows their autonomy, was on the way to being recognized fully, but the concepts of earlier eras still retained their influence.

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legitimate determination of rite that is and must be antecedent to the ceremonies themselves"; ibid., 173–174: "The norm of law is not merely Baptism, but what rite a person should follow in being baptized. In this sense each person is said to have a «native» rite, even before being baptised. This criterion is, then, the ultimate criterion or determining factor in ritual adscription. It is also the legal norm postulated by Canon 6 in the word «*legitime*»"; ibid., 207: "The rite of the baptized is not radically determined by the ceremonies of Baptism, but the ceremonies—if they have to be observed—must be in conformity with the already determined rite of the one to be baptized." Cf. Pospishil, *Code of Oriental Canon Law: The Law on Marriage*, 29 (commenting on *CS* c. 6 §1): "The rule is clearer if expressed by saying that *a child who received baptism belongs to the rite predetermined by law, irrespective of the rite of the minister or the ceremonies*." Joubeir, 34–35 appears to take *legitime* simply to refer to the exceptions of *CS* c. 6 §2.

[215] Cf. Dimitri Salachas, "L'appartenenza giuridica dei fedeli a una Chiesa orientale sui iuris o alla Chiesa latina," *Periodica* 83 (1994) 20. Salachas states that ascription in both 1917 *CIC* and *CS* was "prevalentemente «ritualistico»." I would disagree concerning *CS* for the reasons given above, namely that the use of "debuit" and "legitime" indicate some *sui iuris* entity having rights over the person being baptized, regardless of the ritual used.

[216] The relevant norm was to be included in a fifth apostolic letter *motu proprio* on Sacraments and certain other matters, which was never promulgated. The proposed norm is found in Ivan Žužek, "Testi iniziali per le revisione dei canoni *De Baptismo, Christmate, et Eucharistia*," *Nuntia* 4 (1977) 47 (c. 25). Cf. Faris, *The Eastern Catholic Churches*, 179 note 2: "[*CS* c. 6] was of little practical value since a norm determining the autonomous Church of baptism was never promulgated for the Eastern Catholic Churches."

4.4.3.2. Formulation of the Juridic Autonomy of the Eastern Communities in the Canons

The first Eastern codification contained several difficulties concerning how the juridic autonomy of the communities was structured. Looking first at patriarchal communities, one notes that the canons recognized the legislative power in patriarchates to rest not with the synod itself, but with the patriarch within the synod. Canon 243 §1 of *Cleri sanctitati* stated:

> The patriarch can issue laws (whether they concern the whole patriarchate, some part of it, or a group of persons) not contrary to the universal laws of the Church or to those that the Apostolic See has constituted for the patriarchate only in the patriarchal synod referenced in canon 340 §1.[217]

The canon does not state that the patriarchal synod[218] itself possessed legislative power, but only that it was somehow necessary for the lawmaking process insofar as the patriarch could not issue laws outside of it.[219] However, stating that the patriarch held legislative power as opposed to the synod was not consonant with Eastern traditions. As Ivan Žužek notes:

> The less than appropriate expressions, as that of *Cleri Sanctitati* canon 243 §1 ("The patriarch can issue laws...," albeit "only in the patriarchal synod"), have been abandoned [in the *CCEO*] since they do not correspond to the *sacri canones*, which, as concerns legislative power—although at that time there were no clear distinctions about the word

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[217] *CS* c. 243 §1: "Leges, universalibus Ecclesiae legibus iisque etiam quas Sedes Apostolica pro patriarchatu constituit non contrarias, sive integrum patriarchatum ipsae respiciant sive aliquam ipsius partem, seu personarum coetum, Patriarcha, tantum in Synodo patriarchali de quo in can. 340, §1, ferre valet."

[218] Note that there were other types of synods in *CS* that were not involved in the exercise of legislative power, namely the synod for the election of the patriarch (*CS* cc. 221–239), that for the election of bishops (*CS* cc. 251–255), and the permanent synod (*CS* cc. 288–295); cf. Paul Pallath, *The Synod of Bishops of Catholic Oriental Churches* (Rome: St. Thomas Christian Fellowship, 1994) 126–127.

[219] Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:233 argues that legislative power strictly speaking only pertains to the patriarch "in et cum Synodo." Acacius Coussa, *Epitome Praelectionum de Iure Ecclesiastico Orientali* (Typis Monasterii Exarchici Cryptoferratensis, 1948) 1:71 states that the patriarch "potitur potestate iurisdictionis ordinaria legifera, iudiciaria et exsecutiva in universo patriarchatu, ad normam sacrorum canonum. Unde est verus fons iuris pro patriarchatu" (cf. ibid., 1:226, 255). However, he later states (like the canon) that he can exercise legislative power "in Synodo tantum" (ibid., 1:258) and admits that, according to the *ius antiquum*, legislative power was reserved to the provincial or patriarchal synod (ibid., 1:282). Cf. Wojnar, "The Code of Oriental Canon Law,"420, stating that it was the patriarch who has legislative power, albeit in a patriarchal synod; the implication is that the synod itself did not possess legislative power.

> "power"—considered the synods of the individual Churches as "the superior instance" without any hesitation.[220]

Such a misattribution of legislative power to the patriarch ("The *patriarch* can issue laws...") rather than the synod is evidence of the non-recognition of Eastern traditions in the codified Eastern law, and did not bode well for recognition of a proper autonomy pertaining to the individual communities.[221]

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[220] Ivan Žužek, "Alcune Note circa la Struttura delle Chiese Orientali," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 140: "Le espressioni, meno felici, come quella del *CS* can. 243 §1 («Leges ... Patriarcha ferre valet», tuttavia «tantum in Synodo patriarchali»), sono state abbandonate perché non corrispondenti ai «sacri canones» che, per quanto riguarda il potere legislativo,—benché in quel tempo non vi fossero chiare distinzioni riguardo alla parola «potere»—consideravano i sinodi delle singole Chiese senza alcuna esitazione come «superior instantia»." Cf. idem, "The Patriarchal Structure according to the Oriental Code," in *The Code of Canons of the Oriental Churches: An Introduction*, ed. Clarence Gallagher (Rome: The St. Thomas Christian Fellowship, 1991) 44: "Besides, the Synods of the patriarchate are considered in this *motu proprio* as Synods of the patriarch 'and not of the Patriarchal Church.'"

[221] Catholic canon law tended to focus more on the person of the patriarch in comparison with Eastern non-Catholic law; see Pospishil, "The Ukrainians in the United States and Ecclesiastical Structures," 391: "While [*Cleri sanctitati*] grants to the Eastern patriarchates and other churches a certain autonomy, it is circumscribed rather narrowly. Compared with the corresponding canonical norms in the non-Catholic Eastern churches, the Catholic codification concedes to the patriarchs personally more power within their own churches than Orthodox patriarchs can claim for themselves, but the entire church or patriarch enjoys much less legislative and administrative authority than its non-Catholic counterpart." On the greater power that Catholic patriarchs enjoyed in comparison with their non-Catholic counterparts, see Coussa, *Epitome Praelectionum de Iure Ecclesiastico Orientali*, 1:4: "Apud catholicos, maxima potiuntur iurisdictione Patriarchae in universo patriarchatu, et in complurimis negotiis auctoritatem suam, una cum Episcoporum Synodo vel sine ea, interponere possunt; apud dissidentes, etsi Patriarchae vel Praesules (Archiepiscopi vel Metropolitae autocephali) ipsi modica potiantur auctoritate, Synodus tamen dirigens cui praesunt cuncta negotia ecclesiastica regionis expedit." Note that the institute of the patriarch was specifically praised in the introduction to *CS*: "Memoratu vero dignum prae ceteris videtur patriarchale institutum, quippe quod orientalis ecclesiasticae ordinationis veluti praecipua nota sit. Proprii talis instituti canones, christianae venerandae antiquitatis vestigia prae se ferentes, munera, iura et privilegia iustasque attributiones recensent." Similar praise is contained in *CS* c. 216 §1: "Secundum antiquissimum Ecclesiae morem, singulari honore prosequendi sunt Orientis Patriarchae, quippe qui amplissima potestate, a Romano Pontifice data seu agnita, suo cuique patriarchatui seu ritui tamquam pater et caput praesunt." Cf. Wojnar, "The Code of Oriental Canon Law *De Ritibus Orientalibus* and *De Personis*," 418: "While in the common discipline of the Latin Church, the Patriarch is purely titular, in the Oriental discipline the Patriarch possesses an office of great significance and activity, as intermediary between the Roman Pontiff and almost the whole life of the Patriarch's Church." Among some of the rights and obligations of a patriarch contained in *CS* cc. 240–282, one notes his ability to issue edicts, mandates, general orders, instructions, and encyclical letters for the entire patriarchate (c. 245), to conduct visitations in the whole patriarchate (c. 246), and to provide in an emergency for the good of his patriarchate through the establishment of new ecclesiastical circumscriptions with the consent of the patriarchal synod (c. 248). However, this power of the patriarch was not recognized as being of particular ecclesial significance—note that in *CS* the institute of the patriarch was placed in Title IV, Part I, "De suprema potestate deque iis qui eiusdem sunt canonico iure participes," and was therefore treated as an office of similar ecclesial nature to metropolitans and primates under the 1917 *CIC* (Chapter VI, "De Patriarchis, Primatibus, Metropolitis," is located in Book II, Title VII, "De suprema potestate deque iis qui eiusdem sunt canonico iure participes"). Cf. John D. Faris, *The Communion of Catholic Churches: Terminology and Ecclesiology* (Brooklyn: 1985) 60–61, noting that the office of patriarch was "treated *after* the Roman Pontiff, Ecumenical Councils, Cardinals, the Roman Curia, and Papal Legates." For

Additionally, the canons did not consider the patriarchal synod to be different in nature than other particular synods in the life of the Church. Canon 340, referenced in canon 243 §1 quoted above, stated:

> §1. Bishops and other hierarchs subject to the patriarch or archbishop meet together in a patriarchal or archiepiscopal synod. The patriarch or archbishop convokes this synod and presides over it; having heard the permanent synod, he designates its place of celebration.
>
> §2. The bishops and other hierarchs of an ecclesiastical province constituted outside of a patriarchate and an archiepiscopate meet together in a provincial synod. The metropolitan not subject to a patriarch or archbishop convokes this synod, designates its place of celebration after having heard all those who must attend with deliberative vote within the territory of the province, and presides over it.
>
> §3. The bishops and other hierarchs of many rites can meet together in a synod, having obtained permission from the Roman pontiff, who determines the place of the celebration of the synod and designates his legate to convoke the synod and preside over it.
>
> §4. The bishops and other hierarchs of many provinces not subject to a patriarch or archbishop can meet together in a synod, with a legate designated by the Roman pontiff, who convokes the synod and presides over it.
>
> §5. In designating the place of celebration of the synods mentioned in §§1, 2, and 4, unless a just impediment stands in the way, the patriarchal or metropolitan church is to be preferred.[222]

Nothing in this canon distinguishes the nature of the patriarchal synod from the other types of synods listed there, nor do any of the canons in the section on synods treat the patriarchal synod

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shortcomings in the formulation of *CS* c. 216, see Michael K. Magee, *The Patriarchal Institution in the Church: Ecclesiological Perspectives in the Light of the Second Vatican Council* (Rome: Herder, 2006) 192.

[222] *CS* 340: "§1. Episcopi ceterique Hierarchae, Patriarchae vel Archiepiscopo subiecti, conveniunt in Synodum patriarchalem vel archiepiscopalem. Hanc Synodum Patriarcha vel Archiepiscopus convocat eique praeest; idemque, audita Synodo permanenti, locum celebrationis designat. §2. Episcopi ceterique Hierarchae provinciae ecclesiasticae extra patriarchatus et archiepiscopatus constituti, conveniunt in Synodum provincialem. Hanc Synodum Metropolita Patriarchae vel Archiepiscopo non subiectus convocat, locum eiusmet celebrationis, auditis omnibus qui assistere debent cum suffragio deliberativo, intra provinciae territorium, designat, eique praeest. §3. Episcopi ceterique Hierarchae plurium rituum in Synodum convenire possunt, obtenta licentia a Romano Pontifice qui locum celebrationis Synodi determinat, et suum Legatum designat ad Synodum convocandum eique praesidendum. §4. Episcopi ceterique Hierarchae plurium provinciarum Patriarchae vel Archiepiscopo non subiectarum in Synodum convenire possunt, designato a Romano Pontifice Legato, qui Synodum convocat eique praeest. §5. In loco celebrationis Synodorum de quibus in §§ 1, 2, 4 designando, nisi obstet iustum impedimentum, patriarchalis vel metropolitana ecclesia anteferatur."

differently from other synods in terms of nature.[223] Indeed, all types of synods (and even the provincial and plenary councils held according to the 1917 code) shared the same concerns—"what seems opportune for the territory of each for the increase of faith, the moderation of morals, the correction of abuses, the resolution of controversies, the observance or inducement of one and the same discipline"[224]—and were bound by the same norm for promulgation, namely the requirement of the prior *recognitio* of the Apostolic See.[225] The patriarchal synod was but one type of particular synod in the Church, ecclesiologically indistinct from others in this canonical formulation.[226]

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[223] The canons "De Synodis patriarchalibus, archiepiscopalibus provincialibus, plurium rituum vel plurium provinciarum" (*CS* cc. 340–351) only make distinctions concerning invitees (c. 342) and timing (c. 344). Note Žužek, "The Patriarchal Structure according to the Oriental Code," 44: "In the *motu proprio*, *Cleri sanctitati*, Chapter VI of Title IV is entitled 'Patriarchs.' On the other hand, all kinds of synods are treated under the canons on the bishops and other metropolitans, in Chapter VIII, in a way, which does not allow us to understand the important role of the Synod of Bishops of a Patriarchal Church." Similar comments are made by Pallath, *The Synod of Bishops*, 129. On the general need to distinguish the nature of the Eastern communities from ecclesiastical divisions within the Latin Church, see Victor J. Pospishil, *Ex Occidente Lex* (Carteret: St. Mary's Religious Action Fund, 1979) 153: "The Eastern Catholic churches themselves will have to develop again among their members, starting with their bishops, the consciousness that they are different from other parts of the Catholic Church not so much by the difference of rite, but that they constitute moral persons at the highest level of church structure. The dissimilarity between the Spanish or the German Catholic churches is of a different nature; they are nothing but administrative subdivisions of the Church, which possess no standing as such in law. Each Eastern Catholic church, on the other hand, has legal personhood, is a subject of rights and duties."

[224] *CS* c. 349: "Patres in Synodo congregati studiose inquirant ac decernant quae ad fidei incrementum, ad moderandos mores, ad corrigendos abusus, ad controversias componendas, ad unam eandemque disciplinam servandam vel inducendam, opportuna fore pro suo cuiusque territorio videantur." Compare with 1917 *CIC* c. 290: "Patres in Concilio plenario vel provinciali congregati studiose inquirant ac decernant quae ad fidei incrementum, ad moderandos mores, ad corrigendos abusus, ad controversias componendas, ad unam eandemque disciplinam servandam vel inducendam, opportuna fore pro suo cuiusque territorio videantur."

[225] *CS* c. 350 §1: "Absoluta Synodo, praeses acta et decreta omnia ad Sedem Apostolicam transmittat, nec eadem antea promulgentur, quam ab eadem recognita fuerint; interim vero omnes qui in Synodo partem habuerunt, secretum de actis et negotiis pertractatis servare debent; ipsimet autem Synodi Patres designent et modum promulgationis decretorum et tempus quo decreta promulgata obligare incipiant." Compare with 1917 *CIC* c. 291 §1: "Absoluto Concilio plenario aut provinciali, praeses acta et decreta omnia ad Sanctam Sedem transmittat, nec eadem antea promulgentur, quam a Sacra Congregatione Concilii expensa et recognita fuerint; ipsimet autem Concilii Patres designent et modum promulgationis decretorum et tempus quo decreta promulgata obligare incipiant."

[226] Cf. Ivan Žužek, "Authentic interpretations," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 408, arguing that Eastern synods and Latin episcopal conferences/particular synods "are of a totallly different nature," and synods cannot be "compared, not even by analogy, with episcopal conferences or with particular councils of the Latin Church."

Further, the area for particular legislation in the patriarchates was much more limited under the codified law than prior to it. As was noted above, the application of the Pamphilian jurisprudence had resulted in theortically broad competence for Eastern communities to issue legislation, insofar as they were not subject to the pontifical legislation binding the Latin Church. With the codification of Eastern law, which was pontifically-constituted law, these communities became hemmed in by the resultant legislation, and were only permitted to issue laws inasmuch as the canons allowed.[227] Joseph Hajjar notes:

> In fact, the successive publication of the various parts of this Code showed that the legislative unification of Oriental law became a *fait accompli* although patriarchal and local synods were left free to fill in certain details of the legislative system that had thus been unified.[228]

The law of individual Eastern communities, which had earlier generated so much canonical reflection, became reduced in importance before the unified law of the Eastern codification. Many norms of particular communities, such as the ability of the Maronite patriarch to name, consecrate, and install bishops without needing to inform the Apostolic See beforehand, were eliminated.[229] Each *motu proprio* also abrogated the relevant particular law (marriage,

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[227] Vermeersch-Creusen, 1:70: "Sic constituitur Ius commune diversorum rituum Ecclesiarum Orientalium, in communione cum Sancta Sede. Ius particulare orientale viget in quantum in canonibus admittatur." Commenting on the then-forthcoming *CCEO*, Victor J. Pospishil, "The Constitutional Development of the Eastern Catholic Churches in Light of the Re-codification of their Canon Law," *Kanon* 5 (1981) 42 states: "Because the [forthcoming *CCEO*] is proposed to be a common code and a papal law, not a law of the respective Eastern Catholic church, the individual church will have no power to directly effect the changes judged necessary in the future."

[228] Joseph Hajjar, "The Synod in the Eastern Church," in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 63. Cf. Edelby, "Unity or Plurality of Codes: Should the Eastern Churches Have a Special Code?" 40: "The principal advantage of this codification was to bring to light the ancient disciplines of every Church, and above all to bring them together, but allowing only a very small place to the law belonging to each particular Church. For the first time in history, these Churches, which appeared to have everything to divide them, were united in their discipline."

[229] See *CS* c. 253 §1. The Maronites had initially refused to take part in the codification process for fear of this outcome. See the speech of Peter Sfair, Maronite titular Archbishop of Nisibis, to the One hundred and fourth General Congregation of Vatican II, October 19, 1964: *Acta Synodalia*, 3/5:94–95: "A. 1929, patriarcha Maronitarum, vocatus ut ad ius canonicum orientale condendum participaret, respondit cum toto suo episcopatu *negative*, quia habent constitutionem propriam seu Synodum provincialem libanensem, a viris in iure peritissimis stabilitam, et quae unica synodus inter magnas synodos orientales in forma speciali approbata fuit a Benedicto XIV, qui inter iurisperitos eminet et praecellit. Et adhuc addebant patriarcha et episcopi Maronitarum: «si aliquid deest in

procedure, religious, temporal goods, rites, persons) in such a way that (*ita ut*) the only law henceforth would be the canons; particular laws contrary to the canons only had force when and in the manner the canons themselves admitted them.[230] Hence, particular laws on the relevant discipline not retained in the canons by omission (*praeter ius canonum*) were abrogated as well (although they perhaps could be reestablished later insofar as they were not *contra ius canonum*).[231] Eastern communities had to fit themselves into the structure established in the

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nostra constitutione, recurrimus ad ius *nostrum* suppletorium, quod est Codex Iuris Canonici Ecclesiae latinae ut ius suppletorium. Et sic in iure canonico orientali partem non habebimus. Non indigemus alio iure; non indigemus hac participatione». At die 20 iulii eiusdem a. 1929, Sancta Apostolica Sedes patriarchae et episcopatui Maronitarum respondit: «Vos vultis conservare in vigore Synodum libanensem, et haec Sacra Congregatio nullam obiectionem contra hoc habet ... Pro certo habeatis quod nullum praeiudicium ... afferetur Synodo libanensi». Tunc Maronitae in tuto esse putarunt privilegia patriarchae *eorum* in Synodo libanensi sancita, et propterea ad ius canonicum orientale condendum participarunt. Sed statuta Synodi libanensis aboleta sunt in novo iure canonico orientali; et hoc perturbationem causavit, quia privilegium praecipuum, quod non amplius viget, est quod patriarcha in Synodo episcopali suo episcopos eligebat et consecrabat et dioecesibus provideat, antequam Sanctam Sedem de hac re certiorem faceret. Patriarchatus Maronitarum erat quodammodo in mundo ecclesiastico ut Respublica Sancti Marini in mundo civili. Si privilegia huiusmodi tolluntur, hoc neminem fugit." Discussion of the response of the pontifical commission to the Maronite patriarch is found in "«Codificazione Canonica Orientale» (1926–1935)," 83. The decision to require the intervention of the Holy See in episcopal elections is found in ibid., 256; the only opposed vote was Sfair himself (the Maronite and Melkite patriarchs also made personal protests against this; see ibid., 264).

[230] For example, see *CA*, conclusion: "Simulac per Apostolicas has Litteras huiusmodi canones vigere coeperint, sua destituentur vi quodlibet statutum, sive generale sive particulare vel speciale, etiam latum a Synodis speciali forma adprobatis, quaelibet praescriptio et consuetudo adhuc vigens, sive generalis, sive particularis ita ut disciplina sacramenti matrimonii unice iisdem canonibus regatur, neque amplius ius particulare iis contrarium vigorem habeat nisi quando et quantum in iis admittatur." The other apostolic letters *motu proprio* use the same phrasing, with only adjustments for the discpline involved (*SN*, conclusion: "disciplina de iudiciis"; *PAL*, conclusion: "disciplina de religiosis et de bonis Ecclesiae temporalibus, itemque certorum verborum significationes"; *CS*, conclusion: "disciplina de Ritibus orientalibus et de personis") and minor spelling and punctuation changes.

[231] On the wide abrogative force of the apostolic letters *motu proprio*, note the comments of Conway, 316: "With even more explicit force than the constitution of Pope Benedict XV, *Providentissima Mater Ecclesia* (May 27, 1917), the motu proprio of Pope Pius XII does away with all other statutes, laws and customs, general or particular, unless explicitly retained, so that these newly promulgated Canons will be the only law on the subject of marriage for the faithful of the Eastern Churches"; Gulovich, "The Motu Proprio *Crebrae Allatae*," 334, 335: "With all due respect to those who think otherwise I believe it can be accepted as an indubitable juridical fact that the sole law governing marriages of Eastern rite Catholics is the one published and promulgated in the motu proprio *Crebrae allatae*, and hence all other canonical provisions on marriage, including those of the decree *Cum data fuerit* are wholly ineffective as of May 2, 1949, except for those instances in which the new law allows for some practice based on legitimate custom or an existing particular law. [...] Hence, in no uncertain terms and in a most sweeping manner the Holy Father abrogated all existing canonical provisions not incorporated in or contrary to the provisions in the new Code. This abrogative clause includes all legitimate customs and all canonical provisions whether they emanated from a local, provincial or ecumenical council. It also includes all general as well as particular regulations issued by former Popes and the various Roman Congregations. In other words, regardless of what the laws or legitimate customs may have been, as of May 2, 1949 the only law governing marriages of Eastern rite Catholics is the law promulgated in the motu proprio *Crebrae allatae*"; Wojnar, "The Code of Oriental Canon Law," 222: "The reason for [the frequent revocation of particular laws of individual communities] seems to be obvious. The

canons, often prejudicial to their former rights.[232] By removing the individual communities' laws and customs on these matters and requiring their particular law henceforth to fit into the structure of the new canons, the promulgation of an Eastern common law removed their canonical individuality in these matters.[233]

An additional restriction on the juridic autonomy of the patriarchal communities concerned territory. Although a person retained their "ritual ascription" regardless of where the person lived,[234] the community was still understood primarily as a territorial entity.[235] This

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discipline of the seventeen Oriental rites developed in different ways. To unify it in one system requires the elimination of many longstanding differences. The unification is realized in the principal norms only, especially in those which concern interritual relations and acts affecting the faithful, in order to avoid their misunderstanding of the differing ways of acting in the several rites." In the case of Wojnar, he argued that "old, longstanding discipline" was not revoked, but in context, with Wojnar specifically citing the clause "nisi quando et quantum in iis admittatur" (ibid., 223), it is clear that such discipline only pertained to the exceptions allowed in *Cleri sanctitati*.

[232] Note the objection of two Greek Melkite synods to, among other matters, "the curtailment of the ancient rights of the patriarchs" by the Eastern codification: Ivan Žužek, "Oriental Canon Law: Survey of Recent Developments," in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 130. Descy, 74–75 reviews this action of the Greek Melkites making such objections, with extensive notes. The letter of Patriarch Maximos IV subsequent to the synod, sent to the pope on October 8, 1959, is found in Italian translation in *Discorsi di Massimo IV al Concilio: Discorsi e note del Patriarca Massimo IV e dei vescovi della sua Chiesa al Concilio Ecumenico Vaticano II* (Bologna: Dehoniane, 1968) 148–152; it particularly focuses on the place of precedence of patriarchs among other ecclesiastical dignities (cardinals, papal legates). Edelby, "Unity or Plurality of Codes: Should the Eastern Churches Have a Special Code?" 41 lists more general criticisms of the canons resulting from this first codification process.

[233] While *CS* contained numerous references to particular law (see the list provided in Wojnar, "The Code of Oriental Canon Law," 223–227; I have counted 75 instances of the specific phrase *ius particulare* in these canons, omitting references to particular laws established by the Apostolic See), the other apostolic letters *motu proprio* contained much fewer: *CA* has 11 instances of *ius particulare*, *SN* has 4, and *PAL* has 10 (with two additional references to *leges particulares*, and a description of *ius particulare* itself). For an argument that these particular law provisions were sufficient for these communities' retention of their juridic autonomy, see Bassett, 246: "Hence, though it is true that the codification of the Oriental canon law comprises a complete collection of laws for these churches and thereby abrogates those laws not therein contained, sufficient references to particular law are indicated to constitute an essential provision in favor of the individual churches and to confirm the assertion that particular law is still a necessary constituent of these churches."

[234] Cf. Leo XIII, *Orientalium dignitas*, IX: *Acta Leonis XIII*, 14:366: "Quicumque orientalis, extra patriarchale territorium commorans, sub administratione sit cleri latini, ritui tamen suo permanebit adscriptus; ita ut, nihil diuturnitate aliâve causa ulla suffragante, recidat in ditionem Patriarchae, simul ac in eius territorium revenerit." Clemente Pujol in two articles, "Distinctio inter «Ritum» et «Iurisdictionem»," 198–199 and "Condicio Fidelis Orientalis Ritus extra Suum Territorium," *Periodica* 73 (1984) 497–498, uses this paragraph to show the distinction between rite and "Church" (jurisdiction). To quote the latter text: "Necessario igitur facienda est distinctio inter Rituum et Ecclesiam, cum nec subiectio ritum necessario sequatur. Ritus facit membrum communitatis ritualis, at non necessario membrum Ecclesiae rituali, nec subiectionem iuridicam in fideli significat. Nihil ergo impedi quominus fidelis determinati ritus orientalis, quoties extra territorium sui ritus degit, subsit iurisdictioni Hierarchae loci, etsi sit ritus diversi. Leo XIII in «*Orientalium dignitas*», n. IX affirmavit huiusmodi fidelem esse sub

understanding had important implications for the patriarchal synod: its members were those "bishops and other hierarchs subject to the patriarch,"[236] among whom were not included those bishops and hierarchs located outside the territory of the patriarchate,[237] and its decrees had force only in the territory of the patriarchate.[238] While the canons of the four apostolic letters *motu proprio* applied to all the Eastern faithful, regardless of where they lived,[239] laws of the patriarchal synod could not apply to members of the same community living outside of the patriarchate.[240] Thus, not only was the juridic autonomy of the patriarchal communities limited

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administratione cleri latini, «*ritui tamen suo permanebit adscriptus*», at, ipso ad territorium redeunte, «*in dicionem Patriarchae recidere*». His verbis significavit quod fidelis, durante eius commoratione extra territorium ritus, sub iurisdictione Patriarcha minime erat. Idem docuerat Pius XII in citatis Mp [*Cleri sanctitati*]."

[235] This jurisprudence continued to be followed, even with the mass migration of members of Eastern communities to areas where Latins predominated. The Sacred Congregation for the Propagation of the Faith affirmed the territorial limitations on patriarchal authority in a letter to the Archbishop of Paris: letter fragment *Maxima est*, May 12, 1890: *ASS* 24 (1891–1892) 390–391: "Maxima est generalis huius sacrae Congregationis quod Patriarchae ritus orientalis exercere nequeant propriam iurisdictionem extra eorumdem Patriarchatus; et consequenter quod sacerdotes et fideles cuiuslibet ritus orientalis, domicilium habentes extra respectivos patriarchatus, sive etiam intra limites eorumdem, sed non habentes parochos proprii ritus, subiiciantur Ordinario latino loci, in quo morantur, praecipue in Dioecesibus latinis. Animadvertatur tamen quod auctoritas Episcoporum latinorum super orientalibus, sibi subiectis, haud protenditur ad quaestiones [ritus], neque ad negotia, respicientia statum monasticum sacerdotum illorum, qui illum iam suscepissent. Hisce in casibus, salva semper auctoritate huius s. Congregationis, expedit quod loci Ordinarius agat sive cum ipsa s. Congregatione, seu cum Patriarcha orientali quoad ritus, sive cum Abbate generali ordinis monastici, quoad negocia monachorum" (the addition of "ritus" is based on its use in the parallel Italian text—"questioni di rito").

[236] *CS* c. 340 §1: "Episcopi ceterique Hierarchae, Patriarchae [...] subiecti [...]."

[237] Cf. *CS* c. 340 §§2 and 4, making provisions for synods of a province outside of a patriarchate whose metropolitan was not subject to a patriarch, and bishops of many provinces not subject to a patriarch. Cf. Pallath, *The Synod of Bishops*, 149: "The participation of the bishops outside the territory and the application of the synodal decisions in their territory were not foreseen in CS." Note that *CS* c. 380 stated that it was to be desired (*Optandum*) that apostolic exarchs outside the patriarchate be present (*intersint*) at the synod, although they seem not to have had any voting rights, nor would the decisions bind their territory (cf. *CS* c. 350 §2).

[238] Cf. *CS* c. 350 §2: "Decreta Synodorum promulgata obligant *in suo cuiusque territorio universo* [...]" (emphasis added).

[239] Note that the promulgation sections in the four apostolic letters *motu proprio* all include clauses similar to the following (from *CA*): "Nos autem per Apostolicas has Litteras motu proprio datas supra recensitos canones promulgamus eisdemque vim legis christifidelibus Ecclesiae Orientalis tribuimus, *ubique terrarum hi sunt et tametsi Praelato diversi ritus sunt subiecti*" (emphasis added); the key element determining subjection to these canons was being a member of an Eastern community, not subjection to an Eastern hierarch or presence in an Eastern territory/region (cf. *PAL* c. 303 §1, 2º–3º).

[240] Through this, one might be able understand an earlier 1928 response of the Sacred Congregation for the Eastern Church concerning the marriage law to which Maronites living in the United States were bound. Insofar as the 1736 Synod of Lebanon that imposed canonical form was a territorial synod, limited to the "province" of the Maronites in the Middle East, it did not constitute particular law of the entire Maronite community. See Gulovich, "Matrimonial

materially by the canons of the codification, but it was also limited geographically, with the synod incapable of enacting a law applicable to all members of its community regardless of their location.[241]

What has been stated concerning patriarchal communities also applies to the other types of Eastern communities. The synods of "archiepiscopates" (now called major archiepiscopal Churches) were mentioned in *Cleri sanctitiati* canon 340 §1, and so the status of an archiepiscopal synod was the same as a patriarchal synod, already analyzed above.[242] Those communities constituted neither as patriarchates nor as archiepiscopates did not have legislative

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Laws of the Catholic Eastern Churches," 232–236, which includes in the notes the response of the congregation as well as the results of an inquiry into the question undertaken by Amleto Cicognani.

[241] Pospishil, "The Ukrainians in the United States and Ecclesiastical Structures," 391 comments: "Such a territorial division of the world applies only to the Oriental Rites of the Catholic Church. It denies the Eastern Catholic churches certain rights outside the region where they originated, such as the possibility of ordaining married candidates to the presbyterate in dioceses which are located in an 'Oriental territory' according to the above definition [of *CS* c. 303 §1, 3º]. The Latin Rite Church does not know such divisions and the Latin Rite is, therefore, always legally in a 'Latin region,' even in the Near East or Eastern Europe, the original seats of most Eastern Catholic Rites." For "regions" and "territories, see *CS* c. 303 §1: "2º Nomine *regionum orientalium* intelliguntur loca omnia, etsi in eparchiam, provinciam, archiepiscopatum vel patriarchatum non erecta, in quibus orientalis ritus ab antiqua aetate servatur. 3º *Territorium ritus orientalis* significat loca in quibus erecta est saltem exarchia pro fidelibus ritus orientalis extra regiones orientales commorantibus." *CS* c. 216 §2, 2º did recognize very limited personal power of the patriarch over his entire community: "Patriarchae in fideles eiusdem ritus, extra limites proprii territorii commorantes, competit potestas quatenus iure communi vel particulari expresse statuatur." The patriarch could be entrusted by particular law with the care of faithful of his rite outside the patriarchate (*CA* c. 86 §3, 3º), but it seems that only the Apostolic See would have the authority to establish such a law, since the patriarch and patriarchal synod could only establish laws for the territorial patriarchate itself. For examples of power over extraterritorial faithful granted to the patriarch in this codification, see *PAL* c. 143 §1, 1º, allowing patriarchs and their retinues to enter into the cloister of monasteries of nuns "si monasteria, ubicumque sint, pertineant ad suum ritum"; *CS* cc. 261–262, on his ability to send priests and visitators to faithful outside the territory, dependent on the consent of the Apostolic See; *CS* c. 283, listing several patriarchal privileges that could be exercised even outside the territory. Cf. Pospishil, "The Constitutional Development of the Eastern Catholic Churches," 52: "The Eastern patriarchs, as well as their churches, possess jurisdiction only within the territorial limits of the patriarchate, and, as a rule, have no authority over the faithful of their Rite outside these limits." Contrarywise, within his patriarchate a patriarch possessed ordinary power; see *CS* c. 240 §1: "Patriarcha potestatem habet ordinariam in universo patriarchatu, ideoque ei ius et officium est exercendi, ad normam canonum et legitimarum consuetudinum, iurisdictionem in Episcopos, clericos et fideles, qui omnes canonicam obedientiam et reverentiam ei exhibere debent." Note that this power did not make him a "hierarch" as understood in the codification, even within his patriarchate; see *PAL* c. 306 §4.

[242] *CS* c. 324 describes the archbishop: "Inter Metropolitas excellit Archiepiscopus, quae dignitas coniuncta est cum sede metropolitana, extra patriarchatus sita, determinata vel agnita a Romano Pontifice aut a Synodo Oecumenica." Interestingly, Wojnar, "The Code of Oriental Canon Law," 429 argues that the archbishop lacked the legislative power attributed to a patriarch by *CS* c. 243 §1 (outside of issuing authentic interpretations), but the archiepiscopal synod possessed it, insofar as *CS* c. 243 §1 did not apply to archiepiscopates (see *CS* c. 329). Whatever the case may be, the actual competence of the legislative organ in the patriarchate and archiepiscopate was the same.

organs particular to their specific status as an Eastern community; a community would have to hold the synod mentioned *Cleri sanctitiati* canon 340 §2 if it consisted of a province, or had to use the eparchial assembly of canons 422–428 if it consisted of a single eparchy, in which case the eparchial bishop alone was the legislator.[243] In each case, the special nature of the individual Eastern community was not recognized.[244]

From this review, one finds that the canons contained flaws in recognizing the juridic autonomy of Eastern communities. For example, the canons misattributed legislative power to the patriarch by stating that he (and not the synod) issued laws, did not recognize the ecclesial importance of the patriarchal synod in relation to other synodal bodies, limited the legislative competence of this synod, and restricted the binding force of its legislation to the territory of the patriarchate. Furthermore, archiepiscopates experienced the same limitations on legislative competence as patriarchates, and the legislative organs of non-patriarchal/archiepiscopal communities were not distinguished from the legislative organs of ecclesiastical circumscriptions constituting only part of an individual community. As George Nedungatt states, "Under the regime of CICO, autonomy was indeed more nominal than substantial."[245]

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[243] *CS* c. 428: "Unicus est in Conventu eparchiali legislator Episcopus, ceteris suffragium tantum consultivum habentibus; unus ipse subscribit constitutionibus quae in Conventu datae sunt; quae, si in Conventu promulgentur, eo ipso obligare incipiunt, nisi aliud expresse caveatur."

[244] As an example: At the time *Cleri Sanctitati* was promulgated the only Malankaran jurisdiction was a province consisting of the Archeparchy of Trivandrum with the Eparchy of Tiruvalla as suffragan. At the same time, the Ruthenians in Canada had their own ecclesiastical province, with Winnipeg as its metropolitan see (elevated on November 3, 1956: Pius XII, *Hanc Apostolicam*: *AAS* 49 [1957] 262–264) with suffragans of Edmonton, Toronto, and Saskatoon. Each group could hold the provincial synod described in canon 340 §2. However, the Malankaran synod encompassed all of the ecclesiastical circumscriptions of a single Eastern community, while the Canadian Ruthenian synod consisted of only part of the circumscriptions of a single Eastern community; some legal formulation should have distinguished synods like the Malabar example from those like the Ruthenian example.

[245] George Nedungatt, "Title 2: Churches *Sui Iuris* and Rites (cc. 27–41)," in *A Guide to the Eastern Code*, Kanonika 10, ed. George Nedungatt (Rome: PIO, 2002) 104.

4.4.3.3. The Competence of the Sacred Congregation for the Eastern Church

The canons of *Cleri sanctitati* continued the trend of restricting the competence of the Sacred Congregation for the Eastern Church. Canon 188 §2 still retained the general principle, established in *Dei providentis*, that all Eastern matters pertained to the Sacred Congregation for the Eastern Church:

> With the right of the Congregation of the Holy Office remaining intact, of the Sacred Congregations it is the Sacred Congregation for the Eastern Church that handles the matters of Easterners, unless something else is expressly stated.[246]

However, canon 195, implementing the clause "unless something else is expressly stated," limited the congregation's competence in several areas.[247]

> To the Congregation for the Eastern Church, over which the Roman Pontiff presides, are reserved all matters of any sort that refer to Eastern persons, discipline, or rites, even if the matters are mixed, that is, they also touch Latins by reason of circumstance or person. So for the Churches of the Eastern rite, this congregation enjoys all the faculties that the other congregations obtain for Churches of the Latin rite, but with the right remaining intact of: the Congregation of the Holy Office according to the norm of canon 193; the Congregation of Sacred Rites according to the norm of canon 200 §§2 and 3; the Congregation for Extraordinary Ecclesiastical Affairs according to the norm of canon 202; also the Congregation for Seminaries and Universities according to the norm of 203 §1 in those things that pertain to colleges that are called universities or faculties; and the Sacred Penitentiary according to the norm of canon 204.[248]

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[246] *CS* c. 188 §2: "Incolumi iure Congregationis S. Officii, ex sacris Congregationibus, Orientalium negotia agit, nisi aliud expresse statuatur, Congregatio pro Ecclesia Orientali." Note that *CS* c. 195 §2 allowed the Eastern congregation to conduct judicial trials: "Haec Congregatio controversias dirimit via disciplinari; quas vero ordine iudiciario dirimendas censuerit, ipsa, servato eadem ordine, cognoscet aut ad tribunalia ordinaria Apostolicae Sedis remittet." This is referenced in *CS* c. 205, while indirect reference to this power is found in *SN* c. 79 §2, where the Sacred Roman Rota can judge appeals of Eastern faithful to the Apostolic See "si a Sacra Congregatione pro Ecclesia Orientali ad eam remittantur." See also Sacred Congregation for the Eastern Churches, "Nel Primo Cinquantennio di Vita della Sacra Congregazione per la Chiesa Orientale," 3 and Vattappalam, 80 on this change.

[247] In addition to the limitations listed below, also note that the Sacred Consistorial Congregation had been granted some competence over Eastern migrants: Pius XII, apostolic constitution *Exul Familia*, August 1, 1952, Title 2, 1 §2 and 2 §3: *AAS* 44 (1952) 693.

[248] *CS* c. 195 § 1. 1º: "Congregationi pro Ecclesia Orientali, cui praeest ipse Romanus Pontifex, reservantur omnia cuiusque generis negotia quae sive ad personas, sive ad disciplinam, sive ad ritus orientales referuntur, etiamsi sint mixta, idest sive rei sive personarum ratione Latinos quoque attingant. Quare pro Ecclesiis rituum orientalium ipsa omnibus facultatibus potitur, quas aliae Congregationes pro Ecclesiis ritus latini obtinent, incolumi tamen iure Congregationis S. Officii ad normam can. 193, Congregationis Sacrorum Rituum ad normam can. 200, §§2, 3,

In addition to the reservations of faculties to the Holy Office[249] (operative since *Dei providentis*) and the Sacred Penitentiary[250] and Sacred Congregation for Seminaries and Universities[251] (each operative since the 1930s and contained in *Sancta Dei Ecclesia*), faculties were also reserved to the Sacred Congregation of Sacred Rites and the Sacred Congregation for Extraordinary Ecclesiastical Affairs.[252] The reference to the Sacred Congregation of Sacred Rites concerned processes for beatifications, canonizations, and relics, as well as "historical" causes of saints,[253]

Congregationis pro negotiis ecclesiasticis extraordinariis ad normam can. 202, nec non Congregationis de Seminariis et Universitatibus studiorum ad normam can. 203, § 1, in iis quae spectant ad Athenaea, quae vocant studiorum Universitates vel Facultates, atque Sacrae Poenitentiariae ad normam can. 204."

[249] *CS* c. 193: "§ 1. Congregatio S. Officii, cui ipse Summus Pontifex praeest, tutatur doctrinam fidei et morum. §2. Iudicat de iis delictis quae sibimet secundum propriam eiusdem legem reservantur, cum potestate has criminales causas videndi non solum in gradu appellationis a tribunali Hierarchae loci, sed etiam in prima instantia, si directe ad ipsam delatae fuerint. §3. Ipsa sola cognoscit ea quae, sive directe sive indirecte, in iure aut in facto, circa privilegium, uti aiunt, Paulinum et matrimonii impedimenta disparitatis cultus et mixtae religionis versantur; itemque, ad eam spectat facultas dispensandi ab hisce impedimentis. Quare quaelibet huiusmodi quaestio ad hanc Congregationem est deferenda, quae tamen potest, si ita censeat et casus ferat, quaestionem remittere ad aliam Congregationem vel ad Tribunal Sacrae Romanae Rotae. §4. Ad eandem pertinet non solum delatos sibi libros diligenter excutere, eos, si oportuerit, prohibere, et dispensationes a prohibitione concedere; sed etiam ex officio inquirere, qua opportuniore licebit via, quae in vulgus edantur scripta cuiuslibet generis damnanda, et in memoriam Hierarcharum reducere, quam religiose debeant in perniciosa scripta animadvertere eaque Sedi Apostolicae ad normam iuris denuntiare. §5. Ipsa una competens est circa ea omnia quae ieiunium eucharisticum pro sacerdotibus divinam Liturgiam celebrantibus respiciunt." Specific reference to its powers are found in *SN* cc. 4, 470, 478 §3, 501 §1; *CS* c. 265, 1º. Note also that it resolved a question on the *magna prostratio* of the Byzantine liturgy: Sacred Congregation of the Holy Office, decree *Supremae huic*, February 12, 1951: *AAS* 43 (1951) 217.

[250] *CS* c. 204: "§1. Sacrae Poenitentiariae praeficitur Cardinalis Poenitentiarius Maior. Huius tribunalis iurisdictio coarctatur ad ea quae forum internum, etiam non sacramentale, respiciunt; quare hoc tribunal pro solo foro interno gratias largitur, absolutiones, dispensationes, commutationes, sanationes, condonationes; excutit praeterea, quaestiones conscientiae easque dirimit. §2. Eiusdem insuper est de iis omnibus iudicare quae spectant ad usum et concessionem indulgentiarum, salvo iure S. Officii videndi ea quae doctrinam dogmaticam circa easdem indulgentias vel circa novas orationes et devotiones respiciunt."

[251] Cf. *CS* c. 203 §1: "Eidem pariter commissa est moderatio regiminis ac studiorum, in quibus versari debent Athenaea seu quas vocant studiorum Universitates vel Facultates quae ab Ecclesiae auctoritate dependent, non exceptis iis quae a religiosae alicuius familiae sodalibus diriguntur."

[252] Several canons on other dicasteries, tribunals, and offices excluded Eastern matters from those congregations' competence: *CS* cc. 194 §2; 197 §4; 198 §1; 200 §1; 203 §1; 205 §1; 206 §2.

[253] *CS* c. 200: "§2. Eiusdem Congregationis praeterea est ea omnia agere quae ad beatificationem et canonizationem Servorum Dei, firma §3, vel ad sacros reliquias quoquo modo referuntur. Haec reservantur sectioni alteri, quam promotor generalis fidei moderatur. §3. Pro causis Servorum Dei in quibus colligi nequeunt depositiones testium coaevorum, nec certa prostant documenta tales depositiones rite suo tempore collectas praebentia, praesto est sectio tertia, quae *historica* audit. Haec sectio suffragium praeterea profert circa libros liturgicos emendandos vel denuo edendos. Huic sectioni praeest relator generalis." The new judicial power attributed to the Eastern congregation

while the reference to the Sacred Congregation for Extraordinary Ecclesiastical Affairs concerned the power to create dioceses, to change their borders, or to name bishops when it required consultation with civil powers, and anything that required consultation with the Secretariat of State, especially concordats.[254] The Eastern congregation also retained its exclusive jurisdiction over both Eastern faithful and Latin faithful in certain regions.[255]

As has been noted previously, such alterations of the competence of the Sacred Congregation for the Eastern Church did not directly affect the autonomy of the individual Eastern communities. No authority was taken from them; they simply had to go to other dicasteries for certain matters. However, these alterations do show that there was a diminishing understanding of the particular nature of the Eastern communities in comparison with Latin ecclesiastical structures. While the particular nature of the Eastern congregation, reflecting the particular nature of the Eastern communities themselves, was affirmed in canon 188 §2 of *Cleri sanctitati*,[256] the increasing reservations of faculties to other congregations, albeit in limited areas

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(*CS* c. 195 §2) may be the reason for this exclusion; because of the change, the judicial processes for beatification and canonization now had to be excluded explicitly from its competence.

[254] *CS* c. 202: "Ad Congregationem pro negotiis ecclesiasticis extraordinariis spectat dioeceses constituere vel dividere et ad vacantes dioeceses idoneos viros promovere, quoties hisce de rebus cum civilibus Guberniis agendum est; insuper Congregatio in ea negotia incumbit, quae eius examini subiiciuntur a Summo Pontifice per Cardinalem a secretis Status, praesertim ex illis quae cum legibus civilibus coniunctum aliquid habent et ad pacta conventa cum Nationibus referuntur." Cf. Vattappalam, 79 (citing Staffa, "De Sacrae Congregationis pro Ecclesia Orientali competentia," 372), stating that the addition of the Sacred Congregation for Extraordinary Ecclesiastical Affairs in *CS* c. 195 §1 does not mean that this congregation was not involved with Eastern matters previously, since the Eastern congregation often remitted matters to it.

[255] *CS* c. 195 §1: "3º In iis praeterea regionibus in quibus eadem sacra Congregatio obtinet plenam et exclusivam iurisdictionem, ipsa, non solum pro fidelibus rituum orientalium, sed etiam pro fidelibus ritus latini eorumque hierarchia, operibus, institutis, piis societatibus, facultatibus potitur, quae aliae Congregationes pro fidelibus ritus latini extra illas regiones obtinent, incolumi tamen iure Congregationis S. Officii, atque integris manentibus quae usque adhuc reservata sunt Congregationi de disciplina Sacramentorum, Congregationi Sacrorum Rituum, Congregationi de Seminariis et studiorum Universitatibus ac Sacrae Poenitentiariae."

[256] Two examples of the particular nature of the congregation are found just before the promulgation of *Cleri sanctitati*: 1) In 1941, the Sacred Congregation for Extraordinary Ecclesiastical Affairs granted to local ordinaries "cuiuslibet ritus" the power to issue general dispensations from abstinence and fasting during the war: Sacred Congregation for Extraordinary Ecclesiastical Affairs, indult *Attentis peculiaribus*, December 19, 1941: *AAS* 33 (1941) 516–517; this indult was later extended: Sacred Congregation of the Council, indult *Attentis difficultibus*, January 22, 1946: *AAS* 38 (1946) 27. In both cases, these dicasteries did not have explicit competence to act for

and perhaps done for practical reasons, displayed an understanding of the Eastern congregation as one among many bodies assisting the pope in the exercise of his ministry. The competences of these congregations could be switched among them as good governance required. With such a diminishing recognition of the special ecclesial role of the Eastern congregation, the recognition of the particular nature of Eastern communities could likewise be impaired; they would be understood simply as a means to organize the faithful, possessing only such "autonomy" as would help this organizational system.

4.4.3.4. Unpromulgated Canons: The Obligatory Force of the Proposed Code and Inclusion of the Pamphilian Jurisprudence

Some of the proposed canons for the Eastern faithful were never promulgated. Two are of particular note. The first, which would have been the initial canon of the *Codex Iuris Canonici Orientalis*, partially mirrored the first canon of the 1917 code:

> The *Codex Iuris Canonici Orientalis* obliges Christian faithful ascribed to the Eastern rites living anywhere in the world, even if subject to a hierarch of the Latin rite; however, it does not bind Latins unless they are expressly named.[257]

Eastern faithful. However, when it came time to withdraw this indult, *two* separate decrees were issued, one for Latin ordinaries (Sacred Congregation of the Council, decree *Cum adversa*, January 28, 1949: *AAS* 41 [1949] 32–33) and one for Eastern ordinaries (Sacred Congregation for the Eastern Church, decree *Cum adversa*, January 28, 1949: *AAS* 41 [1949] 31–32). 2) A similar wartime provision ameliorating Mass obligations had been granted on August 1, 1941 by the Sacred Congregation of the Council, again without having explicit competence over the matter as concerned Eastern faithful (according to *Documents Pontificaux de Sa Sainteté Pie XII 1949*, ed. R. Kothen [Paris/Louvain: Éditions Labergerie/Éditions Warny, 1951] 245 note 2, this decree was directly sent to local ordinaries and superiors general of religious orders and congregations). The provision's withdraw also generated *two* distinct decrees: Sacred Congregation of the Council, decree *Cum extraordinaria*, June 30, 1949: *AAS* 41 (1949) 374; Sacred Congregation for the Eastern Church, decree *Cum extraordinaria*, June 30, 1949: *AAS* 41 (1949) 373.

[257] "I Compiti del Coetus Secundus," *Nuntia* 2 (1976) 54: "Codex iuris canonici orientalis obligat christifideles ritibus orientalibus adscriptos, ubique terrarum commorantes, etsi Hierarchae latini ritus subiectos; latinos autem non tenet, nisi ipsi expresse nominentur." No sources are listed for any canon in the section where this text is related. Lorusso, *Eastern Catholics and Latin Pastors*, 31 calls this formulation "more complex and perhaps more clear" than 1917 *CIC* c. 1.

Like canon 1 of the 1917 code, this canon largely limited the application of the code to specific members of the faithful—those ascribed to Eastern rites, regardless of their territorial location. Also like the 1917 code, this canon admitted of exceptions where Latin faithful would be bound by norms in the Eastern code.[258]

However, the nature of such exceptions differed between the two canons. Those canons of the 1917 code that bound Eastern faithful did so *ex ipsa rei natura*—from the very nature of the matter. On the other hand, the Eastern norm would have bound Latins only when they were "expressly named." This change would have made the "supraritual" canons in the Eastern code somewhat easier to determine than those in the 1917 code. Yet the canon would also appear to continue the trend of viewing Latin law as true universal, general law; the canons of the 1917 code were general enough to bind all simply from the nature of the matter they concerned, while the Eastern code could bind all only if Latins were expressly named.

The Pamphilian jurisprudence (in the form given in the 1882 response of the Sacred Congregation for the Propagation of the Faith) was included in the schema on general norms as part of the proposed canon 13.[259] When the schema containing this canon was presented to the pope, he commented on this norm specifically:

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[258] *CS* c. 15 had explicitly applied certain canons to Latins: "Praescriptis can. 1 §2, 4, 5, 7, 10, 11 §2, 13 tenentur clerici et fideles cuiusvis ritus, latinis haud exclusis." Cf. Lorenzo Lorusso, "L'ambito d'applicazione del Codice dei Canoni delle Chiese Orientali. Commento sistematico al can. 1 del CCEO," *Angelicum* 82 (2005) 468, also noting that *PAL* c. 303 §2 included Latin hierarchs under "Hierarchae cuiusvis ritus" when counsel among hierarchs was prescribed or commended. Some other canons explicity placing obligations on Latins were *SN* c. 436 §3; *PAL* cc. 5, 74 §2, 6º, 171; *CS* cc. 219 §3, 2º, 406, 436 §4, 1º. These provisions clash with the promulgative text of the four apostolic letters *motu proprio*, which stated that the canons had force for Christian faithful of the Eastern Church(es). The promulgation granted force to the canons only among Eastern faithful, yet specific canons bound Latins as well. Note also that the broad language used—"Christian faithful ascribed to the Eastern rites"—could be said to include *non-Catholic* Eastern faithful; see Clemens Pujol, "Orientales ab Ecclesia Catholica seiuncti, tenenturne novo iure canonico a Pio XII promulgato?" *Orientalia Christiana Periodica* 32 (1966) 78–110, who reviews the arguments in favor of these apostolic letters *motu proprio* binding Eastern non-Catholics, but argues that Eastern non-Catholics are, in fact, not bound by them.

[259] 1917 *CIC* c. 13, on which the Eastern canon was based, concerned the application of laws: "§1. Legibus generalibus tenentur ubique terrarum omnes pro quibus latae sunt. §2. Legibus conditis pro peculiari territorio ii

> The Holy Father reviewed the study on Book I, pausing particularly on canons 2, 8 §2, and 13; and regarding the addition made to canon 13, although based on the letter of Propaganda of November 8, 1882 to Apostolic delegates for Easterners, he thought that there should be greater study on this point, because, for example, he did not intend to exclude Easterners from the norms given in the encyclical on the education of youth.[260]

Despite the concern of the pope, it appears that the commission continued to use this text of the canon.[261] Canon 6 of the draft on ecclesiastical laws, which was canon 277 of the proposed *motu proprio De Sacramentis*,[262] stated:

> The faithful of the Eastern rites are not bound to universal laws of the Church, even if given in encyclical letters or apostolic constitutions, unless it concerns matters of faith or morals, a declaration of natural or positive divine law, or it is said expressly that Easterners are bound by the law.[263]

The Pamphilian decision was a source for this canon, as well as several of the documents reviewed previously.[264] The canon would continue on the path of recognizing the juridic

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subiiciuntur pro quibus latae sunt quique ibidem domicilium vel quasi-domicilium habent et simul actu commorantur, firmo praescripto can. 14."

[260] "«Codificazione Canonica Orientale» (1926–1935)," 119–120: "Il S. Padre dà uno sguardo allo studio sul lib. I, fermandosi specialmente sul can. 2, 8 §2, e 13, e a proposito dell'aggiunta fatta a questo can. 13, sebbene basata sulla Lettera di Propaganda 8 Nov. 1882 ai Delegati Ap. per gli Orientali, ritiene che si debba studiare di più quel punto, perché, ad es. Egli non à inteso escludere gli Orientali nelle norme date nell'Enciclica sull'educazione della gioventù." The encyclical on education referenced in the pope's response is Pius XI, encyclical *Divini illius Magistri*, December 31, 1929: *AAS* 21 (1929) 723–762 (Italian); *AAS* 22 (1930) 49–86 (Latin).

[261] "Appears," as the actual text of the specific canon in the schema as presented to the pope is not available in the resources I consulted.

[262] On the *iter* of this proposed *motu proprio*, see Metz, "Quel est le droit pour les Églises orientales unies à Rome?" 401–402: "Au début de l'année 1958, le droit sacramentaire (à l'exception du mariage, promulgué en 1949) avec quelques autres parties était prêt pour la promulgation. C'est alors que survint, le 9 octobre 1958, la mort de Pie XII. Le 12 décembre 1958, le cardinal Agagianian, président de la Commission, présenta à la signature du pape Jean XXIII, qui avait succédé à Pie XII, le texte du motu proprio *De sacramentis* pour la promulgation de cette cinquième tranche du code oriental. Jean XXIII ne donna pas son accord à la promulgation; il la renvoya après la réunion du concile, auquel le pape songeait depuis un certain temps. On connaît la suite: le concile, réuni en 1962, s'est achevé en 1965. Contrairement à ce qu'avait prévu Jean XXIII, la suite du code oriental n'a pas été promulguée après le concile." Cf. similar comments in idem, *Le Nouveau Droit*, 32–33.

[263] "I Compiti del Coetus Secundus," 66: "Fideles orientalium rituum non adstringuntur universalibus Ecclesiae legibus, etsi latis in Litteris Encyclicis vel Constitutionibus Apostolicis, nisi agatur de rebus fidei vel morum, de declaratione legis divinae sive naturalis sive positivae aut expresse dicatur Orientales lege teneri."

[264] The note to the canon at ibid. reads: "Can. 277—Benedictus XIV, const. *Etsi pastoralis*, 26 maii 1742, §IX, n. V; ep. encycl. *Allatae sunt*, 26 iul. 1755, §44; alloc. *Quadraginta*, 27 mart. 1757; S. C. S. Off., 13 iun. 1710; S. C. de Prop. 4 iun. 1631; 7 iun. 1620, n. 1; litt. encycl. (ad Del. Ap. pro Oriente) 8 nov. 1882; litt. encycl. 6 aug. 1885.—Syn. Armen., a. 1911, 146." Note that the year given for the second listed decision of the Sacred Congregation for the Propagation of the Faith is incorrect; it was 1639, not 1620.

autonomy of the East, albeit in simply a "negative" sense by stating by what laws Eastern faithful were *not* bound. However, the language used in the canon also continued the confusion of general and Latin laws: if Eastern faithful were not bound by "universal laws of the Church" in most cases, these laws were in fact *not* universal but actually Latin.[265]

4.4.4. Effects of the Eastern Codification on the Understanding of Eastern Autonomy

As this Eastern codification process proceeded, there was increased recognition of a true disciplinary distinction between the West and East.[266] As Giovanni Řezáč commented:

> The Sacred Congregation for the Propagation of the Faith first recognized the difference on June 4, 1631, and the Holy See often confirmed the same; the first canon of the 1917 *Codex Iuris Canonici* repeats it. However, the new codification of Eastern canon law will, in a certain sense, imprint a definitive confirmation.[267]

Even if many of the laws were practically the same,[268] the fact that there was an Eastern code, juridically distinct from the Latin code, indicated that at least the Eastern communities taken together as one unit possessed some form of juridic autonomy.

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[265] On this confusion see also Herman, "De «Ritu» in Iure Canonico," 124. Herman argues that true universal disciplinary laws not included in 1917 *CIC* were revoked by virtue of c. 6 of that code, and therefore would cease to have force for Eastern faithful. While Latins would have the law replaced by norms in 1917 *CIC*, Eastern faithful would not. Thus, a general norm would appear to be abrogated in favor of a norm erroneously considered equally general, but applicable only to a part of the Church.

[266] Cf. T. Lincoln Bouscaren, Adam C. Ellis, and Francis N. Korth, *Canon Law: A Text and Commentary*, 4th rev. ed. (Milwaukee: Bruce, 1966) 18: "The Oriental Church has in course of preparation a Code of Canon law of its own, several parts of which are already promulgated and in effect. Consequently the Latin and the Oriental Church are bound respectively by distinct but very similar Codes."

[267] Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:17: "Differentiam hanc primo agnovit S.C. de Propaganda Fide die 4 iun. 1631 eandemque saepe Sedes Apostolica confirmavit et primus canon CIC retulit. Confirmationem vero quodam sensu definitivam ipsi nova codificatio iuris canonici orientalis imprimet."

[268] Marcelino Cabreros de Anta, commentary on 1917 *CIC* c. 1, in Marcelino Cabreros de Anta, Arturo Alonso Lobo, and Sabino Alonso Moran, *Comentarios al Codigo de Derecho Canonico* (Madrid: BAC, 1963) 60: "A la vez, sin separarse de las fuentes antiguas, ha unificado, en lo posible, el derecho de la Iglesia oriental y el de la latina, particularmente en las materias de interés común y universal, como el matrimonio y las leyes procesales"; Conway, 316: "The new law adheres closely to the respective canons of *The Code of Canon Law* which became effective for the Latin Church on May 19, 1918, and fulfills the desires frequently expressed during the past forty years that

However, one notes that it was a single unit that possessed this autonomy; whether each individual community also enjoyed autonomy was a different matter. As the process to codify Eastern canon law progressed, and there were indications that a unification of law (at least among Eastern communities) was to take place,[269] previous interpretations of the nature of the individual Eastern communities and their autonomy were reevaluated. Indeed, Herman himself felt the need to revise his earlier definition of rite in another article, "De Conceptu 'Ritus,'" published in 1942:

> Rite, understood according to the meaning about which we treat, can be defined as *a group of faithful that is ruled by its own laws and usages supported by ancient tradition, not only concerning what pertains to liturgical matters but also to canonical discipline, and is recognized as autonomous and distinct from others by the Holy See.* We say, however, *group of the faithful* and not "Church," since under this latter word is generally understood a group governed by its own hierarchy, but a rite, although more conveniently

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marriage law be made uniform for the entire Catholic world. In his motu proprio, His Holiness paid particular attention to the efforts of Cardinal Gasparri to achieve this result, and stressed the great need for uniformity today, when association and marriages between people of different rites is frequent, that uncertainties about the validity of marriage may be removed, and its sanctity safeguarded"; McNicholas, 174: "The aim of this codification of the Oriental Canon Law is to establish, as far as possible and with complete respect for the discipline of each of the Oriental Churches, a common discipline for the Universal Church"; Rohban, 248: "Ce premier Code oriental suivait de très près, preque pas-à-pas, le Code latin de 1917; uniformité presque totale: sur un ensemble de 131 canons, par exemple, concernant le droit matrimonial, 101 canons on un libellé presque identique à celui du code latin"; Szentirmai, 39: "After Pope Pius XI had ordered (in 1929) the codification of the canon law of the Eastern rite Churches united with Rome, Acacius Coussa, Secretary of the Commission instituted for this task, disclosed in 1934 that the new Code of Oriental Canon Law being prepared would resemble in the main (*in plerisque*) the *Codex Iuris Canonici* promulgated in 1917 by Pope Benedict XV for the Latin Church, although it would not be a simple copy of the latter" (he cites Coussa, "De Codificatione Canonica Orientali," 4:528); Wojnar, "The Code of Oriental Canon Law *De Ritibus Orientalibus* and *De Personis*," 213: "As other parts of the Oriental Code, so also this part has the characteristic, in general, of following the Latin Code, because the final aim of this codification is, as far as possible, a common unified discipline for the universal Church through a single code." Such uniformity had been supported by Wernz-Vidal, 113: "Orientales pertinent ad *unam* Christi Ecclesiam, quae unitas maxime ostenditur et fovetur uniformitate legislationis." Anthony Wuyts, "De Monachis Ceterisque Religiosis in Motu Proprio 'Postquam Apostolicis Litteris,'" *Periodica* 42 (1953) 6 does note that uniformist aspects in *PAL* were fewer than in *CA* and *SN*. For comments on how this Latin quality of the first Eastern codified law resulted in affirming the Eastern character of the second codification, see Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 141–144.

[269] Note that the secretary of the codification commission, Acacius Coussa, thought that codification would "bring down the lofty walls" between the faithful of different "rites" ("[C]eciderunt enim sublima moenia quae fideles ab invicem ob ritus diversitatem separabant!"—"De Codificatione Canonica Orientali," 4:526). Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 89, speaking of a similar concern in the *CCEO* codification process: "One of the greatest concerns of many of those involved in the revision of CICO, and some others, was that a common code for all the Easterners would render the law of different Eastern Catholic Churches uniform, destroying the disciplinary identity of each Church."

> ruled by proper bishops, could exist even without them—the Malabars and Italo-Greeks had been subject to Latin bishops for many centuries.[270]

Herman no longer deemed "rite" to be an "order of ecclesiastical law," but rather a determined community—*coetus fidelium*—that was governed by its own laws (but not necessarily its own hierarchy) and was recognized as "autonomous" by the Holy See. Commenting on this change, Meletius Wojnar stated:

> Later, in anticipation of the definition given in the new Oriental Code—through which will be achieved the unification of Oriental Canon Law and the suppression of the disciplines of individual Churches (namely, *ordines iuris*)—[Herman] substituted *coetus fidelium* for *ordo iuris*.[271]

Herman himself explained the reason he changed his definition when replying to an objection doubting its legitimacy after the promulgation of a common Eastern code of law:

> [T]hrough the promulgation of the Eastern code, the law by which Easterners will be ruled henceforth will formally be pontifical law—in other words, the laws and uses by which they have been ruled up to that time will be formally abrogated, and norms promulgated by the authority of the Holy See will succeed in their place. Again, from the very nature of the matter, although there is a great respect of individual Churches, it cannot but happen that most of the norms will henceforth be common to all Eastern rites. We admit that these reasons above all moved us to correct the definition of rite that we proposed earlier.[272]

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[270] Aemilius Herman, "De Conceptu 'Ritus,'" *The Jurist* 2 (1942) 338–339: "Ritus iuxta significationem de qua agimus intellectus definiri potest: *Coetus fidelium qui propriis regitur legibus et usibus antiqua traditione innixis, non solum quod ad res liturgicas sed etiam ad canonicam disciplinam attinet, et qui tamquam autonomus et a ceteris distinctus a S. Sede agnoscitur*. Dicimus autem ritum *coetum fidelium* non Ecclesiam, cum sub hac voce generatim coetus propria hierarchia instructus intelligatur, ritus autem licet convenientius propriis episcopis regatur, existere possit etiam sine his; Malabarenses et Italo-Graeci per multa saecula Episcopis latinis subiecti erant." Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 310–311, arguing that this definition "was the immediate source of PAL c. 301 §1, OE 2 and CCEO c. 27," based on comments found in Nedungatt, *The Spirit of the Eastern Code*, 77 note 18 (concerning *CCEO* c. 27) and 82 note 49 (concerning all three texts).

[271] Wojnar, "The Code of Oriental Canon Law: *De Ritibus Orientalibus* and *De Personis*," 278 note 31.

[272] Herman, "De Conceptu 'Ritus,'" 340–341: "Primo per promulgationem Codicis Orientalis ius quo Orientales deinceps regentur, formaliter pontificium erit, seu aliis verbis legibus et usibus quibus usque ad id tempus reguntur, abrogatis formaliter normae auctoritate Sanctae Sedis promulgatae in earum locum succedunt. Porro ex ipsa rei natura etsi magnus singularum ecclesiarum respectus habeatur, fieri non potest quin pleraeque normae deinceps omnibus ritibus Orientalibus communes futurae sint. Fatemur has rationes nos imprimis movisse ad definitionem ritus olim propositam corrigendam." He cited his earlier definition in note 26. He also responded to the first objection by stating that "pontifical" only references the bond by which laws are imposed, not their content; thus, they would still be ruled by a form of particular/proper law. Cf. Bassett, 86, who thinks that even the adjusted definition "seemed to overemphasize the legal element in rite, and was insufficient in omitting the hierarchical," and at 243–244 argues that a hierarchy is at least "an integral constituent" and essential to the definition if the concept of

Herman admitted space for law for individual rites, but from his description such space appears to have been extremely limited:

> It is helpful to note that even today the similarity existing among the disciplines of various rites is greater than appears at first glance. Also, after the promulgation of the code certain diversities in liturgical form or in discipline, especially discpline connected with the liturgy, will remain. Moreover, the diversity of rites must be explained not only through liturgical or juridic reasons; historical or national reasons have also been the cause for the formation of rites.[273]

The coming of an Eastern code of canon law forced Herman to focus less on the existence of a proper discipline—"order of ecclesiastical law"—as being the fundamental element of "rite," since the Eastern code would likely remove many areas of discipline from the legislative competence of the individual communities and subject them to a common Eastern discipline.[274] Thus, the community—the *coetus fidelium*—was substituted, with disciplinary autonomy subordinated to it and restricted in scope.

Other canonists also began commenting on how the codification would affect the juridic autonomy of the Eastern communities. William W. Bassett states:

> The promulgation of the Oriental Code with its fundamental aim to render more uniform the basic legislation of the Oriental rites was seen by many as an attempt to minimize

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"hierarchy" is expanded to include non-Catholic structures and is not limited by the present time (i.e., a hierarchy existed at some point in the past).

[273] Herman, "De Conceptu 'Ritus,'" 341: "Ad alterum vero notare iuvat, hodie quoque similtudinem inter disciplinam variorum rituum existentem maiorem esse quam primo aspectu apparet. Etiam promulgato Codice certae diversitates sive formae liturgicae, sive disciplinae, praesertim illius quae cum liturgia connexa est, manebunt. Ceterum diversitas rituum non ex solis rationibus liturgicis et iuridicis explicanda est, sed etiam rationes historicae et nationales vim ad ritus afformandos habuerunt." A similar commonality among the laws of various Eastern communities was noted in Coussa, "De Codificatione Canonica Orientali," 4:527–528. Note that Herman's comment is contrary to the opinion of the Secretary Cretoni for the preparatory commission at the First Vatican Council, at the Twenty-first *Congressus*, September 3, 1869: Mansi, 50:32*: "Tanto più che potrebbe forse dirsi, che non è molto minore in alcuni punti la differenza che passa fra una chiesa orientali e l'altra, di quella che passa fra le chiese orientali e la latina."

[274] Cf. Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:141–142: "Disciplinam quod attinet hoc non ita intellegendum est ac si disciplina legibus tantum proprii ritus regeretur; nam dantur v.g. leges pontificiae sive pro omnibus ritibus sive pro aliquo determinato ritu datae quae servari debent. Sed ita ut nulla pars disciplinae per se exclusa sit quae legibus propriis ordinari non possit. (*Hoc saltem usque ad novam codificationem valebat*)" (emphasis with italics added).

> ritual differences and thus undermine the autonomy of the rites. It was even predicted that as a result, the Eastern churches will gradually fade away as formally distinct rites.[275]

For example, Giovanni Řezáč, who admitted the juridic diversity in the Catholic East, added that "unity [was] increasing with the new Eastern legislation."[276] Marcelino Cabreros de Anta noted: "The codification has formed a nucleus of common law for all Eastern rites, placing an ample basis for *juridic unification* among the individual Churches of the East."[277] Antoine Joubeir added that "the codification of Eastern canon law is on track to reduce the concept of the proper law of each canonical rite to the level of simple particular law. [...] It seems that the Church is abandoning the idea of individual canonical rites."[278] Victor J. Pospishil also wrote:

> Although the number of rites will vary in accordance with the criteria adopted by various authors, we can say that this problem will lose its importance with the progressing codification and unification of Eastern canon law. It is true that there are more matters in Oriental canon law relegated to particular law than in the Latin rite canon law, but this will not amount always among Eastern Catholics to such a difference that a separate rite will be thereby established. There will remain one important criterion: whether that particular group possesses one and unified hierarchy of its own.[279]

William W. Bassett also focused less on the capacity for individual "rites" to rule themselves and more on other factors:

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[275] Bassett, 130.

[276] Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:17: "Dum enim in Occidente ob varias rationes supra adductas unitas haec summum gradum attingit, in Oriente aliquo tantum sensu adest, sed sufficienti adhuc ad systema quoddam unitarium construendum. Augetur vero haec unitas cum nova legislatione orientali."

[277] Cabreros de Anta, 1:60: "La codificación ha formado un núcleo de derecho común a todos los ritos orientales, poniendo una amplia base de *unificación juridica* entre las iglesias de Oriente." Cf. Stephanus Sipos, *Enchiridion Iuris Canonici*, 6th ed. (Rome: Herder, 1954) 67: "Codificatione iuris Ecclesiae Orientalis Sancta Sedes ius commune constituit diversorum rituum orientalium, quod hactenus desiderabatur, et ita maxime promovet inter eos unitatem disciplinae."

[278] Joubeir, 30: "[...] la codification du droit canon oriental est en train de réduire ce concept de droit propre à chaque rite canonique au niveau de simple droit particulier... [...] On dirait que l'Église abandonne l'idée des rites canoniques individualisés..." He argues that from another vantage point—that of canonical effects (e.g., hierarchical subjection)—the canonical "rite" retained its importance. Cf. ibid., 99: "[...] les différences disciplinaires dans les divers rites canoniques commencent à s'estomper depuis que le Code Oriental de droit canon uniformise autant que possible la discipline ecclésiastique de tous les Orientaux."

[279] Pospishil, *Orientalium Ecclesiarum*, 13. He made similar arguments in his earlier *Code of Oriental Canon Law: The Law on Marriage*, 21.

> Furthermore, the autonomy of the rites does not consist or depend merely upon their particular law. They also have a distinct and independent hierarchy, a spiritual patrimony formed of their own life and a constitutional direction adapted to the history and basic needs of their members. [280]

Bassett argued that "sufficient references to particular law are indicated [in Eastern canon law] to constitute an essential provision in favor of the individual churches and to confirm the assertion that particular law is still a necessary constituent of these churches."[281] Yet while claiming that codification provided "great leeway [...] for patriarchal and particular law," he simultaneously admitted that "the problem [of defining 'rite'] has even been aggravated by the codification of a common law that seems to obscure the lines of particular law and yet at the same time makes more exacting the observance of precise ritual norms."[282] Further, the idea that the codification provided "great leeway" for particular law is questionable, as noted above.[283] Thus, despite a certain evolution in terminology in the four apostolic letters *motu proprio*, moving from speaking of "Eastern Church" to speaking of "Eastern Churches,"[284] there does not appear to have been a parallel evolution in recognizing the individual communities' autonomy.

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[280] Bassett, 130. He follows this statement with a paraphrase of *OE* 5, declaring the right and duty of Eastern Churches to govern themselves; one would think an essential part of the right and duty of self-rule would be the capacity to make particular law.

[281] Ibid., 246.

[282] Ibid., 7.

[283] Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 61, commenting on the statement of someone at the *Coetus centralis* of the second attempt at codification: "Another suggestion in this regard was, 'L'esperienza del passato (4 Motu proprio) indica che le leggi devono essere generali e che ogni Chiesa eve completare ciò che manca, in Sinodo, con leggi particolari. Sia evitata la poca chiarezza.' This suggestion refers back to the experience with the four MP of Pius XII, which left room, *albeit very little*, for particular law" (emphasis added). Note also Vermeerch-Creusen, 1:70, who state that that particular law was allowed "as much as was permitted in the canons."

[284] The first two apostolic letters *CA* and *SN* only referred to the "Eastern Church," i.e., a singular entity. There are seven total instances in the introduction to *CA*, and ten total instances *SN*. In *PAL*, the plural is used—"Eastern Churches"—in eleven cases; there are three instances of the singular, but all reference the Sacred Congregation for the Eastern Church. *CS* is more complicated. There are eight instances using the plural (Žužek, "Incidenza del *Codex Canonum Ecclesiarum Orientalium* nella storia moderna della Chiesa universale," 319 notes that the reference to *Ecclesiae* in *CS* c. 195 §1, 1º concerns eparchies, as it is paralleled by a reference to Latin Churches—that is, dioceses). Fourteen instances use the singular when referring to the the Sacred Congregation for the Eastern Church. However, there are three other instances in the canons where the singular is used apart from reference to

The reduced recognition of the autonomy of the individual Eastern communities affected the language used in apostolic constitutions erecting Eastern ecclesiastical circumscriptions. The six apostolic constitutions erecting specifically Eastern ecclesiastical circumscriptions issued by Pius XII from the beginning of his pontificate up to 1952 all refer to the particular norms, customs, and laws of a specific Eastern community.[285] For example, the apostolic constitution *Inter praecipuas* of 1946, establishing the patriarchal vicariate for Maronites in Egypt, stated:

> For what pertains to the rule and administration of this diocese, to the rights and obligations of clerics and faithful and to other such things, we order to be observed what the sacred canons and the norms and legitimate customs of the Church of Antioch of the Maronites shall prescribe.[286]

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the curial dicastery. Cf. Bassett, 74 note 4; Lorusso, "L'ambito d'applicazione del Codice dei Canoni delle Chiese Orientali," 468. In addition, note Szentirmai, 41–42, listing four ways that the Eastern communities are designated in the apostolic letters *motu proprio*: *Oriens, Ecclesia Orientalis, Ecclesiae Orientales,* and *Ecclesiae rituum orientalium*. For examples of commentators recognizing a plurality of ecclesial entities in the East after the four apostolic letters *motu proprio*, see Řezáč, *Institutiones Iuris Canonici Orientalis*, 1:10–11: "Nam non datur aliqua Ecclesia Orientalis unica, sed potius adsunt plures Ecclesiae seu Ritus Orientales, terminus qui ordinarie in praeterito evitabatur, forte ad arcendas confusiones quas apud simpliciores ingenerare posset, dum in Mp. 'Postquam Apost. Lit.' (9.2.1952) constanter adhibetur. [...] In hac varietate nos potius denominationem officialem sequemur, sive illam 'Ecclesiae Orientales' quae omnium optima et exactissima est, sive alteram 'Ecclesia Orientalis' [...]"; Romani, 64: "*Ecclesia orientalis* nomen est ideo usu introductum, cui tamen non persona, non entitas quaedam iuris respondet, sed numerus plurium ecclesiarum particularium, earum scilicet quae non latina lingua liturgica utuntur"; Szentirmai, 42: "The appellation '*Ecclesia Orientalis*' can hardly be considered as correct since an Oriental Church as a unity does not exist. Among the several Eastern Churches there are substantial differences as to liturgy and canon law, even after the publication of the new code, which maintains the validity of the particular law in many cases." Cf. Wojnar, "The Code of Oriental Canon Law," 221 note 7. Wojnar attempted to refine Herman's concept of *Ius commune totius Ecclesiae Orientalis* ("De «Ritu» in Iure Canonico," 107–108), preferring to speak of *supraritual non-universal law*, since Herman "do[es] not envision the Oriental Church as 'one unit,' but speak[s] of Oriental rites." While similar to the other cited authors in his recognition of plurality in the East, Wojnar does not here identify the communities as "Churches." For a comparison of the definitions of Herman and Wojnar, see Kuriakose Bharanikulangara, *Particular Law of the Eastern Catholic Churches*, Maronite Rite Series 4 (New York: St. Maron Press, 1996) 12–13.

[285] The apostolic administration of Southern Albania, established by Pius XII, apostolic constitution *Inter regiones*, November 11, 1939: *AAS* 32 (1940) 139–140, encompassed faithful of both the Latin and Byzantine rites, and thus is not taken into account in this enumeration. That constitution contains no reference to any type of Eastern law, but only mentions the rights and faculties that pertained to apostolic administrators throughout the world.

[286] Pius XII, apostolic constitution *Inter praecipuas*, June 22, 1946: *AAS* 39 (1947) 85: "Quod vero attinet ad huius Dioecesis regimen et administrationem, ad clericorum et fidelium iura et onera aliaque huiusmodi servanda iubemus quae sacri canones et Ecclesiae Antiochenae Maronitarum normae et legitimae consuetudines praescribunt."

The other five constitutions from this time period included similar clauses.[287] In such cases, laws of the specific community (in the quote above, the Maronites) governed the ecclesial life of these circumscriptions.

The phrasing found in such apostolic constitutions changed after 1952. Twelve apostolic constitutions were issued by Pius XII between 1953 and 1958 establishing specifically Eastern ecclesiastical circumscriptions. One of these constitutions did not go beyond a generic reference to the rights of apostolic exarchs.[288] Of the remaining eleven, only two contained clauses similar to that quoted above.[289] Eight of the remaining constitutions referred to the norms, prescripts, laws, or customs of the "Eastern Church." For example, in the constitution *Ad Christi*, erecting the Malabar diocese of Tellicherry, it is stated:

> As for what pertains to the election of the vicar capitulary or administrator in a *sede vacante*, to the payments of the episcopal table, to the instruction of youth who grow to the hope of the Church, to the rights and obligations of faithful and priests and to other

[287] Pius XII, apostolic constitution *Ex Petri Cathedra*, August 10, 1947: *AAS* 40 (1948) 173: "ad sacrorum canonum iurisque peculiaris Ecclesiae Coptorum normas"; idem, apostolic constitution *Omnium cuiusvis*, March 3, 1948: *AAS* 40 (1948) 288: "ad normam sacrorum canonum et peculiaris Ruthenae Ecclesiae iuris"; idem, apostolic constitution *De Ruthenorum*, March 11, 1951: *AAS* 43 (1951) 545: "ad normam sacrorum canonum et peculiaris Ruthenae Ecclesiae iuris"; idem, apostolic constitution *Aethiopica Alexandrini*, October 30, 1951: *AAS* 44 (1952) 207: "iuxta sacros Canones et peculiaris Ecclesiae Aethiopicae Alexandrini ritus disciplinam"; idem, apostolic constitution *Paterna semper*, October 30, 1951: *AAS* 44 (1952) 254: "iuxta sacros canones et peculiarem Ecclesiae Aethiopici Alexandrini ritus disciplinam."

[288] Pius XII, apostolic constitution *Quia Christus*, June 10, 1957: *AAS* 50 (1958) 345–347. This constitution does not specify the legal nature of the rights, privileges, honors, and obligations pertaining to such exarchates and their bishops: "In regionibus Anglia et Vallia, exclusa Scotia, exarchatum apostolicum condimus pro populis Ruthenis Byzantini ritus ibidem commorantibus, cum iuribus, privilegiis, honoribus ad has Ecclesias spectantibus. Ad officium autem primi Exarchi Apostolici venerabilem Fratrem Villelmum Godfrey, Archiepiscopum Vestmonasteriensem, eligimus et nominamus, datis scilicet honoribus et iuribus, itemque oneribus impositis quae talium Antistitum sunt propria." That the first exarch was in fact the Latin Archbishop of Westminster, William Godfrey, may explain the hesitance to refer to laws or norms of the Eastern Church or the Ruthenians. On the other hand, the law of *Cleri sanctitati* on apostolic exarchates (cc. 366–387) had been promulgated eight days earlier; thus, the reference to the rights, privileges, honors, and obligations pertaining to such Churches and their bishops may be an implicit reference to the codified Eastern law.

[289] Pius XII, apostolic constitution *Ex quo tempore*, June 29, 1954: *AAS* 46 (1954) 754: "ea omnia Ecclesiae Armenorum praescriptis regantur"; idem, apostolic constitution *Optatissimo unitatis*, July 20, 1956: *AAS* 49 (1957) 117: "ad normam ss. canonum et propriorum byzantini ritus iurium."

> such things, we order to be observed those things that are prescribed by the legitimate norms of the Eastern Church.[290]

Seven other constitutions contain similar phrasing.[291] The remaining constitution made specific reference to the canons on apostolic exarchates in *Cleri Sanctitati*, that is, unified Eastern law.[292] In such constitutions, the specific Eastern communities no longer appeared to possess any notable norms of their own; only the law of the "Eastern Church" was recognized as governing these communities.[293] As the codification and unification of Eastern law progressed, recognition in apostolic constitutions of the individual communities' juridic autonomy diminished.

4.5. Conclusion

The period from the pontificate of Leo XIII through that of Pius XII contained many events impacting the recognition the juridic autonomy of Eastern communities. On the one hand,

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[290] Pius XII, apostolic constitution *Ad Christi*, December 31, 1953: *AAS* 46 (1954) 386: "Quod autem attinet ad Vicarii Capitularis seu Administratoris, Sede vacante, electionem, ad episcopalis mensae emolumenta, ad iuvenum institutionem qui in spem Ecclesiae succrescunt, ad fidelium et sacerdotum iura et onera aliaque huiusmodi, eadem servari praecipimus quae Orientalis Ecclesiae legitimis normis praecipiuntur."

[291] Pius XII, apostolic constitution *Christi Ecclesia*, December 31, 1953: *AAS* 46 (1954) 389: "ad normam iuris communis et peculiarium legum Ecclesiae Orientalis," "haec omnia sive communis iuris normis sive peculiaribus Orientalis Ecclesiae praescriptis regantur"; idem, apostolic constitution *Cum summus*, June 29, 1954: *AAS* 46 (1954) 757: "ea praecipimus quae Orientalis Ecclesiae legitimis normis statuuntur"; idem, apostolic constitution *Hanc Apostolicam*, November 3, 1956: *AAS* 49 (1957) 263: "servatis praescriptis ac legitimis consuetudinibus Orientalis Ecclesiae propriis"; idem, apostolic constitution *Etsi taeterrima*, July 3, 1957: *AAS* 50 (1958) 27: "ad normam iuris et peculiarium Orientalis Ecclesiae legum"; idem, apostolic constitution *Quasi pastor*, July 3, 1957: *AAS* 50 (1958) 250: "ad iuris normam ac secundum peculiares Orientalis Ecclesiae leges"; idem, apostolic constitution *Summam animo*, July 15, 1957: *AAS* 50 (1958) 142: "ad iuris normam ac peculiarium Orientalis Ecclesiae legum"; idem, apostolic constitution *Apostolicam hanc*, July 10, 1958: *AAS* 51 (1959) 156: "servatis tamen praescriptis ac legitimis consuetudinibus Orientalis Ecclesiae propriis."

[292] Pius XII, apostolic constitution *Singularem huius*, May 10, 1958: *AAS* 51(1959) 97: "Sive autem novae Ecclesiae sive eius sacrorum Antistiti iura ac privilegia facimus, honores damus, quae in Litteris Apostolicis De Ritibus Orientalibus et De Personis nuper datis a can. 366 ad can. 387 recensentur, impositis tamen Exarcho omnibus oneribus, quae officium suum consequuntur."

[293] In this regard, one notes that there were two ordinariates established for the faithful of *any* Eastern rite: Sacred Congregation for the Eastern Church, decree *Cum fidelium*, November 14, 1951: *AAS* 44 (1952) 382–383; idem, decree *Nobilis Galliae*, July 27, 1954: *AAS* 47 (1955) 612–613. The establishment of such jurisdictions, while perhaps convenient, did not recognize the disciplinary diversity present among the various Eastern communities.

the clear assertion of the Pamphilian jurisprudence in curial praxis led to its canonization in canon 1 of the 1917 *Codex Iuris Canonici*. There was an increasing understanding that Christians were ascribed not to a liturgical tradition, but to a community. The Sacred Congregation for the Eastern Church was established as a dicastery with nearly sole competence over Eastern matters, indicating the distinctive nature of the relationship of the Roman pontiff to Eastern communities as compared with his relationship to Latin ecclesiastical structures. Pius XI initiated the process to form a specifically Eastern code of law, thereby indicating recognition of some form of juridic autonomy for the East. On the other hand, Latin law continued to be confused with universal law, at least *de facto* through the use of the 1917 *Codex Iuris Canonici* as the basis for the Eastern codification project, and even *de iure* with the application of canons of that code to Eastern faithful, in one case—canon 866 §2—without a clear basis in law or ecclesiology. Competence over certain matters was removed from the Eastern congregation and reserved to other "Latin" curial congregations, while other competences were granted to the Eastern congregation based on territorial rather than ecclesial ("ritual") factors. Each of these events suggests a lack of recognition of the East as ecclesially distinct and subject only to the pope's primatial power, instead understanding "Eastern matters" as simply one way among many to organize curial competences. The codified Eastern law did not affirm a special status for the legislative organs of Eastern communities, and their self-governing capacity was restricted both by territory (members ascribed to a "rite" outside of the proper territory of their community were not bound by such laws) and by material (outside of an express reference, communities could not enact laws contrary to any of the pontifically-promulgated Eastern canons).

With the ascension of John XXIII and the calling of the Second Vatican Council came the recognition of Eastern communities as Churches, having a right to rule themselves in accord

with their own traditions. A second codification process would begin, attempting to implement this ecclesiological vision of the council. The debates and documents of the council, the process to create an Eastern code, and the resulting canons are the final subject of this dissertation.

CHAPTER 5

From the Second Vatican Council to the Codex Canonum Ecclesiarum Orientalium

5.1. Introduction

The purpose of this chapter is to trace the developing recognition of the autonomy of Eastern communities from the Second Vatican Council to the current norms of the *Codex Canonum Ecclesiarum Orientalium*. The debates surrounding the Second Vatican Council touched on aspects of autonomy, and the resulting documents, particularly the conciliar decree *Orientalium Ecclesiarum*, recognized the right and duty of Eastern communities to govern themselves in accord with their own traditions. Following the council, Pope Bl. Paul VI instituted a new Eastern codification process to take into account these conciliar teachings. This process resulted in the promulgation of the *Codex Canonum Ecclesiarum Orientalium* by Pope St. John Paul II on October 18, 1990, which contains the current norms governing the exercise of autonomy by the Eastern Catholic Churches.

This chapter is divided into three sections. The first section will review the discussion and documents of the Second Vatican Council touching on the autonomy of Eastern communities. The second section will examine the post-conciliar Eastern codification process, specifically the decision concerning the codal structure and the inclusion of the Pamphilian jurisprudence in the new code. The third section will analyze pertinent sections of the new canonical legislation bearing on autonomy.

5.2. The Second Vatican Council

After the death of Pope Pius XII, Angelo Giuseppe Roncalli was elected as Bishop of Rome on October 28, 1958, taking the name John XXIII. Less than three months later, during a solemn allocution at the Basilica of St. Paul Outside the Walls,[1] the pope announced:

> Our venerable brothers and beloved sons! We announce first to you, certainly trembling a little with emotion, but also with a humble steadfastness of purpose, the name and the proposal of a double celebration—a diocesan synod for the city of Rome, and an ecumenical council for the universal Church. Copious illustrations about the historical and juridic significance of these two proposals are not necessary for you, our venerable brothers and beloved sons. These will lead happily to the desired and awaited updating of the Code of Canon Law, which must accompany and crown these two tests with practical application of measures of ecclesiastical discipline that the Spirit of the Lord Itself will suggest along the way.[2]

The Eastern codification project was also associated with these celebrations. However, unlike the updating of the 1917 *Codex Iuris Canonici*, the pope suggested that the promulgation of the *Codex Iuris Canonici Orientalis* would occur prior to the council: "The forthcoming promulgation of the Code of Eastern Law will give a preannouncement of these events."[3] The pope repeated these intentions few months later in his encyclical *Ad Petri Cathedram*:

> And, moreover, the plan we have announced—that it is our intent to celebrate an ecumenical council and a Roman synod, and likewise to prepare a code of canon law accommodated to present-day needs, and to issue a new code of the same type for the Church of the Eastern rite—has pleasingly obtained the wide consent of many, and has fed a common hope that the minds of all would be incited towards recognizing the truth

[1] John XXIII, solemn allocution *Questa festiva*, January 25, 1959: *AAS* 51 (1959) 65–69.

[2] Ibid., 68–69: "Venerabili Fratelli e Diletti Figli Nostri! Pronunciamo innanzi a voi, certo tremando un poco di commozione, ma insieme con umile risolutezza di proposito, il nome e la proposta della duplice celebrazione: di un Sinodo Diocesano per l'Urbe, e di un Concilio Ecumenico per la Chiesa universale. Per voi, Venerabili Fratelli e Diletti Figli Nostri, non occorrono illustrazioni copiose circa la significazione storica e giuridica di queste due proposte. Esse condurranno felicemente all'auspicato e atteso aggiornamento del Codice di Diritto Canonico, che dovrebbe accompagnare e coronare questi due saggi di pratica applicazione dei provvedimenti di ecclesiastica disciplina, che lo Spirito del Signore Ci verrà suggerendo lungo la via."

[3] Ibid., 69: "La prossima promulgazione del Codice di Diritto Orientale ci dà il preannunzio di questi avvenimenti."

> more fully and deeply, towards beneficially restoring Christian morals, and towards happily restoring unity, concord, and peace.[4]

This statement in the encyclical, like that of the allocution, directly connected the Eastern codification project with the ecumenical council. However, there were differences between the statements as to the nature of this connection. In his allocution, the pope declared that the promulgation of the Eastern code would "preannounce" the council; the statement implied that the promulgation was intended to be done rather quickly, built on the work of the first codification process. However, in his encyclical, the code to be issued was described as "new" and "of the same type" as the revised *Codex Iuris Canonici*, namely, "accommodated to present-day needs." This statement suggests some revision of the previous canons (akin to that to be done with the 1917 code), requiring more work and a lengthier process. Thus, on the eve of the council, the exact status of the Eastern codification project—and exactly how Eastern autonomy would be structured in it—was unclear.

5.2.1. Antepreparatory Phase

On Pentecost, May 17, 1959, during solemn vespers at the Vatican, Pope John XXIII announced the creation of the Antepreparatory Commission for the Council.[5] Joseph Komonchak lists five duties given to the commission:

> (1) to contact the bishops of the world for their advice and suggestions, (2) to gather proposals from the dicasteries of the Roman Curia, (3) to learn the views of the

[4] John XXIII, encyclical letter *Ad Petri Cathedram*, June 29, 1959: *AAS* 51 (1959) 498: "Ac praeterea, quod nuntiavimus, Nobis in animo esse Oecumenicum Concilium ac Romanam Synodum celebrare, itemque Codicem iuris canonici, hodiernis necessitatibus accommodatum apparare, novumque eiusdem generis Codicem pro Orientalis ritus Ecclesia edere, id placuit admodum multorum obtinuisse consensum, communemque aluisse spem fore ut omnium animi ad veritatem satius altiusque agnoscendam, ad redintegrandos salutariter christianos mores, et ad restituendam unitatem, concordiam et pacem feliciter excitarentur."

[5] John XXIII, allocution *Volge il settimo*, May 17, 1959: *AAS* 51 (1959) 420.

> theological and canonical faculties of Catholic universities, (4) to sketch the general lines of the topics to be discussed at the Council, and (5) to suggest various bodies (Commissions, Secretariats, etc.) to prepare the Council's agenda.[6]

The commission sent to the bishops and prelates, superiors general of religious orders, and Catholic universities and theological faculties a circular letter asking for their general comments on what topics should be discussed at the forthcoming council.[7] The commission then sorted all of the responses and prepared summaries of the responses received, divided by topic.[8]

For the most part, the responses received by the antepreparatory commission did not explicitly concern the juridic autonomy of Eastern communities. One notable exception was the response of Giuseppe Sensi, the apostolic delegate to Jerusalem and Palestine, who attacked the idea of an ecclesial dualism implying possession of juridic autonomy by Eastern communities:

> Is it possible, in the present historical situation, still to conceive a Catholic Church divided, as at the time of the Byzantine Empire, into two branches, united solely in faith and obedience to their supreme head, but distinct and autonomous in the rest? Is it not anachronistic today to want to distinguish the authority of the supreme pastor from that of the patriarch of the West, by supposing that—admitting such a distinction— the first is exercisable only rarely, and rejecting the second [as applicable to Eastern faithful]? These Melkites emphasize that the Greek Catholic Church and the "Orthodox" one are two branches of the same Church, one of which is united with Rome and the other separated. However, the Western Church is another Church, with which the Greek Catholic Church is united. The Catholic Church is thus the result of these two united Churches. [...] The observer who lives in these countries is in a position to detect that the principal cause of evils that afflict the Melkite Church resides in the aforementioned conception, which makes it very difficult for the Holy See to offer a solution to these evils and frustrates its action in large measure. In conclusion, would it not be desirable to clarify, not only for the eyes of the Easterners but above all for those of the Westerners who in this regard hold confused or overly theoretical views, what is the real import of the expression "Eastern Church"—namely, does it concern only rite, customs, privileges,

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[6] Joseph A. Komonchak, "The Antepreparatory Period," 1: https://jakomonchak.files.wordpress.com/2012/01/antepreparatory-period.pdf (accessed July 18, 2016).

[7] The letter to the bishops and prelates is found in *Antepraeparatoria*, 2/1: x–xi. A translation is found in Komonchak, 9, who states that the letter to universities and faculties was similar. The head of the commission, Domenico Cardinal Tardini, had initially proposed sending a questionnaire to the bishops, mirroring the preparation for the First Vatican Council. However, it was eventually decided to send only a circular letter; see ibid., 4–8.

[8] Komonchak, 10–11.

> and Eastern discipline? Or can it also receive the dualism (West–East) to which the Melkites are strenuously attached, and the autonomy that would follow?[9]

Sensi admitted that certain differences existed between the East and the West: rites, customs, privileges, and discipline. However, he considered as anachronistic a dualism resulting in autonomy for the Eastern Church, albeit with it still subject to the pope or an ecumenical council as a supreme authority. He felt that Melkites suffered difficulties because they refused to accept many papal acts on the basis that they were subject to the pope only when he acted as the supreme authority of the Church, and not as Patriarch of the West, a position based on the Pamphilian jurisprudence. Thus, Sensi's response parallels the comments of Seraphino Cretoni, the secretary of the preparatory Eastern commission for the First Vatican Council, who thought praxis based on such dualism to be an "embarrassment" preventing the implementation of disciplinary reforms in the East.[10]

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[9] *Antepraeparatoria*, 2/4:440–441: "In breve: si può, nella presente congiuntura storica, concepire ancora la Chiesa Cattolica divisa, come al tempo dell'impero di Bisanzio, in due rami, uniti soltanto nella fede e nell'obbedienza al suo Capo Supremo, ma distinti e autonomi nel resto? Non è oggi anacronistico voler distinguere l'autorità del Pastore Supremo da quella del Patriarca dell'Occidente, per sottoporsi alla prima che—ammessa una tale distinzione—si eserciterebbe assai di rado, e rifiutare la seconda? Questi melchiti sottolineano poi che la chiesa greco-cattolica e quella «ortodossa» sono due rami di una stessa chiesa, l'uno dei quali è unito con Roma e l'altro è separato, mentre la chiesa occidentale è un'altra chiesa, con la quale però la chiesa greco-cattolica è unita. La Chiesa Cattolica è perciò la risultante delle due chiese unite. [...] L'osservatore che vive in questi paesi è in grado di rilevare che la causa principale dei mali che travagliano la chiesa melchita risiede nella qui sopra accennata concezione, la quale rende molto difficile alla Santa Sede di portare rimedio ai mali medesimi e frustra in larga misura la sua azione. In conclusione: sembrerebbe desiderabile chiarire, non soltanto agli occhi degli orientali ma sopratutto a quelli degli occidentali che talvolta hanno al riguardo vedute confuse o troppo teoriche, quale sia la reale portata dell'espressione «chiesa orientale». Si tratta, cioè, soltanto del rito, dei costumi, dei privilegi e della disciplina orientali? Ovvero si può accettare anche il dualismo (Occidente–Orientale) a cui i melchiti sono strenuamente attaccati, e l'autonomia che ne consegue?" The phrase "confused or overly theoretical views" in Sensi's response appears to refer to desires of some Latin prelates to have greater autonomy through the establishment of patriarchates in the West or endowing national conferences of bishops with law-making power; see the response of the PIO in ibid., 4/1:150. The Sacred Consistorial Congregation did not think such suggestions to change the contemporary legislation were opportune: ibid., 3:42–43. For an extra-conciliar argument affirming Eastern autonomy, see the response of the Greek Ordinary of Athens, George Calavassy, to an Orthodox bishop, found in Adriano Garuti, *Il Papa Patriarcha d'Occidente? Studio storico dottrinale* (Bologna: Francescane, 1990) 178 note 4.

[10] Twenty-first *Congressus*, September 3, 1869: Mansi, 50:37*: "Non sarebbe dunque espediente che avesse l'aria il concilio di confermare la rimembrata massima [the Pamphilian jurisprudence], la quale poi avrebbe per lo meno bisogno d'essere bene chiarita e determinata; tanto più che la medesima ha costituito pur troppo un imbarazzo, quando si è trattato di regolare la disciplina degli orientali."

As the pope had specifically mentioned the Eastern codification project twice in relation to the calling of the council, it is no surprise that some responses also mentioned it.[11] However, the unclear status of the project led to a variety of proposals. Bishop Nicholas Elko, Ruthenian Apostolic Exarch of Pittsburgh, wished that the promulgation of the rest of the code be carried out as soon as possible: "It would be praiseworthy if, on the occasion of the ecumenical council, the entire *Codex Iuris Canonici Orientalis* was published with needed or opportune explanations so that all Eastern Catholics would have a determined norm of action."[12] George Alapatt, Malabar Bishop of Trichur, also asked that the remaining portions of the code "be published as soon as possible."[13] Neither response indicates that these prelates thought an entirely new codification project would be initiated.[14]

On the other hand, Elie Farah, Maronite Archbishop of Cyprus, asked:

> In the new codification of the Eastern Churches, would it not be appropriate to unify all this legislation and leave to each rite that which is strictly proper to that rite? For example, why have differences between some of the Eastern rites on the publication of the banns, impediments of affinity, etc.?[15]

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[11] A summary of responses concerning the Eastern code is found in *Antepraeparatoria*, 2/appendix part 1:239–240. However, this summary does omit several of the responses detailed below. Cf. Néophytos Edelby and Ignace Dick, *Les Églises Orientales Catholiques: Décret «Orientalium Ecclesiarum»*, Unam Sanctam 76 (Paris: Cerf, 1970) 58–59, who state that many comments indicated displeasure with the codification, but for different reasons; some thought it too Latin, others too Eastern, and still others too Byzantine. They also state that some Eastern prelates were pressing towards the maximum internal disciplinary autonomy compatible with being in communion with Rome, while others found the current situation acceptable provided Roman interventions were not reinforced.

[12] *Antepraeparatoria*, 2/6:473: "Laudandum esset si occasione Concilii Oecumenici totus Codex Iuris Canonici Orientalis publicaretur cum explanationibus necessariis vel opportunis ut omnes Orientales Catholici determinatam haberent normam agendi."

[13] Ibid., 2/4:211 (#6): "Partes iuris orientalis adhuc non editae quamprimum iuris publici fiant."

[14] Bishop Alapatt only asked that "termini et principia in iure Codicis canonici Orientalis contenta melius enucleentur" (ibid.). His other suggestions, aside from that concerning marriage impediments (ibid., 2/4:212 [#12]), would not seem to require changes to the already-promulgated Eastern canons.

[15] Ibid., 2/4:68: "Dans la nouvelle codification des Églises Orientales, ne serait-il pas opportun d'unifier toute cette législation et de ne laisser à chaque rite que ce qui est strictement propre à ce rite: par ex: pourquoi avoir de différences entre certains rites orientaux sur la publication des bans, les empêchements d'affinité, etc.?" For the possibility of particular law on the publication of the banns, see *CA* c. 12; for affinity, see *CA* c. 68 §2, 1º and §3, 1º.

That Farah specifically referenced norms on marriage law, which had already been codified in *Crebrae allatae*, indicated his belief that the "new codification" would review even the Eastern canons that had already been promulgated. His response also suggested that some of the autonomy of the individual Eastern communities concerning such matters be removed, with discipline rendered more uniform through the pontifically-promulgated law of the new code.

Melkite Patriarch Maximos IV Saïgh and other Melkite prelates responded to the Antepreparatory Commission by explicitly asking for a revision of all Eastern law, including the previously-promulgated canons:

> We propose a *revision of the parts of the future Code of Eastern canon law, whether already published or to be published, before its definitive promulgation*. This revision, in which the Eastern Churches themselves should be better represented and more heeded, would be done in view of a greater fidelity to authentic traditions of the Christian East, without excluding the opportunity of doing retouches to simplify and mitigate the ancient law. We think in particular of the marriage law and the necessity, for our countries of the East, to recognize the validity of mixed marriages contracted before an Orthodox authority. *This is a very important point*, regarding which our patriarchate and the bishops meeting in synod have frequently told the Holy See, corroborating their propositions through factual arguments that they consider decisive.[16]

[16] *Antepraeparatoria*, 2/4:459–460: "Nous proposons une *révision des parties, déjà publiées ou à publier, du futur Code de droit canonique oriental avant sa promulgation définitive.* Cette révision, dans laquelle les Églises orientales elles-mêmes devraient être mieux représentées et davantage écoutées, se ferait dans le sens d'une plus grande fidélité aux authentiques traditions de l'Orient chrétien, sans exclure l'opportunité d'opérer des retouches tendant à simplifier et à alléger le droit ancien. Nous pensons en particulier au droit matrimonial et à la nécessité qu'il y a, pour nos pays d'Orient, à reconnaître la validité des mariages mixtes contractés devant l'autorité orthodoxe. *C'est un point trés important* sur lequel notre Patriarcat et les Evêques réunis en synode ont fréquemment entretenu la Saint-Siège Romain, corroborant leurs propositions par des arguments de fait qui leur paraissent décisif." Comments of the Melkite prelates lamenting how the new codification did not respect the prerogatives of the patriarchate and subjected the decisions of patriarchs to prior or subsequent authorization from the Roman Curia are found in ibid., 2/4:461 (b). The problem of canonical form for mixed marriages mentioned in this response was also a very grave concern for other prelates; see, for example, the comments of Domenico Caloyera, Apostolic Administrator of the Greek Exarchate of Istanbul, in ibid., 2/2: 791; Elie Farah, Maronite Archbishop of Cyprus, in ibid., 2/4:69; Maronite Patriarch Paul II Peter Méouchi, in ibid., 2/4:389; Syrian Patriarch Ignace Gabriel I Tappouni with other Syrian bishops, in ibid., 2/4:392; Armenian Patriarch Grégoire-Pierre XV Agagianian with other Armenian bishops, in ibid., 2/4:397–398; Antoine 'Abed, Maronite bishop of Tripoli, in ibid., 2/4:403–404; Giuseppe Sensi, Apostolic Delegate to Jerusalem and Palestine, in ibid., 2/4:440; Vincent Gelat, auxiliary of the Latin Patriarch of Jerusalem, in ibid., 2/4:443; Alexandros Scandar, Coptic bishop of Assiut, in ibid., 2/5:382; Paul Nousseir, Coptic Bishop of Minya, in ibid., 2/5:384–386; Isaac Ghattas, Coptic Archbishop of Thebes, in ibid., 2/5:388; Amand Hubert, Apostolic vicar of Eliopoli, in ibid., 2/5:398; Youhanna Nueir, Coptic auxiliary of Thebes, in ibid., 2/5:403; Seraphin Uluhogian, Abbot General of the Mechitarist Order in Venice, in ibid., 2/8:49.

Archbishop Paolo Bertoli, nuncio to Lebanon, supported a revision of all Eastern law as well, but asked that the question be brought before the council itself:

> Moreover, concerning the Eastern canonical code, which has aroused different opinions—and, as would be expected, not a few of them critical—it is asked that the study and reexamination be remanded (as is now officially admitted) to the Council itself.[17]

The Melkites had hoped that the revision of Eastern law that they proposed would be more faithful to Eastern traditions than the canons promulgated by Pius XII, which had been based in many cases on the canons established for the benefit of the Latin Church in the 1917 code. While supporting a full review of the Eastern codification project like the Melkites, Bertoli differed in the manner that it would be carried out—not necessarily with a commission with better Eastern representation, but (at least partially) by the ecumenical council itself.

These foregoing responses, as well as others offering criticisms on the Eastern codification,[18] presume the existence of a juridic autonomy for the East, although the place

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[17] Ibid., 2/4:413: "Circa, poi, il Codice Canonico Orientale, che ha suscitato pareri diversi e, com'era da attendersi, non poche critiche, si chiede che lo studio ed il riesame venga rimandato—com'è ormai ufficialmente ammesso—al Concilio stesso." I am not certain what "officially admitted" references, other than perhaps the pope's statement in *Ad Petri Cathedram*.

[18] For example, see the comments of Coptic Patriarch Stephen I Sidarouss of Alexandria and two of his bishops in *Antepraeparatoria*, 2/5:377: "*Le Nouveau Code Oriental*: La promulgation des parties du Code parues à ce jour, loin d'opérer un rapprochement, ont été cause d'éloignement. Ainsi, pour les Droits et Prérogatives des Patriarches, leur élection, le choix des Evêques, etc. de même pour le mariage: invalidité pour l'inobservance de la forme, les empêchements dirimants, le sous-diaconat comme empêchement dirimant allant à l'encontre des coutumes traditionnelles plus que séculaires dans l'Église Copte"; of Youhanna Kabes, an auxiliary of the Coptic Patriarch, in ibid., 2/5:401: "De plus les Schismatiques ont éte blessés depuis la parution du nouveau Code Oriental, dans la partie qui concerne le mariage, et qui considère nul le mariage bénit par un prête schismatique, alors que jusqu'ici, il était considéré comme valide. De plus dans le «De Personis», le droits et les privilèges des Patriarches, ont été diminués. Les Schismatiques en ont pris conaissance, ils ont été choqués, et considèrent cela dans leur façon de penser: «impérialisme» d'ou l'idée qui leur est venue: «Rome veut l'unité pour dominer les Églises Orientales»; plusieurs articles ont été écrits dans ce sens dans le journal quotidien schismatique «Misr»"; of Raphaël Rabban, Chaldean archbishop of Kirkuk, in ibid., 2/4:367: "A mon humble avis: 1) le Code de droit Canon oriental, que le St-Père a l'intention de publier, devrait éviter toute expression qui pourrait signifier quelque «inégalité» dans les effets des canons sur les membres de l'Église Catholique. Les canons publiés jusqu'à présent pour l'église Orientale, portent, hélas! quelques unes de ces inégalités!" For complaints about the rights of patriarchs in particular, see the summary of the prelates' responses given in ibid., 2/appendix part 1:391–394, and the suggestions of the PIO in ibid., 4/1:149–150. On a plea to make clear that all communities were equal in the Church, see the response of the PIO in ibid., 4/1:158.

where that autonomy rested (the whole East or the individual communities) was left unstated.[19] However, some responses asked that there be a single code of law for the entire Church. Paul Myskiw, Protoarchmandrite of the Basilian Order of St. Josaphat, stated that "it would be in the desires of the Easterners that the canon law of West and East be rendered into one code."[20] Maronite bishop Antoine 'Abed asked that a theology of the laity be incorporated both in a tract on the Church "and in a corresponding title of a universal code of canon law."[21] Neither response, however, went into detail as to how such a code would be structured, namely, whether all laws within a universal code would be applicable to all communities, or some laws would be restricted to specific communities, as was proposed early in the first codification project.[22]

While the response of the Pontificale Istituto Orientale did not expressly indicate the number of codes for a future codification, it did ask that a single discipline be established for the whole Church, within which the particular laws of individual communities would find a place.

> The Pontificale Istituto Orientale asks that Latins, in the reformation of their own discipline and liturgy, have before their eyes the discipline and liturgy of the Easterners.
>
> 1) For the good of the universal Church it would truly help that, save legitimate laws and customs of each rite, the same discipline have force everywhere in the Catholic world. As yet, it has been almost exclusively demanded only on the part of the Easterners that they conform themselves to Latin discipline and customs. The equality of rites, however, seems to demand that, according to the cases, Latins receive the discipline and uses of the Easterners.

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[19] Cf. the comments of Isidore Borecky, Ruthenian Bishop of Toronto, in ibid., 2/6:119, stating that having the same discipline for clergy and people in different parts of the world was not necessary for the unity of the Church.

[20] Ibid., 2/8:61: "In votis orientalium esset, ut ius canonicum occidentale orientaleque in unum redigatur codicem (cf. MP *Cleri Sanctitati*, *A.A.S.* 1957, pag. 434)."

[21] Ibid., 2/4:402: "Elaboratio cuiusdam theologiae laicatus christiani ubi iura et officia, statusque christianae vitae in coelibatu aut in matrimonio veram suam positionem obtineant in tractatu de Ecclesia Christi, et in correspondenti titulo Codicis Iuris Canonici Universalis."

[22] Cf. "«Codificazione Canonica Orientale» (1926–1935)," *Communicationes* 26 (1994) 128–129 (*foglio di ufficio*), 131 (Pietro Cardinal Gasparri's *votum*).

2) What was done very well in the constitution of Pius XII of happy memory regarding the matter of the Sacrament of Orders can be done in other similar matters, for example, in determining feasts of precept.[23]

This response somewhat reflected the proposals made in the pontifical commission overseeing the first codification to form a single universal code of law for the Church. In both cases a uniform discipline would exist, within which the laws and customs of individual communities would find a place. However, in the case of the PIO proposal, the future universal discipline would be a mix of Latin and Eastern norms.[24] This proposal rejected the idea that Eastern faithful should simply "conform themselves to Latin discipline and customs," as would have generally been the case had the earlier proposal for a single codification taken place.[25] Rather, in certain cases Latins would "receive the discipline and uses of the Easterners."[26]

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[23] *Antepraeparatoria*, 4/1:149: "*De respectu ad Orientalium consuetudines habendo*. Pont. Institutum Orientalium Studiorum postulat ut Latini in reformatione suae disciplinae et liturgiae prae oculis habeant disciplinam et liturgiam Orientalium. 1. Ad bonum Ecclesiae universae sane confert, salvis legitimis cuiusque Ritus legibus et consuetudinibus, eandem disciplinam ubique in orbe catholico vigere. Hucusque fere exclusive ex sola parte Orientalium exigebatur ut se disciplinae et consuetudinibus latinis conformarent. Aequalitas rituum autem postulare videtur ut, secundum casus, Latini disciplinam et usus Orientalium accipiant. 2. Quod optime factum est in Constitutione Pii XII f. m. quoad materiam Sacramenti Ordinis, in aliis similibus rebus fieri potest, v. gr. in determinandis festis de praecepto." The reference to "Constitutione Pii XII" concerns the apostolic constitution *Sacramentum ordinis*, November 30, 1947: *AAS* 40 (1948) 5–7, establishing for certain the matter and form of the sacrament of orders; Meletius M. Wojnar, "Decree on the Oriental Catholic Churches," *The Jurist* 25 (1965) 177 notes that the pope's decision was made on the basis of "the argument taken from Oriental customs." Interestingly, along with this desire for disciplinary uniformity (at least in partial measure), the PIO also expressed an affirmation of *unitas in varietate*, specifically citing the Mystical Body concept (*Antepraeparatoria*, 4/1:143–144).

[24] For an example of a more specific request that Latins adopt an Eastern custom, see the comments of Domenico Caloyera, Apostolic Administrator of the Greek Exarchate of Istanbul, in *Antepraeparatoria*, 2/2: 792: "Cum, ingravescentibus malis, magis magisque manifestetur quod «*messis quidem multa operarii autem pauci*» (*LC.* X, 2) proponere liceat Orientalis Ecclesiae consuetudinem de diaconibus latino quoque ritui extendi."

[25] Again, note that Pietro Cardinal Gasparri had considered four-fifths of law issued for the benefit of the Latin Church in 1917 *CIC* to be universal law, applicable to Eastern faithful with only a few modifications: "«Codificazione Canonica Orientale» (1926–1935)," 130.

[26] Joseph O'Sullivan, Bishop of Kingston, Canada, and Joseph Ryan, Bishop of Hamilton, Canada, also supported some uniformity of discipline, although from their comments such uniformity would appear to be limited to matters then causing problems between Eastern faithful and Latins who were living in the same place. For Bishop O'Sullivan, see *Antepraeparatoria*, 2/6:33: "Ius Canonicum Ecclesiae Occidentalis et Orientalis, quoad fieri poterit, concordare debemus. Exempli gratia, in his locis, kalendarium pro festis Nativitatis D.N.I.C. et Paschae unificare optemus, ut difficultates in rebus scholasticis et commercialibus aboleantur"; for Bishop Ryan, see ibid., 2/6:30: "*Codicis Iuris Canonici* revisio hac in re peritis melius relinquenda est. Tamen, oportet eniti ut Ius Canonicum Ecclesiae Occidentalis et Ius Canonicum Ecclesiae Orientalis concorda fiant in quaestionibus connexis, v.g. matrimonii, baptismi, mutationis ad alterum ritum etc., in quibus, ut nunc est, difficultates sine fine fuerunt."

One final response should be noted, that of Maronite Archbishop Michael Doumith, joined by three other Maronite bishops. The archbishop discussed the problems of having many bishops having jurisdiction in the same place, a common situation in the Middle East[27] and one starting to arise in Western areas with the establishment of "personal" Eastern jurisdictions.[28] In considering the problem, the archbishop offered two possible solutions:

> 1) Admitting the multiplicity of jurisdiction by reason of diversity of liturgical usage, the rule must be applied uniformly in the West as it is in the East, and the desire of Easterners to have a proper hierarchy in the West (e.g., in America) be made legitimate, just as all in the East, not excluding Latins, have a proper hierarchy. Otherwise, the Easterners would seem to be second-class faithful in the Church, and their law to be particular law.
> 2) Not admitting such multiplicity, as is now the case in the West and as it was everywhere in prior times, one must come to the unity of jurisdiction and rule also in the East, first of all among Catholics, whereby the situation will happen more easily with non-Catholics.[29]

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[27] As an example, in 1960 there were six active Catholic jurisdictions based in Aleppo. *Annuario Pontificio 1960* (Vatican City: Tipografia Poliglotta Vaticana, 1960) 103–104 lists the Eastern jurisdictions: three archeparchies (Melkite, Syrian, Armenian) and two eparchies (Maronite, Chaldean). Ibid., 770 lists the Latin jurisdiction, an apostolic vicariate (at that time headed by an apostolic administrator).

[28] This problem reaches further than the limits of this dissertation and cannot be discussed in great detail here. For a summary of the differing attitudes towards this question at the council, see Edelby-Dick, 59, attributing opinions in favor of reducing all jurisdictions in a given area to a single one to the Maronite prelates generally and to some Chaldean and Coptic prelates. For analysis of this issue, see Hervé Legrand, "'One Bishop Per City': Tensions Around the Expression of the Catholicity of the Local Church since Vatican II," *The Jurist* 52 (1992) 369–400, especially 378–382; idem, "Nature de l'Église Particulière et Rôle de l'Évêque dans l'Église (nos. 11–24)," in *La Charge Pastorale des Évêques*, Unam Sanctam 71 (Paris: Cerf, 1969) 196–214. Brief reflections on the specific situation of Antioch at the end of the council are presented in Ivan Žužek, "Oriental Canon Law: Survey of Recent Developments," in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 140–142. For comments of other council fathers during the antepreparatory phase, see those of: Joseph Attipetty, the Latin Archbishop of Verapoly, India, joined by eight of his suffragans, in *Antepraeparatoria*, 2/4:219–220; Thomas Reis, Chaldean Bishop of Zaku, in ibid., 2/4:370; Chaldean Patriarch Paul II Cheikho, in ibid., 2/4:363; Joseph Goguè, Chaldean Archbishop of Basra, in ibid., 2/4:365–366; Elie Farah, Maronite Archbishop of Cyprus, in ibid., 2/4:69; François Ayoub, Maronite Archbishop of Alep, in ibid., 2/4:448; Isaac Ghattas, Coptic Archbishop of Thebes, in ibid., 2/5:388; Joseph Kallas, Melkite Bishop of Tripoli, in ibid., 2/4:406.

[29] *Antepraeparatoria*, 2/4:409–410: "Quae si considerantur, sequentes conclusiones sequuntur: 1. Admissa multiplicitate iurisdictionum ratione diversitatis usus liturgici, regula uniformiter applicanda est in Occidente sicut in Oriente, et legitimum fit votum Orientalium habendi in Occidente (v.g. in America) propriam hierarchiam, sicut omnes in Oriente, non exclusis latinis, propriam hierarchiam habent. Secus videntur Orientales esse in Ecclesia fideles non pleni iuris, illorum ius esse ius particulare. 2. Multiplicitate autem non admissa, sicuti est nunc in Occidente et ubique fuit antiquitus, deveniendum est etiam in Oriente ad unitatem iurisdictionis et regiminis, inter Catholicos, primo, quo res fiet facilior cum acatholicis."

Doumith favored the second option, as he did not consider "ritual" differences as necessitating separate jurisdictions:

> Communion of faith and charity is aptly expressed by unity of jurisdiction, and where this unity is not present, such communion is troubled by many dangers. "Rite" in itself is an expression of worship, not a license for autonomy, and the faithful, although of different rite, are members of the same Church, not opposed nations or sects. Therefore, to avoid scandals, to reintegrate properly the rule of the Church, and to promote charity before other Christians, this unity must be insisted upon, notwithstanding even the greatest difficulties that can occur, and that are not all insoluble if the pastors themselves give an example of evangelical renouncing. The particular Lyonese, Milanese, Mozarabic rites, or even an Eastern rite, do not oppose unity of jurisdiction in the West presently—why cannot the same be the case in the East?[30]

In order to prepare for this act unifying jurisdictions, Doumith suggested unifying discipline throughout the Church.

> Unity of jurisdiction is aptly prepared for by unity of discipline. Saving the liturgical distinction, one does not see why, in other matters, there is so frequently recourse to particular law. "Particular" law is a seed of division, and at one time there were not so many particular laws. Hence conversion to unity is not necessarily an innovation, nor do the dissidents themselves reject innovation except for the fact that it is done without them having been consulted. They would agree to innovation that would occur *ad normam*, as they say, excluding more grave matters that, according to them, pertain to the deposit [of faith] and about which the Roman Church has not cared.[31]

Archbishop Doumith distinguished the ritual and liturgical elements of an Eastern community from discipline and hierarchy, just as Pius IX had done during the Armenian and Chaldean

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[30] Ibid., 2/4:410: "Communio fidei et caritatis, apte exprimitur unitate iurisdictionis et ubi haec non adest, multis periculis offenditur illa. «Ritus» ex se est expressio cultus, non autonomiae tabula, et fideles, licet diversi ritus, Eiusdem Ecclesiae, non oppositarum nationum vel sectarum, membra sunt. Ideo ad vitanda scandala, coram aliis christianis, haec unitas urgenda est, non obstantibus difficultatibus etiam maximis, quae occurrere possunt, et quae omnes non sunt insolubiles, si ipsi Pastores exemplum dant evangelicae renuntiationis. Unitati iurisdictionis non offendunt nunc particularitates liturgicae ritus Lugdunensis, Milevitani, Mosarabici immo et Orientalis in Occidente, cur in Oriente idem esse non potest?" Very similar comments were made by another Maronite prelate, patriarchal vicar John Chelid, in ibid., 2/4:418: "Multiplicatio enim iurisdictionis in eodem loco originem trahit ex eo quod ritus ut Ecclesia, propriam Hierarchiam et propriam disciplinam habens, sumptus est. Sed ritus essentialiter non est nisi expressio cultus, seu liturgia, et semper sub influxu morum fidelium sese habet."

[31] Ibid., 2/4:409: "Unitas iurisdictionis apte praeparatur unitate disciplinae. Salva distinctione liturgica, non videtur cur, in alia materia, tam frequentissime recurritur ad ius particulare[.] Ius «particulare» est semen divisionis, et olim non fuerunt tot iura particularia. Inde conversio ad unitatem non est necessario novitas, nec ipsi dissidentes novitatem respuunt nisi quia fit, ipsis inconsultis. Novitati quae fieret «ad normam» ut dicunt consentirent, exclusis gravioribus quae, secundum illos, ad depositum pertinent et de quibus non curavit Romana Ecclesia."

crises. Rite did not oppose ecclesial unity, and should be retained by each person. However, it did not necessitate a separate discipline (except in liturgical matters) nor a separate hierarchy (which was only an aberration dictated by the times); simple differences in worship did not constitute a "license for autonomy" (*autonomiae tabula*).[32] Unity in discipline would reduce the influence of particular law as a "seed of division" both among Catholics and between Catholics and Eastern non-Catholics.[33]

These responses to the antepreparatory commission were extremely varied, with support for the continuation of the two-code system, a two-code system with revision to the already-promulgated law, a single code system, and a single general discipline system. Such variety in the proposals concerning the practical structuring of Eastern discipline resulted from the absence of a single, consistent understanding of the autonomous nature of the Eastern communities among the council fathers. One emphasizing autonomy would tend not to support uniformity in discipline, however it would be effected, while one emphasizing unity and seeing "ritual" distinctions as generally undesirable and ecclesiologically unsupportable would tend to support uniformity in discipline.

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[32] Cf. Legrand, "Nautre de l'Église Particulière et Rôle de l'Évêque dans l'Église (nos. 11–24)," 208: "Il est significatif, par exemple, que le projet d'unification des juridictions ait été présenté en connexion plus ou moins étroite avec le projet d'un code de droit canonique unique qui serait commun à l'Orient et à l'Occident, ou du moins que ces deux projets aient eu leur origine dans les mêmes cercles. En cette affaire, il n'en allait donc pas simplement d'intérêts pastoraux immédiats, une grande partie ecclésiologique et oecuménique s'y jouait simultanément."

[33] The archbishop's view of particular law as a "semen divisionis" is quite startling, since it appears to ignore the idea of diversity in unity, even in disiciplinary matters, being a part of the "Catholicity" of the Church. His statement echoes those made in the preparatory Commission on Missions and the Churches of the Eastern Rite for Vatican I, viewing uniform discipline as the ancient norm and diversity in discipline between West and East as a result of division, namely the schism. Note that Doumith would ameliorate some of his opinions during the council, still supporting "common" juridic principles but suggesting they be but one chapter of a larger *corpus*, with particular ones put into other chapters; see One hundred and third General Congregation, October 16, 1964: *Acta Synodalia*, 3/5:36: "Postulatum est multoties ut sive in Synodi decretis, sive in Codice Iuris principia omnibus communia in uno capite exponentur, particularia vero in specialibus capitibus adnexis. Hoc solo modo procedendi unitas Ecclesiae innotescit aequalitas particularium Ecclesiarum servatur et clare apparet distinctio inter humanas et divinas traditiones."

5.2.2. Preparatory Phase

Among the organs created by Pope St. John XXIII to formulate schemata for the forthcoming council was the preparatory Commission on the Eastern Churches.[34] The questions pointed out for possible examination in this preconciliar commission were "a) transfer to another rite; b) *communicatio in sacris* with Eastern non-Catholic Christians; c) the means to reconcile with Eastern dissidents; d) further, the principal disciplinary questions that have been pointed out for the other commissions, but as they relate to the Eastern Churches."[35] Working throughout 1960 and 1961, this commission formulated several schemata[36] that were then to be presented to the Central Preparatory Commission, whose duty was to follow and put into order the work of the individual commissions and present the properly-weighed conclusions to the pope so that he could establish what would be treated at the council.[37]

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[34] John XXIII, *motu proprio Superno Dei*, June 5, 1960, §7, *h*): *AAS* 52 (1960) 435–436. The pope would personally preside at one of the meetings of this commission, on February 23, 1961: *Praeparatoria*, 1:62–63.

[35] *Praeparatoria*, 2/1:413: "Commissio examini subiicere potest quaestiones: *a*) de transitu ad alium ritum; *b*) de communicatione in sacris cum christianis orientalibus non catholicis; *c*) de modo reconciliandi Orientales dissidentes; *d*) insuper praecipuas quaestiones disciplinares, quae pro ceteris Commissionibus indicatae sunt, relate tamen ad Ecclesias Orientales."

[36] Johannes M. Hoeck, "Decree on Eastern Catholic Churches," in *Commentary on the Documents of Vatican II*, ed. Herbert Vorgrimler (New York: Herder and Herder, 1967) 1:308 gives the following enumeration: the Eastern commission created fourteen short schemata as well as the lengthy schema *De Ecclesiae Unitate*; of the fourteen short schemata, "the Central Commission referred six to other instances: three to other commissions, one to the commission for the revision of the codex and two to the Pope, that is, to the Roman congregations." However, only eleven schemata are to be found in *Praeparatoria*, 3/2:189–238. From the listing of schemata given in Edelby-Dick, 69–71, it appears that the following occurred: four schemata on sacramental matters were combined into the one schema listed in *Praeparatoria*, and another, *De habitu clericorum*, was entirely dropped and not even printed. Ibid., 71–72 also lists the texts sent to other instances: *De facultatibus Episcoporum*, *De ministro poenitentiae*, and *De catechismo et catechetica institutione* were remitted to other commissions because they dealt with points of common interest to West and East; *De Ecclesiae praeceptis* was remitted to the Eastern codification; and part of the schema *De Patriarchis Orientalibus* and the whole of *De communicatione in sacris* was reserved to the pope.

[37] John XXIII, *Superno Dei*, §14: *AAS* 52 (1960) 436: "Commissionis Centralis munus esto sequi ac, si necesse sit, in ordinem disponere singularum Commissionum labores, atque illarum conclusiones, rite perpensas, ad Nos deferre, ut res in Concilio Oecumenico tractandas Nosmetipsi statuamus."

The topic of autonomy did not factor greatly into the schemata that the Eastern preparatory commission produced. The only explicit consideration of the issue came in connection with the schema *De Ecclesiae Unitate «Ut Omnes Unum Sint»*, on ecumenical matters concerning Eastern non-Catholics.[38] This document contained an express declaration of Eastern juridic autonomy:

> What has been said about [liturgical] rites is likewise valid concerning the legitimate ways and customs of peoples, sanctioned by the institutes of the holy fathers and ecclesiastical discipline, which the Catholic Church has always retained, except those "that should bear danger to souls and derogate from ecclesiastical decency" (Lateran IV, c. 4) or oppose unity. "Thus it is entirely in the interests of Catholic affairs that there be totally removed and destroyed that opinion that as yet holds some of the Easterners, that Latins would want some removal or reduction of their rights, privileges, or ritual custom" (Leo XIII, *Auspicia rerum*, 1896).
>
> This holy ecumenical synod, adhering to these paths, clearly recognizes and confirms the right that the Eastern Church enjoys to rule itself according to its proper and particular discipline, as more congruous to the customs of its faithful and more apt for fostering the good of souls. Nevertheless, this must not stand in the way of union that must have force between the Western and Eastern Church, the mutual recogniton of which this council intends to promote, from which both mutual love and mutual esteem come.[39]

This section of the schema connected the legitimacy of liturgical diversity with that of disciplinary diversity.[40] The first paragraph quoted above (§27 of the schema) affirmed that

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[38] *Praeparatoria*, 3/2:225–238.

[39] Ibid., 3/2:230–231: "[XIII. *Media canonica seu disciplinaria*] 27. Quod de ritibus dictum est, idem valet etiam de legitimis populorum moribus et consuetudinibus, SS. Patrum institutionibus et ecclesiastica disciplina sanctis, quas Ecclesia catholica semper retinuit, exceptis illis «quae periculum generant animarum et ecclesiasticae derogant honestati» (*Con. Lat. IV*, cap. 4), vel unitati obstant. «Quippe rei catholicae valde nimirum interest eam omnino tolli ac dilui opinionem quae quosdam ex Orientalibus antehac tenuit, perinde ac si de ipsorum iure, de privilegiis, de rituali consuetudine vellent Latini detractum quidquam aut deminutum» (Leo XIII, *Auspicia rerum*, 1896). 28. Sancta haec Oecumenica Synodus vestigiis hisce inhaerens plane agnoscit et confirmat ius quo Orientalis Ecclesia pollet se secundum propriam ac peculiarem disciplinam regendi, utpote moribus suorum fidelium magis congruam, atque bono animarum consulendo aptiorem. Id tamen minime obstare debet unioni quae inter occidentalem et orientalem Ecclesiam vigere debet, cuius mutuam cognitionem hoc Concilium promovere intendit, unde et mutuus amor provenit et mutua aestimatio." The quote of Leo XIII is found in *motu proprio Auspicia rerum*, March 19, 1896: *Acta Leonis XIII*, 16:80–81.

[40] The subject of liturgy and its connection to ecumenism took up four sections of the schema (§§23–26: *Praeparatoria*, 3/2:230–321) with the title "Media liturgica." The schema, after noting how much Eastern Christians loved and were devoted to the liturgy, stated that this patrimony pertained to the entire Church of Christ and declared that these rites and ceremonies had to be retained and fostered (§23). It urged greater understanding of the liturgy, and that it be restored to a more perfect state in accord with traditions (§24), quoting *Orientalium*

Eastern faithful were to retain their discipline, provided that it was not opposed to decency, the salvation of souls, or ecclesial unity. As can be seen from the citations of Lateran IV and Leo XIII, this affirmation has had a long history in the Catholic Church. However, the second quoted paragraph (§28) moved a step further. Not only were the Eastern faithful to retain their discipline with the aforesaid provisos, but the Eastern Church had the right rule itself according to that discipline.

Despite this affirmation of a right to some juridic autonomy, one finds two problems with the text. First, the right was declared to pertain to the "Eastern Church" as a single unit—"ius quo *Orientalis Ecclesia* pollet"—and not to the individual Eastern communities. Thus, the authority of the internal legislative organ of each community could conceivably be reduced, provided that the Eastern Church as a whole enjoyed some juridic autonomy. Second, this declaration occurred in a document on ecumenism; while it would appear to include the Eastern Catholic communities as well, insofar as they too constituted part of the "Eastern Church," the affirmation could appear to be directed more towards Eastern non-Catholics.[41]

In addition to these issues concerning the text as it stood, two members of the Central Preparatory Commission proposed changes that would have reduced the strength of this affirmation of autonomy. First, Ernesto Cardinal Ruffini asked that the word "right" (*ius*) be replaced with "faculty" (*facultas*) in the text.[42] No explanation for this change was given.

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dignitas of Leo XIII on the subject (§25). The part on the liturgy ended with a quotation of Pope Paul V rejecting the idea that the Roman Church intended to suppress these rites, and with statements that no place could be given to any fear that the Catholic Church constituted a foreign home for them, and that a wide door would be open for them (§26).

[41] The *mens* of the Eastern commission was that this document spoke first of all and directly to Catholic faithful, and only indirectly to separated Eastern Christians (ibid., 3/2:238 [2]). However, the psychological impact of having this statement appear only in relation to non-Catholic communities would seem to override any attempt to make clear that this document applied to Catholics first and foremost.

[42] Ibid., 2/4:453: "«... confirmat *ius* quo Orientalis Ecclesia pollet...». Loco vocabuli «ius» ponatur «facultas»."

However, as Johannes Hoeck notes, "*facultas* has a condescending and attenuating savour."[43] The word carries the suggestion that someone possesses power as a result of the grant of a superior; using "facultas" could have suggested that the community governed itself (whether through the patriarch or the synod) only because it had been granted that power by a superior.[44] Second, Reverend Michael Browne, OP suggested that the word "right" be entirely omitted, with the council declaring that it "fully recognized the discipline, etc."[45] He stated his reason for the change thus: "For every pure discipline has a certain added changeability."[46] Reverend Browne's proposed change appears to have been based on a concern that the declaration of a right would render authorities incapable of changing the manner that self-governance would be exercised; if the Eastern Church enjoyed self-governance as a right, how then could the Roman pontiff intervene and change it, as Pius XII had with the promulgation of the Eastern canons?[47] In any event, neither of these proposals was adopted in the text that would be presented to the council.[48]

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[43] Hoeck, "Decree on Eastern Catholic Churches," 1:318.

[44] While *facultas* could have a broader meaning, simply denoting an ability to act, the stricter meaning implies some dependence on a superior; see R. Naz, "Faculté," *Dictionnaire de Droit Canonique*, ed. R. Naz (Paris: Librairie Letouzey et Ané, 1953) 5:800: "Au sens large une faculté, c'est le pouvoir de faire quelque chose. En un sens plus étroit, c'est le pouvoir spécialement donné par le supérieur, sans lequel une chose ne pourrait pas être faite validement, licitement ou en sûreté de conscience."

[45] *Praeparatoria*, 2/4:458: "[...] suggererem ut dicatur «... plane agnoscit *disciplinam* etc.» omittendo vocem *ius*."

[46] Ibid.: "Omnis enim mera disciplina quamdam mutabilitatem habet adiunctam."

[47] A proposed emendation to the general schema on ecumenism (which would become *UR*) asked that *officium* be omitted for the same reason: "Ius agnoscitur, sed libertas etiam, ut possint disciplinam mutare" (*Acta Synodalia*, 3/7:684 [#18]). The proposal was rejected, as *officium* did not forbid changes made according to modern needs in accord with the relevant traditions.

[48] The replacement of *ius et officium* with *facultatem* would occur in what would become *UR* 16, although I was not able to find when this took place; the former phrase was still used in the responses to proposed emendations given at the One hundred and twenty-second General Congregation held on November 14, 1964: ibid., 3/7:683–685.

Autonomy was also referenced in the commission's discussion on the schema *De Patriarchis Orientalibus,* although the text of the schema never uses the word. The *relator* of the Eastern preparatory commission, Amleto Cardinal Cicognani, introduced the schema by noting:

> The question concerning patriarchs seemed to the Commission on the Eastern Churches to be of the greatest importance, because it has often been asked that the juridic figure of the Eastern patriarchs be placed more clearly into light. For, from the way of understanding their privileges, rights, and "autonomy," grave controversies have often arisen. [...] It is superfluous to note that this so-called "autonomy" does not respect matters of faith, the supreme authority concerning which has always been attributed to the Roman See. Thus, it concerns exclusively canonical "autonomy." Nor can this canonical "autonomy" signify full independence from the Roman See; moreover, history attests that over the course of centuries the Roman pontiffs have interposed their authority even in merely disciplinary matters.[49]

Cicognani did recognize some type of autonomy relative to canonical affairs in patriarchates. However, his further comments do not explicitly include *legislative* competence within this autonomy, and he applied it to the patriarchs personally, omitting reference to the synod. Further, he only referenced the election of bishops, the constitution of new dioceses, and judging cases as "that widest power" pertaining to the patriarchs.[50]

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[49] *Praeparatoria*, 2/2:200–201: "*Status quaestionis*. Commissioni de Ecclesiis Orientalibus quaestio maximi momenti visa est, quae Patriarchas Orientales respicit, propterea quod persaepe petitum est, ut figura juridica Patriarcharum Orientalium in sua luce clarius poneretur. Nam ex modo intelligendi eorum privilegia, iura et «autonomiam», haud raro graves controversiae ortae sunt. [...] Supervacaneum adnotare est, hanc sic dictam «autonomiam» minime respicere res fidei, circa quas summa semper auctoritas Romanae Sedi tributa fuit. Agitur ideo de «autonomia» exclusive canonica. Neque haec «autonomia» canonica significare potest plenam independentiam a Sede Romana; ceterum historia testatur, saeculorum decursu Romanos Pontifices auctoritatem suam interposuisse etiam in rebus mere disciplinaribus."

[50] Ibid., 2/2:201: "Hoc autem dignitatis Patriarchalis incrementum, ut efficaci ratione obtineatur, necesse est ut ab ipsa Patriarcharum potestate proficiscatur. Ceterum haec est via atque ratio quam semper Sancta Sedes secuta est; quae quidem non solum Patriarchas Orientales maximo semper in honore habuit, verum etiam eorum amplissima privilegia agnovit, quorum praecipua latissimam potestatem eis tribuunt, quod attinet ad eligendos episcopos, ad novas dioeceses constituendas, atque ad iudicandum." Cf. his general opening comments at ibid., 2/2:182: "Probe animadvertendum est, huiusmodi dignitatis momentum in eo praesertim situm esse, quod scilicet penes Patriarchas potestas est eligendi Episcopos, erigendi novas dioeceses, iudicandi; quae quidem iura atque privilegia semper agnita fuerunt a Sede Apostolica, ab eadem nunc etiam sarta tecta studiose servantur." However, part of this concept was not taken into account in the schema *De dioeceson partitione*; Patriarch Maximos IV Saïgh, at ibid., 2/2:895, noted that that schema at two places appeared to reserve changes in dioceses to the Holy See alone, and asked that an alteration be made to the text to take cognizance of Eastern discipline.

The other schemata themselves made no explicit reference to the autonomy of these communities, but only touched general points.[51] Some of these points, nevertheless, could have had an impact on the practical exercise of autonomy by Eastern communities. The affirmation of diversity that the "rites" of the Church demonstrated to the world could be used to support diversity not simply in discipline but in modes of governance.[52] These communities were also called "particular Churches," suggesting a greater dignity than the term "rite" did, dignity that could possibly include possession of some autonomy.[53] The synods were explicitly named as

[51] The closest statement to recognizing some autonomy is found the description of "rites" in *De Ritibus in Ecclesia*: "I. [*De varietate «Rituum» in Ecclesia*]. 1. Sancta et Catholica Ecclesia, quae est corpus Christi mysticum, organice coalescit fidelibus individuis qui fide, sacramentis et regimine uniuntur in coetibus hierarchia iunctis, seu particularibus Ecclesiis, quae aliquoties ritus etiam dicuntur. 2. Isti ritus seu particulares Ecclesiae, etsi liturgia, constitutione, ecclesiastica disciplina spiritualique proprio patrimonio partim differant, aequali tamen modo concrediti sunt pastorali gubernio Romani Pontificis, qui Beato Petro in primatu super universam Ecclesiam divinitus succedit" (ibid., 3/2:190). The use of "regimine" suggested that some form of autonomous governance was involved in the nature of a "rite" or particular Church, but it was not stated what such governance entailed.

[52] Cf. ibid., 3/2:189: "Ad catholicitatis notam, qua insignitur Ecclesia Dei, magis magisque illustrandum, eius Divini Conditoris providentia et dispositione factum est, ut varii in Ecclesia ritus, qui antiquissima aetate sunt instituti, per saeculorum decursum, salva fidei unitate, in diversis Orientis regionibus religiose servarentur. Huiusmodi enim rituum diversitas in Ecclesiae unitate luce clarius demonstrat, Ecclesiam Christi ut divinum salutis institutum suapte natura ad omnes prorsus spectare populos, nullo habito nationis vel stirpis discrimine." Cf. the comments of Amleto Cardinal Cicognani, president of the Commission on Eastern Churches, at ibid., 2/2:184: "Varietas rituum in Ecclesia est factum historicum et canonicum, plane respondens indoli humanae naturae, quae multiformem se ostendit ac multiplicibus rationibus operatur." Paul-Émile Cardinal Léger also praised such variety in his comments at ibid., 2/2:191. Cf. Ivan Žužek, "Incidenza del CCEO nella storia moderna della Chiesa universale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 313, transcribing a note attached to an initial schema of the Eastern preparatory commission of April 20, 1961, stating that the aforementioned variety did not pertain only to liturgy but also discipline: "Ipsa varietas disciplinaris in Ecclesia est res per se bona." Edelby-Dick, 151–152 also quote a comment to an article in the November 1960 version of this schema stating that Western Catholics generally considered multiplicity of rites as an evil.

[53] Again, note *Praeparatoria*, 3/2:190: "Sancta et Catholica Ecclesia, quae est corpus Christi mysticum, organice coalescit fidelibus individuis qui fide, sacramentis et regimine uniuntur in coetibus hierarchia iunctis, seu particularibus Ecclesiis, quae aliquoties ritus etiam dicuntur." The question of terminology drew some comments from the members of the Central Preparatory Commission. Cardinal Tisserant, at ibid., 2/2:185, stated: "Sed omnino dedecet quod societas quaedam fidelium ritus dicatur. Unde dicerem: «... in coetibus hierarchia iunctis, qui ritibus distinguuntur et particulares Ecclesias efficiunt»." Ernesto Cardinal Ruffini objected to mixing the terms *ritus* and *ecclesia*, although he did not mention which one would be preferable (ibid., 2/2:186). Arcadio María Cardinal Larraona Saralegui complained about the same issue, noting that the phrase *Ecclesiae particulares* could apply to individual dioceses and that "rites" were not distinguished from particular Churches—the former, while in fact being particular Churches, were distinguished by certain specific characteristics. Reverend Michael Browne, OP argued that *ritus* was something that pertained to a particular Church (ibid., 2/2:189), and Augustin Cardinal Bea asked for "rite" to be used only for the liturgy (ibid., 2/2:195). Cardinal Cicognani defended the mixed use of *ritus* and *Ecclesiae particulares* on the basis of praxis (ibid., 2/2:192). Although *ritus* was initially dropped in favor of *Ecclesia particularis, ritus* was restored to the final version of the schema at the insistence of some council fathers: *Acta Synodalia*, 3/8:558, 563–564; cf. the criticisms of this choice (and its later effect on the codification) made in

competent to establish certain particular norms for their communities, albeit in a very small number of cases.[54] On the other hand, there was still a desire among some members of the commission to reduce the material legislative competence of each community by having the supreme authority of the council establish uniformity of discipline in certain areas, either among just Eastern communities or throughout the whole Church.[55] Yet it is precisely in these more

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John H. Erickson, "The *Code of Canons of the Eastern Churches*: A Development Favoring Relations Between the Churches?" *The Jurist* 57 (1997) 288. On the inconsistency of terminology in the conciliar documents, and how this inconsistency was reflected in the canonical revision process, see Verena Feldhans, "*Ecclesia sui iuris* and the Local Church: An Investigation into Terminology," *The Jurist* 68 (2008) 350–360. See also the review given in Miguel Campo-Ibañez, "Ecclesia *sui iuris*. Un concepto canónico novedoso," *Estudios Ecclesiásticos* 86 (2011) 664–669, and the comments of Sunny Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO*, Kanonika 15 (Rome: PIO, 2009) 312–313.

[54] References are found: in the schema on vernacular in the liturgy, giving the patriarch "cum Synodo" the right of approving and moderating such use of the vernacular and approving the liturgical texts (*Praeparatoria*, 3/2:200 [II and III]); in the section of the schema on sacraments dealing with the permanent diaconate, remitting to the synods of provinces or patriarchates other matters involved in reviving this office (ibid., 3/2:305 [IV]); in the section on feast days in the schema on ecclesiastical precepts, stating that a prescript of an approved synod could make a feast day have force (ibid., 3/2:208 [II]); in the section on fasting and abstinence in the same schema, allowing a prescript of an approved synod to determine other days of abstinence or fast (or both) (ibid., 3/2:209 [V]); in the schema on catechetical instruction, entrusting the catechetical instruction of races and peoples to, among others, bishops gathered in synods (ibid., 3/2:217 [V]). Note that a consultor from the Secretariat of State, Archbishop Angelo dell'Acqua, objected to the approval and moderation of the use of the vernacular by the patriarch with the synod or the supreme head of any Eastern Church with his council without mentioning the pope or the Apostolic See, since, as the decree itself declared, the protection of these rites was a duty of the Roman pontiff (ibid., 2/2:472).

[55] Comments supporting some uniformity are found throughout the *vota* on the various disciplinary schemata, but particularly in those concerning the schema on the precepts of the Church. Among others, note the comments of Josef Cardinal Frings in ibid., 2/2:873: "Nobis occidentalibus difficile est diiudicare, quid bonum sit quoad praecepta Ecclesiae pro Ecclesia Orientali. Sed optandum mihi videtur, ut maior uniformitas intendatur inter Ecclesiam Orientalem et Occidentalem et inter varios ritus"; of Cardinal Ruffini in ibid., 2/2:874: "[M]ihi placeret si Ecclesiae praecepta tum in *Oriente* cum in *Occidente* observarentur eodem modo saltem quantum fieri potest. Plura in schemate decreti proponuntur quae a statutis Ecclesiae latinae differunt; sed puto ea concordari posse"; of Fernando Cardinal Cento in ibid., 2/2:875: "Placet [...] cum voto, in quantum possibile sit, unificationis legum, hac in re, inter Catholicos Latinos et Orientales"; of Cardinal Larraona in ibid., 2/2:876: "Placet iuxta modum [...] cum voto quod unificetur in lineis generalibus disciplina et alia relinquantur Codici." Cardinal Cicognani also noted when introducing the section on feast days: "Disciplina Orientalium de diebus festis valide differt a disciplina latinorum, sive quoad numerum dierum festorum de praecepto, sive quoad rationem horum festorum celebrandorum et huiusmodi obligationis implendae. Ad numerum festorum quod attinet, varii ritus non eandem normam sequuntur; imo deest uniformitas etiam inter christifideles eiusdem ritus, qui tamen non ad eandem nationem pertinent. Quod autem spectat ad modum implendi hoc praeceptum, fideles obligationi satisfaciunt non solum si divinae Liturgiae intersunt, verum etiam si assistunt cuidam parti Officii Choralis seu celebrationi Divinae Laudis, inde a vespere vigiliae usque ad finem diei festi. In voto fuit Episcoporum Orientalium ut, quatenus possibile, quaedam norma uniformis attingeretur, praesertim pro regionibus ubi fideles varii ritus simul vivunt" (ibid., 2/2: 869; cf. his comments on the law of abstinence at ibid., 2/2:870). For comments suggesting refraining from imposing uniformity, see those of Cardinal Jullien at ibid., 2/2:251: "Videlicet Concilium Oecumenicum, occasione illarum varietatum, paucissimis verbis commendet spiritum unitatis sive inter Orientales diversorum rituum, sive inter Orientales et Latinos. Heic igitur longe abest error unicitatis seu unificationis, quam dicunt"; of Achille Cardinal Liénart at ibid., 2/2:253: "Placet [schema *De usu linguarum veracularum in liturgiis*], quia varietas illa non

disciplinary matters that one also finds an increasing recognition that disciplinary uniformity would, at the very least, be difficult to impose.[56]

These schemata, and the debates on them in the Central Preparatory Commission, display the different ways the autonomy of the Eastern communities was considered. There was an affirmation of juridic autonomy, but it concerned the Eastern Church as a whole and was found in the schema on ecumenism. There was a desire for disciplinary uniformity that vied against a desire to admit diversity, or at least not suppress the diversity that already existed. As in the antepreparatory period, no clear concept of Eastern juridic autonomy and what such autonomy entailed was found among the members of the Central Preparatory Commission. The tensions in this commission would be repeated in the general debates on Eastern matters held at the council itself.

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adversatur unitati, quae nullam uniformitatem exigit, sed magis illustrat catholicitatem Ecclesiae Dei"; of Giuseppe Cardinal Ferretto at ibid., 2/2:873: "Placet [schema *De Praeceptis Ecclesiae*], nescio tamen utrum ad uniformitatem, quantum fieri potest, in catholica Ecclesia fovendam, magis valeret si Concilium Oecumenicum daret tantum normas generaliores, peculiaribus legibus Sanctae Sedi iudicio remissis." The schema on ecumenism had rejected confounding unity and *excessive* uniformity (therefore allowing for some uniformity): "Erraret tamen qui unitatem in capite cum nimia uniformitate in corpore confunderet. [...] Talis autem opportuna diversitas non impedit, sed e contra postulat auctoritatem unicam quae omnia coordinet, coadunet et coniungat" (ibid., 3/2:227 [VI, 8]).

[56] Note the comments of Cardinal Cicognani at ibid., 2/2:870: "In hoc schemate conficiendo, ratio habita est tum codificationis Orientalis, quae super hoc subiecto nondum publici iuris facta est, tum votorum quae Episcopi Orientales in Antepraeparatoria fecerunt. Valde arduum fuit in tanta rerum varietate statuere quandam disciplinam minimam uniformem; multa proinde capita Synodis definienda relicta sunt"; at ibid., 2/3:1312: "In Commissione de Ecclesiis Orientalibus Concilii Vaticani II praeparatoria, sententiae discordes fuerunt. Nam membra ad eos ritus pertinentia, qui disciplinam latinam amplexi sunt, sententiam tulerunt obligationi Officii recitandi faventem, et opportunum esse duxerunt, ut huiusmodi usus in generalem Orientis disciplinam introducatur. Non ita tamen membra eorum rituum, apud quos haec obligatio non viget. Ob sententiarum diversitatem et ob librorum liturgicorum defectum, Commissio de Ecclesiis Orientalibus statuit ut res maneant prout sunt apud diversos ritus, eo vel magis quod non videtur opportunum ut usus catholicorum nimis discrepit ab usu christianorum dissidentium." Cf. Hoeck, "Decree on Eastern Catholic Churches," 1:308, on how divergences among different Eastern disciplines affected drafting of the schemata: "[...] the views and interests of the Oriental Churches are widely divergent on some points, thus making agreement difficult on just the decisive questions. Some of the unsatisfactory compromises and gaps of the Decree are to be traced to this."

5.2.3. The Debates at the Council

The *iter* of the schemata drafted by the Eastern preparatory commission through the sessions of the Second Vatican Council was rather complicated. The schema *De Ecclesiae Unitate «Ut Omnes Unum Sint»* was presented to the council at the twenty-seventh general congregation, held on November 26, 1962.[57] The debate on this document was spread over four general congregations and resulted in a preliminary vote of approval.[58] However, it was decided to merge the contents of this document with the schema on ecumenism drafted by the Secretariat for Promoting Christian Unity and the chapter on ecumenism drafted by the theological commission.[59] Thus, after this decision there was no longer a separate, Eastern-oriented document on this topic.

The other Eastern schemata were merged into a single document, based on a proposal made by the Eastern preparatory commission itself prior to the general congregations of the council.[60] After an initial version of a unified schema consisting of ninety-six paragraphs

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[57] The schema as presented to the council is found in the acts for the Twenty-seventh General Congregation, November 26, 1962: *Acta Synodalia*, 1/3:528–545.

[58] Thirty-first General Congregation, December 1, 1962: ibid., 1/4:141. There were 2,068 votes *placet*, 36 votes *non placet*, and 8 null votes.

[59] This desire was expressed in some of the speeches on *De Ecclesiae Unitate*. See, for example, the speech of Melkite Patirarch Maximos IV Saïgh at the Twenty-eighth General Congregation, November 27, 1962: ibid., 1/3:617: "Le défaut de collaboration entre les commissions préparatoires au Concile nous a valu trois schémas distincts pour la même matière: le schéma dont nous parlons, préparé par la commission des Églises orientales; le schéma *de Oecumenismo*, préparé par le secrétariat de l'union des chrétiens; et un chapitre du même titre *de Oecumenismo*, préparé par a commission théologique. Un proverbe arabe dit: «Quand beaucoup de mains se mêlent pour faire la cuisine, les mets se brûlent». Sans doute, ces trois textes touchent parfois des aspects différents de la même question, mais il est évident qu'ils traitent de la même matière. Il convient donc qu'un text unique nous soit présenté, sous le titre: «De unione christianorum» ou de quelque autre, et qu'il soit élaboré par une sous-commission mixte composée des membres des trois organismes susdits. Ainsi la matière gagnera en cohésion, et le Concile gagnera du temps." Cf. Edelby-Dick, 77–78 on the fate of this schema along with the others touching on ecumenism.

[60] A request was made by Cardinal Cicognani to this effect at the seventh congregation of the fourth session of the Central Preparatory Commission, February 27, 1962: *Praeparatoria*, 2/2:871: "Desiderat Pont. Commissio de Ecclesiis Orientalibus ut haec quae ab ea hucusque proposita sunt et quae dein proponentur, in unicam tractionem redigantur seu simul colligantur in Actis Concilii Oecumenici sub unico titulo «De Ecclesiis Orientalibus»."

(Version A) was ordered to be reduced in scope, a second version consisting of forty-four paragraphs (Version B) was eventually produced by the commission.[61] To this was added a section on ecumenism, consisting of ten paragraphs adapted from the former schema *De Ecclesiae Unitate «Ut omnes unum sint»*.[62] This schema was presented, in two slightly different redactions, to the council fathers for written comments.[63] The Commission for Coordinating the Work of the Council on January 15, 1964 asked for a further abbreviation of the text, plus the addition of specific norms on *communicatio in sacris*.[64] While the Commission for the Eastern Churches did reorganize and amend of the text,[65] the text was ordered to be shortened even further, resulting in a schema consisting of twenty-nine paragraphs.[66] This schema (Version C) was presented to the council fathers at the one hundred and second general congregation on October 15, 1964.[67] Unfortunately, some confusion was generated, as additional change had already been made by the commission in an addendum to Version C, of which many of the council fathers were unaware; thus, several changes proposed in the debate had already been

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[61] Hoeck, "Decree on Eastern Catholic Churches," 1:308–309. The schemata were initially compressed by the conciliar Eastern commission into the 96-article version after the end of the first session of the council (December 1962). The conciliar Coordinating Commission at the end of January 1963 asked for a further abridgement, leaving 44 articles. The classification of the different versions of the schemata as versions "A," "B," and "C," is adopted from Hoeck. Edelby-Dick list the initial fifteen separate schemata as "Version A," and thus differ from Hoeck by one letter.

[62] While no longer constituting a separate document, Eastern ecumenical matters were considered particular enough to merit special attention in the unified Eastern schema. See the footnote in *Acta Synodalia*, 3/5:754. Cf. Hoeck, "Decree on Eastern Catholic Churches," 1:308, stating that ten articles on ecumenism were added "on the instruction of the president of the [Eastern] Commission, who was also president of the Coordinating Commission."

[63] *Acta Synodalia*, 3/5:743–758. The first redaction is dated April 22, 1963. There is no draft of the second redaction in this source, but it can be gathered from the second group of comments of council fathers (ibid., 3/5:835–849) that the only real change concerned §9 on whether Eastern non-Catholics coming into the Catholic Church had to retain their own rite (the first redaction made it merely desirable, while the second required it).

[64] Ibid., 3/4:497.

[65] See the report given in ibid., 3/4:497–516, approved March 26, 1964. The meetings of the commission stretched from March 10 to March 14, 1964 (ibid., 3/4:493). A history of the schema is found in *relatio* to the council added to the schema, at ibid., 3/4:494–497.

[66] Hoeck, "Decree on Eastern Catholic Churches," 1:309.

[67] The schema is found in *Acta Synodalia*, 3/4:484–493. It was dated April 27, 1964.

approved by the commission.[68] The public debate on this schema lasted over four sessions,[69] resulting in a successful preliminary vote on the text[70] and specific passage of all sections except one.[71] The section that did not pass, paragraphs two through four of Version C (*De Ecclesiis Particularibus*), failed because of the high number of votes *placet iuxta modum*.[72] The commission reviewed all the *modi* and presented a finalized schema for the vote of the council fathers.[73] Paragraphs two through four were once again voted upon, and the section passed,[74] as did the emendations of the text proposed by the commission.[75] The final vote of the general congregation passed the schema 1,964 to 135, with one vote *iuxta modum* and four null votes.[76]

The debates at the general congregations provide insight into the differing ways of understanding the ecclesial status of the Eastern communities and their juridic autonomy. This dissertation will therefore review the pertinent comments of the council fathers, beginning with those concerning the Eastern schema on ecumenism and then with those on the different versions of the unified Eastern schema.

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[68] The addendum to the *relatio* is found in ibid., 3/4:527–528. Archbishop Gabrijel Bukatko, vice president of the Eastern commission, lamented the confusion over the emendations at ibid., 3/5:113. See also Hoeck, "Decree on Eastern Catholic Churches," 1:309: "However, no new text [taking account of proposals already sent to the Eastern commission] was printed for the discussion which began in the aula on 15 October 1964, but only the alterations approved by the Commission were distributed to the Fathers on an additional sheet, a fact which rendered a general view difficult, thus causing some confusion in the interventions as well."

[69] Namely, from the one hundred and second to the one hundred and fifth general congregations; the conclusion of the oral debate is found in *Acta Synodalia*, 3/5:112–115.

[70] Ibid., 3/5:214. There were 1,911 *placet*, 265 *non placet*, 1 *placet iuxta modum*, and 3 null votes.

[71] The votes were on seven individual sections of the schema. The votes are found in ibid., 3/5:276, 279, 290, 346–347; a list of all the votes is found in ibid., 3/8:556–557.

[72] Ibid., 3/5:279. There were 1,373 *placet*, 73 *non placet*, 719 *placet iuxta modum*, and 5 null votes; two-thirds of the votes for *placet* were required for passage (Hoeck, "Decree on Eastern Catholic Churches," 1:310).

[73] The report of the commission is found in *Acta Synodalia*, 3/8:556–605; the finalized schema is found at ibid., 3/5:606–620.

[74] Ibid., 3/8:635. There were 1,841 *placet*, 283 *non placet*, 1 *placet iuxta modum*, and 4 null votes.

[75] Ibid. There were 1,923 *placet*, 188 *non placet*, and 4 null votes.

[76] Ibid., 3/8:653.

5.2.3.1. The Debate on *De Ecclesiae Unitate «Ut Omnes Unum Sint»*

As previously noted, paragraphs 27 and 28 of the schema *De Ecclesiae Unitate «Ut Omnes Unum Sint»* initially constituted the most significant statement on Eastern autonomy, affirming the right of the Eastern Church to govern itself in accord with its own discipline. These specific paragraphs did not produce much comment from the council fathers.[77] There were some more general comments on juridic autonomy, however. Syrian Patriarch Ignace Gabriel I Tappouni simply noted that "at no time in its history has the Eastern Church been considered as a part of the patriarchate of the West; from almost the time of the Apostles, it has always enjoyed administrative and disciplinary autonomy."[78] Some other council fathers argued that the status of Eastern patriarchs needed to be recognized as a true level of jurisdiction and given appropriate juridic support.[79] On the other hand, other fathers supported increased

[77] Most instances concerned removing the phrase "exceptis illis «quae periculum generant animarum et ecclesiasticae derogant honestati»" from §27. See, for example, the speeches of Archimandrite Athanasius Hage at the Twenty-eighth General Congregation, November 27, 1962: ibid., 1/3:649, and Archbishop Joseph Tawil, Melkite patriarchal vicar, at the Twenty-ninth General Congregation, November 28, 1962: ibid., 1/3:660; the written comments of Raúl Cardinal Silva Henríquez, Latin Archbishop of Santiago, Chile, in ibid., 1/3:744, Bishop Garabed Amadouni, Apostolic Exarch of the Armenians in France, in ibid., 1/3:746, Reverend Jean-Baptiste Janssens, S.J., in ibid., 1/3:797, and the Chilean Bishops Conference in ibid., 1/3:836. One emendation was suggested by Latin Bishop Juan Bautista Velasco Díaz of Xiamen for §28, to emphasize a bond of visible unity in the Church: "Ut vinculum visibilis Ecclesiae unitatis a Concilio stabiliatur et profiteatur videtur addendum: «*Igitur episcopi et pastores orientalis Ecclesiae gregem sibi commissum regant et pascant libere, directe et adhibitis, cum opus fuerit, consiliis et apostolicis curis Romani Pontificis, qui Petri successor est et visibilis in terris Christi Iesu, Supremi nostri Pastoris, Vicarius*»" (Twenty-ninth General Congregation, November 27, 1962: ibid., 1/3:666). Bishop Nicholas Elko, Ruthenian Apostolic Exarch of Pittsburgh, also offered a brief commentary on the phrase "vigere debet" in §28 at the Thirtieth General Congregation, November 29, 1962: ibid., 1/3:736.

[78] Twenty-ninth General Congregation, November 28, 1962: ibid., 1/3:660: "[...] in nullo tempore historiae suae, Ecclesia Orientalis considerata fuit ut pars Patriarchatus Occidentis; a tempore fere Apostolorum, semper autonomia administrativa et disciplinari gavisa est." Note also the comments of Latin Archbishop John Heenan of Liverpool at the Thirtieth General Congregation, November 29, 1962: ibid., 1/3:727: "Ex parte Pontificis bona voluntas non desideratur, sed non ita certus sum quod omnes Ecclesiae orientales vere sunt paratae autonomiam propriam amittere et cum fratre magno romano se unire."

[79] See the written comments of Cardinal Silva Herníquez in ibid., 1/3:744, asking that a line in the schema be changed from "qui patriarchali condecorantur titulo" to "qui patriarchali fruuntur potestate": "Patriarchalis dignitas in Ecclesia non est quid mere honorificum, praelatorum familiae pontificiae instar, sed gradus iurisdictionis ecclesiasticae ut etiam in Codice novissimo pro orientalibus agnoscitur" (the conference of Chilean bishops joined him in this request: ibid., 1/3:836); the written comments of Melkite Bishop Augustin Farah of Tripoli in ibid.,

disciplinary uniformity, with the consequent diminishment of Eastern juridic autonomy. Maronite Bishop Khoury rejected a strict division between East and West, arguing for a "single conciliar legislation and doctrine," albeit with respect for the traditions of the East.[80] A more extensive proposal came from Latin Bishop Alejandro Olalia of Lipa:

> For obtaining the aim of the union of Churches, it is to be desired that the council determine that in any ecclesiastical document no division of the Church into Western and Eastern be made in the future. Rather, it should determine that these terms of "Western" and "Eastern" be suppressed. The reason: the Church is one, for one Church was established by Christ the Lord, who wishes that it be one until the end of time. The retention of these terms aids to sustain its dissolution. In essentials there is no distinction between Western and Eastern Catholics. The distinction is particularly in the accidentals of rites. But if this were a sufficient reason to retain these terms, then many terms would have to be introduced to distinguish Churches of different rites within that part of the Church in regions that are called the Eastern Church. As a consequence [of ending this division], the congregation that is called "for the Eastern Church" at the Holy See could be[81] suppressed, and the competence of other congregations would be extended so that even the respective matters that now pertain to the Congregation for the Eastern Church would pertain to them. Nor would greater difficulty or confusion be caused in the other congregations from the fact the particularities of the so-called Eastern Churches must be maintained in rite and discipline, since men expert in matters pertaining to the so-called Eastern Churches could be ascribed to each congregation as members, assessors, or consultors, to be selected even from the clergy of those very Churches.[82]

1/3:783: "Ratio habenda tandem institutionum quae, hac in materia, tenent acatholici orientales ex traditione venerabili et antiquiori, ut promovendae sint vel restaurandae et etiam in Ecclesia catholica, ut sunt: *a*) Potestas patriarchalis plene exercita sive ipsius patriarchae sive Synodi patriarchalis; *b*) Potestas episcopalis plene exercita ipsius episcopi"; written comments of Coptic Bishop Jean Nuer, auxiliary of Thebes, at ibid., 1/3:813, proposing adding to the final paragraph of the schema: "Patres Conciliares Ecclesiae orientali antiquam dignitatem, eiusque patriarchis iurisdictionem et praecedentiam, quibus ab initio fruebatur, agnoscunt." On more clearly understanding the exact power of patriarchs within the Catholic Church, see the written comments of Latin Bishop Carlos Eduardo de Sabóia Bandeira Melo of Palmas in ibid., 1/3:819–820.

[80] Twenty-ninth General Congregation, November 28, 1962: ibid., 1/3:670: "Oriens non est Oriens, et Occidens Occidens. Sicut in Christo enim nec Graecus nec Barbarus, ita enim nec Oriens nec Occidens, sed nova creatura. Unus eget altero, unus debet alterum respicere, alter debet alterum sequi. [...] Ceterum quod ab aut pro orientalibus exigitur legitime, etiam a et pro tota Ecclesia optatur. Scl. v. gr.: [...] deductio in praxim doctrinae constantis Pontificum Romanorum circa respectum debitum traditionibus orientis et nihilominus elaboratio unius legislationis et unius doctrinae conciliaris et orientalibus et occidentalibus, servatis pro unoquoque servandis, ita ut magis eluceat unitas et aequalitas inter fratres [...]."

[81] In the original written text, the passive periphrastic was used: "supprimenda esset." The bishop weakened the force of the verb in his oral speech to "supprimi posset," but retained the passive periphrastic for the extension of competence of other congregations. See Thirtieth General Congregation, November 29, 1962: ibid., 1/3:730 note 7.

[82] Ibid., 1/3:730 (#5): "Ad finem unionis Ecclesiarum obtinendum etiam optandum est quod Concilium decernat ut in quibuscumque ecclesiasticis documentis nulla in futurum distinctio fiat Ecclesiae in occidentalem et orientalem, immo ut ipsae appellationes orientalis et occidentalis supprimantur. Ratio: Ecclesia una est, nam una instituta est a Christo Domino, qui unam vult eam esse usque ad finem temporum. Retentio istarum appellationum quodammodo

Bishop Olalia took the idea mentioned by several other fathers—that there was not really a single "Eastern Church" [83]—and went in a contrary direction from them. Instead of seeing an opportunity to establish more formally the existence of several Eastern Churches through use of proper language in the conciliar text, he considered these communities to be insufficiently distinct to constitute integral juridic units. "Rites" were only accidentals; from the context, these were the liturgical rites, which were not of enough significance to constitute distinct communities. Thus, he asked for the rejection of any ecclesially-dualistic language. A result of such a proposal would be the application of papal legislation and curial decrees to all the Christian faithful, reversing the Pamphilian jurisprudence; Eastern faithful would not be exempt, although their particular rites and discipline would supposedly be taken into account.

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operatur ad sustinendam excissionem. In essentialibus nulla est distinctio inter catholicos occidentales et orientales. Distinctio praecipue est in accidentalibus rituum; at si haec fuisset sufficiens causa illas appellationes retinendi, tunc plures appellationes essent inducendae ad distinguendas Ecclesias diversorum rituum intra ipsam partem Ecclesiae in regionibus quae dicuntur Ecclesia orientalis. Ex consequenti, *tunc supprimi posset* [see previous note] apud Sanctam Sedem Congregatio quae vocatur pro Ecclesia Orientali, et aliarum Congregationum competentia extendenda ut ad illas pertineant etiam respectiva negotia quae nunc ad Congregationem pro Ecclesia Orientali pertinent. Nec inde maior difficultas vel confusio causaretur in ceteris Congregationibus, eo quod Ecclesiarum, quae dicuntur orientales, peculiaritates in ritu et disciplina servandae sunt; quia singulis Congregationibus adscribi possunt tamquam membra, vel adsessores vel consultores, viri periti in rebus pertinentibus ad Ecclesias, quae dicuntur orientales, seligendi etiam e clero ipsarum Ecclesiarum."

[83] Note the very first speech of the debate, given by Achille Cardinal Liénart, Bishop of Lille, France at Twenty-seventh General Congregation, November 26, 1962: ibid., 1/3:554: "Non una est enim Ecclesia orientalis, sed plures; quarum aliae byzantinae sunt originis, aliae vero arabicae. Unaquaeque propriam habet indolem; nec promiscue una pro altera haberi vult; non ergo de facto tantum in hoc deficit schema, sed psychologicus etiam est defectus, illas per modum unius tractare quae se in multis diversas sentiunt." Similar comments were offered by Joseph Khoury, Maronite Bishop of Tyre, at the Twenty-ninth General Congregation, November 28, 1962: ibid., 1/3:669; Antun Hayek, Syrian Bishop of Aleppo, at the Thirtieth General Congregation, November 29, 1962: ibid., 1/3:725; Raphael Bayan, Armenian Bishop of Alexandria, in written animadversions at ibid., 1/3:750 (b). Note that Sergio Méndez Arceo, bishop of Cuenavaca, Mexico, observed that there was also no clear understanding of what the Eastern Church was in general: "Ut quid sit Ecclesia orientalis nullibi adamussim circumscribatur. Quaestio certissime non est ethnographica neque geographica; sed agitur de Ecclesia integram catholicitatem prae se ferente, distincta a catholicitate latina, directe ab Apostolis orta et a Patribus ordinata" (Twenty-eighth General Congregation, November 27, 1962: ibid., 1/3:644). Cf. Bernardo Schultze, "Riflessione teologica sul significato di 'Chiese Orientale' e 'Ortodossia,'" *Gregorianum* 42 (1961) 445–446, considering use of the singular *Ecclesia Orientalis* "una semplificazione della realtà storica complicata e intrecciata, con la tendenza di vedere tipi opposti, di schematizzare, di generalizzare."

5.2.3.2. The Debate on Version B of the Schema *De Ecclesiis Orientalibus*

For the most part, Version B of the schema on Eastern Churches simply shortened and reorganized the material of the prior distinct disciplinary schemata, which had first been combined into the ninety-six paragraph Version A.[84] However, there was an important addition made to the text—two new paragraphs concerning Eastern synods:

> This holy ecumenical synod desires that the institute of synods, of venerable antiquity, flourish with new strength, so that the necessities and discipline of the Eastern Churches, according to the circumstances of the times, be more aptly and more efficaciously provided for.
>
> It is earnestly commended that the prelates of the Eastern Churches, in promoting the discipline of the proper Church in the synods and for fostering work for the good of religion more efficaciously, also take into account the common good of the whole region where many particular Churches exist, through consultations carried out in meetings of various rites.[85]

Although these statements were brief in light of the actual importance of synods in the life of the Eastern Churches, these paragraphs established that Eastern discipline was not a single unified body to which these communities would simply submit themselves; rather these Churches had their own particular disciplines that the synods were to take care of and foster.[86] Indeed, the

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[84] Neither Version A nor comments on it are found in *Acta synodalia* vols. 1–4. Hoeck, "Decree on Eastern Catholic Churches," 1:308 states it was sent to "members" (likely of the Central Commission) but "even before their answers poured in," the Coordinating Commission asked for the further shortening of the text. Hence, Version B is the first version discussed here.

[85] *Acta Synodalia*, 3/5:746–747: "18. Exoptat Sancta haec Oecumenica Synodus ut Synodorum institutum, antiquitate venerandum, novo vigeat robore, ut necessitatibus et disciplinae Ecclesiarum Orientalium, pro temporum adiunctis, aptius et efficacius provideatur. 19. Enixe commendatur ut Praesules Orientalium Ecclesiarum, in disciplina propriae Ecclesiae in Synodis promovenda et ad opera in bonum religionis efficacius fovenda, rationem etiam habeant boni communis totius regionis, ubi plures Ecclesiae particulares extant, concillis in conventibus ex variis ritibus collatis." It was noted that §19 in many ways repeated §4 of this schema, with only the reference to the synod being a distinguishing characteristic; see ibid., 3/5:744: "In hac tamen diversitate Hierarchae variarum Ecclesiarum particularium in eodem territorio iurisdictionem obtinentes, curent, collatis in periodicis conferentiis consiliis, unitatem actionis fovere, et, viribus unitis, communia adiuvare opera, ad bonum religionis expeditius promovendum et cleri disciplinam efficacius tuendam." Thus, Patriarch Maximos IV Saïgh asked that §19 be suppressed (written comments in ibid., 3/5:826).

[86] Cf. Edelby-Dick, 290–291 on a Melkite proposal to strengthen the references to the synod in the text of the decree. Note also that Reverend Hoeck offered a replacement to §11 on patriarchs, specifying that the synod was involved in exercising jurisdiction with the patriarch (*Acta Synodalia*, 3/5:840).

opening of the schema remitted "other matters to the providence of the Eastern synods and the Apostolic See."[87]

Version B also declared the right of these Churches to govern themselves in accord with their particular discipline in its forty-eighth paragraph:

> Since some diversity of discipline of customs, sanctioned by the institutes of the fathers, in no way opposes the unity of the Church, this holy ecumenical synod, to remove all doubt, solemnly declares that the Eastern Churches enjoy the right to rule themselves according to their own particular disciplines, as noteworthy for their venerable antiquity, more fitting for the traditions of their faithful, and more apt for fostering the good of souls. Therefore, the Catholic Church orders the discipline of the Eastern Churches to be observed and fostered. Hence, for all Eastern communities coming to Catholic unity, this same synod recognizes and confirms the right to observe this discipline and follow it, correcting only those things that, if present, are opposed to this unity.[88]

Unlike the original text found in the schema *De Ecclesiae Unitate*, this version admitted the plurality of Churches in the East, such that each of them (and not simply the Eastern Church as a whole) possessed a right of self-governance.[89] However, like the previous version of this

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[87] *Acta Synodalia*, 3/5:744: "[...] nonnulla capita, a Patriarchis ac Praesulibus orientalibus praeposita, probare et promulgare [Sancta Oecumenica Synodus Vaticana II] censuit, ceteris ad providentiam Synodorum Orientalium nec non Sedis Apostolicae remissis."

[88] Ibid., 3/5:755: "48. Cum porro unitati Ecclesiae minime obstet diversitas quaedam disciplinae et consuetudinum, Patrum institutionibus sancitarum, sancta Oecumenica Synodus, ad tollendas omnes dubitationes, sollemniter declarat Ecclesias orientales iure pollere se secundum proprias disciplinas peculiares regendi, utpote veneranda antiquitate claras, moribus suorum fidelium magis congruas atque ad bonum animarum consulendum aptiores. Quapropter Ecclesia Catholica disciplinam Ecclesiarum orientalium servari eamque foveri iussit. Communitatibus igitur orientalibus ad unitatem catholicam convenientibus, eadem Synodus ius agnoscit et confirmat illam servandi disciplinam eamque sectandi, iis tantummodo, si forte adsint, emendatis, quae unitati huic adversantur." Latin Archbishop Maurice Baudoux of Saint Boniface, Canada, argued that a statement about the right of Eastern Churches to rule themselves did not pertain to the council, as it was an ancient and innate right: "Non pertinet ad Concilium declarare sollemniter Ecclesias orientales frui iure disciplinaque propria, siquidem hoc est factum antiquum et ius innatum a primo apostolico tempore Ecclesiae subortum" (ibid., 3/5:774).

[89] Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 345: "The recognition of the ecclesial nature of the particular Churches by the Council stimulated the nomenclature of the Eastern Catholic Churches. Besides, the Eastern Churches are no longer in contraposition to the Western Church and called in the singular *Eastern Church* but, recognizing that each of these communities is a Church in itself, the plural *Churches* is used today [...]." John Madey, *Orientalium Ecclesiarum: More Than Twenty Years After* (Paderborn: Eastern Churches Service, 1987) 20 makes similar comments concerning the importance of using the plural in the title of the decree. Note also the comments of Maronite Archbishop Ignatius Ziadé of Beruit in *Acta Synodalia*, 2/6:360, praising the recognition of a plurality of Churches in the unified schema on ecumenism (which would become *UR*). René Metz, "Quel est le droit pour les Églises orientales unies à Rome?" *L'année canonique* 30 (1987) 394 argues that the focus of the council on differences rather than uniformity helped lead to the use of the plural rather than the singular;

statement in the schema *De Ecclesiae Unitate «Ut Omnes Unum Sint»*, this paragraph was located in the section on ecumenism, suggesting that it was directed to Eastern non-Catholics rather than Eastern Catholics.

These paragraphs, as well as others in the schema, generated several written comments concerning the juridic autonomy of Eastern Churches. Some supported increased recognition of autonomy as recognized in paragraph 48 of Version B. Reverend Hienrich Bliestle, Superior General of the Congregation of Missionaries of the Holy Family, wrote:

> Moreover there is declared with a solemn promise that the Eastern Churches enjoy the right to rule themselves according to their own proper disciplines (nn. 48, 49). Quite properly must it be held before our eyes that the Eastern rites encompass two orders, liturgical and disciplinary, and it does not suffice to observe faithfully the proper liturgy alone, but the particular discipline must be entirely retained.[90]

An attempt to strengthen the schema's recognition of such autonomy was made by Reverend Johannes Hoeck, Superior General of the Order of St. Benedict. This council father proposed an entirely rewritten schema to the Eastern commission,[91] in which was stated:

> All these particular Churches, therefore, enjoy that autonomy that pertains to them individually from their origin, tradition, and dignity, and that is more consonant and accustomed to their character, but with this condition, that each remain in fraternal union with the whole Church under the primatial care of the Roman pontiff, the successor of St. Peter, to whom namely the Lord gave the mandate to confirm his brothers.[92]

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similar comments are made by Péter Erdö, "La Coesistenza delle diverse Chiese particolari e «sui iuris» nello stesso territorio nel quadro della piena comunione: Realtà e prospettive," *Periodica* 91 (2002) 72.

[90] Written comments in *Acta Synodalia*, 3/5:755: "Insuper solemni promissione declaratur, Ecclesias orientales iure pollere, se secundum proprias disciplinas peculiares regendi (nn. 48, 49). Bene nempe prae oculis habendum est, ritus orientales duos ordines comprehendere, liturgicum scil. et disciplinarem, nec sufficere propriam liturgiam solam fideliter servare, sed et peculiarem disciplinam omnino retinendam esse."

[91] Ibid., 3/5:788–805.

[92] Ibid., 3/5:790 (emendation to §2 of Version B): "Omnes ergo hae particulares Ecclesiae ea gaudent autonomia, quae singulis competit ex earum origine, traditione et dignitate quaeque earum ingenio magis est consona et consueta; hac sane condicione, ut unaquaeque remaneat in unione fraterna cum tota Ecclesia sub cura primatiali Romani Pontificis, successoris Sancti Petri, cui nempe Dominus mandavit, ut confirmet fratres suos." He added at ibid., 3/5:791 that the Sacred Congregation for the Eastern Church and the Eastern codification excessively curtailed the rights of the Eastern Churches, "et ita earum autonomiae contradicit." For his comments on how the recognition (or not) of the canonical autonomy of Eastern Catholic Churches would affect relations with Eastern non-Catholic Churches, see his speech at the One hundred and fourth General Congregation, October 19, 1964: ibid., 3/5:72–73.

This revision used the very word "autonomy" and stated the bases of this autonomy to be these Churches' "origin, tradition, and dignity," bases not stated in the original text. This paragraph was also placed at the beginning of the schema, outside of the section on ecumenism, more clearly indicating that this autonomy applied to the *Catholic* Eastern Churches just as it did to non-Catholic Eastern Churches.

Some council fathers still pressed for some uniformity in discipline throughout the whole Church through the composition of a single code of law. Armenian Patriarch Ignatius Peter XVI Batanian wrote:

> It is to be desired that the *Codex Iuris Canonici* be formed *as one*, embracing the whole Catholic Church, in its various rites, Latin and Eastern. In this way, there will more appear the unity of the Catholic Church, whose common discipline constitutes the greatest part of the code of canon law of both the Eastern Church and the Latin Church. Those things that are particular to the Latin or Eastern Churches would be treated in the same code, or in particular chapters, or in canons adjoined to the general material. It is desirable also for the study of Western and Eastern canon law since, being contained in one and the same code, scholars and consultors can find and perceive differences.[93]

While admitting that particularities of the various Churches would be taken into account in a single, universal code, the patriarch still considered most of the codified law (*maxima pars*) as common to East and West. Thus, the individual Eastern communities would have their ability to govern themselves limited as concerned the substance of this *maxima pars*.[94]

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[93] Ibid., 3/5:765: "Optandum est ut C.I.C. recognitus *unus sit*, amplectens universam Ecclesiam catholicam, in suis variis ritibus latino et orientalibus. Hoc modo magis apparebit unitas Ecclesiae catholicae, cuius disciplina communis maximam constituit partem codicis iuris canonici Ecclesiae tum latinae tum orientalis. Ea vero, quae particularia sunt Ecclesiarum latinae vel orientalium, poterunt tractari, in eodem codice, vel particularibus in capitibus, vel canonibus adiunctis iuxta materiam generalem. Ita, consuletur etiam studio iuris canonici occidentalis et orientalis, quod, in uno eodemque codice contentum, invenire poterunt studentes et consultores atque differentias percipere." Note also his comments at ibid., 3/5:768, supporting uniform norms on days of feast, fast, and abstinence: "In diebus festi, ieiunii et abstinentiae stabiliendis, procuranda est quantum fieri potest, uniformitas."

[94] Note also that he had asked that the clause "salvis quae ad unitatem fidei et regiminis requiruntur" be added to §48 on juridic autonomy (ibid.).

Joseph Goguè, Chaldean Archeparch of Basra, strongly supported disciplinary uniformity throughout the council, basing his proposals on his conception of the Church as a single entity admitting of no substantive divisions. As he noted:

> The Church of Christ is, must be, and is nothing else but one.
>
> 1. The Roman Catholic Church, the Roman Latin Catholic Church, the Roman Chaldean Catholic Church, the Roman Greek Catholic Church, the Roman Syrian Catholic Church, etc. No more the Eastern and Western Church.
> 2. Practical conclusion for the faith, unity, and administration:
>   a) Only one code of canon law for all the Church.
>   b) With an appendix of uses, particular traditions for each rite.
>   c) The Sacred Roman Congregations treating their subjects on the whole without any distinction between Latins and Easterners, etc.
>
> This separation does not cause anything but a real separation, inferiority between Easterners and Westerners. Equal rights and obligations for all, all the Eastern Churches are perhaps equal among themselves? Yet they are not divided as if they were Easterners and Westerners. Only one Church. Everything was in the East and from the East. Everything was consigned to the authority in the West. East and West, West and East. Epilogue: 1) Only one Holy Catholic Apostolic Roman Church. 2) Only one law, only one administration for all.[95]

For Goguè, the particularities of the individual Eastern and Latin communities were only uses and traditions, subordinate to a common discipline. Excessive emphasis on distinctions resulted in the inferiority of the Eastern communities; unified discipline, to which all Catholics would be subject, would (according to Goguè) remove such inferiority.

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[95] Ibid., 3/5:787: "*Conclusione del soggetto.* La Chiesa di Cristo è, deve essere, e non può non essere che una. 1. La Chiesa cattolica romana, Chiesa cattolica romana latina, Chiesa cattolica romana caldea, Chiesa cattolica romana greca, Chiesa cattolica romana sira, ecc. Non più Chiesa orientale e occidentale. 2. Conclusione pratica per la fede, l'unità e l'amministrazione. A) Un solo codice di diritto canonico per tutta la Chiesa. B) Con appendice di usi, tradizioni particolari per ogni rito. C) Le SS. Congregazioni romane, coi loro soggetti da trattare per tutti senza nessuna distinzione per i latini e per gli orientali ecc. Questa separazione non cagiona se non una vera separazione, inferiorità tra gli orientali ed occidentali. Diritti e doveri uguali per tutti, tutte le chiese orientali sono forse uguali fra di loro? Eppure non sono divise come se fossero orientali ed occidentali. Una sola Chiesa. Tutto era nell'oriente e dall'oriente. Tutto fu consegnato all'autorità nell'occidente. L'oriente e l'occidente: l'occidente e l'oriente. *Epilogo*. 1. Una sola Chiesa santa cattolica apostolica romana. 2. Una sola legge, una sola amministrazione per tutti."

5.2.3.3. The Debate on Version C of the Schema *De Ecclesiis Orientalibus*

The Eastern commission reviewed these animadversions when revising and shortening Version B of the schema. In general, the commission decided not to take a strong position in either direction concerning the expression of autonomy in the text. On the one hand, it refused to mention any unification of law or curial administration in the schema, stating that such a statement did not pertain to the schema.[96] On the other hand, the commission did not insert the word "autonomy" into the schema because it considered the term not to be entirely clear.[97] The resulting text was approved unanimously by the members of the commission.[98]

This text was then further shortened by order of the Coordinating Commission, creating Version C.[99] This abridgement suppressed the two recently-introduced paragraphs on Eastern synods.[100] However, Version C of the schema did reorder the text such that a revised statement on Eastern juridic autonomy was placed towards the beginning, outside of the section on ecumenism and in the section on observing the Eastern spiritual patrimony:

> The history, traditions, and many ecclesiastical institutes brightly testify to how greatly the Eastern Churches are valued in the whole Church. Therefore, this holy synod not only offers this ecclesiastical and spiritual patrimony due esteem and just praise, but also

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[96] Emendations proposed to the Eastern commission and responses to them, presented to the One hundred and second General Congregation, October 15, 1964: *Acta Synodalia*, 3/4:498 (#4): "Unica est catholica Ecclesia, unicus proinde habeatur Codex Iuris Canonici, cum appendicibus pro singulis ritibus. SS. Congregationes omnes causas latinorum et orientalium simul tractent. *Resp*.: Non pertinet ad schema nostrum."

[97] Ibid., 3/4:500 (#33): "«Post 'dignitates' [in n. 3] inseratur: 'et autonomia' [...]». *Resp*.: «Autonomia» est vox non omnimode clara."

[98] Ibid., 3/4:493.

[99] Hoeck, "Decree on Eastern Catholic Churches," 1:309. Hoeck states: "The secretariat of the Commission together with some *periti* again discharged this work for our Decree, whereby the 54 articles of Version B were compressed into a total of 29 and the division into two parts was deliberated upon anew in the Commission with due regard to those proposals for improvement which were still pertinent."

[100] One hundred and second General Congregation, October 15, 1964: *Acta Synodalia*, 3/4:507. Both §18 and §19 have the accompanying text "(suppressus in novo textu)." Cf. the written comments of Armenian Bishop Garabed Amadouni, Exarch of France, in ibid., 3/5:851, and Melkite Patriarch Maximos IV Saïgh in ibid., 3/5:884, both lamenting the lack of reference to the institute of the synod in the section on patriarchs (§§7–11).

> firmly considers it as the patrimony of the whole Church of Christ. On account of this, it solemnly declares that the Churches of the East and of the West enjoy the right and are bound by the duty to rule themselves according to their own proper disciplines, as commended by their venerable antiquity, being more congruous to the habits of their faithful, and appearing more apt for fostering the good of souls.[101]

While clearly based on paragraph 48 of Version B of the schema, the list of changes given by the Eastern commission indicated no actual source for this text.[102]

Just as occurred with the animadversions on Version B, the council fathers offered different views on Eastern juridic autonomy.[103] In favor of explicitly recognizing such autonomy was Franz Cardinal König, Archbishop of Vienna, who told the council:

> To the mind of the great ecumenical councils, which in the same way pertain to the East and the West and which are often cited in the footnotes [of the schema], the patriarchates must be described—like communion or *koinonia*—as a most ancient expression of the unity of the Church. As for internal legislation—I say as for internal legislation—it seems to me that the juridic autonomy of all patriarchates that are in the Church must be recognized explicitly. In this manner the way may be prepared for the work of the post-

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[101] Schema (Version C) presented at the One hundred and second General Congregation, October 15, 1964: ibid., 3/4:486: "Historia, traditiones et plurima ecclesiastica instituta praeclare testantur quantopere de universa Ecclesia Orientales Ecclesiae meritae sint. Quapropter Sancta Synodus patrimonium hoc ecclesiasticum et spirituale non solum aestimatione debita et iusta laude prosequitur, sed etiam tamquam patrimonium universae Christi Ecclesiae firmiter considerat. Quamobrem sollemniter declarat, Ecclesias Orientales iure pollere et officio teneri se secundum proprias disciplinas peculiares regendi, utpote quae veneranda antiquitate commendentur, moribus suorum fidelium magis sint congruae atque ad bonum animarum consulendum aptiores videantur." The emendations added to the report of the *relator* altered this text partially (and are taken into account in the translation above): "N. 5: lin. 16: Dicatur: «... declarat, Ecclesias *Orientis sicut et Occidentis* ius pollere...»" (ibid., 3/4:527). Several fathers in their written animadversions prior to the oral debate had suggested such a change—see, for example, comments of Melkite Patriarch Maximos IV Saïgh in ibid., 3/5:880. However, there was one father who proposed that the Western Church be omitted from consideration in this paragraph; the Eastern commission rejected the proposal (ibid., 3/8:574 [#70]). This paragraph was specifically cited in the *relatio* to the council given by Archbishop Bukatko, vice president of the Eastern conciliar commission; see One hundred and second General Congregation, October 15, 1964: ibid., 3/4:524: "Ius, imo etiam obligatio inculcatur Ecclesiis Orientalibus se secundum proprias disciplinas regendi (n. 5)."

[102] Note that at ibid., 3/4:501, the former §5 is said to be part of the new §4, and the former §6 part of the new §6. §§47 and 48 are said to be the source of §24 of the new text (ibid., 3/4:515). None of the other former paragraphs is listed as the basis for the new §5. Edelby-Dick, 240–241 hold that the finalized *OE* 5 did result from the excision of part of the former §48 and its placement in a new section. In addition to Hoeck's revision cited above, a proposal from Joseph Slipyj, Ukrainian Major Archbishop of Lviv, may have also influenced moving §48 to the beginning of the text. He suggested at ibid., 3/5:832 that §§46–48 of Version B be placed at the beginning of the text, just after §1 (§1-§48-§46-§47-§2...).

[103] For summaries of the speeches on Version C given at the general congregations, see Edelby-Dick, 83–96.

> conciliar commission for reforming the code, and a path laid out for the reestablishment of unity with the Orthodox Churches.[104]

Patriarch Maximos IV Saïgh also declared:

> The patriarchate is not a simple honorific dignity. That dignity must be the external expression of its actual importance. Further, one must not cover the Eastern patriarchs in honor and precedence, then treat them as subordinates, whose authority is conditioned, in simple details, by infinite obligatory recourses (both prior and subsequent) to the dicasteries of the Roman Curia. Without prejudice to the prerogatives of the successor of Peter, the patriarchs, with their sacred synods, must be as a rule the final instance for all affairs of their patriarchate. This is that internal canonical autonomy that saved the Christians of the East from all kinds of vicissitudes throughout history. It could be an interesting way to envision other ecclesial groups, being in particular conditions. It could also serve as a bond of unity between the Catholic Church and the other Churches, both in the West and in the East.[105]

While these two speeches supported recognition of juridic autonomy for Eastern communities, they notably focused on the patriarchs and patriarchal Churches. The quoted comments did not reference communities not having a patriarch, and how they too could enjoy proper autonomy. This problem was noted by Archbishop Gabriel Bukatko, the vice president of the Eastern

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[104] One hundred and second General Congregation, October 15, 1964: *Acta Synodalia*, 3/4:529: "Ad nn. 7–11. Ad mentem magnorum Conciliorum Oecumenicorum, quae eodem modo ad orientem sicut et ad occidentem pertinent et quae in notis saepe citantur, patriarchatus tamquam expressio antiquissima unitatis Ecclesiae prout est Communio vel Koinonia describendi essent. Quoad legislationem internam—dico quoad legislationem internam—mihi videtur agnoscenda esset explicite autonomia iuridica omnium patriarchatuum qui sunt in Ecclesia. Hoc modo via parari possit labori commissionis post-conciliaris ad Codicem reformandum et via sterni pro redintegratione unitatis cum Ecclesiis orthodoxis."

[105] Ibid., 3/4:534: "[...] le patriarchat n'est pas qu'une simple dignité honorifique. Sa dignité ne doit être que l'expression extérieure de son importance effective. Aussi, il ne faut pas couvrir les Patriarches orientaux d'honneur et de préséance, pour les traiter ensuite en subalternes, dont l'autorité est conditionnée, dans les moindres détails, par d'infinis recours obligatoires, antécédents et subséquentes, aux dicastères de la Curie Romaine. Restant sauves les prérogatives du successeur de Pierre, le Patriarche, avec son Saint-Synode, doit être normalement l'instance ultime pour toutes les affaires de son Patriarchat. C'est cette autonomie canonique interne qui a sauvé les chrétientés d'Orient de toutes sortes de vicissitudes à travers l'histoire. Elle pourrait être une forme intéressante à envisager pour d'autres groupes ecclésiaux, se trouvant en conditions particulières. Elle pourrait aussi servir comme lien d'union entre l'Église catholique et d'autres Églises, aussi bien d'Occident que d'Orient." Cf. similar comments by Reverend Hoeck at the One hundred and fourth General Congregation, October 19, 1964: ibid., 3/5:72–73, calling the current "rights" of Catholic patriarchs mere shadows of what they were in the past.

commission: "Not all Eastern Catholic Churches have a proper patriarch. Some—in fact, the ones with a greater number of faithful—as yet lack one."[106]

The initial text of Version C also tended to emphasize the power of the patriarch, as the two paragraphs on the synod in Version B had been suppressed during the changes made to the text.[107] Armenian Bishop Raphael Bayan of Alexandria stated:

> The *dignity* and *honor* due to the *patriarch* as such must be carefully distinguished from the *jurisdiction and rule* that pertains to the *patriarchal synod*—this latter is the genuine tradition of the Easterners, as yet in force with our separated brothers.[108]

The Eastern commission seems to have recognized this problem, as one of the changes approved in the addendum to Version C added the following text to the ninth paragraph:

> Patriarchs, with their synods, constitute the superior instance for all matters of the patriarchate, not excluding the right of constituting new eparchies and naming bishops of that rite anywhere this should seem opportune, save the inalienable right of the Roman pontiff to intervene in individual cases.[109]

While not entrusting jurisdiction and rule to the synod exclusively, as Bishop Bayan had suggested, this addition did at least recognize explicitly the important role of the synod in *all* matters of the patriarchal Church.

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[106] One hundred and fifth General Congregation, October 20, 1964: ibid., 3/5:114: "Non omnes enim Ecclesiae orientales catholicae habent proprium patriarcham. Nonnullae, immo numero fidelium maiores, eo adhuc carent."

[107] In the original Version C (One hundred and second General Congregation, October 15, 1964: ibid., 3/4:485–493), only the patriarch (and major archbishop by virtue of §10) is said to possess jurisdiction over the relevant Church (§7). No other supra-episcopal entity is said explicitly to have such general jurisdiction; only the phrase "ceteris ad providentiam Synodorum orientalium nec non Sedis Apostolicae remissis" in §1 suggested such jurisdiction to pertain to the synod. Otherwise the synod is mentioned in this original Version C only in two specific matters: 1) establishing, transferring, or suppressing feast days (§19); 2) use of the vernacular in the liturgy (§23). There are two other vague references to non-patriarchal authorities: 1) in §17, the "legislative authority" in each Church can determine the rights and obligations of the subdiaconate and lesser orders; 2) in §20, patriarchs as well as "supreme authorities in a place" can agree on a single date for Easter.

[108] One hundred and fourth General Congregation, October 19, 1964: ibid., 3/5:77: "Sedulo distinguenda videntur *dignitas* ac *honore*, *patriarchae* qua tali debita, a *iurisdictione* ac *regimine*, quae *Synodo Patriarchali* competunt: haec est genuina orientalium traditio, apud seiunctos fratres adhuc vigens."

[109] Emendations given to the One hundred and second General Congregation, October 15, 1964: ibid., 3/4:527–528: "N. 9: lin. 13–4: Emendetur sic: «[...] *Patriarchae, cum suis synodis, superiorem constituunt instantiam pro quibusvis negotiis patriarchatus, non secluso iure constituendi novas eparchias atque nominandi episcopos sui ritus ubicumque hoc opportunum videbitur, salvo inalienabili Romani Pontificis iure in singulis casibus interveniendi*."

Chaldean Archbishop Gogué continued to favor a single code of law despite the rejection by the Eastern commission of his earlier petition on the matter:

> It is not a Westerner or a Latin who proposes the unity of the code and of administration of the sacred congregations, as if to say that the Western or Latin Church wants to submit the Eastern Churches to its own proper law—that is to say, wants to treat them like slaves. The proposal was made by an Easterner, namely by one who sincerely wants progress in order and in true unity, and a necessary union in the whole Catholic Church. For what motive must the Eastern Catholic Churches always remain inferior, divided among themselves for ages and ages? One and the same faith, one and the same morality requires the same good work, such work necessarily being based on the same legislation. Why do we willingly and quickly accept from the Westerners the worst modern style, rejecting with contempt our exemplary traditions of life in family and society, but at the same time with a hoarse voice we insist, on the basis of our same Eastern pretensions, to reject the Latin Code, preferring rather our individual freedom in a particular legislation?
>
> A single code, in the whole Catholic Church, would be in the hands of everyone: professors, students, clerics, members of tribunals, etc., thus eliminating divisions, parties, criticisms, deceit, scandal, etc.[110]

According to Gogué, Eastern faithful had already accepted some unification of legislation through the four apostolic letters *motu proprio* of Pius XII; one would think they would accept a single code for the whole Church, with a supplement for the particularities of each community.[111] Gogué even addressed a personal plea to Paul VI,

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[110] Written comments in ibid., 3/5:860–861: "1. Non è un occidentale o un latino, che propone l'unità nel Codice e nell'amministrazione delle SS. Congregazioni, per dire che la Chiesa occidentale o latina vuole sottomettere le Chiese orientali alla sua propria legge, per così dire, trattarle come quasi schiave. La proposta è fatta da un orientale, cioè da uno che vuole sinceramente il progresso nell'ordine e nella vera unità, e una unione necessaria in tutta la Chiesa cattolica. Per qual motivo, debbono per sempre, le Chiese cattoliche orientali rimanere inferiori, tra di se stesse per secoli e secoli divise? Una medesima fede, una medesima morale richiedono le medesime buone opere, tali opere è necessario che siano basate sulla medesima legislazione. Perché accettiamo dagli occidentali, volentieri e con fretta, perfino le pessime mode moderne, rigettando con disprezzo nostre tradizioni di vita esemplare in famiglia e nella società; mentre in pari tempo insistiamo con rauca voce, su quelle medesime pretensioni nostre orientali, ricusando il codice latino, preferendo piuttosto la nostra libertà individuale, in una legislazione particolare. 2. Un solo Codice, in tutta la Chiesa cattolica sarebbe tra le mani di tutti: professori, alunni, clero, membri di tribunali, ecc. eliminando così divisioni, partiti, critiche, inganni, scandali, ecc." Cf. his concluding summation in ibid., 3/5:861–862. The rejection of his initial petition is found in the report on emendations presented to the One hundred and second General Congregation, October 15, 1964: ibid., 3/4:498 (4): "Unica est catholica Ecclesia, unicus proinde habeatur Codex Iuris Canonici, cum appendicibus pro singulis ritibus, SS. Congregationes omnes causas latinorum et orientalium simul tractent. *Resp*. Non pertinet ad schema nostrum." This is also quoted in Gogué's written comments in ibid., 3/5:859.

[111] Written comments in ibid., 3/5:860–861.

> to concede to each Eastern Church and residential bishops of the Eastern rites [the ability] to follow, if they want, the discipline of the Holy Roman Church, with their own proper ritual particularity. Thus there would be realized, in the true Church of Our Lord, our prayer "thy kingdom come." Amen.[112]

Gogué's opinions suggest that the Eastern communities could only reach true equality in the Catholic Church when they no longer were treated as special cases in law, as inferior because of their particularities. Adoption of a single code for East and West would constitute a sign of the unity of the Church, would show that the Eastern faithful were just as much a part of the Church as Latin faithful, and would end the scandal of apparent divisions within the Church.

Having reviewed the proposals of the council fathers, the Eastern commission decided to maintain the *status quo* in the declaration of juridic autonomy of the Eastern communities. On the one hand, efforts to remove the statement acknowledging juridic autonomy were rebuffed.

> One father proposes that lines 16–20 be removed, namely the clause "Quamobrem ... videatur" ["On account of this, it solemnly declares that the Churches of the East and of the West enjoy the right and are bound by the duty to rule themselves according to their own proper disciplines, as commended by their venerable antiquity, being more congruous to the habits of their faithful, and appearing more apt for fostering the good of souls"], because this right is very indeterminate, the bases alleged [for it] do not suffice, and the code makes dispositions in liturgical and disciplinary matters. Otherwise, even the Western particular Churches could rule themselves according to their proper discipline with the danger of national churches, and oversight is necessary for necessary unity.
>
> *Response*: There does not seem to be a reason to fear the things that have been said in our schema.[113]

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[112] Ibid., 3/5:862: "*Supplica filiale* al Nostro Santissimo Padre Paolo VI, fel. regnante, di degnarsi concedere a quella Chiesa orientale e Vescovi residenziali del riti orientali, di seguire se vogliono la disciplina della S. Chiesa Romana, con le proprie loro particolarità rituali. Così sarebbe realizzata, nella vera Chiesa di N. S. la nostra preghiera «adveniat regnum tuum» amen."

[113] Report on proposed emendations given to the One hundred and twenty-seventh General Congregation, November 20, 1964: ibid., 3/8:574 (#73): "1 Pater proponit ut auferantur lineae 16–20, i.e. dictio: «Quamobrem ... videatur», quia hoc ius est sat indeterminatum, fundamenta allegata non sufficiunt, in liturgicis et disciplinaribus disponat Codex. Alioquin etiam Ecclesiae particulares occidentales possent sese regere secundum propriam disciplinam cum periculo Ecclesiarum nationalium, et moderamen est necessarium ob necessariam unitatem. R.—Non videtur adesse ratio timendi ex his quae dicta sunt in nostro schemate."

On the other hand, in order to maintain the *status quo* of the text, the commission again rejected the use of the term "autonomy":

> Twenty-two fathers propose a *new redaction* [of paragraph seven, on patriarchs], which is attributed to Reverend Hoeck: "By the name of patriarch comes the bishop, to whom, together with the synod, pertains (others say "the canons attribute") full canonical and disciplinary autonomy in their territory, and jurisdiction over all bishops, not excepting metropolitans, clergy, and people (omitting: "of the territory or rite" and "according to the norm of law"), but save the primacy of the Roman pontiff (omitting the words "to be exercised").
>
> *Response*: a) It is better to express more precisely that this only concerns *Eastern* patriarchs. b) Regarding the mention of the synod, see the previous responses to *modi* 3 and 4 [of this section on paragraph 7/B].[114] c) "Pertains" better expresses the customary origin of patriarchal rights. d) The formula "canonical and disciplinary autonomy" seems to offer a pretext for false interpretations. e) It is better to retain the words "territory or rite." f) "According to the norm of law" can be omitted or can be said. g) It is better to omit the words "to be exercised."[115]

Thus, the fifth paragraph remained as it stood in Version C (with the change introduced by the commission in the addendum to that text),[116] but no other sections were altered to establish more clearly the juridic autonomy of the Eastern communities.

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[114] Ibid., 3/8:580–581: "104—2 Patres proponunt, ut post «canones tribuunt» addatur: «*una cum sua Synodo*». R.—Non convenit mentio Synodi in hoc loco, quia Synodus non habet, stricte loquendo, iurisdictionem in episcopos, clerum et populum. 105—1 Pater proponit, ut post verba «ad normam iuris» addatur: «*vi cuius iurisdictio Patriarchalis limitatur a S. Synodo, cui ille praeest et quacum Ecclesiam suam regit*». R.—Cf. modum antecedentem. Ceteroquin, verba «ad normam iuris» sufficiunt, quia ius determinat modum exercitii potestatis patriarchalis."

[115] Ibid., 3/8:581–582 (#110): "22 patres proponunt *novam redactionem*, quae tribuitur R. P. Hoeck: «Nomine vero *huiusmodi Patriarchae* venit episcopus, cui *una cum sua Synodo competit* (alii dicunt: «*canones tribuunt*») *plena autonomia canonica et disciplinaris in suo territorio* et iurisdictio in omnes episcopos, metropolitis non exceptis, clerum et populum (omissis: 'territorii vel ritus' et 'ad normam iuris'), salvo *tamen* primatu R. P.» (omissa voce: «exercenda» vel «exercendam»). R.—*a*) Melius est pressius exprimere, quod agitur tantum de Patriarchis *orientalibus*; *b*) de mentione synodi, vide supra ad modos 3 et 4; *c*) «competit» melius exprimit originem consuetudinariam iurium patriarchalium; *d*) formula «autonomia canonica et disciplinaris» videtur ansam praebere falsis interpretationibus; *e*) melius est retinere verba: «territorii vel ritus»[;] *f*) «ad normam iuris» et potest omitti et potest dici; *g*) melius est omittere verbum «exercendam»." Cf. ibid., 3/5:390 (#144) on three proposals to adjust §9 to include an explicit recognition of patriarchal autonomy, which were rejected for the same reason, namely the possible pretext offered for false interpretations. Comments on the absence of the word "autonomy" from the conciliar texts are found in Georgică Grigoriță, *L'Autonomie Ecclésiastique selon la Législation Canonique Actuelle de l'Église Orthodoxe et de l'Église Catholique: Étude canonique comparative*, Tesi Gregoriana, Serie Diritto Canonico 86 (Rome: Pontificia Università Gregoriana, 2011) 383–385.

[116] See the comparison of versions in the Report on proposed emendations given to the One hundred and twenty-seventh General Congregation, November 20, 1964: ibid., 3/8:609.

All these debates, proposals, and revisions indicate the complex nature of properly expressing the autonomy of the Eastern communities in a conciliar text. The different positions were generally based on the same desire, that the Eastern communities—the Eastern *Churches*—be recognized as equal in dignity to the Latin Church within the Catholic communion of Churches. On the one hand, equal dignity would seem to demand that ecclesiastical laws apply to all Churches equally. Some form of uniform discipline for the whole Church seemed necessary, as the existence of special norms for Eastern faithful contributed to the belief that these faithful constituted "exceptions" in a predominantly Latin Catholic Church. As Archbishop Doumith admitted, establishing a uniform discipline would reduce the capacity of the individual communities to legislate for themselves on such matters, eliminating "particular" law as a seed of division in the Church. On the other hand, equal dignity would also seem to demand equal legislative capacity among all "particular Churches"; thus, their autonomy should be strongly affirmed, even to the point of using the term "autonomy," and the ability of the internal authorities of each community to enact law and exercise jurisdiction for their Church should be strengthened. The finalized draft of the decree on Eastern Churches given to the council fathers avoided going beyond a simple affirmation of autonomy (without using that word) and recognition of the patriarch with the synod as the "superior" instance for matters within the patriarchates. Of particular note was the decree's avoidance of the language proposed by Reverend Hoeck, stating that the right and obligation of self-governance derived from these Churches "origin, tradition, and dignity."[117] The concept of the equal dignity of Churches, which drove so much of the debate on this question, was not explicitly referenced in the text on

[117] Ibid., 3/5:790 (emendation to §2 of Version B): "Omnes ergo hae particulares Ecclesiae ea gaudent autonomia, quae singulis competit *ex earum origine, traditione et dignitate* quaeque earum ingenio magis est consona et consueta; hac sane condicione, ut unaquaeque remaneat in unione fraterna cum tota Ecclesia sub cura primatiali Romani Pontificis, successoris Sancti Petri, cui nempe Dominus mandavit, ut confirmet fratres suos" (emphasis added).

autonomy. The basis for the right and duty of self-governance appeared to arise from more pratical reasons—commendation by antiquity, congruity to habits of the faithful, and aptness for providing for the good of souls. The final draft thus affirmed Eastern autonomy without clearly connecting it to the ecclesial dignity of these Churches.

5.2.4. The Final Texts of the Council

The conciliar decree on Eastern Catholic Churches, *Orientalium Ecclesiarum*, was formally approved at the fifth public session of the council on November 21, 1964, with 2,110 votes *placet* to 39 votes *non placet*.[118] The decree states that the Catholic Church "makes much" (*magni facit*) of the institutes, liturgical rites, ecclesiastical traditions, and discipline of Christian life of the Eastern Churches.[119] The council declared its desire that these Churches flourish and gain new strength, and thus issued these particular principles in addition to others pertaining to the whole Church.[120] However, the council explicitly made no attempt to restructure the entirety of Eastern discipline; all other matters were "remitted to the providence of the Eastern synods and the Apostolic See."[121] Thus, while the introductory paragraph implied that the Eastern

[118] Ibid., 3/8:782.

[119] *OE* 1: "Orientalium Ecclesiarum instituta, ritus liturgicos, traditiones ecclesiasticas atque vitae christianae disciplinam Ecclesia catholica magni facit."

[120] Ibid.: "[...] haec Sancta et Oecumenica Synodus cupiens ut eaedem floreant et novo robore apostolico concreditum sibi munus absolvant, praeter ea quae ad universam spectant Ecclesiam, capita quaedam statuere decrevit [...]."

[121] Ibid.: "[...] ceteris ad providentiam Synodorum orientalium nec non Sedis Apostolicae remissis."

Churches have some form of juridic autonomy, the exact nature and extent of this autonomy are not clearly explicated, as the Apostolic See is said to have a concurrent responsibility.[122]

In the following three paragraphs, the decree establishes that the Catholic Church consists of Christian faithful who are organically united among themselves in the Holy Spirit by the same faith, sacraments, and rule, and who, coalescing in particular groups joined by a hierarchy, constitute particular Churches or "rites."[123] Such coalescing is addressed in a more historical-theological way[124] in the dogmatic constitution on the Church, *Lumen gentium*:

> By divine providence it has happened that various Churches, instituted in various places by the Apostles and their successors, over the course of time have coalesced into many groups, joined organically, which, save the unity of faith and the single divine constitution of the universal Church, enjoy their own proper discipline, their own liturgical use, and their own theological and spiritual patrimony. Among these some, notably the ancient patriarchal Churches, like matrices of the faith, have given birth to others like daughters, with whom they are connected up to our time by a rather strong bond of charity in sacramental life and in mutual reverence of rights and duties. This

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[122] Some fathers had suggested deleting "nec non Sedis Apostolicae," notably Reverend Hoeck in *Acta Synodalia*, 3/5:788–789. Others asked to replace *nec non* (and) with *vel* (or); see, for example, the comments of Archbishop Baudoux in ibid., 3/5:853.

[123] *OE* 2: "Sancta et catholica Ecclesia, quae est corpus Christi mysticum, constat ex fidelibus, qui eadem fide, iisdem sacramentis et eodem regimine in Spiritu Sancto organice uniuntur, quique in varios coetus hierarchia iunctos coalescentes, particulares Ecclesias seu ritus constituunt." Archbishop Elias Zoghby, Melkite patriarchal vicar, made similar comments during the debate on the document, also using "constat": "Ecclesia universalis enim, quae constat omnibus Ecclesiis particularibus [...]" (One hundred and third General Congregation, October 16, 1964: *Acta Synodalia*, 3/5:32). Each statement may be emulating the use of *constare* in Benedict XIV, constitution *Allatae sunt*, July 26, 1755, §3: *Bullarium Benedicti XIV*, 4:123: "Orientalem autem Ecclesiam omnibus notum est quatuor Ritibus constare, Graeco videlicet, Armeno, Syriaco, et Cophtico, qui sane Ritus universi subuno [*sic*] nomine Ecclesiae Graecae, aut Orientalis intelliguntur, non secus ac sub Ecclesiae Latinae Romanae nomine, Ritus Romanus, Ambrosianus, Mozarabicus, et varii peculiares Ritus Ordinum Regularium comprehenduntur." Wojnar, "Decree on the Oriental Catholic Churches," 181, lists four differentiating elements separating one particular Church from another: possession of a proper hierarchy, possession of a proper liturgy, possession of a proper discipline, and possession of a proper spiritual heritage. Victor J. Pospishil, *Orientalium Ecclesiarum, The Decree on the Eastern Catholic Churches of the II Council of Vatican: Canonical–Pastoral Commentary* (New York: Fordham University, 1965) 10 argues that "only the first of the differentiating elements is essential, namely a hierarchy independent from other hierarchical organizations, and subject only to the primatial authority of the Roman pontiff."

[124] Thus was the text that would become *LG* 23 described by the Eastern conciliar commission in the report on proposed emendations given to the One hundred and twenty-seventh General Congregation, November 20, 1964: *Acta Synodalia*, 3/8:578 (#92): "Petitur ab 1 Patre, ut caput istud de Patriarchis [*OE* 7–11] «*transferatur* in Schema de Ecclesia (cap. III) post adaptationem (sc. factis necessariis emendationibus)». R.—In Schemate De Ecclesia (cap. III, n. 23) iam habetur aliqua introductio historico-theologica de Patriarchatibus. Caput nostrum est indolis disciplinaris, sicut totum Schema De Ecclesiis Orientalibus."

> variety of local Churches breathing as one rather clearly demonstrates the catholicity of the indivisible Church.[125]

All these Churches, regardless of whether they are "mother" or "daughter" Churches, enjoy the same rights and obligations even as pertaining to preaching the Gospel. They are also explicitly affirmed to be equal in dignity, with none preeminent over the others by reason of rite.[126]

The fifth paragraph of the decree remained unchanged from the last schema presented to the council:

> The history, traditions, and many ecclesiastical institutes brightly testify to how greatly the Eastern Churches are valued in the whole Church. Therefore, this holy synod not only offers this ecclesiastical and spiritual patrimony due esteem and just praise, but also firmly considers it as the patrimony of the whole Church of Christ. On account of this, it solemnly declares that the Churches of the East and of the West enjoy the right and are bound by the duty to rule themselves according to their own proper disciplines, as commended by their venerable antiquity, being more congruous to the habits of their faithful, and appearing more apt for fostering the good of souls.[127]

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[125] *LG* 23: "Divina autem Providentia factum est ut variae variis in locis ab Apostolis eorumque successoribus institutae Ecclesiae decursu temporum in plures coaluerint coetus, organice coniunctos, qui, salva fidei unitate et unica divina constitutione universalis Ecclesiae, gaudent propria disciplina, proprio liturgico usu, theologico spiritualique patrimonio. Inter quas aliquae, notatim antiquae Patriarchales Ecclesiae, veluti matrices fidei, alias pepererunt quasi filias, quibuscum arctiore vinculo caritatis in vita sacramentali atque in mutua iurium et officiorum reverentia ad nostra usque tempora connectuntur. Quae Ecclesiarum localium in unum conspirans varietas indivisae Ecclesiae catholicitatem luculentius demonstrat." For an overview of the history of this conciliar text, see John D. Faris, *The Communion of Catholic Churches: Terminology and Ecclesiology* (Brooklyn: 1985) 35–38, noting that the original version of the text focused on episcopal conferences, but was altered in 1964 to take account of the patriarchates. Note also Olivier Rousseau, "Divina autem Providentia... Histoire d'une phrase de Vatican II," in *Ecclesia a Spiritu Sancto edocta (Lumen Gentium, 53): Mélanges théologiques Hommage à Mgr Gérard Philips*, Bibliotheca Ephemeridum Theologicarum Lovaniensium 27 (Gembloux: J. Duculot, 1970) 281–289, tracing the evolution of this section of *LG* 23. Dimitri Salachas and Luigi Sabbarese, *Codificazione latina e orientale e canoni preliminiari* (Vatican City: Urbaniana University, 2003) 188 argue that *OE* 5 is the juridic consequence of the ecclesiological principle stated in *LG* 23.

[126] *OE* 3: "Eaedem proinde pari pollent dignitate, ita ut nulla earum ceteris praestet ratione ritus, atque iisdem fruuntur iuribus et tenentur obligationibus, etiam quod attinet ad Evangelium praedicandum in universum mundum (cf. *Mc*. 16, 15), sub moderamine Romani Pontificis." This statement thereby rejects the concept of *praestantia ritus latini* that had been supported by Benedict XIV. Cf. Edelby-Dick, 157, 165–168 on *OE* 3 and *praestantia ritus latini*; Patrick Valdrini, "L'*Aequalis Dignitas* des Églises d'Orient et d'Occident," in *Acta Symposii Internationalis circa Codicem Canonum Ecclesiarum Orientalium, Kaslik, 24–29 aprilis 1995*, ed. Antoine Al-Ahmar, Antoine Khalife, and Dominique Le Tourneau (Kaslik: Université Saint-Esprit, 1996) 51–68 for a discussion of this article and its later effect on the *CCEO*.

[127] *OE* 5: "Historia, traditiones et plurima ecclesiastica instituta praeclare testantur quantopere de universa Ecclesia Orientales Ecclesiae meritae sint. Quapropter Sancta Synodus patrimonium hoc ecclesiasticum et spirituale non solum aestimatione debita et iusta laude prosequitur, sed etiam tamquam patrimonium universae Christi Ecclesiae firmiter considerat. Quamobrem sollemniter declarat, Ecclesias Orientis sicut et Occidentis iure pollere et officio teneri se secundum proprias disciplinas peculiares regendi, utpote quae veneranda antiquitate commendentur,

All particular Churches, both Eastern and Western, have the *right* and are bound by the *obligation* to rule themselves according to their own proper discipline.[128] Declaring this to be a *right* means that it cannot be restricted entirely, and any limitation must be for some greater good and only in particular circumstances; there must no longer be any latinization, or any other action imposing one ecclesiastical tradition on a Church not of that tradition.[129] Declaring this to be a right would also seem to indicate that it is not a concession by the pope, the council, or the code, but derives from the very nature of these communities.[130] However, one notes that the origin of this right is never explicitly stated. Further, using this right would in many cases entail

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moribus suorum fidelium magis sint congruae atque ad bonum animarum consulendum aptiores videantur." Hoeck, "Decree on Eastern Catholic Churches," 1:323 argues that the later disciplinary rules of the decree (*OE* 12–23) do not oppose this declaration insofar as they deal primarily with "interritual questions" or alteration of acts issued by Rome, both of which would be outside of the competence of the internal legislative organs of the individual Eastern Churches. For a consideration of *OE* 5 in relation to both historical precedents and the *CCEO*, see Orazio Condorelli, "Il diritto e dovere delle Chiese d'Oriente di reggersi secondo le proprie discipline particolari (*Orientalium Ecclesiarum* 5): radici, valore e implicazioni della formula conciliare," in *Il diritto canonico orientale a cinquant'anni dal Concilio Vaticano II, Atti del simposio di Roma, 23–25 aprile 2014*, Kanonika 22, ed. Georges Ruyssen (Rome: Edizioni Orientalia Christiana/Valore Italiano, 2016) 33–62.

[128] See the commentary offered by Michel Jalakh, *Ecclesiological Identity of the Eastern Catholic Churches:* Orientalium Ecclesiarum *30 and Beyond*, Orientalia Christiana Analecta 297 (Rome: PIO, 2014) 71. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 134 argues that "the question of one code, two codes, or as many codes as there are Churches, does not arise here." Note also Edelby-Dick, 168, stating that equality in dignity does not mean that disciplines have to be equal.

[129] Edelby-Dick, 252.

[130] Ibid.; cf. Luis Okulik, "Significato e Limiti della Definizione di Chiesa *sui iuris*," *Folia Canonica* 12 (2009) 76: "É in questo senso che la dottrina del Concilio Vaticano II mette in evidenza che questa caratteristica della giusta autonomia non risulta da una concessione conciliare o dello stesso Codice, essendo piuttosto un elemento specifico della Chiesa di Cristo, la quale è contemporaneamente universale e particolare, senza una priorità di un aspetto sull'altro"; Frederick R. McManus, "The Code of Canons of the Eastern Catholic Churches," *The Jurist* 53 (1993) 48: "Such firm statements [of *OE* 5 and *UR* 16] should likewise be a corrective to the erroneous theory or mindset that the Eastern discipline is somehow derived from privileges or concessions granted by the Apostolic Roman See"; George Nedungatt, "Title 2: Churches *sui iuris* and Rites (cc. 27–41)," in *A Guide to the Eastern Code*, Kanonika 10, ed. George Nedungatt (Rome: PIO, 2002) 100: "This self determination is an ecclesial right, which precedes all codes and canons, though in precise formulation it is rather recent. It is not a concession of any council or of the Code but a fundamental trait of the Church being particular and universal at the same time, without the latter or the former having a priority over the other"; Wilhelm de Vries, "Il Decreto Conciliare sulle Chiese Orientali Cattoliche," *La Civiltà Cattolica* 116 (April 17, 1965) 113: "Sottolineando che questo vale in uguale modo per le Chiese d'Oriente come per quelle d'Occidente, si vuol monstrare che la disciplina propria dell'Oriente non è una speciale concessione per i cristiani orientali, ma, piuttosto, che la varietà di discipline nella Chiesa universale è una cosa del tutto normale." Similar comments relative to the very existence of these Churches themselves are made in Edelby-Dick, 149–150.

exercising supra-episcopal authority; insofar as the exercise of such authority could limit the rights of individual bishops, it would necessarily depend on the supreme authority of the Church, which alone has the power to limit the authority of bishops through reservation of individual cases to the Roman pontiff or, in this case, to another authority—the legislative organs of the Churches *sui iuris*.[131] Declaring this to be an *obligation* means that particular Churches cannot simply "dissolve" themselves in another Church. While they may organically adopt various liturgical rites or disciplines from other particular Churches,[132] they cannot change themselves into simple clones of other particular Churches.

One notes that this paragraph does not specify the governmental apparatus with which this autonomy rests. The paragraph lies outside of the section on patriarchs (*OE* 7–11); thus, juridic autonomy pertains not simply to the patriarchal (and major archiepiscopal—*OE* 10) Churches, but to any particular Church, even if consisting of one or a few eparchies (e.g., the Italo-Albanian Church, the Slovak Church). The key element is the existence of some authority exercising power within the community, regardless of the particular form (patriarch/synod, major

[131] *CD* 8a: "Episcopis, ut apostolorum successoribus, in dioecesibus ipsis commissis per se omnis competit potestas ordinaria, propria ac immediata, quae ad exercitium eorum muneris pastoralis requiritur, firma semper in omnibus potestate quam, vi muneris sui, Romanus pontifex habet sibi vel alii auctoritati causas reservandi"; *LG* 27: "Haec potestas qua, nomine Christi personaliter [episcopi] funguntur, est propria, ordinaria et immediata, licet a suprema ecclesia auctoritate exercitium eiusdem ultimatim regatur et certis limitibus, intuitu utilitatis ecclesiae vel fidelium, circumscribi possit." Péter Szabó, "Autonomia disciplinare come carattere del fenomeno dell'*Ecclesia sui iuris*: ambito e funzioni," in *Le Chiese* sui iuris*: Criteri di individuazione e delimitazione*, ed. Luis Okulik (Venice: Marcianum, 2005) 162, 174–175, 194–195 references this question in dealing with the legislative capacity of the individual Churches *sui iuris*.

[132] Cf. *OE* 6: "Sciant ac pro certo habeant omnes Orientales, se suos legitimos ritus liturgicos suamque disciplinam semper servare posse et debere, ac nonnisi ratione proprii et organici progressus mutationes inducendas esse. Haec omnia, igitur, maxima fidelitate ab ipsis Orientalibus observanda sunt; qui quidem harum rerum cognitionem in dies maiorem usumque perfectiorem acquirere debent, et, si ab iis ob temporum vel personarum adiuncta indebite defecerint, ad avitas traditiones redire satagant."

archbishop/synod, metropolitan/council) it should take.[133] Further, this right and obligation was not explicitly limited to a territory, at least as concerned things strictly pertaining to rite.[134]

In addition, the *Catholic* particular Churches are not the only possessors of this capacity for self-rule. Concerning all Eastern Churches, the decree *Unitatis redintegratio* declares:

> Moreover, already from the earliest times the Churches of the East followed their own proper disciplines, sanctioned by the holy fathers and synods, even ecumenical ones. As this diversity of *mores* and customs does not oppose the unity of the Church, but rather increases its beauty and is of not a little benefit for fulfilling its mission, as was noted previously, this holy synod, to remove all doubt, declares that the Churches of the East, aware of the necessary unity of the whole Church, have the faculty to rule themselves according to their own proper disciplines, as more congruous to the character of their faithful and more apt for fostering the good of souls. The complete observance of this traditional principle, not always maintained, pertains to those things that are entirely required for the restoration of unity, as a previous condition.[135]

Pope John Paul II commented on this text:

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[133] Cf. Dimitri Salachas, *Orient et Institutions: Théologie et Discipline des Institutions des Églises Orientales Catholiques selon le Nouveau Codex Canonum Ecclesiarum Orientalium* (Paris: Cerf, 2012) 64: "«Le droit et le devoir de se régir selon leurs propres disciplines particulières», qui fait le sens d'une Église *sui iuris*, comporte essentiellement un propre hiérarchie, un autorité supérieure et une autonomie interne, à savoir un pouvoir législatif, administratif et judiciaire, restant sauve l'autorité suprême sur elles du Pontife romain et du Concile oecuménique, et par conséquent le droit d'avoir sa propre normative canonique."

[134] See the rejected proposal of a council father at *Acta Synodalia*, 3/8:574 (#71): "1 Pater in fine lin. 17 [cf. ibid., 3/4:486] addit: «intra fines sui territorii», quia, extra, mores et conditiones vitae valide differunt. R.—Quae stricte ad ritus pertinent, sunt leges personales ubique terrarum obligantes." On the other hand, see the (seemingly unanswered) request of Patriarch Maximos IV Saïgh that, among other emendations for clarification, the decree state explicitly that the right of self-governance given in §48 of Version B was valid "ubique terrarum" (*Acta Synodalia*, 3/5:828).

[135] *UR* 16: "Praeterea a primis iam temporibus Ecclesiae Orientis disciplinas proprias a Sanctis Patribus atque Synodis, etiam Oecumenicis, sancitas sequebantur. Cum autem unitati Ecclesiae minime obstet, immo decorem eius augeat et ad missionem eius implendam non parum conferat quaedam morum consuetudinumque diversitas, uti supra memoratur, Sacra Synodus, ad omne dubium tollendum, declarat Ecclesias Orientis, memores necessariae unitatis totius Ecclesiae, facultatem habere se secundum proprias disciplinas regendi, utpote indoli suorum fidelium magis congruas atque bono animorum consulendo aptiores. Perfecta huius traditionalis principii observantia, non semper quidem servata, ad ea pertinet quae ad unionem restaurandam tamquam praevia condicio omnino requiruntur." See the *relatio* presented to the Eighty-sixth General Congregation, September 23, 1964: *Acta Synodalia*, 3/2:343, noting that many fathers desired that the right of Eastern communities to rule themselves according to their own disciplines be affirmed more clearly and strongly in the draft text of the decree. Note also *LG* 13, emphasizing that it is the role of the Roman Church to protect this diversity, but also to make sure it does not oppose the necessary unity of the whole Church: "Inde etiam in ecclesiastica communione legitime adsunt Ecclesiae particulares, propriis traditionibus fruentes, integro manente primatu Petri Cathedrae, quae universo caritatis coetui praesidet, legitimas varietates tuetur et simul invigilat ut particularia, nedum unitati noceant, ei potius inserviant." For comments on this statement of *LG*, see Faris, *The Communion of Catholic Churches*, 34–35.

> From this decree [*Unitatis redintegratio*] it is clearly grasped that the autonomy that the Eastern Churches enjoy as to discipline does not emanate from privileges conceded by the Roman Church, but from the law itself, which such Churches hold from apostolic times.[136]

However, the declaration of *Unitatis redintegratio* is a bit weaker in form than that of *Orientalium Ecclesiarum*; the former only states that the Churches of the East have the faculty ("facultatem habere") to govern themselves, rather than enjoy a right ("iure pollere") to it.[137] Nevertheless, these two texts—*Orientalium Ecclesiarum* 5 and *Unitatis redintegratio* 16—should be read *together* to understand better the ecclesiological and canonical importance of the conciliar declaration of the right and obligation of particular Churches to rule themselves according to their own proper disciplines.[138] Thus, despite the use of "facultatem," the Eastern non-Catholic Churches enjoy the same right (and are bound by the same obligation) to rule themselves in accord with their own discipline.[139]

Although this autonomy pertains to all particular Churches, *Orientalium Ecclesiarum* focuses on the governance in patriarchal and major archiepiscopal Churches. In line with *Cleri sanctitati*, the decree declares an Eastern patriarch to be a bishop to whom pertains jurisdiction

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[136] John Paul II, apostolic letter *Euntes in mundum*, January 25, 1998, §10: *AAS* 80 (1988) 950: "Ex hoc Decreto eruitur dilucide autonomiam, qua quoad disciplinam Ecclesiae Orientales fruuntur, non manare e privilegiis ab Ecclesia Romana concessis, sed a lege ipsa, quam huiusmodi Ecclesiae a temporibus apostolicis tenent"; cf. McManus, "The Code of Canons of the Eastern Catholic Churches," 48; Victor J. Pospishil, *Eastern Catholic Church Law*, 2nd ed. (New York: Saint Maron Publications, 1996) 109.

[137] Hoeck, "Decree on Eastern Catholic Churches," 1:318 notes: "This [substitution of *ius et officium* with *facultas*] appears to be justified insofar as that passage refers to the Orthodox Chrches, in regard to which the Council was not competent to speak of *officium*. Yet, on the other hand, this is regrettable because *facultas* has a condescending and attenuating savour." Cf. the aforementioned request of Cardinal Ruffini for such a change in the Eastern schema *De Unitate Ecclesiae*, in *Praeparatoria*, 2/4:453: "«... confirmat *ius* quo Orientalis Ecclesia pollet...». Loco vocabuli «ius» ponatur «facultas»."

[138] Dimitri Salachas, "Le «status» ecclésologique et canonique des Églises catholiques orientales «sui iuris» et des Églises orthodoxes autocéphales," *L'année canonique* 33 (1990) 32.

[139] Cf. Hoeck, "Decree on Eastern Catholic Churches," 1:311: "[T]he [Eastern conciliar] Commission took this opportunity [in emending the title to include the word 'Catholic'] to state that in some of the passages (e.g., in Articles 5 and 6), the Orthodox Churches were also meant." One can find this statement in the report on emendations given the One hundred and twenty-seventh General Congregation, November 20, 1964: *Acta Synodalia*, 3/8:560 (#5); note that the commission did not refer to "articles 5 and 6" but to the general title for the section, "de patrimonio spirituali."

over all bishops (not excluding metropolitans), clergy, and people of the proper territory or rite, according to the norm of law and save the primacy of the Roman pontiff.[140] Thus, the broad power of the patriarch cannot be exercised in a vacuum, but must be structured according to the norm of law—namely, papal laws, the Eastern codification, and any laws of the particular Churches concerning the matter. Further, the synod is involved; while the finalized text did not discuss Eastern synods extensively,[141] mention of patriarchal synods was added, declaring that the patriarchs "cum suis synodis" are the superior instance of all matters of the patriarchate.[142]

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[140] *OE* 7: "Nomine vero Patriarchae orientalis venit episcopus, cui competit iurisdictio in omnes episcopos, haud exceptis metropolitis, clerum et populum proprii territorii vel ritus, ad normam iuris et salvo primatu Romani Pontificis." Cf. *CS* c. 216 §2, 1º: "Nomine Patriarchae venit Episcopus cui canones tribuunt iurisdictionem in omnes Episcopos, haud exceptis Metropolitis, clerum et populum alicuius territorii seu ritus, ad normam iuris, sub auctoritate Romani Pontificis, exercendam." Note that, starting in Version B, a change was made in the quotation of *CS* c. 216 §2, 1º; there was no longer a quasi-identification of "rite" and "territory" with the conjunction *seu*, but *vel* was used instead: *Acta Synodalia*, 3/5:745 (§11): "[...] clerum et populum territorii vel ritus [...]." This alteration seemed to suggest that patriarchs could exercise jurisdiction directly over a "rite" as distinct from a territory, opening the possibility of recognizing patriarchal jurisdiction over faithful outside the territorial boundaries of the patriarchate. On the import of this change, see Edelby-Dick, 316, 318–320; Madey, 74–75; Francis J. Marini, *The Power of the Patriarch: An Historical-Juridical Study of Canon 78 of the* Codex Canonum Ecclesiarum Orientalium, Excerpta ex dissertatione ad doctoratum in facultate iuris canonici (Rome: PIO, 1994) 149; Clemente Pujol, "De Sensu Vocis «Aggregatus» (Vaticanum II, Decr. «Orientalium Ecclesiarum», n. 7)" *Periodica* 60 (1971) 260–261; Dimitri Salachas, *Orient et Institutions: Théologie et Discipline des Institutions des Églises Orientales Catholiques selon le Nouveau Codex Canonum Ecclesiarum Orientalium* (Paris: Cerf, 2012) 109–110. Edward Farrugia, "Re-reading *Orientalium Ecclesiarum*," *Gregorianum* 88 (2007) 359 argues that the use of *vel* "leaves room for hope" concerning the extension of patriarchal jurisdiction outside of territory. However, Ivan Žužek, "Canons concerning the Authority of Patriarchs over the Faithful of their own Rite who Live outside the Limits of Patriarchal Territory," *Nuntia* 6 (1978) 17–18 argues that, since the exercise of jurisdiction must be structured *ad normam iuris*, the decree made no major change in the law by replacing *seu* with *vel*.

[141] Cf. Joseph Hajjar, "The Synod in the Eastern Church," in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 63: "After reading those two decrees [*OE* and *UR*] carefully, it seems to me that that the institution of the synod, the keystone of the organic structure of the Eastern Churches, has been overshadowed by the affirmation of principles, however necessary, and by the emphasis placed on the patriarchate"; Hoeck, "Decree on Eastern Catholic Churches," 1:313: "The mention of Oriental synods in the present article [*OE* 1] and later on in Article 9 is a poor remnant from two originally envisaged articles [...] on the synodal constitution so typical and important for the Eastern Church [...]." The same criticism was made in Victor J. Pospishil, *Ex Occidente Lex* (Carteret: St. Mary's Religious Action Fund, 1979) 105 relative to the proposed *CCEO*: "The draft of CICO assimilates the patriarch to the pope by speaking of him as if the church were an extension of the patriarch, placed around him, and not vice versa." He cites Alexander Schmemann's criticism of *OE*, that it focuses too much on the institution of the patriarch. Hoeck, in the citation above, does note that *CD* 36 and 38, 6 reference synods, but the particular character of the synod of an Eastern Church (as opposed to particular synods in the Latin Church) is not made clear in those texts, just as occurred in *CS*.

[142] *OE* 9: "Patriarchae cum suis synodis superiorem constituunt instantiam pro quibusvis negotiis patriarchatus [...]." Wojnar, "Decree on the Oriental Catholic Churches," 201 notes that it is not specified here whether the synods in question are the permanent synods or patriarchal synods according to *CS*; "later legislation will determine this

Thus, the decree delineated generally a governance system at least for the patriarchal and major archiepiscopal Churches, but left the particulars of this system to be determined by future norms.

The conciliar decree *Orientalium Ecclesiarum* affirmed the juridic autonomy of the Eastern Churches, but offered few specifics on how such autonomy would be structured and exercised, especially in a legal system using codes. Thus, it was left to the revisers of Eastern canon law, and ultimately the Roman pontiff, to structure juridically how the right and obligation of Eastern Catholic Churches to govern themselves would be exercised.

5.3. The Post-conciliar Revision of Eastern Law

During the Second Vatican Council, Pope St. John XXIII initiated the first of several processes to revise existing canon law in accord with conciliar teaching. On March 28, 1963, the pope established the Commission for the Revision of the Code of Canon Law.[143] On November 12, 1963, the cardinal members of this commission agreed to defer their work to a point after the

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according to the matter." As carried over from Version C of the schema, two paragraphs explicitly remit matters to the synod: *OE* 19, on determining, transferring, and suppressing feast days of a particular Church; *OE* 23, on regulating the use of languages in the liturgy. Also, *OE* 17 remits to the legislative authorities of each Church decisions concerning the subdiaconate and minor orders, and *OE* 20 entrusts to patriarchs "vel supremis in loco auctoritatibus ecclesiasticis" the decision concerning celebrating Easter on the same Sunday. Paul Pallath, *The Synod of Bishops of Catholic Oriental Churches* (Rome: St. Thomas Christian Fellowship, 1994) 60 calls *OE* 9 "the most fundamental assertion of the autonomy of the Oriental Churches," although at 130 he criticizes the text for appearing to make the synod depend on the patriarch, which "does not correspond to the 'sacred canons' of the first millennium which, without any shadow of doubt, considered the Synods of Bishops of an autonomous Church superior to the patriarchs [...]." George Nedungatt, "Autonomy, Autocephaly, and the Problem of Jurisdiction Today," *Kanon* 5 (1981) 22 argues that this conciliar declaration "recognizes a degree of ecclesial autonomy midway between that of the dioceses/eparchies and the higher supreme authority." Cf. Edelby-Dick, 256, explaining how the use of *superior* indicates that this is a relative autonomy. See also Ivan Žužek, "De Patriarchis et Archiepiscopis Maioribus," *Nuntia* 2 (1976) 50, which reports the decision of the relevant codification *coetus* not to determine which of these two—patriarch or synod—was superior relative to the other.

[143] The date of the commission's establishment is found in the preface to the Latin Edition of the 1983 *Codex Iuris Canonici*, in *AAS* 75/2 (1983) xix. The public announcement of the creation of the commission, along with the names of those first appointed to it, is found in "Diarium Romanae Curiae": *AAS* 55 (1963) 363–364.

council had concluded.[144] This commission formally inaugurated its work on November 20, 1965. At this time, Pope Bl. Paul VI addressed the commission, seeming to suggest that there be three bodies of canon law—a Latin code, an Eastern code, and a common and fundamental code containing the Church's constitutive law.[145] Two more codification processes were initiated. The first was a process to create a *Lex Ecclesiae Fundamentalis*.[146] The process initially was entrusted to the Commission for the Revision of the Code of Canon Law [147] but in February 1974 was moved to a separate *coetus mixtus* composed of Latin and Eastern members.[148] The second was the Eastern codification process, formally initiated with the suppression of the codification commission of Pius XI and the establishment of the new Pontifical Commission for the Revision of the Code of Eastern Canon Law, a decision officially communicated to Joseph Cardinal Parecattil (named as president) on June 10, 1972.[149]

At its first *plenaria*, or plenary meeting, in March 1974, the Eastern code commission reviewed and approved certain guidelines that would guide their work, drafted by the Pontificio

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[144] *Communicationes* 1 (1967) 36; Preface to the Latin Edition of the 1983 *Codex Iuris Canonici*, in *AAS* 75/2 (1983) xix.

[145] Preface to the Latin Edition of the 1983 *Codex Iuris Canonici*, in *AAS* 75/2 (1983) xx; cf. Paul VI, allocution *Singulari cum animi*, November 20, 1965: *AAS* 57 (1965) 985–989.

[146] One can find an extensive study of the path of the *LEF* in Daniel Cenalor Palanca, *Le Ley Fundamental de la Iglesia: Historia y análisis de un proyecto legislativo* (Pamplona: Universidad de Navarra, 1991).

[147] Ibid., 35, 39. The work was entrusted to the *Coetus* on coordination in 1965, and then a special *coetus* focused solely on the *LEF* in 1967.

[148] The PIO draft of the guidelines for the revision of the Eastern code had initially included a guideline asking for Eastern participation in formulating the *LEF* (see PIO Faculty, "Norme per la Ricognizione del Diritto Canonico Orientale," *Nuntia* "Fasciculus Praevius" [1973] 33, guideline XII). Prior to the approval of the guidelines, a letter was sent by the Secretariat of State to the vice president of the Eastern code commission indicating the formation of a *coetus specialis* or *coetus mixtus* for formulating the *LEF*, so the proposed guideline was dropped; see Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 64–65. A notice about the creation of the *coetus mixtus* is found in "Nota sulla partecipazione della PCCICOR al Coetus de Lege Ecclesiae Fundamentali," *Nuntia* 1 (1975) 19. For a general study of the relation of the *LEF* to both codes, see Ivan Žužek, "La «Lex Ecclesiae Fundamentalis» et les Deux Codes," *L'année canonique* 40 (1990) 19–48.

[149] The letter of Jean-Marie Cardinal Villot to Cardinal Parecattil is found in "Istituzione e Composizione della Commissione," *Nuntia* 1 (1975) 11, and a notification on behalf of Paul VI, given on June 15, 1972, was published in *L'Osservatore Romano* on June 16, 1972 (*Leges Ecclesiae*, 4:6279 [#4059]); cf. Thomas J. Green, "Reflections on the Eastern Code Revision Process," *The Jurist* 51 (1991) 22; the Preface to the Latin Edition of the 1990 *Codex Canonum Ecclesiarum Orientalium*, in *AAS* 82 (1990) 1055.

Istituto Orientale.[150] The commission also reviewed the archives of the prior commission instituted by Pius XI and gathered suggestions from Eastern patriarchs and other heads of Churches *sui iuris* as to the codification project itself and the persons to be named as consultors.[151] Nine *coetus* were formed, subject to the oversight of a central *coetus*, to formulate a complete draft of a code. The eight individual drafts eventually formulated were sent to consultative bodies throughout the world, Roman dicasteries, Roman universities, and other universities having chairs in Eastern canon law. Each of the texts was then revised by the commission in a process called the *denua recognitio*. A draft of the complete code was then formulated, with adjustments made to make the eight separate sections follow the same rules concerning grammar, orthography, references, and other such matters. The resulting *Schema Codicis Iuris Canonici Orientalis*[152] was sent to members of the Eastern code commission and consultative bodies on October 17, 1986, with responses to be sent in by April 30, 1987.[153] Adjustments to the text were made based on these responses, and a second *plenaria* of the Eastern code commission was held in November 1988. After approval of the *schema novissimum*, the text was sent to the pope on January 28, 1989[154] who, after making some final alterations, promulgated the *Codex Canonum Ecclesiarum Orientalium* on October 18, 1990.[155]

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[150] The draft is found in PIO Faculty, "Norme per la Ricognizione del Diritto Canonico Orientale," 20–33. The finalized guidelines are found in *Nuntia* 3 (1976) 3–24 in various languages; see also the entirety of Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, as well as Green, 22–26.

[151] John D. Faris, *The Eastern Catholic Churches: Constitution and Governance* (New York: Saint Maron Publications, 1992) 88. The entire following section is indebted to this source, particularly pp. 88–92. See also the summary provided in Émilio Eid, "Relazione del Vice-Presidente della Commissione alla apertura dell'Assemblea Plenaria dei Membri (3 novembre 1988)," *Nuntia* 29 (1989) 12–15; "Ex Actus Pont. Comm. CICO Recognoscendo," *Communicationes* 40 (2008) 167–174.

[152] The schema is found in *Nuntia* 24-25 (1987) 1–268.

[153] The relevant documentation is found in "Invio dello Schema Codicis Iuris Canonici Orientalis all'Esame dei Membri della Commissione," *Nuntia* 23 (1986) 109–119.

[154] Cf. Pospishil, *Eastern Catholic Church Law*, 70.

[155] John Paul II, apostolic constitution *Sacri canones*, October 18, 1990: *AAS* 82 (1990) 1033–1044.

During the process to reform Eastern canon law, two particular discussions arose impacting how the autonomy of the Eastern Catholic Churches would be structured in the law. First, as was true for the first codification process, there was the question of creating a single code for the whole Church, a single code for all Eastern Churches, or individual codes for each Eastern Church. The debates concerning this question dealt with the proper application of *Orientalium Ecclesiarum* 5 to the entire codification project. Second, there was the question of canonizing the Pamphilian jurisprudence. Whether and how a declaration of the "negative" autonomy of the Eastern communities (papal decisions as a rule not applying to them) would be included in the new code would become one of the more contentious questions in the entire codification process.

5.3.1. Determining the Number of Codes

The nature of the forthcoming codification—one code, two codes, or many codes based on other criteria—confronted canonists and others at the beginning of the post-conciliar codification process.

> It is to be noted that some Oriental prelates desire a single Code for the whole Church, while others think that two distinct Codes are "a necessary guarantee against latinization." There could be several distinct Oriental Codes, for instance, one for each of the five principal rites.[156]

Thus, on May 6, 1965—prior to the formal inauguration of their work—the members of the code commission raised the issue: "There is the question whether one or two codes are to be made,

[156] Žužek, "Oriental Canon Law: Survey of Recent Developments," 143. Note that Patriarch Maximos IV Saïgh had written to Pope Bl. Paul VI in 1963 urging the production of a specifically Eastern code as opposed to a single code for the whole Church: Letter of November 22, 1963, found in Italian translation in *Discorsi di Massimo IV al Concilio: Discorsi e note del Patriarca Massimo IV e dei vescovi della sua Chiesa al Concilio Ecumenico Vaticano II* (Bologna: Dehoniane, 1968) 467–469.

one for the Easterners and another for the others, preceded by a certain fundamental code."[157] A subcommission of nine members, led by Daniel Faltin, looked at the question over several months and created a document concerning the "fundamental questions," which was sent to all commission members.[158] The document offered three possibilities for the structure of the forthcoming codification:

> 1. Whether it is useful or opportune to render a single code of canon law for the whole Church (therefore, for the Latin Church and the Eastern Churches together);
> 2. Whether (to the contrary) it is necessary to retain a double code of canon law, one of which respects the Church of the Latin rite, and the other the Churches of the Eastern rites;
> 3. If the second proposal prevails, it will be opportune to consider whether a fundamental code, containing the constitutional law of the Church, can be created, to be placed at the beginning of each code.[159]

In these three options, there were two possibilities specifically for Eastern law: a separate code for the East, or a single code for both West and East. There was no explicit option that each particular Church *sui iuris* have its own code, although one member did bring the question up during the discussion.[160]

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[157] *Communicationes* 1 (1969) 37: "Quaestio utrum unus an duo Codices faciendi sunt, unus pro Orientalibus et alter pro aliis praemisso Codice quodam Fundamentali"; cf. Cenalor Palanca, 25; Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 95 note 1. See also Valentín Gómez-Iglesias, "Los trabajos iniciales de la Comisión para la Revisión del 'Codex Iuris Canonici' de 28 de marzo de 1963 y la Codificación Oriental," in *Ius Ecclesiae Vehiculum Caritatis: Atti del simposio internazionale per il decennale dell'entrada in vigore del* Codex Canonum Ecclesiarum Orientalium, ed. Congregazione per le Chiese Orientali (Vatican City: Libreria Editrice Vaticana, 2004) 735–751 for an overview of the early discussions of the codification commission on the number of codes.

[158] *Communicationes* 1 (1969) 37, 42; cf. Cenalor Palanca, 28.

[159] Speech of Pericle Cardinal Felici to the 1971 Synod of Bishops, October 28, 1971, in Pontifical Commission for the Revision of the Code of Canon Law, *Communicatio de schemate «Legis Ecclesiae Fundamentalis» patribus Synodi Episcoporum habenda* (Vatican City: Typis Polyglottis Vaticanis, 1971) 7: "1) Utrum utile aut opportunum sit redigere unicum Codicem iuris canonici pro universa Ecclesia (ergo pro Ecclesia Latina et Ecclesiis Orientalibus insimul); 2) Utrum (e contra) necessarium sit retinere duplicem Codicem iuris canonici, quorum alter Ecclesiam ritus latini, alter vero Ecclesias rituum orientalium respiciat; 3) Si altera hypothesis praevaleat, considerare oportebit utrum Codex fundamentalis, ius constitutionale Ecclesiae continens, confici possit, utrique Codici praemittendus"; cf. Cenalor Palanca, 28.

[160] Gómez-Iglesias, 743–744; the member was Álvaro del Portillo. While there was some discussion, the decision was made to go through with a single Eastern code containing the common Eastern law, leaving it to the individual Churches to codify their own particular laws.

Pope Bl. Paul VI, in his allocution to the code commission on November 20, 1965, commented on the question:

> Here there is a particular question, and a grave one at that, arising from the fact that there is a double code of canon law—for the Latin Church, and for the Eastern Church—namely, whether it is convenient that a common and fundamental code be formulated, containing the constitutive law of the Church.[161]

These comments presume a "double codification," namely the retention of the juridic structure that Pope Pius XI had decided upon in 1930—a code for the Latin Church, and a (single) code for the Eastern Church. The novelty of the comment concerns the possibility of a third code, applying equally to all Churches—what would become the *Lex Ecclesiae Fundamentalis*.[162] The commission soon pronounced in favor of this triple-law structure,[163] which was later supported by certain Eastern Catholic prelates in a proposal presented to Pope Paul VI in November 1967.[164]

Canonists were simultaneously discussing whether the decision to render a single common Eastern code was appropriate in light of the teaching of *Orientalium Ecclesiarum*.

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[161] Paul VI, *Singulari cum animi*: *AAS* 57 (1965) 988: "Peculiaris vero hic exsistit quaestio eaque gravis, eo quod duplex est Codex Iuris Canonici, pro Ecclesia Latina et Orientali, videlicet num conveniat communem et fundamentalem condi Codicem, ius constitutivum Ecclesiae continentem."

[162] The idea of the *LEF* arose from the desire of some council fathers to have a fundamental code common to all Churches. See the speech of Pericle Cardinal Felici to the 1971 Synod of Bishops, October 28, 1971, in Pontifical Commission for the Revision of the Code of Canon Law, *Communicatio de schemate «Legis Ecclesiae Fundamentalis» patribus Synodi Episcoporum habenda*, 7: "Quaesitum hoc de opportunitate et redactione alicuius Codicis fundamentalis, ea positum est ratione, quia durante iam Concilio Vaticano II aliqui Patres conciliares votum expresserant ut talis Codex fundamentalis, omnibus Ecclesiae ritibus communis, conficeretur, eorum propositi voces eminentes apud Summum Pontificem interpretes fuerunt"; cf. Cenalor Palanca, 27.

[163] The commission formally agreed to having two codes with a fundamental law on November 25, 1965, five days after the pope's allocution: Ivan Žužek, "L'idée de Gasparri d'un *Codex Ecclesiae Universae* comme «Point de Départ» de la Codification Canonique Orientale," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 455 note 73 (stating that the vote was thirty in favor and three against a two-code structure); cf. Cenalor Palanca, 28–30; Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 95 note 1. The questions discussed at that meeting (but not the votes) are found in *Communicationes* 1 (1969) 42.

[164] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 111–112. The proposal termed the entire body of law the *Codex Ecclesiae Catholicae*, composing a fundamental law, the law of the Latin Church, and the common law of the Eastern Catholic Churches. The proposal was also referenced in the first *plenaria* of the Eastern codification commission: see "Lavori della Prima Assemblea Plenaria della Commissione," *Nuntia* 30 (1990) 27.

Néophytos Edelby, a Melkite bishop and canonist, discussed the matter in an article appearing in a volume of *Concilium* in 1965.[165] After considering the conciliar legislation supporting the Eastern Churches' recovery and maintenance of their own discipline and heritage, Edelby looked at the possible juridic options to support this.[166] While recognizing some practical advantage to a single code for the whole Church—displaying the unity of the Church, having Eastern legislation appear on par with that of the Latin Church, mutual understanding between East and West—he considered the disadvantages to be more weighty—the possibility of Eastern legislation appearing as exceptions to "common" (i.e., Latin) legislation, inevitable latinization of Eastern law, diminishment of the distinct disciplines of the Eastern Churches in an attempt at uniformity, disadvantages in ecumenism with Eastern non-Catholics, and incompatibility with the council's mandate of internal disciplinary autonomy of the Eastern Catholic Churches.[167] Yet, Edelby argued, one would go too far to ask each individual Eastern Church to establish its own code; any attempt to have separate codes for each Church "would cause enormous confusion and would hinder vital collaboration between them."[168]

Edelby concluded that some sort of single, common Eastern code was the most practical option.

> [A]lthough the Eastern Churches are sufficiently different from the Western Church to have a right to their own Code, they have sufficient disciplinary affinities to make it

[165] Néophytos Edelby, "Unity or Plurality of Codes: Should the Eastern Churches Have a Special Code?" in *Canon Law: Pastoral Reform in Church Government*, Concilium 8 (New York/Glen Rock: Paulist Press, 1965) 37–47.

[166] Ibid., 42 admitted the advantage of having a single "constitutional" code encompassing both West and East. However, his main concern was "what comes after these constitutional, general and interritual norms: the sacred hierarchy, religious, 'things', ecclesiastical procedure, offenses and penalties. Clearly, Eastern and Latin law are sometimes alike and sometimes different in these matters. Should there be a single Code in which the Eastern divergences are noted, or should there be two distinct Codes, even though they will sometimes overlap?"

[167] Ibid., 42–45.

[168] Ibid., 46.

> proper for them to share a single Code, which would nevertheless respect differences between rites under 'special law.'[169]

This option preserved the juridic distinctiveness of the Eastern Churches by having a code separate from the Western Church, and, through the use of "special law," would fulfill the council's demand for some form of juridic autonomy.[170] However, this single Eastern code would not have the same juridic nature as the earlier canons codified by the pope; instead of being promulgated by the Roman pontiff, the code would be promulgated "by the supreme legislative authority in each particular Church."[171] In Edelby's commentary on *Orientalium Ecclesiarum* written with Ignace Dick, this last point would be emphasized:

> Of itself, the Holy Roman See should not have to legislate for the Eastern Churches, who have their own proper legislative organs. The intervention of Rome is desirable in two ways: *in a subsidiary manner*, that is, in legislating insofar as the Eastern Churches, for different reasons, cannot or will not do so; then *by title of unification or coordination*: Rome is the guardian of unity and arbiter of inter-ecclesial relations. By this double title, Rome can offer its services to aid the Eastern Churches in unifying, as much as possible, their legislations and coordinating their efforts. But it should not, in principle, impose law on them, unified or not, by virtue of its own authority. In this way, the recent effort put forth by Rome to unify and codify Eastern ecclesiastical legislation is laudable. However, one can regret above all the way it proceeds, as at the final step of codification (the most important one) the participation of the Eastern hierarchy is entirely ruled out; one can also regret the manner of promulgating the already codified laws: in place of coming from Rome as an *imposed law*, the promulgation should have come from the Eastern synods themselves.[172]

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[169] Ibid.

[170] Ibid., 47. Note that Edelby thought that special codes could be drawn up even in parts of the Western Church: "Finally, the necessary number of special Codes for each Eastern and Western Church (the various episcopal conferences) would compile their own usages on points with which the single Code had not dealt. These special Codes would naturally be drawn up and promulgated by each particular Church."

[171] Ibid.

[172] Edelby-Dick, 125: "Enfin le Concile signale l'*oeuvre du Siège Apostolique Romain* lui-même. De soi, le Saint-Siège Romain ne devrait pas avoir à légiférer pour les Églises Orientales, qui ont leurs propres organes législatifs. L'intervention de Rome n'est souhaitable que de deux manières: *d'abord subsidiairement*, c'est-à-dire en ne légiférant que dans la mesure où les Églises Orientales, pour différentes raisons, ne peuvent pas ou ne veulent pas le faire; ensuite *à titre d'unification ou de coordination*: Rome est la gardienne de l'unité et l'arbitre des relations inter-ecclésiales. A ce double titre, elle peut offrir ses services pour aider les Églises Orientales à unifier, autant que possible, leurs législations et à coordonner leurs efforts. Mais elle ne devrait pas, en principe, leur imposer un droit, unifié ou pas, par voir d'autorité. De cette façon, l'effort récemment déployé par Rome pour unifier et codifier la législation ecclésiastique orientales reste louable. Mais on peut regretter d'abord la façon de procéder qui, dans la dernière étape de la codification (la plus importante), a entièrement écarté la participation de la hiérarchie orientale,

Edelby supported a common Eastern code, but it would derive its authority from individual promulgatory acts of the Eastern Churches themselves, not from a single act of the pope.[173]

On the other hand, there were concerns about a double codification system.[174] Ivan Žužek in 1967 noted this "great problem" on structuring the codified law, the solution depending on how one understood articles 2, 3, 5, and 6 of *Orientalium Ecclesiarum*: "In fact, [the principles established in these articles] may be reduced to a single one: each Oriental Church has as much right as the Latin Church for a special Code, because each Church is obliged to preserve her heritage and to utilize it as the best means for the salvation of her faithful."[175] If one held that the ecclesial dignity of the Eastern and Latin Churches as recognized in *Orientalium Ecclesiarum* was the true basis for the right and obligation of self-governance, it seemed to follow that each Church be at least capable of establishing its own code, especially as the Latin Church already had one.

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puis la façon de promulguer les lois ainsi codifiées: au lieu de venir de Rome, comme un *droit imposé*, la promulgation aurait dû venir des synodes orientaux eux-mêmes."

[173] One problem with this proposal concerns the matter to be included in such codes. Many things would require papal authority to alter, either because the matters were only subject to the supreme authority (e.g., canons on the Roman Curia, the pope himself, an ecumenical council), the matters would work best if a universal norm was established, which could only be done by the pope (e.g., rules for ascription), or the matters had been subject to previous papal laws, which would require papal authority to alter (e.g., the canons of the four apostolic letters *motu proprio*). Another problem concerns the individual communities and their governmental authorities: Which communities would be considered capable of establishing a code? What if, like the Italo-Greek community, there was no unified legislative or administrative organ?

[174] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 97–98 summarizes some of the objections to a single common code for the Eastern Churches: "How can there be a single code for the Eastern Catholic Churches of different origin and when they are governed by diverse disciplinary traditions? What about the autonomy of the Eastern Catholic Churches, guaranteed also by Vatican Council II? Why is it that the Latin Church (which is only one of the Churches in the Catholic communion) has its own code while all the others together have one alone? Why not a single code for the whole Catholic Church, and each Church has its own particular code? Did a common code for all the Eastern Churches really exist in the first millennium? Is it not an oversimplification of the matter? What about those Churches which originated and developed outside the Roman Empire and those which did not accept the Councils of Ephesus, Chalcedon, etc.?"

[175] Ivan Žužek, "Opinions on the Future Structure of Oriental Canon Law," in *Canon Law: Postconciliar Thoughts on Renewal and Reform*, Concilium 28, ed. Néophytos Edelby, Teodoro Jiménez Urresti, and Petrus Huizing (New York/Glen Rock: Paulist Press, 1967) 142.

Ignace Ziadé, opposed to the double codification system, offered as a substitute a system sounding similar to that proposed during the first codification process—a single code, with each Church completing it with its own particular legislation.[176]

> The question is no longer about two codes but sixteen codes [for sixteen Churches] in the universal Catholic Church. But then we see clearly that the solution is not in this multiplicity of codes, but in *one code that would be reduced to fundamental principles common* to all Churches, leaving *to patriarchal synods to establish their particular law* in fidelity to their traditional juridic patrimony.[177]

Based on the recognition that there exist *many* Eastern Catholic Churches, Ziadé does not consider a two-code system to be ecclesiologically justified. The Church is one, existing in many particular Churches; therefore, there should be one code, or each particular Church should have its own code. Since a multiplicity of codes would be unfeasible, one is left with a single-code system, although limited only to the most basic juridic principles with all other matters left to the legislative authorities of the particular Churches.[178]

The question was debated at the first general Synod of Bishops, held from September 29 to October 29, 1967, at which the principles for the revision of the *Codex Iuris Canonici* had been presented to the bishops for their comments.[179] There were proposals for a single code

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[176] "«Codificazione Canonica Orientale» (1926–1935)," 81: "Dopo minuta discussione, gli Emi convengono nella decisione seguente: «Tutte le osservazioni fatte sono in favore della Codificazione con un codice unico, da cui le varie chiese prenderanno ciò che le riguarda, e che completeranno a parte con proprio Sinodo o Concilio»."

[177] Ignace Ziadé, "Note sur la nécessité d'un unique code de Droit Canonique pour l'Église," *L'Orient Syrien* 11 (1966) 93, as cited in Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 103: "La question n'est plus alors de deux Codes mais de seize Codes dans l'Église Catholique Universelle. On voit alors clairement que la solution n'est pas dans cette multiplicité de Codes, mais *d'un Code qui se ramènerait à des principes fondamentaux communs* à toutes les Églises, en laissant ensuite *aux synodes patriarchaux le soin de fixer leur droit particulier* dans la fidélité à leur patrimoine juridique traditionnel."

[178] Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 103: "For him, if the decision was for more than one code, it should be as many codes as there were Churches, not just two. He proposed a single code for the entire Church, and particular codes codified by the synods of each Church in accordance with their particular discipline." One notes that the quote does not indicate that the particular law has to be in a code form, as Kokkaravalayil states.

[179] There seems to have been some confusion over whether a decision had already been made in regard to the number of codes. Note Giovanni Caprile, *Il Sinodo dei Vescovi, Prima assemblea generale (29 settembre–29 ottobre 1967)* (Rome: Edizioni "La Civiltà Cattolica," 1968) 100, where Raimondo Bidagor, SJ, special secretary,

containing general laws, with each Church then issuing its own code of truly particular law.[180] Bishop Edelby, on behalf of Melkite Patriarch Maximos IV, specifically rejected this proposal, although admitting the value of having a single physical volume containing all the legislation as well as accepting possible unity in matters already common to all Churches.[181] Other proposals supported, in different ways, the "tripartite" system suggested in the allocution of Paul VI from 1965—a Latin code, an Eastern code, and a fundamental law.[182] The final summary of opinions

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said that in all the comments on this question three solutions appeared: one code for the whole Church; two codes, one for the Eastern Churches and one for the Western Church; a fundamental code that allowed the redaction of other codes as needed. He stated that the principles for revision, which were being debated, were rendered so as to be valid for any legislation, whether general or particular, and the commission would continue on this path according to the indications emerging from the synod's discussion. This statement suggests that there was no decision on the question of number of codes; indeed, after the debate Cardinal Felici explicitly stated that to be the case: "Ci sono sentenze diverse circa un Codice unico o duplice (latino e orientale). —*R.*: Poiché l'annosa questione non si può ora risolvere, la Commissione sta elaborando dei principi che possano valere anche per gli Orientali" (ibid., 133 [#17]). However, it was already noted that a decision for a two code system was made on November 25, 1965, nearly two years prior to the synod: Žužek, "L'idée de Gasparri," 455 note 73. Bishop Edelby considered the statement of the special secretary as indicating there was nothing to debate, although it is not clear to me how this is indicated; see Caprile, 110. Joseph Parecattil, then Malabar Archbishop of Ernakulam, who had made a proposal to the synod, also thought later that the matter had been closed in some way (although he did not think that prevented the synod from offering suggestions); see ibid., 121. Finally, at a press conference after the debates, Giovanni Cardinal Urbani stated that a single-code idea was not mature at that moment; see ibid., 133: "Circa la questione del Codice unico, il cardinale [G. Urbani] fa notare che «dalle opposte tesi, sostenute con calore da ambo le parti, si conclude che la tesi dell'unico Codice non sembra ancora del tutto matura[»]." The confusion is also mentioned in the final summary of opinions; see ibid., 126.

[180] The proposal was first made by Archbishop Parecattil, who would become president of the second Eastern codification commission. He argued that as juridic principles were the same through the whole Church, there was no need for two distinct codes, especially as all the Eastern Churches were very different from one another and could not be simply grouped together. See Caprile, 100, 121; cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 103–104. Maronite Archbishop Doumith made a proposal similar to that of Parecattil, arguing that a two code system was not acceptable as there were not two parallel Churches; see Caprile, 120–121. Syrian Patriarch Tappouni did not think this single-code system opportune, but if it was chosen he wanted there to be two parts, one containing the common norms (not ignoring the patriarchal structure) and the second containing Eastern law based on the *fontes* of particular law; see ibid., 106.

[181] Caprile, 110–111.

[182] Armenian Patriarch Batanian suggested this, although he was not certain whether the synod was called to pronounce on the revision of Eastern law; see ibid., 108. Ukrainian Archbishop Maxim Hermaniuk of Winipeg, Canada, supported this as well, although suggesting that there could be even more than two non-fundamental laws; see ibid., 109. Ukrainian Cardinal Slipyj noted nine arguments for a distinct Eastern code, ranging from the fact that the commission had already decided on a two code system to a promise made by Paul VI in Bombay that he would not change the Malankaran rite and discipline, although, like others, the cardinal admitted the possibility of a common, general part: ibid., 119–120.

somewhat glossed over these divergences in opinions, focusing on the support of some fundamental law with other subsidiary codes.[183]

The decision not to have a single-code system was formalized with the suppression of the codification commission of Pius XI and the establishment of the new Pontifical Council for the Codification of Eastern Canon Law.[184] Early in its existence, the new commission requested that the faculty of the Pontificio Istituto Orientale look at this issue in formulating certain *principia quae Codicis Orientalis recognitionem dirigant*.[185] The second guideline in the draft presented on April 17, 1973[186] offered justification for a distinct, single code for the Eastern Catholic Churches:

> The juridic patrimony in the Eastern Churches, although of different rites, is founded for the most part, up to the Council of Chalcedon, on the same ancient canons that are found in almost all Eastern collections. Moreover, many Byzantine laws after the said council have become parts of the codes of other rites (e.g., in *Mekitar Gos*, in *The Book of Kings*, etc.). These canons constitute *per se* a single fundamental code for all the Churches.
>
> It is true that among the various rites there are also some disciplinary differences, but these differences, introduced through the centuries because of the autonomy of the individual Churches and because of the minimal communication among them, are today for the most part rather resented both by Catholics and Orthodox. Further, the latter, at least in the Byzantine world, seek to arrive at a single code for all Churches, precisely to avoid unpleasant differences—for example, in marriage impediments. And it would not be fair that Catholics today think differently, because a difference—particularly in the canons regarding public life of the faithful and clergy—can be a notable impediment in the modern pluralistic world.
>
> The Second Vatican Council, which affirmed the right and the obligation of the Eastern Churches to rule themselves according to their own disciplines (*OE* 5), can be fully observed by means of a single code if these same Churches accept a common code that also corresponds to the ancient canons and Eastern traditions, adapted to modern needs.

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[183] Ibid., 126.

[184] Again, see the letter of Jean-Marie Cardinal Villot to Cardinal Parecattil in "Istituzione e Composizione della Commissione," *Nuntia* 1 (1975) 11, and the notification on behalf of Paul VI, given on June 15, 1972, made in *L'Osservatore Romano* of June 16, 1972 (*Leges Ecclesiae*, 4:6279 [#4059]).

[185] "Brevi Delineamenti del Lavoro della Commissione dalla Istituzione 10 Giugno al 1 Dicembre 1973," *Nuntia* "Fasciculus Praevius" (1973) 12; Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 52.

[186] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 54–55.

Further, what has been experienced with the application of the apostolic letters *motu proprio* with which Pius XII promulgated a part of the Eastern canon law has demonstrated that a single code for all Easterners would be beneficial for those Churches. It is true that in these apostolic letters *motu proprio* there are latinisms, things that did not always respect Eastern discipline, and finally there were some protests; nevertheless, the effect of this single code promulgated for all the Eastern Churches has been positive. That which has aroused the greatest difficulty during the council has been adjusted in part, at least in theory, by *Orientalium Ecclesiarum* (e.g., *OE* 9).

Finally, a code for each Church, besides multiplying the work, would be of little usefulness: the code is necessarily limited to general norms to respect particular law; in this situation, there would be a repetition of the same code for each Church, which would not have any usefulness or advantage.

Against what is given in favor of a single code, one can object that each of the Eastern Churches has a proper and autonomous personality, and indeed the right to rule itself according to its own proper discipline. In fact, according to *Orientalium Ecclesiarum* 5, "the Churches of the East and of the West enjoy the right and are bound by the duty to rule themselves according to their own proper disciplines..."; and in *Orientalium Ecclesiarum* 9 it is said: "Patriarchs, with their synods, constitute the superior instance for all matters of the patriarchate..."; and finally *Unitatis redintegratio* 16 declares that "the Churches of the East ... have the faculty to rule themselves according to their own proper disciplines."

From these texts some can conclude that the particular Churches had the power to give themselves internally even a proper code, and in fact that a single code for all the Eastern Churches is contrary to the autonomy of the individual particular Churches. To such observations one can respond:

1. The Eastern Churches have to rule themselves according to a code that corresponds to their particular discipline inasmuch as the Eastern Churches "enjoy the right and are bound by the duty to rule themselves according to their own proper disciplines, as commended by their venerable antiquity, being more congruous to the habits of their faithful, and appearing more apt for fostering the good of souls" (*OE* 5). With these words the council has wished to indicate only the character that the laws must have, without however indicating the source from which they must proceed. In fact, it is not said whether such laws must be given by the synods or by the supreme authority. The same council, which has established the aforementioned principle, has also imposed some general, common laws on all the Eastern Churches. Therefore, under this light there exists no difficulty concerning a single code, as it only requires that it be Eastern.

2. The figure of the particular Church with a relative autonomy must certainly be safeguarded in the new code—indeed, it must be strengthened. But this autonomy does not demand that each Church must give itself a proper code even in material that is traditional and common to the whole East, or that a superior authority cannot promulgate

laws that it believes are necessary for the common good of all the Eastern faithful of any rite. In fact, the council, which in different ways has affirmed the autonomy of the Eastern Churches, prescribed for all certain common norms; and the entire tradition is a clear testimony of the fact that, while respecting their particular law, common laws have been imposed on individual Churches, and no one has deemed that autonomy has suffered through these impositions.

3. The single code would not be recommendable if it obliged individual Churches to make themselves uniform and to lose those things proper and particular to them. But the single code does not aim at this as, respecting particular law, it intends only to impose general laws, adapted to the common good of all the Eastern Churches. These general laws, from the fact that they are general, not only do not destroy autonomy, but rather are a clear affirmation and a re-enforcement, because these laws do not impede the existence of other particular norms—in fact, they call for them. Moreover, these have the merit of ruling interritual relations, a thing that cannot be obtained with different particular codes.

4. Finally, it is true that some Churches actually live, for obvious reasons, in conditions different from one another, and that the laws given for one Church cannot serve fully for another. But experience not only in these recent times but through all tradition speaks to the fact that such diversity of situation does not constitute an impediment for the application of general laws.[187]

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[187] PIO Faculty, "Norme per la Ricognizione del Diritto Canonico Orientale," 21–23: "II. UN CODICE PER TUTTE LE CHIESE ORIENTALI. Nelle Chiese orientali, benché di diverso rito, il patrimonio giuridico si fonda in gran parte, fino al Concilio di Calcedonia, sugli stessi canoni antichi che si trovano in quasi tutte le collezioni orientali. Inoltre, molte leggi bizantine posteriori al predetto Concilio sono entrate a far parte dei codici di altri riti (p.e. nel Mekitar Gos; nel libro Dei Re, ecc.). Questi canoni costituiscono di per sè un codice fondamentale unico per tutte le Chiese. E' vero che tra i riti vi sono alcune differenze anche disciplinari, ma queste differenze, introdotte attraverso i secoli a causa della autonomia delle singole Chiese e della poca comunicabilità fra loro, sono oggi da tutti, sia cattolici che ortodossi, piuttosto risentite. Anche questi ultimi, almeno nel mondo bizantino, cercano di arrivare ad un unico codice per tutte le Chiese, appunto per evitare spiacevoli diversità, come p. e. negli impedimenti matrimoniali. E non sarebbe giusto che i cattolici oggi pensassero diversamente perchè una diversità, specialmente nei canoni che riguardano la vita pubblica dei fedeli e del clero, può essere un notevole impedimento nell'odierno mondo pluralistico. Il Concilio Vaticano II, che ha affermato il diritto e il dovere delle Chiese orientali di reggersi secondo le proprie discipline ('Orientalium Ecclesiarum', n. 5), può essere pienamente osservato per mezzo di un unico Codice qualora queste stesse Chiese accettino un codice comune che peraltro corrisponda ai canoni antichi e alle tradizioni orientali adatte alle odierne esigenze. Anche l'esperienza fatta con l'applicazione dei Motu-propri coi quali Pio XII ha promulgato una parte del diritto canonico orientale ha dimostrato come un Codice unico per tutti gli orientali sia molto benefico per tutte le Chiese. E' vero che nei detti Motu-propri ci sono dei latinismi e che essi non sempre rispecchiano la disciplina orientale e che infine ci sono state alcune proteste, tuttavia l'effetto di questo unico Codice promulgato per tutte le Chiese orientali è stato positivo. Ciò che ha destato maggiori difficoltà durante il Concilio è stato regolato in parte, almeno in teoria, dal decreto 'Orientalium Ecclesiarum' (p.e. con il n. 9). Infine un Codice per ciascuna Chiesa, oltre a moltiplicare il lavoro, sarebbe di poca utilità perchè dovendosi limitare il Codice alle norme generali, per rispettare il diritto particolare, esso sarebbe una ripetizione dello stesso Codice per ciascuna Chiesa; ciò non recherebbe alcuna utilità e vantaggio. Contro quanto si è detto in favore di un unico Codice, può opporsi che ciascuna delle Chiese orientali ha una propria ed autonoma personalità, e quindi il diritto di reggersi secondo la propria disciplina. Infatti, secondo il decreto 'Orientalium Ecclesiarum' n. 5 'Ecclesias Orientis sicut et Occidentis iure pollere et officio teneri se secundum proprias disciplinas peculiares regendi...'; e nel n. 9 si dice: 'Patriarchae cum suis synodis superiorem constituunt instantiam pro quibusvis negotiis patriarchatus...'; e, infine, il decreto 'Unitatis redintegratio', n. 16, dichiara che 'Ecclesias Orientis facultatem habere se secundum proprias disciplinas regendi'. Da questi testi alcuni potrebbero concludere che le Chiese particolari hanno la potestà

This proposed guideline defended a single code for all Eastern Catholic Churches primarily on practical grounds: 1) the Eastern Churches already have a common legislation;[188] 2) distinctions in legislation can be an impediment to unity and good governance;[189] 3) previous common legislation worked relatively well; 4) making multiple codes would multiply work, and the

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di darsi interamente anche un proprio Codice e quindi che un Codice unico per tutte le Chiese orientali è contrario all'autonomia delle singole Chiese particolari. A questa osservazione si può rispondere: 1)—Le Chiese orientali devono reggersi secondo un Codice che corrisponda alle loro discipline particolari in quanto le Chiese orientali 'hanno il diritto e il dovere di reggersi secondo le proprie discipline, poiché sono commendevoli per veneranda antichità, più corrispondenti ai costumi dei fedeli e più adatte a provvedere al bene delle anime' ('Orientalium Ecclesiarum', n. 5). Con queste parole il Concilio ha voluto indicare soltanto il carattere che devono avere le leggi, senza tuttavia indicare la fonte dalla quale esse provengono. Infatti, non si dice se quelle leggi devono essere date dai Sinodi ovvero dalla Suprema autorità. Lo stesso Concilio, che ha fissato il principio sopra enunciato, ha imposto anche alcune leggi generali comuni a tutte le Chiese Orientali. Quindi, sotto questo profilo non esiste difficoltà circa il Codice ùnico per il quale si richiede solo che sia orientale. 2)—La figura della Chiesa particolare con una relativa autonomia deve certamente essere salvaguardata nel nuovo Codice, anzi esso la deve rafforzare. Ma questa autonomia non esige che ogni Chiesa debba darsi un suo Codice anche in quelle materie che sono tradizionali e comuni a tutto l'Oriente o che una autorità superiore non possa promulgare delle leggi che creda necessarie per il bene comune di tutti i fedeli orientali di qualunque rito. Infatti il Concilio, che varie volte ha affermato, l'autonomia delle Chiese orientali, prescrive a tutte parecchie norme comuni; e tutta la tradizione è una chiara testimonianza del fatto che alle singole Chiese, pur rispettando il loro diritto particolare, sono state imposte delle leggi comuni e nessuno mai ha giudicato che per questa imposizione l'autonomia ne abbia sofferto. 3)—Il Codice unico non sarebbe raccomandabile se esso obbligasse le singole Chiese a uniformarsi e a perdere quello che hanno di proprio e di particolare. Ma il Codice unico non pretende ciò poiché, rispettando il diritto particolare, intende soltanto imporre delle leggi generali e adatte al bene comune di tutte le Chiese orientali. Queste leggi generali, per il fatto che sono generali, non solo non distruggono l'autonomia bensì ne sono una chiara affermazione e un rafforzamento perchè queste leggi non impediscono la esistenza di altre norme particolari anzi spesso le richiedono. Inoltre esse hanno il pregio di regolare le relazioni interrituali; cosa che non potrebbe ottenersi con diversi codici particolari. 4)—Infine è vero che alcune Chiese vivono attualmente, per ovvie ragioni, in condizioni diverse da altre e che le leggi date per una Chiesa non possono servire pienamente ad altre. Ma l'esperienza non solo di questi ultimi tempi ma di tutta la tradizione ci dice che una tale diversità di condizioni non costituisce un impedimento per l'applicazione di leggi generali."

[188] Cf. the comments of Consultor I at the first *plenaria*, found in "Lavori della Prima Assemblea Plenaria della Commissione," 41: "Je ne croyais pas qu'il serait nécessaire de défendre le bien fondé de la Codification d'un droit commun à toutes les Églises Orientales; toute la tradition des Nomocanons prouve que le droit canon, en sa plus grande partie, est commun à toutes les Églises, l'Église latine aussi. Cela n'empêche nullement des particularités, en réalité réduites; la plus importante en est certainement 'la figure canonique propre à chaque Église Orientale.'" Cf. John D. Faris, "The Revision of Eastern Canon Law," *CLSA Proceedings* 50 (1988) 165: "Consequently, the canonical basis of all eastern churches is largely identical, and a common code is therefore appropriate."

[189] Cf. George Nedungatt, *The Spirit of the Eastern Code* (Rome/Bangalore: Centre for Indian and Inter-religious Studies/Dharmaram Publications, 1993) 39 (commenting on the finalized version of the guideline): "The Guidelines answered in the first place an objection that had been raised in some quarters against a common code for the Oriental Churches: these Churches have their own traditions and particular law, which risk being levelled down in a bid for a common code. While this objection stressed the diversity, it overlooked the unity. [...] While the differences ought not to be overlooked, unilateral stress on them would dim out the unity of the Church and pave the way for division."

resulting codes would contain many repetitions.[190] The juridic autonomy of the Eastern Catholic Churches factored into this guideline only in responses to objections; the four points given at the end of the guideline are attempts to defend a single code against what would seem to be the right of each Church to form its own code, derived from the statement of *Orientalium Ecclesiarum* 5. The argument of the guideline was not that the juridic autonomy of these Churches demanded a single code, but rather that a single code did not impede their juridic autonomy.[191] One also notes that the draft guideline took advantage of the absence of an ecclesial basis for autonomy being enunciated in the conciliar decree. The draft norm stated that *Orientalium Ecclesiarum* 5 indicated that the discipline by which the Eastern Churches would rule themselves had to be Eastern, not that the juridic origin of the norms had to be the relevant Church itself.

This guideline did not contain any reference to the possibility of a single code for the whole Church; "from this fact, one may derive the conclusion that for PCCICOR [the second Eastern code commission] the question of a single code for the whole Catholic Church was no longer a consideration, as it was for [the first Eastern codification commission]."[192] Despite this fact, as well as the constitution of a separate codification commission for Eastern law, some of the persons who commented on the draft still supported a single, general code with each "rite" having distinct particular laws.[193] Nevertheless, the responses of the members of the Eastern codification commission initially reviewing this guideline generally favored a single code for all

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[190] Writing after the promulgation of the *CCEO*, Luis Okulik, "L'Evoluzione Terminologica nel Diritto Canonico Orientale della Chiesa Cattolica: Da 'Ritus' a 'Ecclesia Sui Iuris,'" *Kanon* 21 (2010) 66 argues: "Inoltre, il fatto che il diritto comune delle Chiese orientali cattoliche sia contenuto in un unico testo codiciale (CCEO), essendo esse numerose, dipende da una ragione meramente funzionale e non ecclesiologica." Cf. Pablo Gefaell, "Relations entre les Deux «Codes» de l'Unique «Corpus Iuris Canonici»," *L'année canonique* 41 (1999) 170 with similar comments.

[191] Cf. Dimitri Salachas, "Ecclesia Universa et Ecclesia sui iuris nel Codice Latino e nel Codice dei Canoni delle Chiese Orientali," *Apollinaris* 65 (1992) 66, who argues that the distinction made in the *CIC* c. 1 and *CCEO* c. 1 is a fulfillment of the norm of *OE* 5, which "implica anche il diritto di avere la propria normativa canonica."

[192] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 111.

[193] Ibid., 111–112.

Eastern Catholic Churches, provided that it did not suppress the particularity of the individual Churches.[194]

At a meeting of the *Coetus Centralis*, held on January 14–19, 1974, a modified version of this draft guideline was discussed by the members.[195] After some further modifications to this text,[196] the guideline was presented to the first *plenaria* of the Eastern codification commission of March 20–23, 1974[197] in the following form:

> 1. In the Eastern Churches, the juridic patrimony is founded for the most on the same ancient canons that are found in almost all Eastern collections [of law], and on a common tradition, as appears from the same collections, often formulated with words of identical tenor. These canons and traditions offer a common base for a single code for all the Eastern Churches.
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> 2. However, among the various Eastern Churches there are differences even in disciplinary norms. These differences, introduced through the centuries because of various historical events and "because of the diversity also of character and conditions of life" (*UR* 14), could create today a situation of notable inconvenience that is opposed to the movement towards unity, to which the world and all the Churches are tending and to which Catholics must be profoundly committed.
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> 3. The experience made with the application of the apostolic letters *motu proprio* with which Pius XII promulgated a part of the Eastern canon law has demonstrated that a single code for all Easterners would be, on the whole, beneficial for those Churches.
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> 4. A single code for all the Eastern Churches is opposed neither to their particular discipline, nor to the relative autonomy of these Eastern Churches since, to the contrary, a clearer expression and a greater safeguard of these things would be found in a single code. The decree *Orientalium Ecclesiarum* of Vatican II, which guarantees the particular discipline and autonomy of these Churches and, at the same time, gives common and general norms for all the Churches as the ancient Eastern synods did, could constitute an example for future common codified legislation. The diversity of socio-cultural conditions in which these Eastern Churches live does not call for different codes, but an opportune updating of a single code that takes this into account.

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[194] Ibid., 112–116.

[195] The adjustments made to the PIO draft by the pro-secretary of the commission are found in ibid., 115. It greatly shortened the text and took into account comments that had been made on the initial version.

[196] The proposed modifications of the pro-secretary's text by members of the *Coetus Centralis* are found in ibid., 116–119.

[197] Ibid., 120.

> (Note: As concerns the word "relative" applied to "autonomy": four consultors voted to remove it, seven voted that it remain [one *iuxta modum*, according to conciliar terminology], one abstained. The secretary noted that the term "autonomous Church" indicates in Orthodox law a certain canonical dependence [myron, tribunal of appeal...] on a patriarch. Perhaps a new term should be sought.)
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> 5. As concerns the elements of the Eastern code common with that of the Western Church, above all in supra-ritual or interritual matters or in terminology, it is highly desirable that suitable measures be taken toward an effective exchange of opinions between the two commissions, and that a common formulation of the relevant juridic texts be made.[198]

The modified text contained the basic elements of the previous, lengthier draft formulated by the PIO. It affirmed the practical value of a single code (a preexisting juridic basis, the trend towards greater unity, the general benefit of the partial Eastern codification), and argued that a single code did not oppose the juridic autonomy or disciplinary diversity of the Eastern Churches. However, an interesting change was introduced. The first version had stated that "the figure of the particular Church with a relative autonomy must certainly be safeguarded in the

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[198] "Lavori della Prima Assemblea Plenaria della Commissione," 26: "Codice unico per le Chiese orientali: 1. Nelle Chiese orientali il patrimonio giuridico si fonda in gran parte sugli stessi canoni antichi, che si trovano in quasi tutte le collezioni canoniche orientali e sulle tradizioni comuni, come appare nelle stesse collezioni, spesso formulate con leggi di identico tenore. Questi canoni e tradizioni offrono una base comune per un Codice unico per tutte le Chiese orientali. 2. Tra le Chiese orientali vi sono, però, delle differenze anche nelle norme disciplinari. Queste differenze, introdotte attraverso i secoli, a causa delle varie vicende storiche e 'ob diversitatem quoque ingenii et vitae condicionum' (U. R. n. 14), potrebbero creare oggi una situazione di notevole disagio che si oppone al movimento di unità a cui tende il mondo e tutte le Chiese e a cui i cattolici debbono profondamente impegnarsi. 3. L'esperienza fatta con l'applicazione dei *Motu propri* coi quali Pio XII ha promulgato una parte del Codice orientale, ha dimostrato come un Codice unico per tutti gli orientali sia, nel suo complesso, benefico per tutte le Chiese. 4. Un Codice unico per tutte le Chiese orientali non si oppone né alla disciplina particolare, né alla relativa autonomia delle Chiese orientali che, al contrario, in un Codice unico troverebbero una loro più chiara espressione e una maggiore salvaguardia. Il Decreto 'Orientalium Ecclesiarum' del Concilio Vaticano II che garantisce le discipline particolari e l'autonomia di queste Chiese e nello stesso tempo dà norme comuni e generali per tutte le Chiese come facevano gli antichi Sinodi orientali, potrebbe costituire un esempio per una futura legislazione comune codificata. La diversità delle condizioni socio-culturali in cui vivono le Chiese orientali non richiede Codici diversi, bensì un opportuno aggiornamento di un Codice unico che tenga ciò in debito conto. Nota: Per quanto riguarda la parola "relativa" applicata ad 'autonomia': 4 consultori votano che si tolga, 7 votano, che resti (1 'iuxta modum,' secondo la terminologia conciliare), 1 si astiene. La Segreteria fa presente che il termine 'Chiesa autonoma' indica nel diritto ortodosso una qualche dipendenza canonica (myron, tribunale di appello...) da una Patriarca. Forse si dovrebbe cercare un nuovo termine. 5. Per quanto riguarda gli elementi comuni del Codice orientale con quello per la Chiesa occidentale, soprattutto nelle materie sopra o interrituali o nella terminologia, è sommamente auspicabile che si prendano misure atte ad uno scambio efficace delle opinioni tra le due Commissioni e si abbia una formulazione in comune dei testi giuridici relativi." There was also a note (ibid., 27) suggesting a single physical text containing the Latin code and Eastern code so that ecclesial diversity would be better recognized.

new code—indeed, it must be strengthened."[199] The first version thus expressed the obligation (*deve*) to safeguard and strengthen the particular Church, particularly its autonomous nature. In the revised version initially presented by the pro-secretary, the statement had been altered: "Neither the particular discipline nor the relative autonomy of the Eastern Churches are opposed to the advisability of a single code for all the Eastern Churches; to the contrary, in a well done single code would be found a clearer expression and a greater safeguard of these things."[200] An explicit obligation to safeguard the figure of the particular Church with its autonomy was omitted. In its place, one finds a statement that a "well done" ("ben fatto") common Eastern code would better express and safeguard particular discipline and autonomy. By the use of the phrase "well done," the draft implied that the "singleness" of the proposed Eastern code did not *per se* guarantee this. However, the final version formulated by the *Coetus Centralis* dropped the phrase "well done," thereby seeming to affirm that a single code would *per se* strengthen autonomy: "A single code for all the Eastern Churches is opposed neither to their particular discipline, nor to the relative autonomy of these Eastern Churches since, to the contrary, in a single code would be found a clearer expression and a greater safeguard of these things."[201] The statement simply asserts that the "singleness" of the code would necessarily safeguard particular law and autonomy, with no justification given as to how this would be the case.

At the first *plenaria*, during the review of this guideline, there were several interventions against the idea of a common Eastern code. One member noted:

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[199] PIO Faculty, "Norme per la Ricognizione del Diritto Canonico Orientale," 23: "La figura della Chiesa particolare con una relativa autonomia deve certamente essere salvaguardata nel nuovo Codice, anzi esso la deve rafforzare."

[200] Cited in Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 115: "All'opportunità di un Codice unico per tutte le Chiese Orientali non si oppone né la disciplina particolare, né la relativa autonomia delle Chiese Orientali che, al contrario, in un Codice unico, ben fatto, troverebbero una loro più chiara espressione, e una maggiore salvaguardia."

[201] "Lavori della Prima Assemblea Plenaria della Commissione," 26: "Un Codice unico per tutte le Chiese orientali non si oppone né alla disciplina particolare, né alla relativa autonomia delle Chiese orientali che, al contrario, in un Codice unico troverebbero una loro più chiara espressione e una maggiore salvaguardia."

> Proposing to create a single code is founded on a non-existent basis, acting as if there was, in reality, an "Eastern Church," whereas there are many [Churches], very different in various aspects. [...] To start by elaborating a single code and leaving to the various Eastern Churches the freedom and the responsibility to add in their particularism is to put the cart before the horse and go against the constant sense of history. Certainly it will be of interest to point out, in retrospect, what is common in the various canonical legislations of the Eastern Catholic Churches; this will be a great interest for canonical scholars. But this must be done *a posteriori* and not decided *a priori*. In this manner no question about the promulgation of this common law will arise; it suffices by the action already carried out. The fact that single code *a priori* would be neither fully Eastern, nor fully ecumenical, is the reason to renounce the idea. All that our commission could do—but this would already be considerable—would be to assist the Eastern Catholic Churches in the necessary preliminary study of their history and their law, the useful study of comparative Eastern law, perhaps even of the philosophy and, even better, of the theology of canon law (which, it must be said in parenthesis, would lead us to the heart of the debate between East and West and perhaps to the threshold of a solution), and finally make available to the disposition of the different Eastern Churches kinds of schemata, models (patterns) from which they could freely draw for the organization and the redaction of their respective canonical legislations.[202]

Another consultor asked for more clarification on what was intended by "single code," since "a 'single code' cannot be created to the detriment of particular disciplines" and "one needs to accept as a principle that the particular discipline of each of the Churches should be revised and codified and that each of the Churches should have its own proper code."[203] A third objected to

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[202] Consultor R in "Lavori della Prima Assemblea Plenaria della Commissione," 28, also cited in Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 120–121: "1º—Se proposer d'élaborer un code unique c'est partir d'une base inexistante en se comportant comme s'il y avait, en réalité, 'une' Église orientale alors qu'elles sont plusieurs fort différentes sous de multiples aspects. [...] 3º—Commencer par élaborer un code unique et laisser aux diverses Églises orientales la liberté et le soin d'y ajouter leurs particularismes, c'est mettre la charrue avant les boeufs et aller contre le sens constant de l'histoire. Certainement, il sera intéressant de faire ressortir, après coup, ce qu'il y a de commun dans les diverses législations canoniques des Églises orientales catholiques; ce sera d'un grand intérêt pour les savants canonistes. Mais cela doit être fait a posteriori e non décidé a priori. 4º—C'est précisément... parce qu'un Code unique a priori ne serait ni pleinement oriental, ni pleinement oecuménique, il importe d'y renoncer. 5º—Tout ce que pourrait faire notre commission—mais ce serait déjà considérable—ce serait d'aider les Églises orientales catholiques dans l'étude préliminaire nécessaire de l'histoire de leur droit, l'étude utile du droit oriental comparé, peut-être aussi de la philosophie et, mieux encore, de la théologie du droit canonique (ce qui, soit dit entre parenthèses, nous mènerait au coeur du débat entre Orient et Occident et peut-être au seuil d'une solution) et finalement mettre à la disposition des diverses Églises orientales des sortes de schématypes, de modèles (patterns) dont elle pourraient librement s'inspirer pour l'organisation et la rédaction de leurs législations canoniques respectives."

[203] "Lavori della Prima Assemblea Plenaria della Commissione," 29: "*Membro B*: ritiene necessario che innanzitutto venga delimitato «très clairement qu'est-ce qu'on entend par 'Code unique,' parce que 'un Code unique' ne peut pas être fait au détriment des disciplines particulières[»] ed inoltre che «il faudrait tout d'abord accepter, comme un principe, que la discipline particulière de chacune des Églises soit révisée et même codifiée et que chacune de ces Églises ait son propre Code».

the idea, expressed in the draft, that a single code would *per se* support the autonomy of the individual Churches or their particular disciplines: "rather, it would serve to create the impression of only one Eastern Church on a disciplinary plane."[204] Another member also did not believe it appropriate to term disciplinary diversity an inconvenience ("disagio"), since the council deemed these differences legitimate and beneficial.[205] However, many other members supported a single Eastern code, provided that it was limited to "general" concerns and left ample room for particular law.[206]

The guideline received final approval on March 23, 1974, with 14 votes *placet*, one *non placet*, and one abstention.[207] The finalized text stated:

> 1. The legal heritage of the Oriental Churches is to a great extent founded on the same ancient canons that are to be met with in almost all Oriental canonical collections and on common traditions: this is apparent from the collections themselves, which often contain laws of identical tenour. These canons and these traditions provide a common basis for a single code applicable to all the Oriental Churches.
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> 2. However, there is no denying that differences exist among the various Oriental Churches even in the disciplinary norms. These are differences that have come about in the course of centuries for historical causes and "ob diversitatem quoque ingenii et vitae condicionum" (Unitatis redintegratio, n. 14) and that could today even give rise to difficulties and to a situation opposed to the movement towards that unity to which the

[204] Consultor K at ibid., 27–28: "Le n. 4 [of this proposed guideline] exprime une contre vérité, car un code unique ne renforcerait pas l'autonomie de chacune des Églises Orientales, ni sa discipline particulière, mais ne ferait que contribuer à créer l'impression d'une seule Église Orientale au plan disciplinaire."

[205] Member F at ibid., 29–30.

[206] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 124–128. The portions of the first *plenaria* dedicated to this guideline are reported in "Lavori della Prima Assemblea Plenaria della Commissione," 26–33, 40–41, 47–48. Note particularly the statements given by Consultor V at ibid., 32, arguing that the input of the *Coetus Centralis* and Eastern hierarchs would prevent excesses in forming common legislation; Consultor Y at ibid., 40, rejecting the emphasis on particular law as smacking of separatism. A desire to leave room for particular law was also discussed in reference to the preamble to the guidelines; see ibid., 14–23, as well as the summary given in Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 79–91. The final version of the preamble would state: "These principles or guidelines have as [their] sole object the obtaining of a common code that would truly be to the good of the faithful of the Eastern Catholic Churches, established today in so many different milieux: it will be left to the various Churches to codify their particular law 'ad normam iuris'" ("Guidelines for the Revision of the Code of Oriental Canon Law," *Nuntia* 3 [1976] 18; Italian text at "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," *Nuntia* 3 [1976] 3).

[207] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 132. A preliminary vote on the section was made on March 21, with ten *placet*, one *non placet*, and eight *placet iuxta modum*.

world and all the Churches are tending and in which all Catholics should be deeply involved.

3. The experience gained from the application of the various Motu Proprio, by which Pius XII promulgated part of the Oriental Code, has shown that the institution of a single code for all Orientals is, on the whole, to the advantage of all the Churches.

4. The institution of a single code for all the Oriental Churches is not prejudicial to the ecclesiastical patrimony of the Churches concerned: on the contrary, with a single code this patrimony would find a clearer formulation and a stronger safeguard. The Decree "Orientalium Ecclesiarum" of the Second Vatican Council, which guarantees both right and the duty of these Churches to govern themselves according to their own particular discipline, at the same time lays down common an[d] general norms for all the Churches, as did the ancient Oriental Synods, and could well be taken as an example for an eventual common, codified legislation. The diversity of socio-cultural conditions under which the Oriental Churches live does not call for the elaboration of different codes but rather for the timely "aggiornamento" of a single code that would take due account of these conditions.

5. As regards the elements that are common to the Oriental Code and to its Western counterpart, especially with reference to the super-ritual or interritual matters and to terminology, it is highly desirable that arrangements be made for an effective exchange of views between the two Commissions and the juridical texts in question be jointly drafted.[208]

[208] "Guidelines for the Revision of the Code of Oriental Canon Law," *Nuntia* 3 (1976) 18–19. The Italian version, given at "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," 3–4, is presented here for comparison with the previously-cited Italian draft texts: "1. Nelle Chiese Orientali il patrimonio giuridico si fonda in gran parte sugli stessi canoni antichi, che si trovano in quasi tutte le collezioni canoniche orientali e sulle tradizioni comuni, come appare nelle stesse collezioni, spesso formulate con leggi di identico tenore. Questi canoni e tradizioni offrono una base comune per un codice unico per tutte le Chiese Orientali. 2. Tra le Chiese Orientali vi sono, però, delle differenze anche nelle norme disciplinari. Queste differenze, introdotte attraverso i secoli, a causa delle varie vicende storiche e «ob diversitatem quoque ingenii et vitae condicionum» (Unitatis redintegratio n. 14), potrebbero creare oggi una situazione di notevole disagio che si oppone al movimento di unità a cui tende il mondo e tutte le Chiese e a cui i cattolici debbono profondamente impegnarsi. 3. L'esperienza fatta con l'applicazione dei Motu propri coi quali Pio XII ha promulgato una parte del codice orientale, ha dimostrato come un codice unico per tutti gli orientali sia, nel suo complesso, utile per tutte le Chiese. 4. Un codice unico per tutte le Chiese Orientali non si oppone al patrimonio ecclesiastico di ciascuna di queste Chiese che, al contrario, in un codice unico troverebbero una più chiara espressione e una maggiore salvaguardia. Il Decreto «Orientalium Ecclesiarum» del Concilio Vaticano II, che garantisce il diritto e il dovere di queste Chiese di reggersi secondo le proprie discipline particolari, nello stesso tempo dà norme comuni e generali per tutte le Chiese come facevano gli antichi Sinodi Orientali e potrebbe costituire un esempio per una futura legislazione comune codificata. La diversità delle condizioni socio-culturali in cui vivono le Chiese Orientali non richiede codici diversi, bensì un opportuno aggiornamento di un codice unico che tenga ciò in debito conto. 5. Per quanto riguarda gli elementi comuni del Codice Orientale con quello per la Chiesa Occidentale, soprattutto nelle materie sopra o interrituali e nella terminologia, è sommamente auspicabile che si prendano misure atte ad uno scambio efficace delle opinioni tra le due Commissioni e si abbia una formulazione in comune dei testi giuridici relativi."

While considerably shorter than the first text drafted by the PIO, the approved guideline contains the same lines of argument: practical concerns—commonality of canons and traditions, difficulties with too much disciplinary diversity, the apparent benefit of the previous, single codification—supported a single code; a single code did not oppose the autonomy of these Churches. However, due to proposals made by some members, the specific word "autonomy" was omitted from the final text; thus, according to the finalized guideline, it was "ecclesiastical patrimony" that would "find a clearer formulation and a stronger safeguard" in the single Eastern code.[209]

Sunny Kokkaravalayil offers these general comments on the finalized guideline:

> Given the transitory nature of the decision for a single common code, in the case of CICO, it was only natural that PCCICOR had to re-examine whether that option still held good. And the guideline [...] comes out with the result of this re-examination. If, in the case of CICO, the project of a distinct code was launched, partially at least, for fear of a misinterpretation, in the case of CCEO, PCCICOR has more positive reasons for a single code common to all the Eastern Catholic Churches, namely, the already existing disciplinary unity. Hence this code would be the manifestation of the underlying disciplinary unity, rather than a project for the unification of the discipline of the different Churches. In the latter case the presupposition would have been that the unity did not exist. The decision for a single common code not only confirmed the decision of Pius XI, but it went beyond him, in founding it on positive grounds. The experience with the CICO substantiates the reasoning of PCCICOR in this decision-making.[210]

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[209] See the proposals and response in "Lavori della Prima Assemblea Plenaria della Commissione,"47–48: "[D]ue Membri ispirandosi all'OE n. 5 propongono circa il termine «autonomia» di dire: «... che garantisce il patrimonio ecclesiastico e spirituale di queste Chiese».—[U]n altro Membro desiderando una maggiore aderenza al modo di esprimersi dell'OE n. 5 propone: «... garantisce il diritto e il dovere di queste Chiese di reggersi secondo la propria disciplina particolare».—[U]n altro Membro ancora vuole che si tolga solamente la parola «relativa ». R. Si potrebbero accettare i «modi» proposti e dopo «non si oppone» del comma 1º dire «al patrimonio ecclesiastico di ciascuna di queste Chiese che...». Si nota inoltre che l'espressione «patrimonio ecclesiastico» è molto più vasta e comprende anche la disciplina ed indica nello stesso tempo il senso del testo. La parola «spirituale» invece sembra a qualcuno meno giuridica e dà il senso di una pia esortazione che non quadra bene con la natura giuridica del Codice. Di conseguenza si potrebbe emendare il comma 2º così: dopo «garantisce» invece delle parole «le discipline particolari... queste Chiese» si direbbe «garantisce il diritto e il dovere di queste Chiese di reggersi secondo le proprie discipline particolari, nello stesso tempo dà norme comuni e generali per tutte le Chiese come facevano gli antichi Sinodi orientali e potrebbe...».

[210] Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 96.

One must admit that the decision of the second Eastern codification commission was made in a more positive manner than that of the first commission. However, the autonomy of the Eastern Catholic Churches was not formulated positively. To repeat, the guideline in all its versions considered the declaration of *Orientalium Ecclesiarum* 5 from the viewpoint of responding to an objection: a common code was not opposed to the autonomy of the individual Churches recongized in that article. In this guideline, autonomy was more a problem to be dealt with than a characteristic to be affirmed.[211]

The finalization of this guideline did not stop later opposition to the idea of a single code for all Eastern Catholic Churches. Ukrainian Major Archbishop Joseph Slipyj wrote to Cardinal Parecattil, president of the Eastern codification commission, in 1977, expressing his opposition:

> An Eastern Church, particularly if it concerns a patriarchate or major archiepiscopate, is a legal entity of a sovereign nature. This characteristic must find expression also in having its own proper canon law. Thus I am opposed to a code that would be formally common to all the Eastern Catholic Churches, without regard for the particular Church and for its laws. With a common code, one seems to deny the laws of the particular Church and to be contrary to the spirit of the conciliar decree for the Eastern Catholic Churches of Vatican II. ... A common code always creates problems and complications. There are "Eastern Churches," not an "Eastern Church."[212]

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[211] Note Pospishil, *Ex Occidente Lex*, 91, commenting on disciplinary diversity: "The Guidelines admit the existence of differences in disciplinary norms in the present Eastern Catholic churches, but instead of concluding that this opposes a common code, they find that this ought to be suppressed by the imposition of one code for all of them." Perhaps it is a bit much to state that the guideline desired differences to be suppressed, but one definitely senses an unease with too much diversity.

[212] Cited in Pospishil, *Ex Occidente Lex*, 158–159: "Una Chiesa Orientale, specialmente se si tratti di patriarcato o arcivescovado maggiore, è un'entità legale di natura sovrana. Questa caratteristica deve trovare espressione anche nell'avere un diritto canonico suo proprio. Perciò io mi oppongo ad un Codice che sia formalmente comune a tutte le Chiese Orientali Cattoliche, senza riguardo per la Chiesa particolare e per la Sua legge. Con un Codice comune si verrebbe a negare la legge della Chiesa Particolare e ciò contro il spirito del Decreto Conciliare per le Chiese Orientali Cattoliche secondo il Vaticano II. ... Un Codice comune creerà sempre dei problemi e complicazioni. Ci sono 'Chiese Orientali' e non 'Chiesa Orientale.'" Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 98–99, noting that Slipyj had originally not opposed a common code at the 1967 Synod of Bishops, but later changed his mind. Melkite Patriarch Maximos V Hakim responded to Slipyj with some support, holding that his own desire to restrict Eastern codified law only to common norms would fit with Slipyj's desire for different codes: "Lé droit canonique oriental en préparation se propose de restreindre les dispositions du droit commun et de laisser les questions de details au droit particulier. Il pourrait, ce nous semble, comprimer davantage le droit commun au point de ne garder que les dispositions sûrement communes à toutes les Églises Orientales ou que l'identité de chaque Église Orientale le requiert. En vous avez raison de dire qu'il y a des Églises Orientales et non une Église Orientale. J'ose même ajouter qu'il y a autant de differences théologiques, canoniques et psychologiques entre telle ou telle Église Orientale qu'il y a, par ex., entre l'Église Byzantine et l'Église Latine. N'exiger que ces

However, at the 1977 Synod of Bishops, Cardinal Parecattil emphasized the importance of having a single code for all Eastern Churches, in an attempt to diminish unease like that of Archbishop Slipyj. Parecattil argued that a common code has always existed in the East, promulgated by a superior authority—an ecumenical council—and imposed on all Churches by canon 2 of the Council of Trullo.[213]

Another person opposed, at least initially, to a common Eastern code was Victor J. Pospishil.[214] In place of a single Eastern code, Pospishil felt that each Church would promulgate its own code based on norms proposed by the Eastern codification commission, but not formally promulgated as universal norms. Thus, for each Church there would be a single body of legislation as opposed to an Eastern code plus supplementary particular legislation "on fifty or perhaps one hundred disparate matters, which would, by themselves, have no intrinsic connection."[215] This system would be of benefit for the Eastern Churches; each could adapt to

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dispositions communes à toutes les Églises Orientales rejoindrait à mon avis, dans sa substance. Votre idée que chaque Église ait sa législation propre. Autrement on s'exposerait à l'arbitraire et non créerait une situation de confusion difficilement remédiable" (cited in Pospishil, *Ex Occidente Lex*, 162).

[213] Cf. the summary given in "I Lavori della Commissione dal 30 Settembre 1976 al 30 Ottobre 1977," *Nuntia* 5 (1977) 66: "A tal proposito il Cardinale ha rilevato che un Codice comune è sempre esistito nell'Oriente ed è stato promulgato dall'Autorità, superiore agli stessi Patriarchi e ai loro Sinodi, vale a dire dai Concili Ecumenici. Infatti tale Codice, imposto a tutte le Chiese dal canone II del Concilio Trullano, contiene oltre 700 canoni che come noto toccano quasi tutti gli aspetti della disciplina ecclesiastica." However, note again Felix M. Cappello, "Ius Ecclesiae latinae cum iure Ecclesiae orientalis comparatum," *Gregorianum* 7 (1926) 491: "[A]nimadvertisse iuvabit, Codicem Trullanum, proprie et accurate loquendo, respicere dumtaxat fideles ritus graeci seu byzantini, non autem syros, coptos et armenos."

[214] Cf. George Nedungatt, review of *Der Codex Canonum Ecclesiarum Orientalium und das authentische Recht im christlichen Orient: Eine Untersuchung zur Tradition des Kirchenrechts in sechs katholischen Ostkirchen* of Dietmar Schon (Würzburg: Augustinus-Verlag, 1991), in *The Jurist* 60 (2000) 335, stating that Pospishil was "no more opposed in principle to a single code."

[215] Pospishil, *Ex Occidente Lex*, 96; cf. idem, "The Ukrainians in the United States and Ecclesiastical Structures," *The Jurist* 39 (1979) 400, stating that each Church, being *sui iuris*, "must have its own code, at least formally different from the code of other churches, although the contents could be identical with that of some other Catholic Eastern church." See also his comments in "The Constitutional Development of the Eastern Catholic Churches in the Light of the Re-codification of their Canon Law," *Kanon* 5 (1981) 39–44.

their own circumstances what would have been common law under a single code, and recourse would not need to be made to Rome to alter such a law if circumstances should change.[216]

Even at the second *plenaria* near the end of the codification process, the vice president of the Eastern codification commission, Bishop Émilio Eid, defended having a single Eastern code:

> The actual schema of the code, in its unicity and unity, respects the *sui iuris* state of all the Eastern Churches, and safeguards the legitimate diversity of particular law proper to the individual Churches. This explains the numerous references to particular law, already existing or to be established. Moreover, the new code, common to twenty-one Eastern Catholic Churches, will have a great value in expressing universality, having taken up the canons relative to the Roman pontiff, the episcopal college, and the rights and obligations of all Christian faithful. Such canons had been elaborated by a mixed *coetus* composed of consultors from both commissions revising the Latin and Eastern codes, and had been part of the schema on the *Lex Ecclesiae Fundamentalis*.[217]

Bishop Eid, like the guideline, argued that the single code defended the *sui iuris* state of the individual Churches and safeguarded their legitimate diversity. The commonality of the code's laws among all Eastern Catholic Churches, and in certain areas with the Latin Church as well, also showed the universality of the Catholic Church. Thus, despite the varied protests throughout the process, the pope promulgated a single, common code for the Eastern Catholic Churches in 1990.[218]

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[216] Pospishil, *Ex Occidente Lex*, 93. This proposal suffers a problem like that of Edelby's proposal, described above (5.3.1), namely that the heads of the various Churches *sui iuris* would not be competent *per se* of promulgating certain laws that would inevitably be included in a code, but would require at the very least delegation of authority from the Roman pontiff.

[217] Émilio Eid , "Relazione del Vice-Presidente della Commissione alla apertura dell'Assemblea Plenaria dei Membri (3 novembre 1988)," *Nuntia* 29 (1989) 15: "Lo Schema attuale del Codice, nella sua unicità e unità, rispetta lo stato di «sui iuris» di tutte le Chiese orientali e salvaguarda le legittime diversità di diritto particolare proprio alle singole Chiese. Ciò spiega i numerosissimi riferimenti al diritto particolare, esistente o da stabilire. Inoltre, il nuovo Codice, comune a ventuno Chiese orientali cattoliche, avrà un grande valore esemplare di universalità, avendo assunto i canoni relativi al Romano Pontefice, al Collegio episcopale e ai diritti e doveri di tutti i fedeli cristiani, i quali canoni erano stati elaborati da un «Coetus mixtus» composto da Consultori di entrambe le Commissioni di revisione dei Codici latino e orientale e facevano parte dello Schema della «Lex Ecclesiae fundamentalis»."

[218] Adopting the system of a single code for a number of Eastern communities necessitated its promulgation by the Roman pontiff, despite calls to involve the heads of the Eastern communities in some fashion. See Ivan Žužek, "Common Canons and Ecclesial Experience in the Oriental Catholic Churches," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 235: "Laws that are obligatory for all the Churches can only be promulgated by the authority that is superior to them; this has always been clear, from the First Council of Nicaea onwards." He adds at p. 236 that insofar as patriarchs and synods are participants in the supreme authority of the

The debates over the structure of Eastern codified law reveals that practicalities were the primary factor in the decision to render a single, common code to which the Eastern Catholic Churches would be subject. Throughout the debates, supporters of a common Eastern code appealed to the common legal heritage of the Christian East,[219] the increasing desire for unity even in secular affairs, and the difficulties involved with each Church formulating its own code.[220] The ecclesiological aspect—that each Church is an integral ecclesial and juridic unit—

Church, "they cannot themselves be the Legislators of this «ius»." Cf. his similar comments in "Incidenza del CCEO nella storia moderna della Chiesa universale," 281. Nedungatt, *The Spirit of the Eastern Code*, 46 likewise notes: "[W]ithout the involvement of the supreme authority of the Church the others cannot enact laws on interecclesial or interritual matters affecting also the Latin Church, as in fact CCEO does." Victor J. Pospishil would even admit that this form for promulgation was beneficial, albeit for practical reasons; note his comments in *Eastern Catholic Church Law*, 81: "Judging from a purely pragmatic viewpoint, the manner of promulgation of the *CCEO* must be judged not only acceptable but even praiseworthy. In the future, the Code will certainly require additions, corrections, deletions, which can be easily carried out when everything is in the sole hands of the pope or his curial officials. Should the present *CCEO* once be subjected to a total revision, this will be accomplished best if it is depending only on one authority, that of the Roman Pontiff. That the split in eecclesiastical [*sic*] authorities is usually an insurmountable obstacle in such an undertaking is also the experience of the Eastern Orthodox Churches." When the pope finally promulgated the Eastern code with the apostolic constitution *Sacri Canones*, the heads of the Eastern communities were not involved in a direct juridic manner; instead, the constitution's promulgatory text simply stated: " [...] votis Patriarcharum Archiepiscoporum et Episcoporum orientalium Ecclesiarum adnuentes, qui nobiscum collegiali affectu collaboraverunt [...]" (John Paul II, *Sacri Canones*: *AAS* 82 [1990] 1043). Ivan Žužek, "Riflessioni circa la Costituzione Apostolica «Sacri Canones» (18 ottobre 1990)," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 155 comments: "[The constitution] respinge, implicitamente, teorie ed opinioni inesatte sul concetto di «autonomia», che qualche volta si sentono in certi circoli, relative alla promulgazione del Codice e che sembrano andare oltre un'eventuale «participatio» dei Gerarchi orientali da stabilirsi, comunque, interamente da Colui che è il solo Legislatore del diritto comune a tutte le Chiese orientali."

[219] That such a common source truly existed for all Eastern Churches is open to some debate. Specifically concerning the proposition that the Council of Trullo could be the basis for a common Eastern law, Pospishil, *Ex Occidente Lex*, 90 and "The Constitutional Development," 40 notes that this is true only for the Byzantine-derived churches: "Indeed, what the Ukrainian Catholic Church has in common with the Malabar Church, for instance, is probably much less than what it has with the Latin Rite Church." On the other hand, one should note the strong comments of George Nedungatt in his review of Dietmar Schon, *Der Codex Canonum Ecclesiarum Orientalium und das authentische Recht im christlichen Orient: Eine Untersuchung zur Tradition des Kirchenrechts in sechs katholischen Ostkirchen* (Würzburg: Augustinus-Verlag, 1991), in *The Jurist* 60 (2000) 332–337. Nedungatt rejects one premise of this work, that the single-code format resulted from a Tridentine understanding of the Catholic East as a single unit, and the Eastern Churches in fact have no real common legislative basis. He points to the guidelines' nuanced statements on the matter and the advantages of the Eastern Churches having a single code as showing that Schon read the statements of the guidelines too absolutely. Whatever the historical truth, it must be noted that a common source/tradition of legislation for many Churches does not imply that these Churches should necessarily have a single body of legislation (the Eastern Code) emanating from a single juridic source (the supreme authority of the Church), just as the fact that the individual states share a common legal heritage on a given matter does not necessarily mean that the federal government should issue legislation on that matter.

[220] Cf. John D. Faris, "The Codification and Revision of Eastern Canon Law," *Studia Canonica* 17 (1983) 459 and 461, stating that the common Eastern code seemed "to be the most feasible of any of the proposals," as we do not

factored into discussions primarily as an objection to be met. Indeed, the PIO draft actually dismissed the claim that *Orientalium Ecclesiarum* 5 specifically affirmed the right of the Eastern and Western Churches to legislate for themselves, understanding the conciliar text to be indicating the *character* of the laws rather than the *legislative source*. While the Eastern codification commission often insisted that the code being formed would be limited to general norms and that the ability of each Church to establish particular laws would be protected, the overarching attitude expressed in these discussions concerning the common-code structure indicates that the juridic implications of *Orientalium Ecclesiarum* 5 had not yet been fully appreciated.[221]

5.3.2. The Pamphilian Jurisprudence in the New Code

As in previous cases where Roman authorities concerned themselves with the juridic autonomy of Eastern communities, the Pamphilian jurisprudence became a focus of debate

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live in an "ideal world" that would allow each Church to formulate its own code; Louis Rohban, "Codification du Droit Canonique Oriental," *Apollinaris* 65 (1992) 240, arguing that a multiplicity of legislation "risquerait de compromettre l'unité de la discipline ecclésiale et de l'activité pastorale."

[221] Marco Brogi, "La novità del CCEO alla luci dei «Principi Direttivi»," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010)*, ed. Pontificio Consiglio per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 124 writes: "La pluralità delle Chiese Orientali, con l'esigenza che ciascuna di esse abbia un proprio corpo di leggi distinto almeno formalmente da tutti gli altri, pareva contrastare la possibilità di redigere e promulgare un codice comune a tutte: il principio dell'unicità del Codice parrebbe dunque contraddire l'asserito loro diritto-dovere di governarsi secondo le proprie tradizioni." When listing *CCEO* canons canonizing the various paragraphs of *OE*, Lorenzo Lorusso, "Il riconoscimento dell pari dignità nella comunione cattolica: il decreto *Orientalium Ecclesiarum* e il Codice dei Canoni delle Chiese Orientali," *Angelicum* 83 (2006) 473 does not give a corresponding Eastern canon for *OE* 5 (cf. Antony Valiyavilayil, "The Notion of *sui iuris* Church," in *The Code of Canons of the Eastern Churches: A Study and Interpretation—Essays in Honour of Joseph Cardinal Parecattil*, ed. Jose Chiramel and Kuriakose Bharanikulangara [Alwaye: St. Thomas Academy for Research, 1992] 83 note 74, stating "the Code does not expressly canonise even OE 5 and UR 16"). However, Nedungatt, *The Spirit of the Eastern Code*, 208 argues that the multiple references to particular law in the new code constitute a canonization of this conciliar text. Dimitri Salachas, "Le *status* d'autonomie des Églises Catholiques Orientales et leur communion avec le Siège Apostolique de Rome," *L'année canonique* 38 (1996) 75 states that the double codification itself is an application of *OE* 5.

during this second Eastern codification process. Indeed, the question whether to include this jurisprudence and, if so, in what form was one of the more controversial matters of the process.[222] A review of the *iter* of what would become canon 1492 of the new Eastern code gives one some insight into the differing ways of understanding the autonomy of the Eastern communities, even at this relatively late date in the history of the Church.

As was noted in the previous chapter, a canon containing the Pamphilian jurisprudence had been prepared by the redaction commission during the first Eastern codification process and was included in the unpromulgated schema *De Sacramentis*. This canon had read:

> The faithful of the Eastern rites are not bound to universal laws of the Church, even if given in encyclical letters or apostolic constitutions, unless it concerns matters of faith or morals, a declaration of natural or positive divine law, or it is said expressly that Easterners are bound by the law.[223]

The canon follows the wording of the encyclical letters of the Sacred Congregation for the Propagation of the Faith of November 8, 1882 and August 6, 1885 with its reference to "a declaration of natural or positive divine law."

The section of canons containing this proposed norm came within the purview of the *Coetus studii de normis generalibus*, and debate on it touched both on the desire for the Eastern Catholic Churches to be treated in canon law as equal to the Latin Church, not marginalized

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[222] Velasio de Paolis states that the canon "had a tormented *iter*" (commentary on *CCEO* c. 1492, in *A Guide to the Eastern Code*, Kanonika 10, ed. George Nedungatt [Rome: PIO, 2002] 814 note 13).

[223] "I Compiti del Coetus Secundus," *Nuntia* 2 (1976) 66 (c. 6/c. 277): "Fideles orientalium rituum non adstringuntur universalibus Ecclesiae legibus, etsi latis in Litteris Encyclicis vel Constitutionibus Apostolicis, nisi agitur de rebus fidei vel morum, de declaratione legis divinae sive naturalis sive positivae aut expresse dicatur Orientales lege teneri." Again, the note to the canon reads: "Can. 277—Benedictus XIV, const. *Etsi pastoralis*, 26 maii 1742, §IX, n. V; ep. encycl. *Allatae sunt*, 26 iul. 1755, §44; alloc. *Quadraginta*, 27 mart. 1757; S. C. S. Off., 13 iun. 1710; S. C. de Prop. 4 iun. 1631; 7 iun. 1620 [*sic*: read "1639"], n. 1; litt. encycl. (ad Del. Ap. pro Oriente) 8 nov. 1882; litt. encycl. 6 aug. 1885.—Syn. Armen., a. 1911, 146."

minorities requiring special exceptions, and on the desire for legal clarity.[224] At its morning session of January 24, 1978, the *coetus* began considering the proposed canon.

> Ending the break, the work restarts with the examination of canon 6 (canon 277 of *De Sacramentis*), published in *Nuntia* 2, page 66, which the most reverend relator wants unchanged. [...] The canon is greatly discussed. First, it is desired that it be said more explicitly in the canon that the dispositions of the different dicasteries of the Roman Curia also do not have force for the Easterners, "unless this is expressly stated." For other consultors, this canon does not seem necessary; indeed, they want the contrary to be stated: "they are valid for Easterners unless expressly stated." After an ample discussion, the duty of formulating a new text that could meet the wishes of the *coetus* was entrusted to the most reverend eighth consultor.[225]

One week later, at the morning session of January 31, 1978, this eighth consultor offered his proposal to the *coetus*:

> At this point, the most reverend secretary raises for discussion the text of the most reverend eighth consultor regarding the canon of the initial text where it is said that Easterners are not bound to apostolic constitutions "unless it is expressly stated otherwise." The most reverend eighth consultor, as requested by the *coetus*, has presented the following text, already inserted days ago among the motions. The text is the following:
>
> "§3. Laws issued by the Apostolic See are presumed to bind the Christian faithful of the Eastern Churches, unless it is shown otherwise by the nature of the matter or through an express declaration.
>
> "§4. Laws respect the future unless they expressly take account of the past in them."
>
> This is discussed at length without coming to an agreement, because the text reverses what has been established by the supreme pontiffs over the centuries. At the end, the most reverend secretary asks the *coetus* to express in a totally indicative manner whether the canon is required or not. In favor of the canon there are eight votes, two votes

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[224] De Paolis, commentary on *CCEO* c. 1492, in Nedungatt, *A Guide to the Eastern Code*, 814 note 12.

[225] "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 42 (2010) 149: "Terminata la pausa si riprendono i lavori con l'esame del can. 6 (prot. 23/1 can. 6 = de Sacramentis can. 277) pubblicato in *Nuntia* 2, p. 66, che il Rev.mo Relatore vuole *immutatus*, ed è il seguente: «Fideles orientalium rituum non adstringuntur universalibus Ecclesiae legibus, etsi latis in Litteris Encyclicis vel Constitutionibus Apostolicis, nisi agatur de rebus fidei vel morum, de declaratione legis divinae sive naturalis sive positivae aut expresse dicatur Orientales lege teneri». Il canone viene molto discusso. Innanzitutto si vuole che sia detto nel canone più esplicitamente che anche le disposizioni di diversi dicasteri della curia romana non valgono per gli orientali, «nisi hoc expresse dicatur». Ad alcuni Consultori questo non sembra necessario, anzi vogliano che si dica il contrario, «valent pro orientalibus nisi expresse dicatur». Dopo un'amplia discussione si affida al Rev.mo ottavo Consultore l'incarico di formulare un nuovo testo tale da poter incontrare il favore del *Coetus*."

> against, and three abstaining. But the most reverend fourth consultor continues to raise doubts, uncertainties, and difficulties. All are in accord to continue the discussion. No way of escape is found, so all are in agreement that the problem is to be subject to a further examination.[226]

The discussion was resumed the following morning.

> Having recited the prayer, after a brief opening statement on the part of the most excellent vice president, the most reverend secretary, starting to speak, calls the attention of the *coetus* to a question of great importance, namely that about which the group has already expressed itself in a way opposed to what had been established in the document of the Congregation for the Propagation of the Faith of June 4, 1631, and in that of June 7, 1639, which reordered the same matter. It is noted that each document refers to penal law (but there were other citations to canon 6 in *Nuntia* 2). On this question it is necessary that there be a deep discussion, given that the position taken by the *coetus*—namely, that apostolic constitutions are presumed to have force for Easterners—is a reversal of traditional praxis established by the supreme pontiffs themselves.
>
> Debate is started, with the intervention of almost all the consultors, who expressed themselves to be in favor or opposed. The most reverend secretary emphasizes the fact that this canon is not necessary, as it is foreseen in canon 4 §1 of the section *De Legibus*, where the validity of laws "[for whom] they are given" is explicated.[227] After an ample discussion, on the proposal of the most reverend tenth consultor who asks above all whether it is necessary that any such presumption in this regard be expressed in the code, the *coetus* expresses itself in favor of its non-necessity, with six for non-necessity, four against it, and two abstaining. Of the four who voted against non-necessity, three are in favor of the presumption as it was approved in the previous day [Easterners are bound to apostolic constitutions except...] while the fourth desires that which had already been in the tradition, namely that the text published in *Nuntia* 2 be retained [Easterners are not bound to apostolic constitutions except...].[228]

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[226] Ibid., 186: "A questo punto il Rev.mo Segretario fa discutere il testo del Rev.mo ottavo Consultore circa il canone dei testi iniziali (*Nuntia* 2, pag. 66 can. 6) ove si dice che gli *Orientales* non sono tenuti alle Costituzioni Apostoliche «nisi expresse aliud dicatur». Il Rev.mo ottavo Consultore, richiesto dal *Coetus* (cfr. sopra pag. 149) ha presentato il seguente testo già inserito giorni fa tra le mozioni. Il testo è il seguente: «§3. Leges ab Apostolica Sede latae Christifideles Orientalium Ecclesiarum asstringere praesumuntur, nisi a natura rei vel expressa declaratione aliud constat. §4. Leges respiciunt futura nisi expresse in iis de praeteritis caveatur.» Si discute a lungo senza giungere ad un accordo, perché il testo capovolge quanto stabilito da secoli dai Sommi Pontefici. Alla fine il Rev.mo Segretario richiede al *Coetus* di esprimersi in linea del tutto indicativa se il canone *requiratur necne*. Si vota a favore di un canone con 8 placet, 2 non placet, 3 astenuti. Però il Rev.mo quarto Consultore solleva ancora dubbi, incertezze e difficoltà. Si riprende tutti d'accordo la discussione. Non si trova una via d'uscita per cui all'unanimità si concorda di trasmettere ad ulteriore considerazione il problema."

[227] Ibid., 188: "Can. 4 §1. Legibus a Suprema Auctoritate Ecclesiae Universalis latis tenentur ubique terrarum omnes pro quibus latae sunt; ceterae legis vim habent tantummodo in territorio in quo auctoritas a qua leges promulgatae sunt potestatem regiminis exercet, nisi ex natura rei vel ex iure aliud constet."

[228] Ibid., 192–193: "Recitata la preghiera, dopo una breve prolusione da parte dell'Ecc.mo Vice Presidente, il Rev.mo Segretario prendendo la parola richiama l'attenzione del *Coetus* su una questione della massima importanza, cioè quella su cui gruppo si è già espresso in maniera opposta a quanto era stato stabilito nel documento della Congregazione de Propaganda fide del 4 giugno 1631 e in quello del 7 giugno 1639 che riordinava la stessa materia.

Within eight days, the *coetus* went from considering a canon containing the Pamphilian jurisprudence for the Eastern code, to considering a canon that reversed this jurisprudence, to deciding to omit a canon explicitly concerning this matter altogether.

Because of the severe disagreement among the members of the *coetus*, the schema that they produced and sent to the *Coetus specialis de normis generalibus et de officiis* included a note explaining what happened in their meetings concerning this canon.

> Canon 6, which contained the presumption that Easterners *are not bound by univeral laws of the Church unless* etc. (with the *fontes* of Benedict XIV there: cf. *Nuntia* 2, page 66) has been contraposed to the contrary presumption; but the *coetus*, with six in favor, four opposed, and two abstaining, has adopted the position to omit either presumption. Three of the four opposed desired that it be said in the canon: "Laws issued by the Roman pontiff himself are presumed to bind Christian faithful of the Eastern Churches, unless from the nature of the matter or express declaration it is shown otherwise." One of the four opposed, on the other hand, wished for the presumption as it was previously formulated, according to tradition, by the preceding Eastern commission for the redaction of the Eastern code, as was transcribed in its schema: "The faithful of the Eastern rites are not bound to universal laws of the Church, even if given in encyclical letters or apostolic constitutions, unless it concerns matters of faith or morals, a declaration of natural or positive divine law, or it is said expressly that Easterners are bound by the law." The six in favor of omission, however, did not desire to retain any mention of such a presumption for, among other reasons, canon 4 §1 of our schema is sufficient.[229]

Si nota che entrambi i documenti si riferivano al diritto penale (ma vi sono altre citazioni al can. 6 in *Nuntia* 2 pag. 66). Su tale questione è necessaria un'approfondita discussione dato che la posizione assunta dal *Coetus*, che cioè le *Constitutiones Apostolicae praesumuntur valere pro Orientalibus*, è un rovesciamento della prassi tradizionale stabilita dai Sommi Pontefici stessi. Si intavola il dibatto con l'intervento di un po' tutti i Consultori che si esprimono in pro e contro. Il Rev.mo Segretario sottolinea il fatto che non è necessario questo canone perché ciò è previsto nel §1 del can. 4 della sezione *de legibus* dove si esplicita la validità delle legge *latae sunt* (cfr. sopra a pag. 188). Dopo un'ampia discussione, su proposta del Rev.mo decimo Consultore che chiede innanzi tutto che ci si esprima se sia necessario una qualsiasi *praesumptio* a questo riguardo nel codice, il *Coetus* si esprime a favore della non-necessità di essa con 6 placet, 4 non placet, 2 astenuti. Dei 4 che hanno votato contro, tre sono favorevoli alla *praesumptio* come è stata votata nei giorni precedenti, mentre il quarto desidera quella che era già nella tradizione, cioè che si ritenga il testo pubblicato in *Nuntia* 2 pag. 66 can. 6."

[229] "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 44 (2012) 612 note 83: "Il can. 6 del prot. 23/1 che conteneva la *presumptio* che Orientales *non tenentur universalibus Ecclesiae legibus nisi etc.* (con *fontes* da Benedetto XIV in poi: cfr. *Nuntia* 2 p. 66) è stato contrapposto alla *praesumptio* contraria: il *Coetus* però con 6 favorevoli, 4 contrari e 2 astenuti ha adottato la linea di omettere ogni *praesumptio*. Tra i quattro *non placet* 3 desideravano che si dicesse nel Codice: 'Leges ab Ipso Romano Pontifice latae Christifideles Orientalium Ecclesiarum [*sic*] astringere praesumuntur, nisi ex natura rei vel expressa declaratione aliud constat.' Uno dei quattro *non placet* invece voleva la *praesumptio* come gia formulata, secondo la tradizione, dalla precedente Commissione orientale, quella *ad Redigendum Codicem Orientalem*, che qui si trascrive dal Prot. 23/1: "Fideles orientalium rituum non adstringuntur universalibus Ecclesiae legibus, etsi latis in Litteris Encyclicis vel Constitutionibus Apostolicis nisi agitur de rebus fidei vel morum, de declaratione legis divinae sive naturalis sive

When it reviewed the schema at its morning session of March 13, 1980, the members of the *Coetus specialis* took up the matter:

> The *coetus* turns to the note regarding "laws issued by the Roman pontiff are presumed to bind Easterners, unless..." or, as is traditional, "Easterners are not bound except if it is expressly stated that they are bound by a law."
>
> There is a break.
>
> Returning to work, the most reverend second and fourth consultors are of the opinion that nothing should be said in the Eastern code, but elsewhere; the most reverend third and fifth consultors are undecided in this regard; the most reverend sixth consultor and the most illustrious first consultor would like such a matter being in the Eastern code.
>
> After this vote—which is two in favor, two against, and two abstaining—the position of the *Coetus de normis* remains unchanged, namely that nothing be said in the Eastern code.[230]

The decision to maintain the omission of the Pamphilian jurisprudence was affirmed in the second session of the *Coetus* as well.[231] Just as in the prior *coetus*, the special *coetus* was extremely divided concerning this jurisprudence.

In the tenth issue of *Nuntia*, the relator of the *Coetus de normis generalibus*, Archimandrite Elias Jarawan, published an overview of the revision of the canons on general norms.[232] In the midst of this article, Jarawan noted the decision of the *coetus* to omit any canon specifically considering the applicability of "universal" laws to Eastern faithful.

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positivae aut expresse dicatur orientales lege teneri." I 6 *placet* invece non desideravano alcuna menzione di qualche *praesumptio*, ritenendo, oltre ad altre ragioni, sufficiente il can. 4 §1."

[230] Ibid., 614: "Si torna alla nota a pag. 612 del prot. 23/2 circa «Leges a Romano Pontifice latae Orientales astringere praesumuntur, nisi» oppure come è tradizionale «non adstringuntur nisi expresse dicatur Orientales lege teneri». Si fa un intervallo. Alla ripresa dei lavori i Rev.mi Consultori secondo e quarto sono dell'avviso che *nihil dicatur in CICO, sed alibi*, i Rev.mi Consultori terzo e quinto sono indecisi al riguardo, il Rev.mo sesto Consultore e l'Ill.mo primo Consultore vorrebbero qualche cosa nel CICO. Dopo questo voto che è di 2 favorevoli, 2 contrari e 2 astenuti, rimane immutata la posizione del *Coetus de Normis*, e cioè che *nihil dicatur in CICO*."

[231] "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 46 (2014) 267 (c. 131). Aside from altering the wording of §1 of the canon (c. 4 §1 of the previous draft, concerning the application of laws *pro quibus latae sunt*), the canon was approved "*sicut iacet*," with no addition of the Pamphilian jurisprudence to the text.

[232] Elias Jarawan, "Révision des canons *De normis generalibus*," *Nuntia* 10 (1980) 87–118.

> The issues involved in this debate are, as we see, very important, but also very difficult to resolve. On the one hand, it does not seem opportune to specify in the code itself that, in formulating laws, the supreme pontiff always intends to speak only to the Latin Church, unless it is said explicitly that these laws are also valid for the Easterners. On the other hand, this norm was desired by the popes themselves, to render clearly their will to respect Eastern discipline. This norm, which has remained in force since Benedict XIV, gave good results, because thanks to it one could always determine which among the norms issued by the Roman dicasteries were valid for the Eastern Churches and which were not. Even after the council, this was always observed for the good of all.[233]

Jarawan stated that the six consultors who voted to remove the canon from the schema did so in light of the fourth canon of their schema: "Laws issued by the supreme authority of the universal Church bind all for whom they were given wherever they are in the world, unless they have been given for a particular territory [...]."[234]

> [This canon] seems to indicate sufficiently the necessity of always determining clearly to whom the norms issued by the Holy See are addressed. If this practice is respected, a presumption in this regard is no longer necessary. This in particular is why the six consultors have voted for the suppression of the canon in question, from the perspective that the praxis about the matter will continue and will even be rendered clearer than before.[235]

Jarawan indicates that the consultors believed expression of the Pamphilian jurisprudence in the Eastern code would not be necessary, provided that the Holy See always clearly indicated the addressees of a given law. However, the common lack of clarity in declaring for whom laws

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[233] Ibid., 97: "Les questions impliquées par ce débat sont, on le voit, très importantes mais aussi très difficiles à résoudre. D'un côté, il ne semble pas opportun de préciser dans le Code lui-même que, lorsqu'il formule des lois, le Souverain Pontife entend toujours parler seulement de l'Église latine, sauf s'il ne dit explicitement que ces lois sont valables aussi pour les Orientaux. D'un autre côté, cette norme a été voulue par les Papes eux-mêmes, pour mettre bien au clair leur volonté de respecter la discipline orientale. Cette norme, qui est restée en vigueur depuis Benoît XIV, n'a donné que de bons résultats, car grâce à elle l'on a pu déterminer toujours quelles étaient, parmi les normes émanées par les Dicastères Romains, celles qui étaient valables pour les Églises Orientales et celles qui ne l'étaient pas. Même après le Concile, ceci a été toujours observé pour le bien de tous."

[234] Ibid., 99 (c. 4 §1): "Legibus a Suprema Auctoritate Ecclesiae universalis latis tenentur omnes pro quibus latae sunt ubique terrarum, nisi pro particulari territorio latae sunt [...]."

[235] Ibid., 97–98: "On notera qu'avant la votation, l'on avait pris en considération le paragraphe premier du canon 4 où les paroles «*pro quibus latae sunt*» semblent indiquer suffisament la nécessité de déterminer toujours clairement à qui sont adressées les normes émanées par le Saint-Siege. Si cette pratique est respectée aucune présomption à cet égard n'est plus nécessaire. C'est surtout pour cette raison que les six consulteurs ont voté pour la suppression du canon en question, dans la perspective que la praxis à ce sujet continuera et sera même rendue encore plus claire qu'auparavant."

were intended was the basis for adopting the Pamphilian jurisprudence; while future clarity could be hoped for, it was not a certainty. Indeed, if norms lacking a clear addressee were issued after the code, "praxis in this matter would continue." However, it would seem beneficial to the juridic clarity sought that an actual canonical norm be established in this regard.

The decision to omit a canon on this matter was likewise noted in the *Praenotanda* to the schema on general norms, published in *Nuntia* in 1981:

> In the context of this discussion it must be noted that consultors of three study groups, although their votes were divided almost equally, did not think that the norm, as yet of great importance and in praxis from [the time of] Benedict XIV, by which the faithful of Eastern rites are exempted from universal laws of the Church, even if issued in encyclical letters or apostolic constitutions, unless it concerns matters of faith or morals or a declaration of divine law, whether natural or positive (see the sources for *Nuntia* 2, page 66, canon 6), was to be inserted into the code. For, supposing the equality among Churches of the East and the West that the Second Vatican Council extolled (*OE* 3), and considering those things that were said above concerning the notions of "universal law" and "common law," it seemed to more consultors not consonant [with these notions] to insert this norm into the new code.[236]

[236] "Schema Canonum de Normis Generalibus et de Bonis Ecclesiae Temporalibus," *Nuntia* 13 (1981) 11: "In huius sermonis contextu notandum est, normam, hucusque maximi momenti atque inde a Benedicto XIV in praxi vigentem qua fideles rituum orientalium ab universalibus Ecclesiae legibus, etsi latis in Litteris Encyclicis vel Constitutionibus Apostolicis, eximuntur, nisi agatur de rebus fidei vel morum aut de declaratione legis divinae sive naturalis sive positivae (*Nuntia* 2, p. 66, can. 6—cf. fontes canonis), Consultores trium a studiis Coetuum, scissis tamen fere in aequas partes suffragiis, in Codicem inserendam non esse censuisse. Etenim, supposita illa aequalitate inter Ecclesias, tum Orientis tum Occidentis, quae a Vaticano Concilio II extollitur (Decr. «Orientalium Ecclesiarum» n. 3) atque consideratis iis quae superius de notionibus «legis universalis» et «iuris communis» dicta sunt, pluribus Consultoribus haud consonum visum est hanc normam in novum Codicem inserere." The same text is printed in "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 46 (2014) 524. Concerning "universal law" and "common law," note these comments in "Schema Canonum de Normis Generalibus et de Bonis Ecclesiae Temporalibus," 11 and "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 46 (2014) 523–524: "*In capite I « De legibus »* (cann. 126–141) fere inextricabiles quaestiones, cum notionibus legum «universalium», «territorialium», «personalium» etc. connexae, tandem, unanimi fere consensu Consultorum, in canonibus 128 et 129 solutae proponuntur, omnino his vocibus vitatis. Novo modo res propununtur cum spe magis perspicue statuendi quibusnam legibus unusquisque Christifidelium subiaceat. In canone 129 traduntur definitiones «iuris particularis» et «iuris communis». Hae voces in schematibus passim adhibitae sunt proindeque distincte definiri debent. «Ius particulare», etiamsi negative potius describitur, omnes leges ac consuetudines, statuta et similia (vox «similia» sat patet) amplectitur, quae a Synodis orientalibus, Hierarchis locorum, a Synaxibus Religiosorum aliisque competentibus organis orientalibus legitime feruntur. Hoc modo «ius particulare» sine ulla obscuritate a «iure communi», quo veniunt leges et consuetudines Ecclesiae Catholicae universalis aut omnium Ecclesiarum orientalium communes, probe distingui videtur."

The *coetus* stated that the Pamphilian jurisprudence was omitted in the schema not simply because the members felt that the canon concerning the applicability of universal laws[237] would be sufficient for juridic clarity, but also because of the equality of Churches declared in *Orientalium Ecclesiarum* 3. The reasoning of the *coetus* appears to have been that a norm exempting Eastern faithful from supposedly universal laws created the impression that they themselves were exceptions in the universal Church. If all Churches and all faithful were equal, they should be equally subject to universal laws issued by the supreme authority.

The matter was debated once again during the *denua recognitio* of the schemata *De Normis Generalibus* and *De Bonis Temporalibus*. During the afternoon session of September 23, 1982, the special *coetus* for the *denua recognitio* turned to the note inserted under canon 130 of the schema *De Normis Generalibus*, which noted the omission of the norm containing the Pamphilian jurisprudence.[238]

> To this proposition, the secretary observes that this is one of those questions that must be submitted to the judgment of the plenary meeting, given the small divergence between the votes in favor and votes against. However, continues the secretary, if one feels sufficiently prepared, and wants to face this question anew, in order to resolve it definitively, it can be reconsidered at this meeting, especially as an organ of consultation—the German Episcopal Conference—has proposed that there be inserted into the schema a canon "that exempts the Eastern faithful from universal laws according to the norm given by Benedict XIV."
>
> The *coetus* declares itself ready to discuss the whole matter again. Prior to beginning the debate on the issue, the secretary briefly explains the *status quaestionis*, emphasizing that the principal difficulty that is opposed to the introduction into the Eastern schema of the aforementioned norm of Benedict XIV consists above all in the differing meanings given to the words *lex universalis* in the schema of the new *Codex Iuris Canonici*. In fact, in this schema of the *Codex Iuris Canonici*, the expression *leges universales* indicates those laws that "affect the entire Latin Church," while in the schemata of the future Eastern code *leges universales* is intended to reference those laws that are juridically binding for the universal Church, Latin and Eastern.

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[237] "Schema Canonum de Normis Generalibus et de Bonis Ecclesiae Temporalibus," 45 (c. 128 §1).

[238] Ibid., 45 note: "Canon 6 «textuum initialium» in Nuntia 2, p. 66, publici iuris factus, omissus est sequenti suffragatione: 6 placet omissio, 4 non placet, 2 abstinent. Cf. Praenotanda p. 9."

> Having explained the *status quaestionis*, the secretary gave the floor to the *coetus*, which engages in a long and animated debate regarding whether or not to introduce into the schema a canon "that exempts the Eastern faithful from universal laws according to the norm given by Benedict XIV," as the German Episcopal Conference has proposed. All aspects of the problem are examined, both for and against. At the conclusion of this more than laborious debate, it is agreed to formulate a text according to the lines emerging in the course of the discussion.
>
> This must be inserted after canon 128, and it will be given the number "canon 128 *bis*." But regarding its formulation, the most reverend fifth consultor took up the task, who thinks that he will be able to present a text conforming to the *desiderata* of the *coetus* at one of the next meetings.[239]

The consultor presented his draft canon at the afternoon session of the following day:

> The special *coetus* then passes to consider the text of canon 128 *bis*, whose formulation had been entrusted to the most reverend fifth consultor. The text, as it has been formulated by the said consultor according to the indications given by the *coetus*, is of the following tenor:
>
> "Laws issued by the supreme ecclesiastical authority, in which the passive subject is not expressly indicated, affect the faithful of the Eastern Churches only if it concerns matters of faith or morals or a declaration of natural or positive divine law, or it explicitly determines matters concerning them, or it concerns privileges that contain nothing contrary to the Eastern rites."

[239] "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 47 (2015) 204–205: "A questo proposito il SG osserva che questa è una di quelle questioni che dovrebbero essere sottoposte al giudizio della plenaria, dato il lieve scarto di voti tra i placet e i non placet. Tuttavia, continua il SG, qualora ci si senta sufficientemente pronti, e si voglia affrontare di nuovo la questione, in modo da risolverla definitivamente, si potrebbe riconsiderarla in questa sede, tanto più che un Organo di Consultazione, la GER, ha proposto che venga inserito nello schema un canone «qui fideles orientales a legibus universalibus iuxta normam a Benedicto XIV latam eximit». Il Coetus si dichiara pronto a ridiscutere tutta la faccenda. Il SG, prima di intavolare un dibattito al riguardo, espone brevemente lo status quaestionis, sottolineando che la difficoltà principale, che si oppone all'introduzione nello schema orientale della suddetta norma di Benedetto XIV, consiste soprattutto nella diversa accezione data nello schema del NCIC alle parole 'lex universalis.' Infatti in questo schema or [*sic*] ora menzionato con l'espressione 'leges universales' si vogliono indicare quelle leggi che 'totam Ecclesiam latinam respiciunt,[']' mentre negli schemi del futuro CICO con 'leges universales' si intendono quelle leggi che sono giuridicamente vincolanti per tutta la Chiesa universale sia latina che orientale. Esposto lo status quaestionis, il SG cede la parola al Coetus, il quale intavola un lungo ed animato dibattito circa l'opportunità o meno di introdurre nello schema un canone «qui fideles orientales a legibus universalibus iuxta normam a Benedicto XIV latam, eximit», come ha proposto la GER. Di tale problema si esaminano tutti gli aspetti, sia a favore che a sfavore. A conclusione di questo più che laborioso dibattito, si concorda di formulare un testo secondo le linee emerse nel corso della discussione. Esso dovrà essere inserito dopo il can. 128, e gli si attribuirà la numerazione di canone 128 bis. Per quanto riguarda, invece, la sua formulazione, se ne assume l'incarico il Rev.mo quinto Cunsultore [*sic*], il quale ritiene di essere in grado di presentare un testo conforme ai 'desiderata' del Coetus, in una delle prossime sedute."

> It was noted that to this text the most reverend fifth consultor has added the relevant sources on which his formulation was based. The *coetus* subjects it to an attentive examination and a deep debate, in the course of which the following emendations came to be proposed: in place of "ecclesiastical," say "of the Church"; for "faithful," put "Christian faithful"; in place of "if," write "insofar as"; omit the words "natural or positive"; put a semicolon after "determines matters concerning them" in place of the comma, to distinguish better the two cases treated in the canon; finally, in place of the subjunctive "it concerns" [*agatur*], which figures twice in the text, use the indicative "it concerns" [*agitur*]. All these emendations, after a brief examination, are accepted, and introduced into the text of canon 128 *bis*.[240]

The canon, with the approved modifications, was included in the *Schema Canonum de normis generalibus* published in 1984:

> Laws issued by the supreme authority of the Church, in which the passive subject is not expressly indicated, affect the Christian faithful of the Eastern Churches only insofar as it concerns matters of faith or morals or a declaration of divine law, it explicitly makes mention of them in them, or it concerns privileges that contain nothing contrary to the Eastern rites.[241]

The special *coetus* commented:

> The canon is the fruit of a reexamination of the question delineated in the schema with a note added to canon 130, made both *ex officio* and at the request of an organ of consultation that did not accept what was written in the *praenotanda* to the schema in this regard, asking that there be inserted into the schema a canon "that exempts the Eastern faithful from universal laws, according to the norm given by Benedict XIV."

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[240] Ibid., 213: "Si passa quindi a considerare il testo del *can. 128 bis*, la cui formulazione era stata affidata al Rev.mo quinto Consultore (cfr. sopra, pagg. 202–203 l'intera questione). Il testo, così come è stato formulato da detto Consultore sulle indicazioni date dal Coetus, è del seguente tenore: «Leges a Suprema Auctoritate ecclesiastica lata, in quibus subiectum passivum expresse non indicatur, fideles Ecclesiarum Orientalium respiciunt tantummodo, si de rebus fidei vel morum, aut de declaratione legis divinae sive naturalis sive positivae agatur vel explicite de ipsis in eis disponitur aut de privilegiis agatur quae nihil contrarium ritibus orientalibus contineant». Va notato che a questo testo il Rev.mo quinto Consultore ha apposto le relative fonti, sui cui si è basato per la formulazione di esso. Il Coetus lo sottopone ad un attento esame e ad un approfondito dibattito, nel corso del quale vengono proposti i seguenti emedamenti: al posto di 'ecclesiastica' si dica 'Ecclesiae'; invece di 'fideles' si metta 'christifideles'; in luogo di 'si' si scriva 'quatenus'; si omettano le parole 'sive naturalis sive positivae'; si metta un punto e virgola dopo 'disponitur' al posto della semplice virgola, per distinguere bene le due cose di cui si tratta nel canone; infine, in luogo del congiuntivo 'agatur,' che figura due volte nel testo, si metta l'indicativo 'agitur.' Tutti questi emendamenti, dopo un breve esame, vengono accettati, ed introdotti nel testo del can. 128 bis." It seems that the decision concerning replacing the comma (which is not actually present in the transcription given in *Communicationes*) with a semicolon was not carried into later versions of the canon.

[241] "Nuova revisione dello *Schema Canonum de normis generalibus et de bonis Ecclesiae temporalibus*," *Nuntia* 18 (1984) 75: "Leges a Suprema Auctoritate Ecclesiae latae, in quibus subiectum passivum expresse non indicatur, christifideles Ecclesiarum Orientalium respiciunt tantummodo, quatenus de rebus fidei vel morum aut de declaratione legis divinae agitur, vel explicite de ipsis in eis diponitur [*sic*], aut de privilegiis agitur quae nihil contrarium ritibus orientalibus contineant."

In this regard, the reader is kindly asked to reread pages 96–98 of *Nuntia* 10, where there is an account of the previous work of the commission regarding the question of whether or not to retain in the Eastern code canon 6 of the initial text, in force for over two centuries—namely from May 26, 1742, the date of the apostolic constitution *Etsi pastoralis* of Benedict XIV. [...]

As is noted in the *relatio* published in *Nuntia* 10, the canon was not inserted into the schema, but with such a low margin between *placet* and *non placet* that it was made part of that category of eliminated texts with less than two-thirds of the votes, which, according to the praxis of the commission, must at all costs be presented formally to a plenary meeting of the members of the commission for a definitive decision whether or not to omit it from the Eastern code. The study group, all things considered, agreed to insert into the Eastern code the relevant canon of the initial text in a new formulation, namely one that emphasizes that every time a competent dicastery of the Holy See issues norms that it intends to have force for the whole Church, it is necessary to declare it expressly, such that, if nothing is said about it, these norms shall not be considered as binding on the Eastern Churches.

It was decided that a consultor would be responsible for formulating a new text of the canon. This was presented to the study group in the September 23 session, but the decision concerning it was postponed to the following day.

The new canon pleased everyone on September 24, even if some redactional modifications were made. To the text are added indications of some sources for every advantage of the members of the commission who will decide on the matter. They are: Mansi, 50:36; *Collectanea S.C. de Prop. Fide* II, nn. 1578 and 1640; *AAS* 7 (1917) [*sic*] 104.[242]

[242] Ibid., 75–76: "Il canone è frutto di un riesame della questione delineata nello schema con una nota aggiunta al can. 130, fatto sia ex officio, sia su richiesta di un Organo di consultazione il quale, non accettando quanto scritto nei *Praenotanda* allo schema (p. 11) a questo riguardo, richiede che venga inserito nello schema un canone «qui fideles orientales a legibus universalibus, iuxta normam a Benedicto XIV latam, eximit». A questo proposito il lettore è cortesemente invitato a rileggere le pagine 96–98 di *Nuntia* 10 ove vi è un resoconto dei precedenti lavori della Commissione riguardanti la questione se o no ritenere nel CICO il can. 6 dei «testi-iniziali» in vigore per oltre due secoli, cioè dal 26 maggio 1742, data della Costituzione Apostolica di Benedetto XIV «Etsi pastoralis». Il relativo canone è il seguente: «Fideles Orientalium rituum non adstringuntur universalibus Ecclesiae legibus, etsi latis in Litteris Encyclicis vel Constitutionibus Apostolicis, nisi agatur de rebus fidei vel morum, de declaratione legis divinae sive naturalis sive positivae aut expresse dicatur orientales lege teneri» (*Nuntia* 2, p. 66 can. 6). Come è noto dalla relazione pubblicata in *Nuntia* 10, il canone non è stato inserito negli schemi, tuttavia con uno scarto talmente minimo di voti tra i placet e i non placet, che esso è entrato a far parte di quella categoria di testi eliminati con meno di due terzi di voti, che, secondo la prassi della Commissione, devono essere ad ogni costo presentati formalmente ad una riunione plenaria dei Membri della Commissione per una decisione definitiva se lasciarli fuori dal CICO o meno. Il gruppo di studio, tutto considerato, concorda di inserire nel CICO il relativo canone dei testi iniziali in una nuova formulazione, tale cioè che sottolinei che, ogni qual volta che un Dicastero della Santa Sede competente emana delle norme che intende far valere *pro Ecclesia Universa* sia necessario dichiararlo espressamente, di modo che, se niente viene detto in proposito, queste norme non saranno considerate vincolanti per le Chiese Orientali. Deciso ciò, un consultore viene incaricato di formulare un nuovo testo del canone. Questo è presentato al gruppo di studio nella sessione del giorno 23 settembre, ma la decisione al riguardo è rinviata al giorno successivo. Il nuovo canone, il 24 settembre, piace a tutti, anche se vi si apportano alcune modifiche redazionali. Al

With some minor modifications to the text presented in canon 1507 of the 1986 *Schema Codicis Iuris Canonici Orientalis*,[243] the canon would appear in the promulgated text of the Eastern code as canon 1492.

The *iter* of this canon illustrates the problems arising from reconciling the juridic autonomy of the Eastern communities vis-à-vis the supreme authority, particularly the Roman pontiff, with recognizing these communities' equality in juridic dignity within the Catholic communion of Churches. On the one hand, the Eastern communities have for centuries relied on the Pamphilian jurisprudence to defend themselves against enactments that could threaten their own proper laws and traditions through the imposition of Latin norms. This jurisprudence also recognized the *de facto* legislative behavior of the Roman pontiff: he generally issued laws only taking into consideration the situation of the Latin Church. On the other hand, the fresh perspective offered in *Orientalium Ecclesiarum* would seem to call for such *de facto* behavior to end. In the elaboration of a law, there needs to be clarity as to the scope of its authority. If a law is intended for the Latin Church alone, it should explicitly state such lest, through omission of such a reference, "Latin" seem to be equated with "Catholic." A compromise canon was

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testo si aggiunge l'indicazione di alcune fonti per ogni utilità dei Membri della Commissione che decideranno in proposito. Esse sono le seguenti: Mansi, t. 50, col. 36; Coll. P.F. II, n. 1578 e 1610 [*sic*: read '1640']; AAS, 7 (1917) [*sic*] 104." The Mansi reference is to the Pamphilian decision, *Collectanea* #1578 to the 1882 letter to the apostolic delegates of the East, and *Collectanea* #1640 to the 1885 letter with the decision of the Holy Office. The *AAS* reference has a mismatch of year and volume number (volume 7 was 1915; 1917 was volume 9); the actual reference intended is likely Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite, "Dubia circa Constitutionem Apostolicam «Incruentum» quoad Orientales," *AAS* 8 (1916) 104–105.

[243] The canon is found in "Schema Codicis Iuris Canonici Orientalis," 260 (c. 1507): "Leges a suprema Ecclesiae auctoritate latae, in quibus subiectum passivum expresse non indicatur, christifideles Ecclesiarum orientalium respiciunt tantummodo, quatenus de rebus fidei vel morum aut de declaratione legis divinae agitur vel explicite de eis in ipsis disponitur aut de favorabilibus agitur, quae nihil contrarium ritibus orientalibus continent." The later modifications changed "de eis in ipsis" to "de eisdem christifidelibus in his legibus," and moved "contrarium" after "ritibus orientalibus";see "L'operato del «Coetus de coordinatione»: *Seconda fase dei lavori del «Coetus de coordinatione*» (novembre 1986–dicembre 1988): *Emendamenti redazionali proposti all'approvazione dell'Assemblea Plenaria dei Membri della Commissione*," *Nuntia* 27 (1988) 74 (at c. 1507). Also, at some point between the draft of the special *coetus* and the version published in the *Schema Codicis Iuris Canonici Orientalis*, the word "privilegibus" was changed to "favorabilibus."

formulated, maintaining the Pamphilian jurisprudence while stating that the laws to which this jurisprudence applied were not "universal" laws—in which case, "universal" in most cases would mean "Latin"—but laws "in which the passive subject is not expressly indicated," thus making no predetermination about the nature of the law (universal, common, particular).

5.4. The New Canonical Legislation and Eastern Juridic Autonomy

With the promulgation of the *Codex Canonum Ecclesiarum Orientalium* on October 18, 1990, "John Paul II has carried to completion the long journey begun by Leo XIII to recognize the full equality of all Churches of West and East."[244] The Eastern codification commission intended the new code to take into account the teachings of the Second Vatican Council in restructuring the juridic status of the Eastern Catholic Churches,[245] one aspect of which was respecting the relative juridic autonomy of these Churches.[246] This section will review several key ways in which autonomy is structured in the new Eastern code, as well as certain pertinent points in the 1983 *Codex Iuris Canonici* and the apostolic constitution *Pastor bonus*, which all together constitute a new *Corpus Iuris Canonici* for the Church.[247]

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[244]Lorenzo Lorusso, "Il riconoscimento della pari dignità nella comunione cattolica: il decreto *Orientalium Ecclesiarum* e il Codice dei Canoni delle Chiese Orientali," *Angelicum* 83 (2006) 452: "Con la promulgazione del *Codice dei Canoni delle Chiese Orientali* (18 ottobre 1990), Giovanni Paolo II ha portato a compimento il lungo iter iniziato da Leone XIII per il raggiungimento della piena uguaglianza di tutte le Chiese d'Oriente e d'Occidente."

[245] Émilio Eid, "La révision du Code de droit canonique oriental: histoire et principes," *L'année canonique* 33 (1990) 23 points specifically to three documents: *LG*, *OE*, and *UR*.

[246] Cf. Žužek, "Riflessioni circa la Costituzione Apostolica «Sacri Canones» (18 ottobre 1990)," 158, at d).

[247] Cf. John Paul II, allocution *Memori animo*, October 25, 1990, §8: *AAS* 83 (1991) 490: "Dum huic Coetui, tam apto ad exprimendam Ecclesiae uni versantem, Codicem exhibeo qui regit communem omnibus Ecclesiis Orientalibus Catholicis disciplinam, hunc ego puto partem unici «Corporis Iuris Canonici», constantis ex tribus supra commemoratis documentis [1983 *CIC*, *CCEO*, *PB*] intra septem annos promulgatis."

5.4.1. The Applicability of the Law

5.4.1.1. Canon 1 of the Two Codes

As with the 1917 code, the 1983 Latin code and the 1990 Eastern code contain as their first canon a norm indicating who is subject to each code. Canon 1 of the 1983 Latin code states: "The canons of this code regard only the Latin Church."[248] *Sacrae disciplinae leges* further states that the code is to have force "for the whole Latin Church."[249] Therefore, the canons of the 1983 Latin code appear to be limited in application to the Latin Church alone. This significantly changes the wording of canon 1 of the 1917 code, which limited the applicability of the canons of that code to the Latin Church unless "it determines things that, by the very nature of the matter, affect the Eastern Church as well."[250] With this change, the confusion created by commentators on the 1917 code, who gave widely varying lists of canons that applied to the

[248] 1983 *CIC* c. 1: "Canones huius Codicis unam Ecclesiam latinam respiciunt." English translation from *Code of Canon Law, Latin-English Edition: New English Translation* (Washington, D.C.: CLSA, 1998). All subsequent English translations of canons from this code will be taken from this source unless otherwise indicated. On the review of this canon during the codification process, see *Communicationes* 23 (1991) 109; the omission of any reference to Eastern Churches or Eastern faithful was specifically intended. The *coetus* reviewing the canon considered that it was still necessary for the code: "Cum Codex I.C. recognoscendus sit Codex Ecclesiae latinae, dubium non esse videtur quin servandum si praescriptum can. 1, vi cuius Codex recognitus quoque unam respiciet Ecclesiam Latinam, nec per se Orientales Ecclesias obligabit" (*Communcationes* 3 [1971] 83). There was later a request to suppress the canon—"Animadversio proponitur, vi cuius canon *supprimi potest*, quia norma quam continet per se patet et insuper apparet ex promulgatione Codicis Iuris Canonici Orientalis"—but this request was rejected; see *Communicationes* 14 (1982) 129. Cf. George Nedungatt, "The Title of the New Canonical Legislation," *Studia Canonica* 19 (1985) 66, recounting the debates in the codification commission concerning this canon.

[249] John Paul II, apostolic constitution *Sacrae disciplinae leges*, January 25, 1983: *AAS* 75/2 (1983) xiii–xiv: "Itaque divinae gratiae auxilio freti, Beatorum Apostolorum Petri et Pauli auctoritate suffulti, certa scientia atque votis Episcoporum universi orbis adnuentes, qui nobiscum collegiali affectu collaboraverunt, suprema qua pollemus auctoritate, Constitutione Nostra hac in posterum valitura, praesentem Codicem sic ut digestus et recognitus est, promulgamus, vim legis habere posthac *pro universa Ecclesia latina* iubemus ac omnium ad quos spectat custodiae ac vigilantiae tradimus servandum" (emphasis added).

[250] 1917 *CIC* c. 1: "Licet in Codice iuris canonici Ecclesiae quoque Orientalis disciplina saepe referatur, ipse tamen unam respicit Latinam Ecclesiam, neque Orientalem obligat, nisi de iis agatur, quae ex ipsa rei natura etiam Orientalem afficiunt." Note that a consultor had thought the phrase "quae ex ipsa rei natura obligant" could be omitted because "per se res patet," although no other consultor seems to have stated agreement with this thesis: *Communicationes* 23 (1991) 109.

Eastern Church "by the very nature of the matter," would appear to be avoided; the canons of the 1983 Latin code do not apply to the Eastern Catholic Churches, even by exception. However, several modern commentators argue that the absolute wording of canon 1 of the 1983 Latin code does not reflect the juridic reality.[251] For example, Bruno Esposito lists several sets of canons of the 1983 Latin code that apply to Eastern Catholics, whether directly or indirectly; his manner of listing these canons mirrors that used by commentators on canon 1 of the 1917 code.[252] Such arguments suggest a perception among commentators that parts of the 1983 Latin code apply to the Eastern faithful, despite the language used in the act of promulgation and the absoluteness of its first canon.[253] There still remains the threat that "Latin" could be equated with "universal" in the law of the Church.[254]

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[251] Faris, "The Codification and Revision of Eastern Canon Law," 450 note 6 considers that the 1983 *CIC* still "contains matters which are super-ritual or inter-ritual in nature" despite the absolute nature of c. 1; indeed, in *The Eastern Catholic Churches*, 115 note 2, he considers the wording of c. 1 "too absolute." George Gallaro and Dimitri Salachas, "Interecclesial Matters in the Communion of Churches," *The Jurist* 60 (2000) 256 argue that the less absolute norm of *CCEO* c. 1 "can also be applied to canon 1 of the Latin code." Nedungatt, "The Title of the New Canonical Legislation," 66, considers the formulation of 1983 *CIC* c. 1 less accurate that 1917 *CIC* c. 1, although this latter canon still "was in need of a better formulation." Luigi Chiapetta, *Il Codice di Diritto Canonico: Commento giuridico-pastorale*, 2nd ed. (Rome: Dehoniane, 1996) 1:33 and Dimitri Salachas, "Problematiche Interrituali nel Due Codici Orientale e Latino," *Apollinaris* 67 (1994) 635 argue in the same vein. See also Nedungatt's comments in *The Spirit of the Eastern Code*, 226 note 19, foreseeing the possibility of a future revision placing the canons in each code applying to the whole Church in a separate, universal code. Jobe Abbass, "The Interrelationship of the Latin and Eastern Codes," *The Jurist* 58 (1998) 4 has a somewhat more complicated view, admitting that the 1983 *CIC* does consider Eastern Catholics in some canons (e.g., cc. 214 and 383), but stating nevertheless that "Eastern faithful are not subject to the Latin legislation." Salachas-Sabbarese, 142 suggest that a clause similar to *CCEO* c. 1 on interecclesial relations must be understood in 1983 *CIC* c. 1.

[252] Bruno Esposito, "L'ambito d'applicazione del Codice di Diritto canonico latino. Commento sistematico al can. 1 del *CIC*/83," *Angelicum* 80 (2003) 450–452. He states that only two canons apply to Eastern Catholics directly and explicitly: cc. 350 §§1–3 and 1015 §2. Several others contain implicit references to Eastern Catholics: cc. 111–112, 214, 372 §2, 450 §1, 476, 479 §2, 518, 846 §2, 923, 991, 1021, 1109, 1248 §1. Finally, some canons indirectly apply to Eastern Catholics insofar as they concern matters of dogma or faith (cc. 340, 336, 749, 840, 845, 849, 897) or declare or interpret natural or divine positive law (cc. 113 §1, 331–333, 336, 381, 898, 1084, 1085, 1091, 1404, 1732). Cf. Ivan Žužek, "Origin of the Canons, «Coincidences» with *CIC* and «Omissions» in Titles I and III of *CCEO*," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 194–195 and idem, "Omissione di Alcune Sezioni di Canoni dal *Codex Canonum Ecclesiarum Orientalium*," *Apollinaris* 66 (1993) 439–449 (especially 444–445), arguing that the canons of 1983 *CIC* can bind Eastern Catholics *ex sua natura* if they concern an exercise of supreme power in a matter not regulated by the *CCEO*.

[253] A nuanced approach could allow for maintaining the integrity of 1983 *CIC* c. 1, denying the applicability of any canon of that code to Eastern Catholic Churches/faithful directly. In canons of 1983 *CIC* concerning interecclesial relations, the Latin person/entity involved would be bound to the law; the Eastern person/entity would merely be interacting with a person/entity bound by Latin law, but not be bound themselves. Matters concerning natural or

The first canon of the 1990 Eastern code differs from its modern Latin counterpart by explicitly stating that some norms of the Eastern code apply to the Latin Church as well: "The canons of this Code concern all and only the Eastern Catholic Churches, unless, with regard to relations with the Latin Church, it is expressly established otherwise."[255] Unlike the first canon in the 1917 code, this norm limits the cross-application of canons to only those concerning relations with the Latin Church, even implicitly;[256] nothing is said concerning matters applying *ex ipsa rei natura* to all Catholics equally.[257] The exception found in canon 1 is appropriate for

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positive divine law would bind faithful regardless whether a positive canonical norm existed. Finally, in a matter like 1983 *CIC* c. 350 §§1–3, containing the norms concerning the college of cardinals, Eastern cardinals would be bound by the original legislation on the matter (Paul VI, *motu proprio Ad purpuratorum patrum*, February 11, 1965: *AAS* 57 [1965] 295–296), not by the Latin canon. See Francisco J. Urrutia, "Canones praeliminares codicis (CIC). Comparatio cum canonibus praeliminaribus Codicis Canonum Ecclesiarum Orientalium (CC)," *Periodica* 81 (1992) 154–156 arguing that Eastern Catholics are never bound to Latin canons *vi canonis*.

[254] For a rather blatant example, see Dolores García-Hervás, "La Significacion para la Iglesia del Nuevo Codigo Oriental," in *Atti del Congresso Internazionale: Incontro fra canoni d'oriente e d'occidente*, ed. Raffaele Coppola (Bari: Cacucci, 1994) 1:41–48. The author argues that many of the canons in 1983 *CIC* in actuality constitute *per se* universal law (drawing on a parallel of 1917 *CIC* c. 1 and 1983 *CIC* c. 1), while those canons of the Eastern code not present in the Latin canons or contrary to them are particular law for the Eastern Catholic Churches.

[255] *CCEO* c. 1: "Canones huius Codicis omnes et solas Ecclesias orientales catholicas respiciunt, nisi, relationes cum Ecclesia latina quod attinet, aliud expresse statuitur." English translation from *Code of Canons of the Eastern Churches, Latin-English Edition: New English Translation* (Washington, D.C.: CLSA, 2001). All subsequent English translations of canons from this code will be taken from this source unless otherwise indicated. On the *iter* of this canon through the Eastern codification process, see Lorenzo Lorusso, "L'ambito d'applicazione del Codice dei Canoni delle Chiese Orientali. Commento sistematico al can. 1 del CCEO," *Angelicum* 82 (2005) 468–469; idem, *Gli Orientali Cattolici e i Pastori Latini: Problematiche e norme canoniche*, Kanonika 11 (Rome: PIO, 2003) 32–33; Salachas, *Orient et Institutions*, 69–70. Some of the *coetus* deliberations are found in "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 42 (2010) 174, 184 and 44 (2012) 608–609; Jarawan, "Révision des canons *De normis generalibus*," 87–89; "La Nuova Revisione dello *Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium*," *Nuntia* 22 (1986) 12–14; "Le osservazioni dei Membri della Commissione allo «*Schema Codicis Iuris Canonici Orientalis*» e le risposte del «*Coetus de expensione observationum*»," *Nuntia* 28 (1989) 13–14.

[256] The Pontifical Council for Legislative Texts has determined that *expresse* includes implicit references: Pontifical Council for Legislative Texts, explanatory note *Da alcuni anni*, December 8, 2011: *Communicationes* 43 (2011) 315–316; for an analysis of this note, see Jobe Abbass, "The Explanatory Note Regarding *CCEO* Canon 1: A Commentary," *Studia Canonica* 46 (2012) 293–318. Originally, the statement concerning applicability of canons to members of the Latin Church was given in a separate draft canon; see "La nuova revisione dello *Schema canonum de constitutione hierarchica Ecclesiarum orientalium*," 22 (c. 8). It was omitted with the emendation of c. 1.

[257] The canon had at one point included such a statement; see Jarawan, "Révision des canons *De normis generalibus*," 88–89; "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 44 (2012) 608–609. It seems to have been omitted for ecumenical reasons; see "La Nuova Revisione dello *Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium*," 13: "Si ometta la clausola «nisi aliud ex natura rei constet» perché superflua (1 [proposal]), oppure perché «meno conforme al principio direttivo del carattere ecumenico del CICO (Nuntia 3, p. 5) in quanto, sebbene indirettamente (Nuntia 10, pp. 88–89) intende estendere l'applicazione del

the Eastern code; as this code applies to a multitude of Churches *sui iuris*, the law it contains is necessarily "supra-ecclesial."[258] However, one does note that this Eastern canon, by declaring certain canons of that code directly applicable to the Latin Church, does appear to clash with the promulgatory norm of *Sacri Canones*. In this apostolic constitution, the Eastern code is determined to have force "for all Eastern Catholic Churches," omitting reference to the Latin Church.[259] Thus, a canon of a code declared to have force only for the Eastern Catholic Churches would apply to the Latin Church, an apparent juridic contradiction. Clearer promulgatory language would have been helpful in this regard.[260]

Despite some qualms concerning the actual formulation of the first canons in the respective modern codes, the limitation on the applicability of legislation that they establish does affirm that the Eastern Churches are juridically distinct from the Latin Church and require a separate legislation, however such legislation may be structured.[261] Augustine Mendonça comments thus on the first canon of the 1983 Latin code:

Codice delle Chiese Orientali Cattoliche anche agli Ortodossi...» (1 [proposal]). Si è accettato di sostituire questa clausola con quella di cui al numero 4 che segue, per evitare che si possa interpretare il canone nel senso suindicato." As the *coetus* stated the reason as avoiding a certain interpretation, it seems that the real basis for the alteration was the second proposal, not the first (simple superfluity would not give rise to a problem in interpretation), although the *Coetus de expensione observationum*, when rejecting a proposal to return to the former wording, indicated that the words had been omitted for being superfluous ("Le osservazioni dei Membri della Commissione allo «*Schema Codicis Iuris Canonici Orientalis*» e le risposte del «*Coetus de expensione observationum*»," 13–14).

[258] Since 1983 *CIC* applies to only the Latin Church, at least with a strict reading of c. 1, an explicit supra-ecclesial norm would have a different juridic nature from the "intra-ecclesial" Latin norms of the rest of the code. For an opinion holding that no canons of the *CCEO* directly affect Latin Catholics, see Urrutia, 156–158.

[259] John Paul II, *Sacri Canones*: *AAS* 82 (1990) 1043: "[...] Apostolicae qua aucti sumus potestatis plenitudine usi Constitutione hac Nostra in posterum valitura praesentem Codicem, sic ut digestus et recognitus est, promulgamus, quem vim legis posthac obtinere *pro omnibus Ecclesiis orientalibus catholicis* decernimus" (emphasis added).

[260] Indeed, even adopting the promulgation norm of Benedict XV, apostolic constitution *Providentissima Mater Ecclesia*, May 27, 1917: *AAS* 9/2 (1917) 8 and stating that the Eastern code would have force "pro universa Ecclesia" would have been more appropriate.

[261] This separation was also reflected in the promulgation after Vatican II of separate norms for the Latin Church and the Eastern Churches in certain matters. Along with Paul VI, *motu proprio De episcoporum muneribus*, June 15, 1966: *AAS* 58 (1966) 467–472, issued to expand the powers of bishops in the Latin Church, there was also promulgated Paul VI, *motu proprio Episcopalis potestatis*, May 2, 1967: *AAS* 59 (1967) 385–390 for the bishops of

> Implicit in this very first canon is a profoundly theological and canonical statement concerning the nature of the catholic Church. It implies that the catholic Church, in which subsists the Church of Christ, is not a monolithic institution but a *communion* of different autonomous Churches of the East and of the West. The "latin Church" expressly mentioned in this canon is one among many such autonomous Churches competent to legislate for their own subjects.[262]

Dimitri Salachas notes more broadly:

> The double codification in the Catholic Church expresses and puts into practice in ecclesial life the Catholic concept of unity and of autonomy, albeit relative, of the Churches of East and West in the line and the experience of the ancient Church, united in faith, in sacramental life, and in the single divine constitution of the universal Church, *Sede romana moderante* in the event that there was disagreement between them concerning the faith or discipline (cf. *LG* 23; *UR* 14).[263]

The distinction of two legislations (albeit one being for a plethora of Churches[264]), encapsulated in the limitations on applicability established by the first canons in each code, indicates a

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the Eastern Churches (for a commentary on this Eastern document, see Giovanni Řezáč, "De Potestate Dispensandi Episcoporum Orientalium," *Periodica* 57 [1968] 3–79). Procedural law for marriage cases was promulgated by Paul VI, *motu proprio Causas matrimoniales*, March 28, 1971: *AAS* 63 (1971) 441–446 for the Latin Church, and idem, *motu proprio Cum matrimonialium*, September 8, 1973: *AAS* 65 (1973) 577–581 for the Eastern Churches. From a curial perspective, the promulgation of Sacred Congregation for Religious and Secular Institutes, decree *Ad instituenda experimenta*, June 4, 1970: *AAS* 62 (1970) 549–550 was matched with Sacred Congregation for the Eastern Churches, decree *Orientalium Religiosorum*, June 27, 1972: *AAS* 64 (1972) 738–743.

[262] Augustine Mendonça, commentary on *CIC* c. 1, in *The Canon Law—Letter and Spirit: A Practical Guide to the Code of Canon Law*, ed. Gerard Sheehy et al. (Collegeville: Liturgical Press, 1995) 1.

[263] Salachas, "Problematiche Interrituali nel Due Codici Orientale e Latino," 638: "Dunque, la duplice codificazione nella Chiesa cattolica esprime e traduce in pratica nella vita ecclesiale il concetto cattolico di unità e di autonomia, sebbene relativa, delle Chiese d'Oriente e d'Occidente nella linea e nell'esperienza della Chiesa antica, unite nella fede, nella vita sacramentale e nell'unica divina costituzione della Chiesa universale, *Sede romana moderante*, qualora fossero sorti tra loro dissensi circa la fede o la disciplina (cf. *LG* 23, *UR* 14)." Cf. the speech of Patriarch Maximos IV Saïgh to the Sixty-seventh General Congretation, November 28, 1963: *Acta Synodalia*, 2/6:170, noting that the Eastern codification up to that point "n'est sans doute pas parfait," but "le principe est du moins sauf, à savoir la distinction des deux Codes, le Code oriental et le Code latin." He added (ibid., 2/6:170–171) that a unification of the codes would be fatal. Note also Pospishil, *Eastern Catholic Church Law*, 132: "[...] the Eastern Code was created precisely in order to define the boundaries of autonomy of these Churches from the strict centralization which reigns within the Latin autonomous Church." Gefaell, "Relations entre les deux «Codes» de l'unique «Corpus Iuris Canonici»," 166–170 discusses the differing views of the two code system, one holding that two codes indicate two separate orderings in the Church, and the other that they are rather two separate disciplines in the one ordering of the Church.

[264] This objection is raised in Nedungatt, "Title 2," 100: "The fact that the Latin Church is governed by CIC as its proper code, and that this code is placed on a par with CCEO, the common code of the Eastern Catholic Churches, and not the proper code of each of these Churches, constitutes a problem regarding the equal dignity of these Churches." However, note Ivan Žužek, "Presentazione del «Codex Canonum Ecclesiarum Orientalium»," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 Rome: PIO, 1997) 127, arguing that the unusual status of the

disciplinary diversity existing within the Catholic communion of Churches and a rightful autonomy pertaining to each Church in this communion.[265]

5.4.1.2. *CCEO* Canon 1492 and the Pamphilian Jurisprudence

The Pamphilian jurisprudence has been adopted into the modern Eastern code in canon 1492:

> 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 and morals or declarations of divine law, explicitly decide questions regarding these Christian faithful, or concern favors which contain nothing contrary to the Eastern rites.[266]

Latin Church—its head also possessing primatial power incapable of limitation by human law—requires a separate code for it.

[265] For other comments on this topic, note Julio García Martín, *Le Norme Generali del* Codex Iuris Canonici (Rome: Ediurcla, 1995) 16: "Questa decisione [limiting 1983 *CIC* to the Latin Church] presuppone la distinzione della Chiesa Latina dalle Chiese Orientale. Tale distinzione è molto antica e si fonda e si esprime nella diversità del regime, della disciplina, dei riti liturgici, ma non per il territorio, anche se il territorio è una condizione per l'osservanza delle leggi. Questo insieme si chiama *chiesa rituale*, *autonomia* o «*sui iuris*». [...] Questa distinzione manifesta l'esistenza e l'accettazione della autonomia normativa o legislativa delle Chiese Orientali"; Salachas, "Ecclesia Universa et Ecclesia Sui Iuris nel Codice Latino e nel Codice dei Canoni delle Chiese Orientali," 65, arguing that the double codification "è giustificata da una ben definita ecclesiologia nel Vaticano II circa il concetto di *Ecclesia universa* e di *Ecclesiae particulares*, dalle quali emerge il concetto di *Ecclesiae sui iuris*." See also the comments of this latter author and George Gallaro in "Interecclesial Matters," 257–259. Because of this distinction, Abbass, "The Interrelationship of the Latin and Eastern Codes," 1–2 holds that the codes are not *interdependent* but *interrelated*.

[266] *CCEO* c. 1492: "Leges a suprema Ecclesiae auctoritate latae, in quibus subiectum passivum expresse non indicatur, christifideles Ecclesiarum orientalium respiciunt tantummodo, quatenus de rebus fidei vel morum aut de declaratione legis divinae agitur vel explicite de eisdem christifidelibus in his legibus disponitur aut de favorabilibus agitur, quae nihil ritibus orientalibus contrarium continent." The sources are listed in *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli P.P. II promulgatus, Fontium Annotatione Auctus*, ed. Pontifical Council for Interpreting Legislative Texts (Vatican City: Libreria Editrice Vaticana, 1995) 492 note 1 as: "Lat. IV, 4; S.C. de Prop Fide, 4 iun. 1631; 7 iun. 1639; S.C.S. Off., 13 iun. 1710; Benedictus XIV, const. *Etsi pastoralis*, 26 mai 1742, §IX, V; ep. encycl. *Allatae sunt*, 26 iul. 1755, §44; all. *Quadraginta*, 27 mar. 1757, 'Audistis;' litt. encycl. (ad Del. Ap. pro Oriente), 8 nov. 1882; litt. encycl. 6 aug. 1885; decr. 18 aug. 1893, 'Licet.' *Syn. Armen., a. 1911, 146." Note that *CCEO* c. 1 cites as sources only the promulgatory clauses of the four apostolic letters *motu proprio* issued by Pius XII: "Sanctiones promulgatoriae in m.p. Pii XII: *Crebrae allatae sunt*, 22 feb. 1949; *Sollicitudinem Nostram*, 6 ian. 1950; *Postquam apostolicis litteris*, 9 feb. 1952; *Cleri sanctitati*, 2 iun. 1957" (ibid., 3 note 1).

This new norm is not limited to the canons of the code in its application,[267] but rather establishes the Pamphilian jurisprudence as a general rule[268] for the interpretation of all ecclesiastical laws issued by the supreme authority.[269]

Because of the unusual *iter* of this norm through the Eastern codification process, its wording differs from previous instances where the Pamphilian jurisprudence was adopted. First, the canon concerns "laws issued by the supreme authority of the Church." The phrase "supreme authority" indicates both the Roman pontiff and the college of bishops.[270] Thus, not only would papal laws come under this norm, but also norms issued by the college of bishops gathered solemnly in an ecumenical council.[271] Such a norm appears incongruous as concerns the college of bishops. The Roman pontiff holds several offices—Bishop of Rome, Metropolitan of the Roman Province, Primate of Italy, Head of the Latin Church,[272] Supreme Pontiff—and so it is

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[267] Again, note Franz X. Wernz and Petrus Vidal, *Ius Canonicum, Tomus I: Normae Generales*, 2nd ed. (Rome: Gregorian University, 1952) 110 concerning 1917 *CIC* c. 1, based on the Pamphilian jurisprudence: "*Codex talem expressam sanctionem continet* quoad Codicis praescripta, nihil dicens de futuris legibus post Codicem promulgandis."

[268] Velasio de Paolis seems to be somewhat conflicted over whether the norm constitutes a presumption. In his commentary on *CCEO* c. 1492, in *Commento al Codice dei Canoni delle Chiese Orientali. Corpus iuris canonici II*, ed. Pio V. Pinto (Città del Vaticano: Libreria Editrice Vaticana, 2001) 1167, he states: "Là dove l'autorità suprema non determina i soggetti passivi della legge, la *presunzione* è che le sue leggi non vincolino gli orientali cattolici [...]" (emphasis added). However, in his commentary on the canon in Nedungatt, *A Guide to the Eastern Code*, 814 note 13, he states that in situations of doubt, "the present canon supplies a clear answer, which is not a presumption."

[269] Faris, *The Eastern Catholic Churches*, 109: "It cannot be expected that the *CCEO* is the *final word* with regard to common law enacted by the pope or an ecumenical council which could affect the Eastern Catholic Churches. Therefore, a provision is made to determine when legislation does not indicate the persons for whom it is intended." There can be some question of its validity concerning special law issued by the supreme pontiff; note the discussion in Hugo Cavalcante, "'Rispirar com os dois pulmões': O Código de Cânones das Igrejas Orientais," *Forum Canonicum* 4/1–2 (2009) 146–147 concerning the *latae sententiae* penalties given in John Paul II, apostolic constitution *Universi Dominici Gregis*, February 22, 1996, §§58, 78, 80, 81: *AAS* 88 (1996) 330, 338–339, and whether they would apply to Eastern faithful.

[270] Cf. *CCEO* cc. 44 §1 and 49.

[271] In fact, the previous 1917 *CIC* c. 1 had been used in Edelby-Dick, 125 to determine those canonical decisions of Vatican II to which Eastern faithful were bound.

[272] The pope still holds such an office *de facto*, even though the title "Patriarch of the West" has been dropped with the announcement in Pontifical Council for Promoting Christian Unity, "Nota de suppressione tituli «Patriarca d'Occidente» ad Papam relati," March 22, 2006: *AAS* 98 (2006) 364–365. For comments on this act, see Grigoriță,

reasonable that certain legislation issued by him could be naturally limited to the bounds indicated by one of these offices.[273] In the case of the Pamphilian jurisprudence, he would be acting as head of the Latin Church when issuing legislation unless something indicated that he was acting as supreme pontiff. Such is not the case with an ecumenical council. An ecumenical council possesses no other, more particular role—it is neither a Roman synod endowed in particular cases with supreme authority, nor a combination of the synods of all the Churches *sui iuris*. It is the college of those ordained to the fullness of orders[274] and in hierarchical communion,[275] regardless of their specific function or mission. Since it is, in its essence, an ecclesially-universal supreme authority, one would presume that its acts are normally universally applicable. Obviously, an ecumenical council can act, and indeed has acted, in specific,

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425–428 note 226. Cf. Salachas, *Orient et Institutions*, 150, arguing that the pope still remains patriarch of the west despite the dropping of the title.

[273] On distinguishing such powers, see John D. Faris, "The Latin Church *sui iuris*," *The Jurist* 62 (2002) 282: "Further, while it is appropriate to make a distinction between the rightful power of self-governance of the Latin Church and the Supreme Authority, such a distinction is difficult since patriarchal and supreme authority are exercised by one and the same person." At p. 289, he argues that, nevertheless, "it would seem that distinctions can and need to be made." Cf. McManus, "The Code of Canons of the Eastern Catholic Churches," 25: "The 1917 code thus fails to distinguish between those disciplinary laws which might be said to proceed from the patriarchal office of the Bishop of Rome and those laws which proceed from his Petrine or primatial office, as chief bishop and head of the episcopal college—a failure also in the 1983 code of the Latin Church. It is a distinction that needs to be made both canonically and ecclesiologically." Note that the *Lex Ecclesiae Fundamentalis* had at one point included a norm specifically concerning the pope's patriarchal power over the Latin Church as opposed to his universal power; see *Communicationes* 11 (1979) 94 (c. 43). By holding such a distinction possible, at least in terms of the extension of papal authority (to the whole Church, to the Latin Church, to Italy, etc.), I therefore disagree with the comments of Žužek in "Alcune note circa la struttura delle Chiese orientali," 138: "Tutti i poteri episcopali e sovraepiscopali—tra i quali quelli «patriarcali»—sono già contenuti nel suo potere primaziale, e non possono essere *adaequate distincti* gli uni dagli altri"; and in "Le «Ecclesiae Sui Iuris»," 104: "Nel parlare del romano pontefice, come «patriarca dell'Occidente» e della Chiesa latina come del «patriarcato d'Occidente» è doveroso tener presente che nella potestà primaziale conferita da Cristo a Pietro e ai suoi successori non vi è luogo per «adequatae distinctiones» tra i poteri che gli sono propri come vescovo di Roma, arcivescovo e metropolita della provincia di Roma, primate d'Italia, patriarca dell'Occidente." While it is true the acts of the Roman pontiff proceed from the supreme authority in terms of their nature (an act issued by the Roman pontiff enjoys the firmness of an act issued by the supreme authority, regardless at what ecclesial "level" it is issued), the same is not true concerning the extent of their applicability. George Nedungatt, "The Patriarchal Ministry in the Church of the Third Millennium," *The Jurist* 61 (2001) 12–13 gives several arguments indicating that the two offices are capable of logical distinction, contrary to Žužek's argument; see also Nedungatt's comments in *Spirit of the Eastern Code*, 235.

[274] *LG* 21.

[275] *CCEO* c. 49.

localized cases by virtue of the fact that one who can act in greater matters can act in lesser matters.[276] However, its power is general and universal as a rule.

Including legislation of ecumenical councils in this canon appears reflect both historical and practical reasons. Historically, Benedict XIV had understood the word "constitutions" in the Verricelli citation of the Pamphilian decision as including both papal constitutions proper as well as constitutions promulgated in an ecumenical council.[277] Conciliar legislation promulgated by the pope was considered to be "papal" legislation, and thus the Pamphilian jurisprudence would apply to it just as much as it would to legislation enacted by the pope alone. From a practical perspective, there is even now an inadequate understanding of the place of the Latin Church within the Catholic communion of Churches, with the improper equating of "Latin" with "Catholic." Such an attitude affects even bishops. Thus, canon 1492 protects the discipline of the Eastern communities against even the decisions of ecumenical councils, decisions that,

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[276] *Regula iuris* 53: "Cui licet quod est plus, licet utique quod est minus" (*Liber Sextus Decretalium D. Bonifacii Papae VIII. Suae Integritati VI cum Clementinis et Extravagantibus, earumque Glossis Restitutus* [Rome: Aedes Populi Romani, 1582] 832–833; note that the pages are for the first part of the volume, as the pagination restarts with the next collection). This concept was referenced at Vatican II; see Report on proposed emendations given to the One hundred and twenty-seventh General Congregation, November 20, 1964: *Acta Synodalia*, 3/8:562 (#17): "23 Patres textum infra transcriptum inserendum proponunt: «De rebus disciplinaribus Ecclesiarum Orientalium, quamvis ordinarie non sit Conciliorum Oecumenicorum decernere, cum iuxta traditionem ipsae de hisce providendi ius habeant et officium, tamen, votis plurimorum Patriarcharum et Hierarcharum orientalium obsecundans, haec S. Synodus his quae sequuntur urgentioribus decisionibus libentissime praebet assensum». R.—Concilia Oecumenica supremam in Ecclesia potestatem legislativam constituunt, ideoque pleno iure de Ecclesia universali et, a fortiori, de Ecclesiis particularibus decernunt. De facto Concilia Oecumenica et de fide et de disciplina Orientalium non minus quam Occidentalium decreverunt." Cf. Kuriakose Bharanikulangara, *Particular Law of the Eastern Catholic Churches*, Maronite Rite Series 4 (New York: St. Maron, 1996) 29: "[...] since the College of Bishops, together with its head, is the subject of supreme and full power over the universal Church, it can legislate on a particular issue that affects the common good of a *sui iuris* Church."

[277] Benedict XIV, *De Ritibus. Quae Intersit Differentia Inter Latinos et Graecos*, in *Benedicti XIV Papae Opera Inedita*, ed. Franciscus Heiner (Friburgi Brisgoviae: Herder, 1904) 53 (8.5.35): "Quaestionis praefatae solutio [...] ad aliam generalem controversiam examinandam viam aperit, num Graeci Orientales ad observandas et retinendas Pontificias Constitutiones obligati sint, *sive eae intra Generalia Concilia*, sive extra eadem sint promulgatae" (emphasis added). This interpretation seems to be based on Verricelli's consideration of application of not only constitutions of the Roman pontiff but also those of the Council of Trent to Greeks and other subjects of the four patriarchal Churches of the East, and especially his belief that "Azor" had said that "Eastern and Greek clerics are bound neither by pontifical laws, nor by laws constituted in general councils (such as the Council of Trent) for ecclesiastics" (see above, 1.6).

because of the large number of Latin bishops, may often be based on Latin presuppositions.[278] Nevertheless, the aforesaid ecclesiological issues do remain, and reformulating the canon to take these concerns into account would be advantageous.

The phrase "which do not expressly indicate the passive subject" was formulated in the Eastern code revision process to avoid using the phrase "universal laws." This canon, in fact, would determine when legislation was not truly universal in application, so calling such legislation "universal" prior to this determination would be inappropriate. Thus, this emendation does recognize that what is Latin is not universal and should not be treated as such in canon law. However, it does introduce a problem in the wording of canon 1492. If the laws do not expressly indicate the passive subject, the later exception for laws "explicitly decid[ing] questions regarding these [Eastern] Christian faithful" appears to be illogical. A law explicitly ("explicite") determining a matter concerning the Eastern faithful would include specific reference to the Eastern faithful as the law's subjects, and thus would not fall under canon 1492, dealing with laws where the passive subject is *not* indicated. Some alteration of the phrasing of the canon for clarity would be beneficial here as well.

In addition, the exception for laws concerning "matters of faith and morals or declarations of divine law" seems irregular. Decisions concerning faith and morals, while perhaps entailing subsidiary legislation, are themselves not legislation; the same can be said of declarations of divine law.[279] This problematic wording results from Verricelli's excision of the Pamphilian decision from its original context (penal laws and papal reservations) and its

[278] Cf. Gefaell, "Relations," 177, implying that the fact that a majority of bishops at an ecumenical council would be Latin justifies the norm of *CCEO* c. 1492.

[279] John M. Huels comments on this question in his commentary on *CCEO* c. 1492 in the forthcoming *Practical Commentary on the Eastern Code of Canon Law*, edited by John D. Faris and Jobe Abbas, for which project I am an editorial assistant.

rendition as a general norm. Thus, instead of penal legislation in matters of faith and morals, all "legislation" on faith and morals (and, as the canon adds, declarations of divine law) is said to apply to Eastern faithful. Better precision in wording would be beneficial here as well.

It is worth noting again that the canon's phrasing omits specific reference to legislation "implicitly" applying to Eastern faithful. In its place, one finds "determinations of divine law," the wording used in the late nineteenth century in the curial decisions analyzed in the previous chapter. In addition, a new provision appears for the first time explicitly: laws containing favors not opposed to Eastern traditions. Although none of the *fontes* specifically speaks to this class, the reference is based on curial praxis from the beginning of the twentieth century, admitting that Eastern faithful could obtain favors contained in papal legislation provided that such favors were not contrary to their own customs and discipline.[280]

In an article published in 1997, George Nedungatt discusses the application of this norm to documents issued by curial dicasteries.[281] He relates his conversations with the Pontifical Council for Interpreting Legislative Texts concerning the applicability of the instruction of the Congregation for the Doctrine of the Faith on certain aspects of the use of instruments of social communication in passing on the doctrine of faith to the Eastern Catholic faithful.[282] Nedungatt argues that not only does this canon concern laws ("leges") properly speaking, but also

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[280] Sacred Apostolic Penitentiary, "De Indulgentiis quoad Fideles Ritus Orientalis," July 7, 1917: *AAS* 9/1 (1917) 399; Sacred Congregation for the Propagation of the Faith for Matters of the Eastern Rite, "Dubia circa Constitutionem Apostolicam «Incruentum» quoad Orientales": *AAS* 8 (1916) 104–105. Again, this latter document appears to be the intended reference "AAS, 7 (1917) 104" in "Nuova revisione dello *Schema Canonum de normis generalibus et de bonis Ecclesiae temporalibus*," *Nuntia* 18 (1984) 76; the citation was never placed into the finalized *fontes*.

[281] George Nedungatt, "Normae Indolis Iuridicae ad Tenorem C. 1492 CCEO Applicandae," *Periodica* 86 (1997) 477–491. Having reviewed the print versions of *Canon Law Abstracts* as well as the index provided online (http://canonlawabstracts.uk/html/cceo_1990.html [accessed November 30, 2016]), this currently seems to be the only article written specifically on *CCEO* c. 1492.

[282] Nedungatt, "Normae Indolis Iuridicae ad Tenorem C. 1492 CCEO Applicandae," 482. The document involved is Congregation for the Doctrine of the Faith, instruction "Quoad aliquos adspectus usus instrumentorum communicationis socialis in doctrina fidei tradenda," March 30, 1992: *Communicationes* 24 (1992) 18–27.

instructions, since instructions follow from the law.[283] The aforementioned instruction could appear to have universal applicability, since it was said to have been sent to "all bishops of the Catholic Church."[284] However, the pontifical council, based on a decision of the Congregation for the Doctrine of the Faith, nevertheless declared that it only applied to the Latin Church.[285]

> Relative to your request of the past January 10 [1993], I am now able to communicate to you that the Congregation for the Doctrine of the Faith, with a letter of July 18 of the current year, has informed the Congregation for the Eastern Churches that the "Instruction regarding certain aspects of the use of instruments of social communication..." of March 30, 1992, presents in an organic form the relevant legislation of the Latin Church, and therefore does not concern the *Codex Canonum Ecclesiarum Orientalium*.[286]

Nedungatt thus concludes:

> Our investigation has put into clearer light the status of universal legislation of the Church currently in force, according to which, to avoid doubts and hesitations, in documents of a normative nature being issued by the dicasteries of the Apostolic See, it should always be clear whether a document is directed to only the Latin Church or also to the Eastern Churches, if it concerns a dicastery that is competent over both the Latin Church and the Eastern Churches.[287]

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[283] Nedungatt, "Normae Indolis Iuridicae ad Tenorem C. 1492 CCEO Applicandae," 481. Nedungatt notes that the *CCEO* has no canon equivalent to 1983 *CIC* c. 34 §1 describing what instructions are.

[284] Ibid., 483. Other reasons in favor of universal application, connected with the mission of the congregation, are recounted in Nedungatt's letter to the pontifical council, found in ibid., 485–486.

[285] The letters between the author and the pontifical council are found in ibid., 484–490.

[286] Letter of Vincenzo Fagiolo, president of the Pontifical Council for Interpreting Legislative Texts, to George Nedungatt, July 8, 1993, in ibid., 490: "Relativamente alla Sua istanza del 10 gennaio u.s., sono ora in grado di comunicarLe che la Congregazione per la Dottrina della Fede, con una lettera del 18 luglio dell'anno in corso, ha informato la Congregazione per le Chiese Orientali che l'«Istruzione circa alcuni aspetti dell'uso degli strumenti di comunicazione sociale...» del 30 marzo 1992, presenta in forma organica la legislazione in merito della Chiesa latina. E pertanto non riguarda il «Codex Canonum Ecclesiarum Orientalium»." There seems to be some error in dating; the response of Fagiolo (July 8) would appear to have been sent prior to the response of the Congregation for the Doctrine of the Faith (July 18).

[287] Ibid., 490–491: "Nostra vero interrogatio in clariorem lucem posuit statum legislationis Ecclesiae universalis nunc vigentis, iuxta quam, ad vitanda dubia et haesitationes, in documentis indolis normativae a dicasteriis Sedis Apostolicae edendis semper clare pateat oportet utrum documentum dirigatur aut ad Ecclesiam latinam tantummodo aut etiam ad Ecclesias orientales, si agitur de dicasterio quod est competens et in Ecclesiam latinam et in Ecclesiis orientales."

Not only laws but also executive acts issued by the supreme authority would fall under canon 1492, further affirming the negative juridic autonomy of the Eastern Catholic Churches vis-à-vis authorities in Rome.[288]

With this new canonization of the Pamphilian jurisprudence, the Eastern code has affirmed the distinct juridic nature of the Eastern Churches, not simply as concerns the codes but in all legislation issued by the supreme authority (and those acts dependent on such legislation). While greater precision in language could be hoped for, the overall thrust of the canon is clear: the Eastern Churches possess a negative autonomy, that is, they have the right not to have papal and conciliar legislation imposed on them absent some actual intent, even implicit, to do so.

5.4.2. The Juridic Nature of "Church *sui iuris*"

Having determined the negative autonomy of the Eastern Catholic Churches, through the non-applicability to them of the 1983 Latin code as well as most papal, curial, and even conciliar legislation, one comes to the questions of what juridic entities exercise positive autonomy through the establishment of laws, and what is the scope of these entities' legislative competence. Turning to the first question, one finds that the entities determined by the Eastern

[288] For a more recent curial document regarding which a doubt could be raised about its applicability to the Eastern Catholic Churches, see Congregation for Catholic Education, instruction *In continuità*, November 4, 2005: *AAS* 97 (2005) 1007–1013. This instruction, on the admission of those with homosexual tendencies to seminaries, contains several citations of *CCEO* canons (e.g., p. 1008 note 4; p. 1009 note 9). However, while this congregation implicitly has competence over determining the requirements for ecclesiastical degrees (cf. *CCEO* c. 650; see, e.g., idem, decree *Novo Codice*, September 2, 2002: *AAS* 95 [2003] 281–285, updating the requirements for certain ecclesiastical degrees with references to the Eastern code), it is not given competence over the seminaries of Eastern Catholic Churches by *Pastor bonus*.

code to possess positive autonomy are "Churches *sui iuris*."[289] Canon 27 of the Eastern code describes a "Church *sui iuris*":

> 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*.[290]

This heavily juridical description[291] contains three key elements for the constitution of a Church *sui iuris*: 1) that there is a *coetus* of the Christian faithful; 2) that it is united by a hierarchy

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[289] There was an extensive debate on the term to be used for these entities. For a study on the development of the terminology from the Second Vatican Council to the *CCEO*, see Ivan Žužek, "Le «Ecclesiae Sui Iuris» nella Revisione del Diritto Canonico," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 94–109. Other comments on this matter are found in Faris, *The Communion of Catholic Churches*; George Nedungatt, "Ecclesia Universalis, Particularis, Singularis," *Nuntia* 2 (1976) 75–87; Okulik, "Significato e Limiti," 68–70, 73–75; idem, "L'evoluzione Terminologica,'" 43–47, 49–51. There was a late attempt at the second *plenaria* to have the term "Ecclesia particularis" adopted in the code in place of "Ecclesia sui iuris"; see "Resoconto dei lavori dell'Assemblea Plenaria dei Membri della Commissione del 3–14 novembre 1988," *Nuntia* 29 (1989) 68–69.

[290] *CCEO* c. 27: "Coetus christifidelium hierarchia ad normam iuris iunctus, quem ut sui iuris expresse vel tacite agnoscit suprema Ecclesiae auctoritas, vocatur in hoc Codice Ecclesia sui iuris." For the early discussions of the *Coetus de Normis Generalibus* on this matter, see "Ex Actis Pont. Comm. CICO Recognoscendo," *Communicationes* 40 (2008) 406–408; 41 (2009) 194–199, 208–209; 42 (2010) 180–181, 195–196. An early version of the canon is found in Elias Jarawan, "Les Canons des Rites Orientaux," *Nuntia* 3 (1976) 45; it would be would be altered in the 1984 schema, with 1º separated into two parts; see "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," *Nuntia* 19 (1984) 21 (c. 9). For a description of the *iter* of this canon in the codification process, see Marco Brogi, "Le Chiese Sui Iuris nel Codex Canonum Ecclesiarum Orientalium," *Revista Española de Derecho Canónico* 48 (1991) 27–31; idem, "La novità del CCEO alla luci dei «Principi Direttivi»," 128–130; Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 347–355. Valiyavilayil, 59 considers this canon "as a near definition" of the entity, but criticizes it at 60 note 9 for being "circular and defective." Similar comments are made by Faris in three works: *The Communion of Catholic Churches*, 128; "At Home Everywhere—A Reconsideration of the *Territorium Proprium* of the Patriarchal Churches," *The Jurist* 69 (2009) 9 note 10; and "The Latin Church *sui iuris*," *The Jurist* 62 (2002) 285. For in-depth commentaries on this canon as well as c. 28, see Nedungatt, *The Spirit of the Eastern Code*, 60–84 and Élias Sleman, "De «ritus» à «Ecclesia sui iuris» dans le Code des Canons des Églises Orientales," *L'année canonique* 41 (1999) 258–270.

[291] Nedungatt, *The Spirit of the Eastern Code*, 232 notes that *Ecclesia sui iuris* as described in canon 27 "is a juridical expression and not an ecclesiological one." Comments cautioning on the ecclesiological import (or not) of *Ecclesia sui iuris* are also given by Kokkaravalayil, in both "The Guideline *Riti e Chiese Particolari* Applied in CCEO. History and Appraisal," in *Le Chiese* sui iuris*: Criteri di individuazione e delimitazione*, ed. Luis Okulik (Venice: Marcianum, 2005) 33, 40 and *The Guidelines for the Revision of the Eastern Code*, 350. Note also Faris, *The Eastern Catholic Churches*, 144; Paul Pallath, "Introduction," in *Church and its Most Basic Element*, ed. Paul Pallath (Rome: Herder, 1992) 3, 7–8; Salachas, "Ecclesia Universa et Ecclesia Sui Iuris nel Codice Latino e nel Codice dei Canoni delle Chiese Orientale," 71; Žužek, "Presentazione," 122. Astrid Kaptijn, "Problématiques concernant les Églises de droit propre et les rites," in *Ius Ecclesiarum Vehiculum Caritatis: Atti del simposio internazionale per il decennale dell'entrada in vigore del Codex Canonum Ecclesiarum Orientalium, 19–23 novembre 2001*, ed. Congregazione per le Chiese Orientale (Vatican City: Libreria Editrice Vaticana, 2004) 408 argues that the use of "in hoc codice" in *CCEO* c. 27 §1 indicates that other terms (such as *Ecclesia particularis*) could continue to be used in ecclesiology.

according to the norm of law;[292] 3) that it has been recognized expressly or tacitly by the supreme authority of the Church as *sui iuris*.[293] "Rite" is no longer used as a term to describe these communities, as was previously the case with *Postquam Apostolicis Litteris*.[294] Rather, canon 28 §1 states that rite is "a liturgical, theological, spiritual and disciplinary heritage, differentiated by the culture and the circumstances of the history of peoples." While rite "is expressed by each Church *sui iuris* in its own manner of living the faith," it does not directly factor in to the constitution of a Church *sui iuris*, at least in the Eastern code.[295] Canon 27 clearly establishes that it is the community ("coetus"), not a rite or liturgy, which forms the basis of the juridic entity enjoying autonomy, as indicated by the phrase *sui iuris*.[296]

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[292] Nedungatt, *The Spirit of the Eastern Code*, 72 holds that the hierarchy is understood in the canon as "the unifying *form* of the Christian faithful, who constitute the 'matter' in the hylomorphic model." Cf. Edelby-Dick, 141–142, arguing that an autonomous hierarchical constitution in relation to other groups is "un élément formel indispensable" in the constitution of a particular Church.

[293] Campo-Ibañez, 675; Salachas, "Le «status» ecclésologique," 77. Nedungatt, "Title 2," 104 lists *four* constitutive elements, by distinguishing the reference to a hierarchy from the reference to the norm of law.

[294] *PAL* c. 303 §1, 1º: "*Ritus orientales de quibus canones decernunt* sunt alexandrinus, antiochenus, constantinopolitanus, chaldaeus et armenus, aliique ritus quos uti sui iuris expresse vel tacite agnoscit Ecclesia." See Chapter 4 of this dissertation on this matter.

[295] *CCEO* c. 28 §1: "Ritus est patrimonium liturgicum, theologicum, spirituale et disciplinare cultura ac rerum adiunctis historiae populorum distinctum, quod modo fidei vivendae uniuscuiusque Ecclesiae sui iuris proprio exprimitur." Cf. Kaptijn, 407; Kokkaravalayil, "The Guideline *Riti e Chiese Particolari*," 35; Nedungatt, "Title 2," 104; Valiyavilayil, 65, all noting the absence of "rite" in the description of a Church *sui iuris*, and Valiyavilayil, 65 on how the former elements of "canonical rite" were divided between *CCEO* cc. 27 and 28. However, one should also note Campo-Ibañez, 678–679, and Émilo Eid, "Rite-Église de Droit Propre-Juridiction," *L'année canonique* 40 (1998) 10, arguing that rite still plays some factor in distinguishing different Churches *sui iuris*. Pallath, "Introduction," 7–8 offers negative comments on the absence of rite from *CCEO* c. 27: "The Church *sui iuris* as described in the Oriental Code is comparable to any religious congregation or charitable organization or even to a political party like the Christian democratic parties of Italy, Germany and other European countries. [...] In short, separating a Church from its liturgical, theological, spiritual, disciplinary heritage (rite) and thus evacuating the divine, mystical, sacramental dimensions, the *Codex Canonum Ecclesiarum Orientalium* has reduced a Church to a mere juridical institution that can be erected, modified or suppressed by the supreme authority of the Church."

[296] The specific word "autonomous" was not used because it was deemed difficult to understand, and could have caused confusion in light of its use in the Orthodox Churches; see Jarawan, "Les Canons des Rites Orientaux," 46: "L'expresion *sui iuris* existe déjà dans le P. A. [*PAL*], au premier paragraphe du can. 303, qui parle des rites orientaux. Elle y a été choisie pour remplacer le mot *autonomus* dans les anciens schémas pour la rédaction du code oriental, comme étant plus claire et plus juridique. En effet, le mot *autonome* est difficile à comprendre, et prête à confusion, ce même mot étant employé seulement en sens analogique par les Orthodoxes." The decision is also referenced in Ivan Žužek, "L'économie dans les travaux de la Commission Pontificale pour la révision du Code de Droit Canonique Oriental," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 70.

Through such a determination, the Eastern code can then correct the problematic formulation of ascription found in the prior Eastern and Latin codified law. As has been explained in the previous chapter, both the 1917 code[297] and *Cleri sanctitati*[298] established the general rule that one was ascribed to the "rite" by whose ceremonies one was baptized, even though later interpretations of this norm undermined this rule. The 1983 Latin code had more clearly established that the rites by which one was baptized had no direct bearing on the Church *sui iuris* to which one was ascribed.[299] However, the initial wording of the relevant canons of that code, using *ritualis* to describe a Church *sui iuris*, had suggested that rite factored into determining the constitution of this community.[300] On the other hand, rite does not factor at all in the Eastern code's determination of how a person is ascribed to a particular Church *sui iuris*:

> Canon 29 §1. A son or daughter who has not yet completed fourteen years of age is ascribed by virtue of baptism to the Church *sui iuris* to which his or her Catholic father is

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See Pospishil, *Ex Occidente Lex*, 107–109 for comments on this choice. For a discussion of the terminology used by the Orthodox, see Salachas, "Le «status» ecclésologique," 36–56.

[297] 1917 *CIC* c. 98 §1: "Inter varios catholicos ritus ad illum quis pertinet, cuius caeremoniis baptizatus fuit, nisi forte baptismus a ritus alieni ministro vel fraude collatus fuit, vel ob gravem necessitatem, cum sacerdos proprii ritus praesto esse non potuit, vel ex dispensatione apostolica, cum facultas data fuit ut quis certo quodam ritu baptizaretur, quin tamen eidem adscriptus maneret."

[298] *CS* c. 6: "§1. Inter varios ritus ad ilium quis pertinet, cuius caeremoniis legitime baptizatus fuit. §2. Si baptismus a ritus diversi ministro vel ob gravem necessitatem cum sacerdos proprii ritus praesto esse non potuit, vel ob aliam iustam causam de licentia proprii Hierarchae, vel ob fraudem collatus fuit, ita baptizatus illi ritui adscriptus habeatur cuius caeremoniis baptizari debuit."

[299] 1983 *CIC* c. 111: "§1. Ecclesiae latinae per receptum baptismum adscribitur filius parentum, qui ad eam pertineant vel, si alteruter ad eam non pertineat, ambo concordi voluntate optaverint ut proles in Ecclesia latina baptizaretur; quodsi concors voluntas desit, Ecclesiae rituali ad quam pater petinet adscribitur. §2. Quilibet baptizandus qui quartum decimum aetatis annum expleverit, libere potest eligere ut in Ecclesia latina vel in alia Ecclesia rituali sui iuris baptizetur; quo in casu, ipse ad eam Ecclesiam pertinet quam elegerit." Cf. Salachas-Sabbarese, 155–157, comparing this ecclesiological principle to the ritualistic principle underlying 1917 *CIC* c. 98 §1 and *CS* c. 6. Žužek, "Le «Ecclesiae Sui Iuris» nella Revisione del Diritto Canonico," 106–109 reviews the history of forming these Latin canons, which even in the 1980 schema still referred to the Church "in which the person was baptized or had to be baptized according to the norm of law" ("in qua ad normam iuris baptizatus est aut baptizari debuisset"), with additional reference to the canons on sacraments to determine this relation. After several comments, the text took the form of the current *CIC* c. 111 §1, where baptism is simply the act at which point ascription occurs ("per receptum baptismum"), and ascription is entirely dependent on the status of the parents.

[300] See the previous note's quote of *CIC* c. 111; *CIC* c. 112 also used *ritualis* to modify Church *sui iuris*. These and other anomalies were removed from the 1983 *CIC* through Francis, *motu proprio De concordia inter Codices*, May 31, 2016: https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2016/09/15/0646/01457.html (accessed November 30, 2016).

> ascribed; or if only the mother is Catholic, or if both parents are of the same mind in requesting it, to the Church *sui iuris* of the mother, without prejudice to particular law enacted by the Apostolic See.
>
> §2. If, however, a person who has not yet completed fourteen years of age:
> 1º is born of an unwed mother, he or she is ascribed to the Church *sui iuris* to which the mother belongs;
> 2º is born of unknown parents, he or she is ascribed to the Church *sui iuris* to which belong those to whose care he or she is legitimately entrusted; if, however, it is a case of an adoptive father and mother, §1 should be applied;
> 3º is born of non-baptized parents, he or she is ascribed to the Church *sui iuris* to which belongs the one who has undertaken his or her education in the Catholic faith.
>
> Canon 30. Anyone to be baptized who has completed the fourteenth year of age can freely select any Church *sui iuris* in which he or she then is ascribed by virtue of baptism received in the same Church, with due regard for particular law established by the Apostolic See.[301]

Commenting on the early draft of what would become canon 29,[302] Archimandrite Jarawan noted:

> Ascription is made not to a rite—understood as a patrimony—but to a certain ecclesial community *sui iuris*—that is to say, to a particular Church. Canon 6 of *Cleri sanctitati* established that ascription to a particular Church occurs through baptism. It made explicit mention of the liturgical ceremonies that determined rite. It is clear that the real factor determining the rite of a baptized person is not the liturgical ceremony, but the ascription of the parents to some ecclesial community, hierarchically organized, and who

[301] *CCEO* c. 29: "§1. Filius, qui decimum quartum aetatis annum nondum explevit, per baptismum ascribitur Ecclesiae sui iuris, cui pater catholicus ascriptus est; si vero sola mater est catholica aut si ambo parentes concordi voluntate petunt, ascribitur Ecclesiae sui iuris, ad quam mater pertinet, salvo iure particulari a Sede Apostolica statuto. §2. Si autem filius, qui decimum quartum aetatis annum nondum explevit, est: 1º a matre non nupta natus, ascribitur Ecclesiae sui iuris, ad quam mater pertinet; 2º ignotorum parentum, ascribitur Ecclesiae sui iuris, cui ascripti sunt ii, quorum curae legitime commissus est; si vero de patre et matre adoptantibus agitur, applicetur §1; 3º parentum non baptizatorum, ascribitur Ecclesiae sui iuris, ad quam pertinet ille, qui eius educationem in fide catholica suscepit." *CCEO* c. 30: "Quilibet baptizandus, qui decimum quartum aetatis annum explevit, libere potest seligere quamcumque Ecclesiam sui iuris, cui per baptismum in eadem susceptum ascribitur, salvo iure particulari a Sede Apostolica statuto." On dropping *ritualis* for the Eastern code's formulation, see "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," 5 and Kokkaravalayil, "The Guideline *Riti e Chiese Particolari*," 31–32. Cf. Legrand, "'One Bishop Per City," 381, arguing that refusal to conceive of these communities as "ritual Churches" allows the Eastern code to safeguard the territoriality of the Church: "The patriarch is clearly designated as the head of a local church and not as the head of a rite. This explains the status of exarchates outside his territory; they are part of a logic of communion among local churches, and reject properly the idea of the universal extension of a rite."

[302] Jarawan, "Les Canons des Rites Orientaux," 49 (c. 7): "§1. Ipso baptismo, quisquis adscribitur Ecclesiae particulari patris; si vero sola mater sit catholica, Ecclesiae matris. §2. Posthumus et naturalis (illegitimus), nisi a patre publice recognitus, pertinet ad Ecclesiam matris; expositi vel derelicti vero ad Ecclesiam patris adoptivi, tutoris, vel, in eorum absentia, ad Ecclesiam Hierarchae, cui subiecti sunt ii quorum curae isti sunt commissi."

> themselves choose the minister of baptism. This is why the study group decided to formulate the first paragraph of this canon as above, in a clear and precise manner.[303]

Thus, while ascription of an unbaptized person to a Church *sui iuris* occurs with the act of baptism, the ceremonies of baptism do not determine such ascription, but the law itself does.[304]

With both the non-ritual description of "Church *sui iuris*" in canon 27 and the non-ritualistic manner of ascription in canons 29 and 30, the modern Eastern code clearly indicates that the juridic entity possessing positive autonomy, the Church *sui iuris*, is not a complex of rites or a liturgical tradition but fundamentally a community of the faithful, and consequently that the Christian faithful are ascribed to this community. Being a community, it can possess autonomy and is capable of self-governance, traits not applicable to a mere complex of rites or a liturgical tradition.[305] These norms thus lay the foundation for the positive exercise of autonomy through the various legislative organs of the Churches *sui iuris*.

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[303] Ibid.: "L'inscription se fait non à un Rite, entendu comme patrimoine, mais à une certaine communauté ecclesiale *sui iuris*, c'est-à-dire à une Église particulière. Le can. 6 de C. S. statue que l'inscription à une Église particulière se fait par le baptême. Il fait une mention explicite des cérémonies liturgiques qui déterminent le rite. Mais il est bien clair que le facteur réel déterminant le rite d'un baptisé n'est pas la cérémonie liturgique, mais l'appartenance des parents à telle communauté ecclésiale, hiérarchiquement organisée, et qui choisiraient eux-mêmes le ministre du baptême. C'est pourquoi le groupe d'étude a décidé de formuler le premier paragraphe de ce canon comme ci-dessus, d'une manière claire et concise." Cf. Nedungatt, *The Spirit of the Eastern Code*, 71–72: "As a person is distinct from a thing, so is Church distinct from rite. People belong to a church as persons or members; rite belongs to a Church as a thing. Canonically, rite is [...] the heritage of a Church. A particular Church [...] possesses a rite and uses it [...]. Properly speaking, we do not belong to a rite but to a Church." A transcript of the discussion in the *coetus* on this matter is found in "Ex Actus Pont. Comm. CICO Recognoscendo," *Communicationes* 41 (2009) 199 and 213. Cf. Kokkavaralayil, "The Guidline *Riti e Chiese Particolari* Applied in CCEO," 30, summarizing its decision.

[304] Faris, *The Eastern Catholic Churches*, 154: "Whether it is a case of reception of baptism or entrance into full communion, *membership is determined by the law as a consequence of the act* whether or not the baptism or entrance actually occurs according to the rites of the autonomous church as stipulated by the law."

[305] Cf. William W. Bassett, *The Determination of Rite,* Analecta Gregoriana 157 (Rome: Gregorian University Press, 1967) 89: "In legal terminology, «*sui iuris*» can be applied only to a juridically independent and self-subsistent physical or moral person."

5.4.3. Formulation of the Juridic Autonomy of the Eastern Communities in the Canons

While all communities fitting the description of canon 27 are Churches *sui iuris*, they are not necessarily equal to one another in terms of the ability to govern themselves. The Eastern code establishes four classes[306] of Churches *sui iuris*: patriarchal, major archiepiscopal, metropolitan, and "other."[307] The legislative power in the first two of these classes—patriarchal and major archiepiscopal Churches[308]—rests with the synod of bishops:[309]

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[306] Marco Brogi, "Strutture delle Chiese Orientali Sui Iuris Secondo il C.C.E.O.," *Apollinaris* 65 (1992) 307 uses "classi" to describe these four categories, and it seems appropriate to adopt the term here. On the reasons for differing gradations of autonomy, see Kokkaravalayil, "The Guideline *Riti e Chiese Particolari*," 39: "Is there a theological and canonical reason for the denial of a more complete freedom to the hierarchs and the episcopal bodies of these [non-patriarchal/major archiepiscopal] Churches? There may not be. However, there are practical reasons; and practicality determines extensively the style of life and functioning. It may not look quite Eastern the way the hierarchy of the metropolitan Church and other Churches are organised; but there are practical questions to be addressed. An Eastern Church like the Ukrainian and other like the Russian Catholic Church, though they have equal dignity, cannot be hierarchically organised in the same way. All Eastern Churches have the responsibility to grow and reach the maturity of a patriarchal Church, which corresponds more to the ancient Eastern Churches. However, still a more extensive power could be granted to the hierarchies and the episcopal bodies of all the four grades." Cf. Brogi, "Le Chiese Sui Iuris nel Codex Canonum Ecclesiarum Orientalium," 531: "Le chiese particolari, asserisce *Orientalium Ecclesiarum* (n. 3) «pari pollent dignitate»; ciò non toglie che vi si possano riscontrare diversi «gradi», a seconda della maggiore o minore complessità (per non dire perfezione) della loro struttura."

[307] The last two classes, metropolitan and "other," were developed late in the revision process. Such Churches had not been taken into account in the previous codification process; note Kokkavaralayil, "The Guideline *Riti e Chiese Particolari*," 34: "[T]he previous Eastern legislation, namely the MP CS speaks only of the patriarchal and archiepiscopal Churches, while other Churches are overlooked. An ecclesiology of communion cannot permit this lacuna. The communion of churches cannot ignore certain Churches and claim that the Churches outside the margin also form part of the communion." The *Coetus de sacra hierarchia* formulated canons concerning "metropolitan Churches," which first appeared in the 1984 "Schema Canonum De Constitutione Hierarchica Ecclesiarum Orientalium," 48–51 (cc. 131–143); cf. Pallath, *The Synod of Bishops*, 197–198. This class of Church was distinct from the metropolitan outside the territory of a patriarchate under *Cleri sanctitati*, and thus cleared up the confusion that the former classification entailed; see "Schema Canonum De Constitutione Hierarchica Ecclesiarum Orientalium," 13–14. When these draft canons were published in 1984, one organ of consultation commented that even the creation of the metropolitan Church *sui iuris* class left many Churches, such as the Hungarian, Slovak, Byelorussian, and Italo-Albanian Churches, without a clear juridic status; these were juridically autonomous, not being subject or aggregated to any other Church *sui iuris*, but they did not have a metropolitan structure and so could not be considered part of the metropolitan Church *sui iuris* class: "La Nuova Revisione dello *Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium*," 11–12. In order to fill this lacuna, the *coetus* formulated the "other Church *sui iuris*" class, concerning which the *coetus* added three draft canons: ibid., 122–124 (note that canons A, B, and C were the preliminary forms of cc. 143 *ter*, 143 *quater*, and 143 *quinquies*).

[308] Cf. *CCEO* c. 152: "Quae in iure communi de Ecclesiis patriarchalibus vel de Patriarchis dicuntur, de Ecclesiis archiepiscopalibus maioribus vel de Archiepiscopis maioribus valere intelleguntur, nisi aliter iure communi expresse cavetur vel ex natura rei constat."

> The synod of bishops of the patriarchal Church is exclusively competent to make laws for the entire patriarchal Church that obtain force according to the norm of can. 150, §§2 and 3.[310]

The *Coetus de sacra hierarchia* intentionally structured this norm, and the other canons on the patriarchal synod, in such a way to make clear that the synod of bishops is not a second-class institute as it appeared to be in *Cleri sanctitati*, which simply included the norms on patriarchal synods among those on all particular synods.[311] Rather, it is now recognized as a true "deliberative body in all facets of governance."[312]

The general scope of the synod's legislative competence is limited in only two ways.[313] First, any laws made by the synod cannot be contrary to laws made by the supreme authority, an application of the canonical norm that "an inferior legislator cannot validly issue a law contrary

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[309] John D. Faris, "Synodal Governance in the Eastern Catholic Churches," *CLSA Proceedings* 49 (1987) 219 notes that the new synod of bishops is parallel with the old synod of election (*CS* c. 221–239, 251–256) rather than the former patriarchal synod (*CS* cc. 340–350), at least in terms of membership.

[310] *CCEO* c. 110 §1: "Synodo Episcoporum Ecclesiae patriarchalis exclusive competit leges ferre pro tota Ecclesia patriarchali, quae vim obtinent ad normam can. 150, §§2 et 3." For an explanation of the mind of the drafters of this norm and the other canons on the patriarchal synod, see Ivan Žužek, "Canons *De Synodo Ecclesiae Patriarchalis* et *De Conventu Patriarchali*," *Nuntia* 7 (1978) 21–39. Pallath, *The Synod of Bishops*, 143 states that the whole of *CCEO* c. 110 is "considered as the most important and central canon of the whole Code."

[311] Žužek, "Canons *De Synodo Ecclesiae Patriarchalis* et *De Conventu Patriarchali*," 23: "Mais lors de la réunion du 3 au 15 octobre de la même année, le Groupe décida de placer ce titre après celui de De Iuribus Patriarcharum et avant celui de De Curia Patriarchali, afin que le Synode patriarcal n'apparaisse point comme une institution de deuxième ordre (comme certains auraient pu le penser d'après la place qui lui était réservée dans le Caput VIII du CS), comparable ou presque à un organe au service du Patriarche." Ibid., 34–35 also notes that the incoherence of *CS* c. 243, which stated that patriarchs issued laws in the synod, but also called these laws "leges Synodi Patriarchalis," was removed during the drafting process. The *praenotanda* to the 1984 schema states that these canons are for the most part new, despite similarity with the previous norms of *CS*; see "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," 10: "Canones capitis III de Synodo Episcoporum, plerumque novi sunt, nonobstante quadam cum canonibus 340–348 M. P. «Sollicitudinem Nostram» eorundem similitudine." See the previous chapter on how the placement of the canons on patriarchal synods in *CS* expressed a basic misunderstanding about its status in the life of the relevant community.

[312] Faris, "At Home Everywhere," 28.

[313] Pablo Gefaell, "La capacità legislativa delle Chiese orientali in attuazione del CCEO," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010),* ed. Pontificio Consiglio per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 142 notes that "*le Chiese patriarcali e arcivescovili maggiori hanno capacità legislativa generale, non tassativa*."

to higher law."[314] The Eastern code itself constitutes a higher law vis-à-vis the laws of patriarchal and major archiepiscopal Churches, and so each Church cannot directly alter the norms of the canons.[315] However, the reduced number of canons in the new Eastern code (1546) compared with those intended to be in the first Eastern code (2666), as well as the many references allowing particular law, indicate that the possible restriction on the exercise of autonomy by the individual Churches is not as severe as it once had been.[316] Second, the synod is generally competent to make laws only for the territory of the Church *sui iuris*, a point notably debated during the Second Vatican Council,[317] the revision process,[318] and even in the very last stages of that process.[319] Canon 150 §2 was finally formulated to state:

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[314] *CCEO* c. 985 §2: "[...] a legislatore inferiore lex iuri superiori contraria valide ferri non potest." An earlier draft of what would become *CCEO* c. 110 §1 made an explicit statement in this regard: "[c. 10] §1. Synodo Episcoporum exclusive competit leges ferre iuri communi non contrarias pro tota Ecclesia proprii ritus, quae leges vim obtinent ad normam can. N. §§ 2 et 3 (cfr. supra p. 35)" (Žužek, "Canons *De Synodo Ecclesiae Patriarchalis* et *De Conventu Patriarchali*," 37). That canon appears as draft canon 80 in "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," 36, with no substantive alterations. For treatment of what "contrary" indicates, see Szabó, "Autonomia disciplinare come carattere del fenomeno dell'*Ecclesia sui iuris*: ambito e funzioni," 86–89.

[315] Cf. Victor J. Pospishil, "The Constitutional Development of the Eastern Catholic Churches in Light of the Re-codification of their Canon Law," *Kanon* 5 (1981) 42: "Because the [forthcoming *CCEO*] is proposed to be a common code and a papal law, not a law of the respective Eastern Catholic church, the individual church will have no power to directly effect the changes judged necessary in the future."

[316] Žužek, "Riflessioni circa la Costituzione Apostolica «Sacri Canones» (18 ottobre 1990)," 158 states that there are 52 cases where particular law must be established, 89 cases where particular law must be observed or can be established, and 141 cases involving creation of some body of norms, like synodal, conciliar, or tribunal statutes. His *Index Analyticus Codicis Canonum Ecclesiarum Orientalium*, Kanonika 2 (Rome: PIO, 1992) 170–174 indicates 196 explicit references to *ius particulare* in the *CCEO*; cf. his listing in his "Particular Law in the Code of Canons of the Eastern Churches," in *The Code of Canons of the Eastern Churches: A Study and Interpretation—Essays in Honour of Joseph Cardinal Parecattil*, ed. Jose Chiramel and Kuriakose Bharanikulangara (Alwaye: St. Thomas Academy for Research, 1992) 52–56. For his part, Émilio Eid, "The Nature and Structure of the Oriental Code," in *The Code of Canons of the Oriental Churches: An Introduction*, ed. Clarence Gallagher (Rome: Mar Thoma Yogam, 1991) 35 states that there are 183 references to particular law.

[317] During the council, focus was placed on the jurisdiction of the patriarch rather than the synod, but the former would entail the latter, especially as *CS* c. 243 §1 had named the patriarch as the issuer of laws made in the synod. See, among others, the written comments of Armenian Bishop Merzob Terzian, auxiliary of Beruit, in *Acta Synodalia*, 3/5:847, supporting "catholic-universal" patriarchal jurisdiction over all faithful of the same rite. The exact nature of patriarchal extraterritorial authority was left vague in the eventual decree *Orientalium Ecclesiarum*, with the intent that the Eastern codification would see to the particulars; see the proposed emendation and response in ibid., 3/4:504 (#69): "Iurisdictio patriarchalis exerceatur in omnes fideles illius ritus, etiam extra regiones eiusdem (prout quondam fiebat apud Armenos; hodierna die ne apud Armenos quidem rationes supersunt ut haec potestas restringatur). *Resp*.: In Concilio solum de principiis; de aliis videat Commissio pro redactione CICO." While Version C retained the territorial limits of *CS* c. 216 (*Acta Synodalia*, 3/4:487: "Nomine vero Patriarchae orientalis venit episcopus, cui canones tribuunt iurisdictionem in omnes episcopos, haud exceptis metropolitis, clerum et

> 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.[320]

Only a papal act could extend the legislative jurisdiction of the synod of bishops.[321] Thus, except for liturgical laws, the synod's legislative jurisdiction is limited to the territorial boundaries of

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populum territorii vel ritus, ad normam iuris et salvo primatu Romani Pontificis exercendam"), there was added in the addendum to Version C a reference to "aggregated" hierarchs: "N. 9: lin. 13–4: Emendetur sic: «... exercendam. *Ubique Hierarchia alicuius ritus constituitur, manet aggregatus hierarchiae patriarchatus eiusdem ritus, etiam extra fines territorii patriarchalis*»" (ibid., 3/4:527). This text was further emended to create the final version: "Ubicumque Hierarcha alicuius ritus extra fines territorii patriarchalis constituitur, manet aggregatus hierarchiae patriarchatus eiusdem ritus ad normam iuris" (ibid., 3/8:610). This aggregation was not limited to liturgical matters (ibid., 3/8:583 [#115]), but did not entail full jurisdiction on the part of the patriarch, only some *nexus* to be clarified by future law (ibid. [#116]). It did not include naming bishops or constituting eparchies outside the territory (ibid., 3/8:590–591 [#145] and 3/8:611). Cf. the comments of Edelby-Dick, 177–178, stating that by the time of the council the principle of territoriality had already fallen to the principle of personality.

[318] On these debates both inside and outside the Eastern revision commission, see the following: Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 336–343, 355–361; George Nedungatt, "The Patriarchal Ministry in the Church of the Third Millennium," *The Jurist* 61 (2001) 29–30; Pallath, *The Synod of Bishops*, 148–151; Pospishil, *Ex Occidente Lex*, 64–68, 110–140, 155–157; idem, "The Constitutional Development," 52–67; Giovanni Řezáč, "The Extension of the Power of the Patriarchs and of the Eastern Churches over the Faithful of Their Own Rites," in *Canon Law: The Future of Canon Law*, Concilium 48, ed. Néophytos Edelby, Teodoro Jiménez Urresti, and Petrus Huizing (New York/Paramus: Paulist, 1969) 115–129; Ivan Žužek, ,"Alcune note circa la struttura delle Chiese orientali," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 146–148; idem, "Canons concerning the Authority of Patriarchs over the Faithful of their own Rite who Live outside the Limits of Patriarchal Territory," *Nuntia* 6 (1978) 3–33; idem, "The Patriarchal Structure according to the Oriental Code," in *The Code of Canons of the Oriental Churches: An Introduction*, ed. Clarence Gallagher (Rome: The St. Thomas Christian Fellowship, 1991) 55–57. The various drafts are found in: Ivan Žužek, "Canons *De Synodo Ecclesiae Patriarchalis* et *De Conventu Patriarchali*," *Nuntia* 7 (1978) 25–39; "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," *Nuntia* 19 (1984) 12 (introduction), 45–47 (cc. 118–126); "La Nuova Revisione dello *Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium*," 9–11 (introduction), 103–111 (cc. 118–126). Note also Sacred Congregation for the Eastern Churches, declaration *Apostolica Sedes*, March 25, 1970: *AAS* 62 (1970) 179, determining what "aggregatus" meant, at least before the promulgation of the code.

[319] "Resoconto dei Lavori dell'Assemblea Plenaria dei Membri della Commissione, 3–14 novembre 1988," 26–30, recounting a proposal to revisit the question, and the papal response. For comments on this event, see Pospishil, *Eastern Catholic Canon Law*, 76–78; Ivan Žužek, "Un codice per una «varietas Ecclesiarum»," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 258–259.

[320] *CCEO* c. 150 §2: "Leges a Synodo Episcoporum Ecclesiae patriarchalis latae et a Patriarcha promulgatae, si leges liturgicae sunt ubique terrarum vigent; si vero leges disciplinares sunt vel si de ceteris decisionibus Synodi agitur, vim iuris habent intra fines territorii Ecclesiae patriarchalis."

[321] See the response sent on behalf of the pope to the second *plenaria*, in "Resoconto dei Lavori dell'Assemblea Plenaria dei Membri della Commissione, 3–14 novembre 1988," 27: "Tuttavia per le Chiese che si trovano in situazioni speciali per quanto riguarda i loro fedeli abitanti fuori del territorio delle medesime, il Santo Padre sarà lieto di considerare, a Codice promulgato, le proposte elaborate dai Sinodi con chiaro riferimento alle norme del Codice che si ritenesse opportuno specificare con uno 'ius speciale' e 'ad tempus.'" The pope repeated his comment in his allocution to the Synod of Bishops of 1990: *Memori animo*, §12: *AAS* 83 (1991) 492.

the patriarchal or major archiepiscopal Church.[322] Such a norm is problematic under the current law. The faithful, regardless of their location, are ascribed to a community having a united hierarchy and enjoying self-governing authority.[323] Common law determining the synod of bishops to be incapable of legislating for a section of this community is contrary to the declaration of *Orientalium Ecclesiarum* 5 that all Churches have the right and obligation to rule themselves (not simply parts of themselves) in accord with their traditions.[324]

This general territorial limitation on the force of synodal laws and the exception made for liturgical laws appear to result from the new juridic concept "Church *sui iuris*" inheriting elements of both "*natio*" and "rite" as considered by Benedict XIV. As has been previously noted, for Benedict XIV one was ascribed not to a community but to what he called a "rite," a term now considered to mean liturgical traditions.[325] Ascription to such a rite was personal, and competence over it pertained to the pope alone. By being ascribed to a rite, one consequently became part of a community, often subject to a hierarchy; this constituted the *natio*. The *natio*

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[322] For comments on this limitation, see Francis Aloor, *The Territoriality of «Ecclesia Sui Iuris»: A Historical, Ecclesiological and Juridical Study*, Thesis ad Doctoratum in Iure Canonico partim edita (Rome: Pontificia Università della Santa Croce, 2006); Faris, "At Home Everywhere," 5–30; Dominique Le Tourneau, "La 'potestas regiminis' du patriarche sur ses fidéles," in *Ius Ecclesiae Vehiculum Caritatis: Atti del simposio internazionale per il decennale dell'entrada in vigore del* Codex Canonum Ecclesiarum Orientalium, ed. Congregazione per le Chiese Orientali (Vatican City: Libreria Editrice Vaticana, 2004) 825–835; Natalie Loda, "Deliminazione territoriale della Chiesa *sui iuris*: ragionie questioni attuali," in *Le Chiese* sui iuris*: Criteri di individuazione e delimitazione*, ed. Luis Okulik (Venice: Marcianum, 2005) 109–130; Lorenzo Lorusso, "Il territorio canonico," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010)*, ed. Pontificio Consiglio per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 395–412.

[323] Nedungatt, "Autonomy, Autocephaly, and the Problem of Jurisdiction Today," 28–29: "However scattered, Christians who share a particular ecclesial patrimony constitute a *communion* or particular church. Their unity is no more locally based, and so they are not a local church. [...] With the loss of local unity, a church indeed ceases to be a local church, but these other elements may still continue to impart to it a unity. [...] Hence the conclusion: the jurisdiction of the pastor follows the flock."

[324] Faris, *The Eastern Catholic Churches*, 352: "To place canonical barriers between the churches of the migration and the mother churches is to assert that a patriarch governs not a church, i.e., community of the faithful, but a territorial institution. Such a concept is contrary to the letter and spirit of the Second Vatican Council which emphasized the communitarian aspect of ecclesiastical jurisdiction (e.g., *Christus Dominus* n. 11)."

[325] Cf. *CCEO* c. 28 §2.

was territorially limited; thus, for example, the authority of the patriarch and synod of the Maronite *natio* was limited to the territory of the Maronite patriarchate. The general territorial limitation on the binding force of synodal laws in the modern Eastern code results from the "Church *sui iuris*" inheriting this concept of "*natio*." However, insofar as one is now considered to be ascribed not to a rite but to a Church *sui iuris*, that latter concept has also inherited elements of the former concept. Ascription to a Church *sui iuris* follows one everywhere, just as ascription to a "rite" had previously. Further, one normally is bound to observe the liturgy (as well as the other aspects of the broad concept of "rite" in the modern law) of one's Church *sui iuris* everywhere.[326] But, as the liturgy proceeds from the Church *sui iuris*, the relevant Church's authorities are now recognized as possessing the formerly papal competence over it. Thus, liturgical laws issued by the synod are not limited by territorial bounds.[327]

Although this territorial limitation on the exercise of legislative authority does restrict the ability of patriarchal and major archiepiscopal Churches to govern themselves in accord with their traditions to their full extent, in other respects the law provides a wide area for competence, as no other limitations on the synod's legislative competence are found in the Eastern code. Thus, in addition to areas where the Eastern code specifically calls for or allows particular law,

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[326] Cf. *CCEO* c. 40.

[327] Cf. Antoine Joubeir, *La Notion Canonique de Rite: Essai historico-canonique*, 2nd ed., Analecta OSBM Series 2, Section 1, vol. 14 (Rome: Basilian Fathers, 1961) 54: "Avant de se diviser territorialement en provinces et en diocèses, l'Église se divise aujourd'hui en rites, mais cette division personnelle ne s'est pas complètement libérée de notions qui proviennent de l'ancienne division territoriale; au sommet des diverses hiérarchies orientales, l'on trouve encore la limitation ancienne posée par le territoire et l'on doit tenir compte de cette limitation quand on veut comprendre la notion de rite: historiquement, cette notion est liée à celle de nation, mais la limitation territoriale de l'autorité, séparant de la nation ceux qui ont émigré du territoire, fait expliquer le rite par l'idée plus abstraite de la personnalité de la loi."

the patriarchal and major archiepiscopal synods can legislate in any other area, provided that the law would not contradict a higher norm.[328]

> Legislative activity and customary law can theoretically extend to every external manifestation of Christian life and therefore have a very vast range; Christian liberty goes beyond juridical prescriptions and can be expressed in everything that is not determined by law. The legislative power of every competent authority can be exercised in everything that is not determined by a law emanating from a higher authority.[329]

Excepting the problem with territorial limitations, the legislative competence of the patriarchal and major archiepiscopal synods is an adequate canonization of the declaration of autonomy found in *Orientalium Ecclesiarum* 5.

The third class of Church in the Eastern code is the metropolitan Church *sui iuris*, whose legislative organ is the council of hierarchs. The legislative competence of the council of hierarchs is not described in the same way as that of the synod of bishops. At the very least, there is a distinction in terms of the ability to promulgate legislation. The acts of the council of hierarchs must be sent to the Apostolic See, and reception notified to the metropolitan, before any laws can be validly promulgated.[330] This requirement would allow the Apostolic See to

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[328] Nedungatt, *The Spirit of the Eastern Code*, 210 calls cases where some relevant norm is not found in the Eastern code "negative references to particular law." Ivan Žužek, "Qualche note circa lo *ius particulare* nel «CCEO»," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 361 states that generally if a canon present in 1983 *CIC* was omitted in *CCEO*, it was because the relevant *coetus* did not consider that it was a general Eastern norm and individual Churches *sui iuris* could constitute particular law in its absence. Cf. Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code*, 295–296 building off of Žužek's comments. Pospishil, *Eastern Catholic Church Law*, 170 states that the synod can legislate in "matters not treated by the *CCEO*, but which serve to complement the common law"; see similar comments in Faris, *The Eastern Catholic Churches*, 293.

[329] Marco Brogi, "Particular Law in the Future Oriental Code of Canon Law," in *Homage to Mar Cariattil: Pioneer Malabar Ecumenist*, ed. Charles Payngot (Rome: Mar Thoma Yoogam, 1987) 92, quoted in Bharanikulangara, *Parituclar Law of the Eastern Catholic Churches*, 17.

[330] *CCEO* c. 167 §2: "De legibus et normis a Consilio Hierarcharum latis Metropolita Sedem Apostolicam quam primum certiorem faciat nec leges ac normae valide promulgari possunt, antequam Metropolita notitiam a Sede Apostolica scripto datam habuit de Consilii actorum receptione; etiam de ceteris in Consilio Hierarcharum gestis Metropolita Sedem Apostolicam certiorem faciat." In "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," 36 (c. 81 §3), the legislation of the synod of bishops was also to be sent to the Roman pontiff for *recognitio*, but this requirement was removed during the *denua recognitio* ("La Nuova Revisione dello *Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium*," 82–83). Note that "Apostolic See" includes both the Roman pontiff and the Roman Curia; see *CCEO* c. 48: "Nomine Sedis Apostolicae vel Sanctae Sedis in hoc

impede the promulgation of legislation simply by not sending notification of such reception. Conversely, the synod of bishops determines the manner of promulgating its laws, and while the acts concerning laws and decisions of the synod are sent to the Apostolic See, the validity of their promulgation does not depend on any notification of reception.[331] With this latter juridic structure, any involvement of the Apostolic See would be, as a rule, exceptional, in keeping with the conciliar determination that the patriarch/major archbishop with the synod be the superior instance for matters for their Churches, with the Roman pontiff intervening only in individual cases.[332] With the juridic structure for the metropolitan Churches *sui iuris*, on the other hand, the intervention of the Apostolic See is required in all cases for validly promulgating legislation.

The wording describing the legislative competence of the council of hierarchs, taken on its own, seems more restrictive than the competence of the synod of bishops of the patriarchal and major archiepiscopal Churches. Canon 167 §1 states:

> With due regard for the canons in which the power of the council of hierarchs to enact laws and norms is expressly treated, this council can also enact them in cases in which the common law remits the matter to the particular law of a Church *sui iuris*.[333]

The council of hierarchs, within the Church's territory,[334] can therefore enact laws in matters expressly granting the council of hierarchs such power,[335] and in cases where a matter is remitted

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Codice veniunt non solum Romanus Pontifex, sed etiam, nisi aliter iure cavetur vel ex natura rei constat, Dicasteria aliaque Curiae Romanae instituta."

[331] *CCEO* cc. 111 §§1, 3.

[332] *OE* 9: "Patriarchae cum suis synodis superiorem constituunt instantiam pro quibusvis negotiis patriarchatus, non secluso iure constituendi novas eparchias atque nominandi episcopos sui ritus intra fines territorii patriarchalis, salvo inalienabili Romani Pontificis iure in singulis casibus interveniendi"; Jarawan, "Les Canons des Rites Orientaux," 47: "Pour ce qui regarde les Églises orientales catholiques, le Concile Vatican II détermine le domaine de la compétence d'une Église particulière *sui iuris* dans le Décret O. E. 9 [...]." See also Edelby-Dick, 360, emphasizing the distinction between the pope's *right* to act and his *obligation* to do so.

[333] *CCEO* c. 167 §1: "Firmis canonibus, in quibus expresse de potestate Consilii Hierarcharum leges et normas ferendi agitur, hoc Consilium eas ferre potest etiam in eis casibus, in quibus ius commune rem remittit ad ius particulare Ecclesiae sui iuris."

to the particular law of a Church *sui iuris*.[336] Specifically listing these two areas of competence suggests that the council of hierarchs would lack competence in other areas.[337] However, canon 169 states:

> The council of hierarchs is to see that the pastoral needs of the Christian faithful are provided for; in these matters it can determine what seems opportune to promote the growth of faith, to foster common pastoral action, to regulate the morals, to observe their own rite and ecclesiastical discipline.[338]

Particularly the call for the council to determine ("statuere") certain matters indicates a capacity to issue legislation,[339] especially when one notes that this wording parallels that describing the

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[334] *CCEO* c. 157 §2: "Potestas Metropolitae et Consilii Hierarcharum valide exercetur solummodo intra fines territorii Ecclesiae metropolitanae sui iuris." Interestingly, there is no reference to extraterritorial jurisdiction over liturgical matters.

[335] For example, *CCEO* c. 211 §2: "Synodus Episcoporum Ecclesiae patriarchalis vel Consilium Hierarcharum curare debet, ut congruae et dignae Episcopi emeriti sustentationi provideatur, attenta quidem primaria obligatione, qua tenetur eparchia, cui inservivit."

[336] For example, *CCEO* c. 242: "Textum legum, declarationum et decretorum, quae in conventu eparchiali data sunt, Episcopus eparchialis communicet cum auctoritate, quam ius particulare propriae Ecclesiae sui iuris determinavit." Cf. Dimitri Salachas, *Istituzioni di diritto canonico delle Chiese cattoliche orientali* (Rome/Bologna: Edizioni Dehoniane, 1993) 201: "Però questa potestà legislativa è esercitata nei casi in cui i canoni espressamente attribuiscono al suddetto Consiglio questa potestà, ma anche ogniqualvolta il diritto comune rimette al diritto particolare di una Chiesa *sui iuris* di emanare leggi e norme (can. 167, §1)."

[337] Note the general juridic rule *expressio unius est exclusio alterius*. Based on this, James H. Provost, "Some Practical Issues for Latin Canon Lawyers from the Code of Canons of the Eastern Churches," *The Jurist* 51 (1991) 39 argues that "the diverse degrees to which *sui iuris* is applied makes it difficult to speak of the latter two categories [metropolitan and "other" Churches] as really 'self-governing' in the same sense that patriarchal or even major archiepiscopal churches are."

[338] *CCEO* c. 169: "Consilium Hierarcharum curet, ut necessitatibus pastoralibus christifidelium provideatur, atque de eis potest statuere, quae ad fidei incrementum provehendum, ad actionem pastoralem communem fovendam, ad moderandos mores, ad proprium ritum necnon ad disciplinam ecclesiasticam communem servandam opportuna esse videntur."

[339] Gefaell, "La capacità legislativa delle Chiese orientali in attuazione del CCEO," 142; Szabó, "Autonomia disciplinare come carattere del fenomeno dell'*Ecclesia sui iuris*: ambito e funzioni," 72, especially note 13. In fact, there was initially a norm concerning promulgation of these acts distinct from the norm for the promulgation of the acts listed in what would become *CCEO* c. 167. Compare draft canon 139 §4 (the basis for *CCEO* c. 167 §2) in "Schema Canonum de Constitutione Hierarchica Ecclesiarum Orientalium," 51—"De iis quae acta sunt ad normam §1 Metropolita Sedem Apostolicam quamprimum certiorem faciat, nec leges ac normae promulgari valide possunt antequam a Sede Apostolica scriptum nuntium de Consilii actorum receptione a Metropolita recipiatur; etiam de ceteris in Consilio Hierarcharum gestis Metropolita Sedem Apostolicam certiorem faciat"—with draft canon 140 §2 (which would have followed *CCEO* c. 169)—"Decisiones Consilii Hierarcharum de iis de quibus in §1 canonice obligant in universo territorio Ecclesiae metropolitanae tantummodo si a Sede Apostolica adprobatae fuerint." The different requirements for legislation (reception versus approval) remained in the "Schema Codicis Iuris Canonici Orientalis," 30 (cc. 165 §2 and 167 §2), and only with the revisions to that schema ("Le osservazioni dei Membri

legislative competence of particular councils in the Latin Church.[340] Thus, the council of hierarchs appears to have a wide area of legislative competence similar to that of the synod of bishops, and so *Orientalium Ecclesiarum* 5 is canonized in nearly the same way for them; however, the acts of the council do require notification of reception by the Apostolic See for validity.

The legislative competence of the fourth class, the "other" Churches *sui iuris* is described in canon 176:

> If common law relegates something to particular law or to the higher administrative authority of a Church *sui iuris*, the competent authority in these Churches is the hierarch who presides over it in accordance with the norm of law; however, he needs the consent of the Apostolic See, unless it is expressly stated otherwise.[341]

Besides the absence of a collegial legislative authority, actual *consent* of the Apostolic See is required for the validity of any legislative acts of the head of an "other" Church *sui iuris*, unless expressly stated otherwise. This requirement involves the Roman pontiff in the activity of such Churches even more than in metropolitan Churches *sui iuris*. Further, the head of an "other" Church *sui iuris* appears to be able to legislate only in matters remitted to the particular law of a Church *sui iuris* by the Eastern code; there is no canon for "other" Churches *sui iuris* equivalent to canon 169 for metropolitan Churches *sui iuris*.[342] Thus, areas where there is no law on the

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della Commissione allo «*Schema Codicis Iuris Canonici Orientalis*» e le risposte del «*Coetus de expensione observationum*»," 45) was draft c. 167 §2 dropped.

[340] 1983 *CIC* c. 445: "Concilium particulare pro suo territorio curat ut necessitatibus pastoralibus populi Dei provideatur atque potestate gaudet regiminis, praesertim legislativa, ita ut, salvo semper iure universali Ecclesiae, decernere valeat quae ad fidei incrementum, ad actionem pastoralem communem ordinandam et ad moderandos mores et disciplinam ecclesiasticam communem servandam, inducendam aut tuendam opportuna videantur." Cf. the source for the Eastern canon, *CS* c. 349: "Patres in Synodo congregati studiose inquirant ac decernant quae ad fidei incrementum, ad moderandos mores, ad corrigendos abusus, ad controversias componendas, ad unam eandemque disciplinam servandam vel inducendam, opportuna fore pro suo cuiusque territorio videantur."

[341] *CCEO* c. 176: "Si ius commune aliquid remittit ad ius particulare aut ad superiorem auctoritatem administrativam Ecclesiae sui iuris, auctoritas competens in his Ecclesiis est Hierarcha, qui ei ad normam iuris praeest, de consensu Sedis Apostolicae, nisi aliud expresse statuitur."

[342] Gefaell, "La capacità legislativa delle Chiese orientali in attuazione del CCEO," 143 considers this statement of c. 176 a taxative criterion for issuing legislation. However, Szabó, "Autonomia disciplinare come carattere del

matter, as well as where competence is granted to the synod of bishops, alone or with the council of hierarchs, lie outside the general competence of the head of an "other" Church *sui iuris*, resulting in a much more limited autonomy.[343]

The manner in which positive autonomy is structured in the Eastern code contains positives and negatives. On the one hand, the material competence of three of the classes of Churches *sui iuris*—patriarchal, major archiepiscopal, metropolitan—is broad; each can establish laws in any area, provided they are not contrary to a law issued by a higher legislative authority. Further, the type of legislative authority that the synod of bishops and council of hierarchs possesses is distinguished from other collegial bodies capable of making law, avoiding the problematic formulation of *Cleri sanctitati* that simply listed them among other types of synods. On the other hand, aside from liturgical laws, at least in patriarchal and major archiepiscopal Churches, other laws of these legislative organs have force only within the territory of the relevant Church *sui iuris*, thus juridically dividing a community that is a single ecclesiological entity. The autonomy of "other" Churches *sui iuris* is also very limited. Further developments of the common law are, therefore, required to fulfill fully the declaration of the right and obligation of self-governance found in *Orientalium Ecclesiarum* 5.

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fenomeno dell'*Ecclesia sui iuris*: ambito e funzioni," 73 note 14 argues against this, suggesting wide legislative competence similar to the other grades of Churches *sui iuris*.

[343] Cf. Faris, *The Eastern Catholic Churches*, 397: "All these churches are quite small and therefore have limited personnel and means. Consequently, the *autonomy* which they enjoy is quite restricted." Grigoriță, 448–449 notes in particular that "other" Churches *sui iuris* have such limited autonomy that some commentators have called them *Ecclesiae romani iuris*. One such author is Ihor Monczak, "Appointments of Bishops in the Self-governing Eastern Catholic Churches," in *Ius Ecclesiae Vehiculum Caritatis: Atti del simposio internazionale per il decennale dell'entrada in vigore del* Codex Canonum Ecclesiarum Orientalium, ed. Congregazione per le Chiese Orientali (Vatican City: Libreria Editrice Vaticana, 2004) 858.

5.4.4. The Competence of the Congregation for the Eastern Churches

While the codes were themselves being reformed, two reforms of the Roman Curia took place. The first, undertaken under Pope Paul VI after the close of the Second Vatican Council, resulted in the apostolic constitution *Regimini Ecclesiae Universae*.[344] In this constitution, the dicastery overseeing Eastern matters was retitled the "Sacred Congregation for the Eastern Churches."[345] This change expressed the plurality of Churches in the East, as opposed to the inadequate ecclesiological understanding implied by speaking of a singular "Eastern Church."[346] Eastern patriarchs and major archbishops were to be members of the congregation, in addition to cardinals chosen by the pope.[347] The congregation was to have as many offices as there were rites of the Eastern Churches having communion with Rome.[348]

The competence of the congregation under the Pauline curial reform was described thus:

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[344] Paul VI, apostolic constitution *Regimini Ecclesiae Universae*, August 15, 1967: *AAS* 59 (1967) 885–928.

[345] *REU* 41: "Quae adhuc appellabatur Sacra Congregatio pro Ecclesia Orientali, in posterum appellabitur Sacra Congregatio pro Ecclesiis Orientalibus." There were requests to change the name of this congregation during the various phases of the council. See the comments of Latin Patriarch Alberto Gori of Jerusalem in *Antepraeparatoria*, 2/4:440: "*Nomen S. C. pro Ecclesia Orientali*. Nonnulli putant melius vocari posse: «S. C. pro Ritibus Orientalibus»." Cardinal Tappouni suggested both "pro Ritibus Orientalibus" and "pro Ecclesiis Orientalibus" as new names for the congregation, modeled on the preparatory committee "Commissio pro Ecclesiis Orientalibus"; see *Praeparatoria*, 2/2:190. Antoine Hayek, Syrian Archbishop of Aleppo, made this suggestion during the council itself; see Thirtieth General Congregation, November 29, 1962: *Acta Synodalia*, 1/3:725 (3). For comments on this change, see Michael Vattappalam, *The Congregation for the Eastern Churches: Origins and competence* (Vatican City: Libreria Editrice Vaticana, 1999) 86.

[346] Onorato Bucci, "Storia e significato giuridico del Codex Canonum Ecclesiarum Orientalium," in *Il Codice delle Chiese Orientali. La storia. La legislazione particolare. Le prospettive ecumeniche. Atti del convegno di studi tenutosi nel XX anniversario della promulgazione del Codice dei canoni delle Chiese orientali (Sala San Pio X, Roma 8–9 ottobre 2010)*, ed. Pontificio Consiglio per i Testi Legislativi (Vatican City: Libreria Editrice Vaticana, 2011) 107; Vittorio Peri, *Orientalis Varietas: Roma e le Chiese d'Oriente—Storia e Diritto canonico*, Kanonika 4 (Rome: PIO, 1994) 296; Pospishil, *Eastern Catholic Church Law*, 140; Cyril Vasil', "Chiese Orientali Cattoliche nella Ecclesiologica e nel Diritto della Chiesa Cattolica: Il cammino del CCEO," *Folia Canonica* 10 (2007) 149.

[347] *REU* 42: "Haec Congregatio, cui praeest Cardinalis Praefectus, adiutricem operam navantibus Secretario et Subsecretario, in numerum Membrorum refert, praeter Cardinales a Summo Pontifice delectos, etiam Patriarchas Ecclesiarum Orientis atque Archiepiscopos Maiores eisdem aequiparatos [...]."

[348] *REU* 43: "Eadem Congregatio tot officia habet quot sunt ritus Ecclesiarum Orientalium communionem habentium cum Sede Apostolica."

> The Congregation for the Eastern Churches reviews all matters of any type, which pertain to persons, discipline, or rites of the Eastern Churches, even if they are mixed—namely those that also touch Latins by reason of matter or person. To this one congregation alone are subject territories in which a greater part of the Christians pertain to the Eastern rites; moreover, in Latin territories it is vigilant with earnest care, even through visitators, concerning those as yet unstructured nuclei of the faithful of the Eastern rites, and fosters their spiritual necessities, as much as can be done, through the constitution even of a proper hierarchy, if the number of faithful and circumstances demand it.[349]

As in *Dei providentia*, the Eastern congregation in *Regimini Ecclesiae Universae* enjoyed "all faculties that the other congregations obtain for the Churches of the Latin rite," while remitting to other congregations those matters that pertained to them.[350] The only explicit exceptions made in this section of the apostolic constitution were for the Apostolic Penitentiary and the Congregation for Religious in what pertained to Latin religious undertaking mission work in Eastern regions *qua* religious.[351] There were exceptions made in other sections of the apostolic constitution, however.[352] The Sacred Congregation for the Discipline of the Sacraments had exclusive competence over a process to determine a non-consummated marriage,[353] the Sacred

[349] *REU* 44: "Congregatio pro Ecclesiis Orientalibus cognoscit omnia cuiusvis generis negotia, quae sive ad personas, sive ad disciplinam, sive ad ritus Ecclesiarum Orientalium pertinent, etiamsi sint mixta, quae scilicet sive rei sive personarum ratione, Latinos quoque attingant; eidemque uni soli subiiciuntur territoria in quibus maior christianorum pars ad ritus orientales pertineat; immo in ipsis territoriis latinis sedula cura, etiam per Visitatores, invigilat nucleis nondum ordinatis fidelium Rituum Orientalium eorumque spiritualibus necessitatibus, quoad fieri potest, consulit, per constitutionem quoque propriae hierarchiae, si numerus fidelium et adiuncta id exigant." Note that *REU* 49 §1 and 50 exempted regions subject to the Eastern congregation from the jurisdiction of the Sacred Congregation for Bishops, and *REU* 79 exempted parochial and diocesan schools in places dependent on the Eastern congregation from the competence of the Sacred Congregation for Catholic Education.

[350] *REU* 45 §1: "Congregatio omnibus facultatibus gaudet, quae aliae Congregationes pro Ecclesiis ritus latini obtinent, remissis tamen ad cetera Dicasteria negotiis ad ipsa spectantibus [...]."

[351] Ibid.: "[...] incolumi semper iure Paenitentiariae Apostolicae"; *REU* 45 §2: "Quod vero attinet ad Sodales religiosos latini ritus, missionarios in regionibus de quibus in n. 44, haec Congregatio competentiam habet in quidquid eosdem qua missionarios, sive uti singulos sive simul sumptos, tangit; quidquid vero eosdem qua religiosos, sive uti singulos sive simul sumptos, attingit, Congregationi pro Religiosis remittit aut relinquit."

[352] See also the listing provided in Vattappalam, 88–92.

[353] *REU* 56; cf. Sacred Congregation for the Discipline of the Sacraments, instruction *Dispensationis matrimonii*, March 7, 1972, I: *AAS* 64 (1972) 245.

Congregation of Rites in what pertained to processes for beatification and canonization,[354] and the Sacred Congregation for the Evangelization of Peoples as pertained to Eastern religious working in their regions as missionaries.[355] The Sacred Congregation for the Doctrine of the Faith (formerly the Holy Office) was not explicitly mentioned in this regard, although it still had competence over Eastern faithful on matters of faith and morals.[356]

One notable change in this wording, compared with the previous legislation of *Dei providentia* and the relevant canon of the 1917 code, concerned the exclusivity of the congregation's competence. Canon 257 §1 of the 1917 code, quoting article III of *Dei providentia*, had stated:

> To this [Eastern] congregation are reserved all those matters of any sort that pertain to persons, discipline, or rites of the Eastern Churches, even if they should be "mixed," namely those matters that also touch Latins by reason of subject or persons.[357]

The canon uses the language of reservation, indicating the non-competence of other dicasteries over the relevant matters. However, *Regimini Ecclesiae Universae* does not use a form of the word *reservo*; instead, it declares that the congregation "reviews" (*cognoscit*) such matters.[358] Exclusivity was applied only in the cases of territories "in which a greater part of the Christians pertain to the Eastern rites," as these territories were subject "to this one congregation alone." The multiple reservations to other congregations, both explicit and implicit, as well as the change

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[354] *REU* 62 §1. In this regard, note that the judicial competence first granted to the Eastern congregation in *CS* c. 195 §2 (which possibly was the reason for the exception made for the Sacred Congregation of Rites in *CS* c. 195 §1, 1º) was removed only nine years later by *REU*; see Vattappalam, 227.

[355] *REU* 88.

[356] Vattapppalam, 90 states that the competence of the Sacred Congregation for the Doctrine of the Faith was "exclusive."

[357] 1917 *CIC* c. 257 §1: "Huic Congregationi reservantur omnia cuiusque generis negotia quae sive ad personas, sive ad disciplinam, sive ad ritus Ecclesiarum orientalium reteruntur, etiamsi sint mixta, quae scilicet sive rei sive personarum ratione latinos quoque attingant."

[358] Cf. Vattappalam, 89, citing a comment by Eugene J. Fitzsimmons that *cognoscit* constitutes a "mitigated terminology" in comparison with *reservantur*.

in language to *cognoscit*, lessened the understanding of this curial entity as particularly distinct from other dicasteries (e.g., Clergy, Religious) due to it being involved with the pope's exercise of care over the whole Church, not simply the Latin Church.[359]

The apostolic constitution *Pastor bonus*,[360] which resulted from the curial reform undertaken by John Paul II, contains norms similar to those of *Regimini Ecclesae Universae*. Retaining the language of that document, *Pastor bonus* declares that the Congregation for the Eastern Churches "reviews those matters that concern Eastern Catholic Churches, whether concerning persons or things."[361] Its competence is specified thus:

> The competence of this congregation is extended to all matters that are proper to Eastern Churches and that are to be deferred to the Apostolic See, whether concerning the structure and ordering of Churches, or the exercise of the *munera* of teaching, sanctifying, and ruling, or persons, their state, rights, and obligations. It also fulfills all those things that are to be done concerning the quinquennial reports and visitations *ad limina* according to the norm of articles 31 and 32.
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> Nevertheless, there remains untouched the proper and exclusive competence of the Congregations for the Doctrine of the Faith and for the Causes of Saints, of the Apostolic Penitentiary, the Supreme Tribunal of the Apostolic Signatura, and the Tribunal of the Roman Rota, and also of the Congregation for Divine Worship and Discipline of the Sacraments as concerns a dispensation for a marriage *ratum et non consummatum*. In matters that also touch the faithful of the Latin Church, the congregation is to proceed, if the importance of the matter demands it, in consultation with the dicastery competent in the same matter for the faithful of the Latin Church.[362]

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[359] Vattappalam, 89–90 comments that the simple statement that matters belonging to other congregations were to be transferred to them rendered the competence of the Eastern congregation unclear.

[360] John Paul II, apostolic constitution *Pastor bonus*, June 28, 1988: *AAS* 80 (1988) 842–934.

[361] *PB* 56: "Congregatio ea cognoscit, quae, sive quoad personas sive quoad res, Ecclesias Orientales Catholicas respiciunt."

[362] *PB* 58: "§1. Huius Congregationis competentia ad omnia extenditur negotia, quae Ecclesiis Orientalibus sunt propria, quaeque ad Sedem Apostolicam deferenda sunt, sive quoad Ecclesiarum structuram et ordinationem, sive quoad munerum docendi, sanctificandi et regendi exercitium, sive quoad personas, earundem statum, iura ac obligationes. Omnia quoque explet, quae de relationibus quinquennalibus ac visitationibus ad limina ad normam artt. 31, 32 agenda sunt. §2. Integra tamen manet propria atque exclusiva competentia Congregationum de Doctrina Fidei et de Causis Sanctorum, Paenitentiariae Apostolicae, Supremi Tribunalis Signaturae Apostolicae et Tribunalis Rotae Romanae, necnon Congregationis de Cultu divino et Disciplina Sacramentorum ad dispensationem pro matrimonio rato et non consummato quod attinet. In negotiis, quae Ecclesiae Latinae fideles quoque attingunt, Congregatio procedat, si rei momentum id postulet, collatis consiliis cum Dicasterio in eadem materia pro fidelibus Latinae Ecclesiae competenti." (The competence over processes involving a marriage *ratum et non consummatum* was later transferred to an office at the Tribunal of the Roman Rota: Benedict XVI, *motu proprio Quaerit semper*,

The congregation is to take care of the Eastern communities in Latin areas, including establishing hierarchies if needed (after consultation with the relevant congregation of the area—Bishops or Evangelization), has exclusive competence over mission work in areas where the Eastern rites were prevalent from ancient times, and is to work with the Pontifical Councils for Fostering Christian Unity and for Dialogue among Religions in areas that concern their competence.[363]

The language of *Pastor bonus*, like that of *Regimini Ecclesiae Universae*, speaks of review, not reservation.[364] The only explicit reservation in this document concerns missionary work: "Apostolic and missionary action in regions in which the Eastern rites had been preponderant from ancient times depend only on this congregation, even if it is carried out by missionaries of the Latin Church."[365] However, the Eastern congregation still retains exclusive

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August 30, 2011: *AAS* 103 [2011] 569–571.) For an example of the competence of the Congregation for the Doctrine of the Faith over Eastern Catholics, see its declaration "De condicione canonica eorum, qui se dicunt episcopos Graeco-Catholicos Ucrainae urbis «Pidhirci»," February 22, 2012: *AAS* 104 (2012) 377–379. For an example concerning the Congregation for Causes of Saints, see its instruction *Sanctorum Mater*, May 17, 2007: *AAS* 99 (2007) 465–510. To this listing, Žužek, "Omissione di Alcune Sezioni di Canoni," 448 note 22 adds the competence of the Congregation for Catholic Education concerning ecclesiastical universities in the East, as well as that of the pontifical councils. Note that the Congregation for Divine Worship and Discpline of the Sacraments in 1989 obtained competence in dispensing Latin and Eastern clerics from the obligation of celibacy; see Vattappalam, 118. Further, the Pontifical Council for Legislative Texts also has authority to interpret authentically the Eastern code; this power had been in some doubt, but an intepretation related to Ivan Žužek in a letter of February 27, 1991 confirms this power. See Ivan Žužek, "Authentic interpretations," in Ivan Žužek, *Understanding the Eastern Code*, Kanonika 8 (Rome: PIO, 1997) 396–402, recounting the saga to determine the exact competence of this council over the Eastern code; other comments are found in Vattappalam,122–127. The following articles of *Pastor bonus* explicitly or implicitly limit other congregations' competence relative to Eastern faithful: *PB* 85, concerning the Congregation for the Evangelization of Peoples; *PB* 75, concerning the Congregation for Bishops to the Latin Church; *PB* 105, concerning the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. Cf. Nedungatt, "Normae Indolis Iuridicae," 478, especially note 1 on the silence of other articles of *PB* concerning jurisdiction over Eastern faithful.

[363] *PB* 59–61. Cf. *PB* 137 §2 and 161 on the pontifical councils.

[364] *PB* 56: "Congregatio ea *cognoscit*, quae, sive quoad personas sive quoad res, Ecclesias Orientales Catholicas respiciunt" (emphasis added). Vattappalam, 101: "A clause reserving matters of the Eastern Churches to the full and exclusive competence of the Eastern Congregation is lacking in this present constitution, as in the Apostolic Constitution *Regimini Ecclesiae Universae* (1967) art. 45 §1 which stipulated that this Congregation enjoyed all the faculties possessed by other Congregations for the Church of the Latin rite."

[365] *PB* 60: "Actio apostolica et missionalis in regionibus, in quibus ritus orientales ab antiqua aetate praeponderant, ex hac Congregatione unice pendet, etiamsi a missionariis Latinae Ecclesiae peragatur." Peri, *Orientis Varietas*, 302

jurisdiction over ecclesiastical circumscriptions, even Latin ones, in certain territories.[366] As concerned the material competence possessed by the congregation, *Pastor bonus* does not explicitly state that it possesses the faculties that the other congregations possess concerning the Latin Church. Because of this, Michael Vattappalam writes that "at present, it is difficult to define the relative competence of the Congregation for the Eastern Churches in relation to the Eastern Catholic Churches."[367] Besides the practical difficulties that could arise, the lack of even a statement that the Eastern congregation possesses the faculties of the other congregations reduces the recognition of this Eastern congregation's particular supra-ecclesial role; the descriptor "Eastern" appears to be more of a way to classify matters deferred to the Apostolic See than an indication of the differing role the Roman pontiff has relative to the Eastern Churches as opposed to the Latin Church.[368]

The current expression of the Eastern congregation's competence does not properly express the fundamentally different nature of Eastern matters vis-à-vis the Roman pontiff. While several other congregations—Bishops, Clergy, Consecrated Life—express the Roman pontiff's

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considers this reference to be a canonical residue of previous incorrect ecclesiology focusing on territorial and sociological concerns.

[366] See Secretariat of State, rescript "Ex Audientia," January 4, 2006: *AAS* 98 (2006) 65–66. This rescript explicitly determined that both Latin and Eastern jurisdictions of certain European and Asian countries (generally former communist nations) continued to be or were declared to be subject to the Secretariat of State's section on relations with states *donec aliter provideatur*. However, note #2: "Le Chiese particolari di rito latino esistenti in Bulgaria, Grecia e Turchia Europea continuano ad essere affidate alla giurisdizione della Congregazione per le Chiese Orientali, come stabilito dal Papa Pio XI, con il Motu Proprio Sancta Dei Ecclesia del 25 marzo 1938 (A.A.S. 1938, pagg. 154-159)."

[367] Vattappalam, 99. Cf. ibid., 101, citing Marco Brogi's argument that *Pastor bonus* does not adopt the former presumption of competence of the Eastern congregation regarding the Eastern Catholic Churches. Vattappalam investigates the specific area of competence of the Eastern congregation at 99–162, noting all the areas where there is a lack of clarity on the question. Note also Jobe Abbass, "*Pastor bonus* and the Eastern Catholic Churches," *Orientalia Christiana Periodica* 60 (1994) 609, cited in Michael Fahey, "A Note on the 'Code of Canons of the Eastern Churches' and Orthodox/Catholic Reunion," *The Jurist* 56 (1996) 458–459, arguing that *Pastor bonus* does not take into account the canonical discipline of the Eastern Catholic Churches.

[368] A contrary opinion can found in Peri, *Orientis Varietas*, 299–300. He argues that the specification of competence in *PB* 56 and 58, by referring to Eastern persons and matters alone (omitting territorial considerations) that *had to* be deferred to the Holy See (and not simply all matters), offers "una distinta e corretta considerazione del duplice potere primaziale del Papa come Capo della Chiesa universale e come primate della Chiesa Occidentale."

concern for matters of the Latin Church, the Eastern congregation involves matters of an ecclesially-distinct nature. The initial structure of the congregation, with Eastern matters reserved to it alone with only one explicit exception, has given way to the current structure that makes no such reservation, and thus no apparent distinctiveness is attributed to Eastern matters. Such matters appear to be little different in nature from ecclesiastical affairs pertaining to the Latin Church alone—it is simply one way of dividing curial business. As was stated in the prior chapter, the diminished recognition of the special ecclesial role of the Eastern congregation could diminish the recognition of the particular nature of Eastern communities (and their autonomy). Thus, while the beneficial effects of the Pamphilian jurisprudence have been expressed in the codes, they have been reduced in the organization of the Roman Curia compared with the original norms of *Dei providentis*.[369]

5.5. Conclusion

The Second Vatican Council marked a major turning point in recognizing the juridic autonomy of Eastern communities. The council did not simply praise Eastern discipline and traditions, but declared that Eastern Catholic and non-Catholic Churches, like the Western

[369] Reforming this structure could better express the distinctiveness of Eastern matters. For example, Faris, *The Eastern Catholic Churches*, 200–201 reports on "a proposal [...] that an *Officium Sancti Petri* be established which could deal exclusively with the affairs of the Eastern Catholic Churches." While it was deemed "impractical" at the time, Faris notes that "the reason behind the suggestion, namely, that the affairs of the Eastern Catholic Churches should be treated differently than the internal affairs of Latin Church, should always be kept in mind." I disagree with the conclusions of Pablo Gefaell, "Enti e Circoscrizioni meta-rituali nell'organizzazione ecclesiastica," in *Ius Canonicum in Oriente et Occidente: Festschrift für Carl Gerold Fürst zum 70. Geburtstag*, Adnotationes in Ius Canonicum 25 (Frankfurt am Main: Peter Lang, 2003) 496–497. Gefaell, admitting the practical value of having a single Eastern curial dicastery, argues nevertheless that a new system should be set up where each dicastery would have an Eastern section within it, which all together would constitute an interdicasterial nucleus. However, he does note two rather significant issues that would have to be overcome—making sure such Eastern faithful are not simply minorities in the overall dicasterial structure, and clearly indicating those curial acts that apply to Eastern Catholic Churches.

Church, had the right and obligation to rule themselves according to such discipline and traditions. How such autonomy would be structured for the Eastern Catholic Churches was to be determined by the Eastern codification commission established by Pope Paul VI in 1972. Despite the council having appeared to affirm that the right and obligation of self-governance pertained to the individual Churches, the commission decided to create for all Eastern Catholic Churches a single, common code, which, it was hoped, would nevertheless protect the autonomy of the individual Churches. Despite much controversy, the Pamphilian jurisprudence was finally inserted into this code as a general rule of interpretation of all laws issued by the supreme authority. Besides the negative autonomy established by the first canon of the 1983 *Codex Iuris Canonici* and canon 1492 of the *Codex Canonum Ecclesiarum Orientalium*, the clear recognition of the Eastern communities as juridic entities, not simple liturgical traditions or rites, led to the affirmation of their positive autonomy, exercised through the relevant legislative organ—synod of bishops, council of hierarchs, head of an "other" Church *sui iuris*. While some deficiencies in recognizing fully Eastern juridic autonomy remain in the current law—particularly the inability of the legislative organs of Churches *sui iuris* to establish disciplinary laws binding all their faithful regardless of their location—and the distinctiveness of Eastern matters vis-à-vis the Roman pontiff must constantly be affirmed, this era has seen the clear affirmation of the juridic autonomy of Eastern communities, based on the foundation given with the Pamphilian jurisprudence.

CONCLUSION

This review of the developing recognition of the juridic autonomy of Eastern communities in the Catholic Church reveals an extremely complex process over roughly five hundred years to reach the point today where these communities, considered to be Churches, are held to have the right and obligation to rule themselves in accord with their own discipline. It allows us to point to the major steps in this development and to see how subsequent understandings of the question have never totally supplanted previous concepts but fused with them, sometimes in ways not entirely consistent.

With increasing missionary work in areas subject to "schismatic" Eastern patriarchs after the Council of Trent, and especially with the restoration of communion with the Eastern faithful subject to the Metropolitan of Kiev in the Union of Brest of 1595–1596, canonists were faced with the question of the exact relationship of these Eastern faithful to papal legislation. On the one hand, the discipline followed by these faithful did not adhere to such legislation; refusal to submit to it suggested contempt for the law and smacked of rejection of papal authority. On the other hand, the popes had shown "tolerance" for those elements of Eastern discipline not opposed to decency or presenting danger to souls. Further, it was highly probable that imposing all papal legislation on Eastern faithful would cause another break in communion. Considering these arguments, canonists developed the idea that the Roman pontiff could bind Eastern faithful to his legislation, but generally did not intend to do so. Such a solution protected the plentitude of papal power by upholding the ability of the Roman pontiff to legislate, but also protected Eastern discipline by requiring legislative intent on his part. The June 4, 1631 particular congregation of the Sacred Congregation for the Propagation of the Faith would apply this

general jurisprudential rule to the specific matter of apostolic constitutions reserving cases to the Roman pontiff and the Apostolic See, determining that the censures contained in such constitutions bound Greeks and other subjects of the schismatic patriarchs only if they concerned matter of the dogmas of faith, if these faithful were explicitly included, or if these faithful were implicitly included. In turn, the canonist Angelo Maria Verricelli would take this response and articulate it as a general jurisprudential norm of interpretation for all apostolic constitutions. There thus developed a concept of "negative" Eastern autonomy: Eastern faithful were not bound by apostolic constitutions unless the Roman pontiff intended to bind them; the pontiff's intent could be determined by application of the Pamphilian jurisprudence.

While this development determined to what laws Eastern faithful were *not* bound, there was also the question of which laws bound Eastern faithful. Such a question entailed others: How would one become a member of the Eastern faithful? Who had competence to make laws binding the Eastern faithful? The keen canonical mind of Pope Benedict XIV would attempt to offer some answers to these questions. Admitting the legitimacy of the Pamphilian jurisprudence (albeit without official approbation), he determined that the Eastern faithful were, in fact, members of the "Eastern Church," ascribed to it through baptism in one of four Eastern "rites" constituting the Eastern Church—Greek, Armenian, Syrian, or Coptic. Contraposed to this Eastern Church was a Latin Church, also consisting of various rites. While both the Eastern Church as a whole as well as each individual Eastern rite possessed a body of law, such law was beyond the competence of any Eastern hierarch to establish, alter, or abolish. The Roman pontiff alone was head of the Eastern Church (as he was of the Latin Church), and was the sole guardian of all rites in the Church. Eastern hierarchs exercised their authority only over their diocese or, in the case of patriarchs, major archbishops, and their synods, their *natio*, which was territorially

limited and whose jurisdictions were akin to Latin supra-diocesan structures. Thus, the Eastern Church was not considered a juridic anomaly by Benedict XIV, as it was complemented by the Latin Church, but the manner in which the pope considered the structure of the Eastern Church limited the ability of the Eastern communities to exercise autonomy.

Little jurisprudential development on this question occurred until the pontificate of Pope Bl. Pius IX. His pontificate was filled with desires to codify canon law, or at least make it clearer. The fathers of the First Vatican Council were faced not only with the unruly nature of "general" law, based on norms issued by the pope and the Roman Curia, but also with the unorganized state of Eastern law, which appeared to be even worse, as the law of one Eastern community contradicted the law of another and often lacked written sources. Faced with this problem, the conciliar preparatory commission dealing with Eastern matters decided to suppress this "disciplinary dualism." In place of this dualism, there would be a single law for the whole Catholic Church, albeit with allowance for certain Eastern customs not considered to be corruptions. Obviously, the Pamphilian jurisprudence had to be rejected with such a plan. Further, the idea of a distinct body of Eastern discipline had to be thrown out; aside from the aforementioned customs, only the liturgical rites would remain as a positive distinguishing factor between East and West. Thus, both negative and positive Eastern autonomy was rejected. While the council itself never acted on these ideas, Pope Bl. Pius IX issued norms for both the Armenians and Chaldeans drawing on them. Strong opposition from Eastern hierarchs and faithful to these measures prevented similar invasive actions from taking place. However, because of the underdeveloped understanding of Eastern communities as true ecclesial entities, much of this opposition was not clearly argued. Eastern hierarchs tried to defend the autonomy

and discipline of their communities, but could not do so persuasively without seemingly questioning papal supremacy as defined in *Pastor aeternus*.

With the ascension of Pope Leo XIII, the desire to suppress Eastern discipline abated. Indeed, the Pamphilian jurisprudence was once again affirmed in curial praxis, although with some altered wording. Yet the problem of the unruly nature of canon law still had to be dealt with. The promulgation of the 1917 *Codex Iuris Canonici* considered each of these issues. On the one hand, canon law was finally codified; on the other hand, the first canon of the code, based on the Pamphilian jurisprudence, established that the canons of that code applied only to the Latin Church unless *ex ipsa rei natura* they applied to the Eastern Church as well. Yet problems remained, with the continuing identification of the community with their liturgical practices by the use of the term "rite," with the later explicit extension of several canons of the code to the Eastern faithful, and with alterations to the competence of the Sacred Congregation for the Eastern Church reducing recognition of the particular relationship between the pope and Eastern communities. The "disordered" state of Eastern law also remained a concern for Roman authorities, despite some Eastern communities formulating their own codes. A project to codify Eastern law was thus initiated. Such a law would form its own code, despite desires by those working on the project to create a single code for the whole Catholic Church. However, this decision was made by Pope Pius XI not because the East required its own code by its nature, but because creating a single code was viewed as inopportune at that time. The canons of this code, often based on the canons of the 1917 code, generally considered Eastern communities as juridically equivalent to Latin supra-diocesan structures.

At the Second Vatican Council, the council fathers established that the Eastern communities were, in fact, particular *Churches*, each equal in dignity with the Latin Church.

Further, each Church had the right and obligation to rule itself in accord with its own discipline. The postconciliar reform of canon law took these ecclesiological considerations into account; however, the influence of previous concepts was still present. Clashing ideas on how to meld ecclesiological and practical considerations can be seen in the debates over the structure of the codified law. One code for the whole Church seemed required by the statement that all Churches were entrusted equally to the Roman pontiff;[1] two codes seemed the most practical solution and in accord with the previous codification process; as many codes as there were Churches seemed to follow from the declaration of the right and duty of each Church to govern itself.[2] These clashing concepts were also in evidence in the debates over whether to include the Pamphilian jurisprudence in the codified law. A distinct norm for the benefit of the Eastern faithful, exempting them from most apostolic laws, was practical and in accord with canonical tradition, but it also seemed to be contrary to the conciliar declaration of all Churches being equal in dignity. The canons of the 1990 *Codex Canonum Ecclesiarum Orientalium* uphold the juridic distinctiveness of the Eastern Catholic Churches, remove the ritual aspect as an element of their identity, and attribute a particular law-making capacity to the individual Churches *sui iuris*. However, the effects of previous conceptions concerning Eastern Churches and their autonomy are still present, the most impactful being how the distinction between the earlier concepts of "rite" and "*natio*" is reflected in the limitation of legislation issued by patriarchal and major archiepiscopal synods to the territory of the respective Church, except for liturgical laws, which have force everywhere.

One notes how haphazard the development sketched out above has been; indeed, for much of this development, practical considerations pushed this development, not ecclesiological

[1] *OE* 3.

[2] *OE* 5.

considerations. What gave rise to the Pamphilian jurisprudence was a practical problem—in what way were Eastern faithful subject to papal laws. The reflections of Pope Benedict XIV on the juridic structure of the Christian East arose from his answers to the problems he faced—the Melkites trying to alter their liturgical norms, Latin missionaries interfering with Eastern communities, the Italo-Greeks requiring clear norms, and others. Mid-nineteenth century Roman authorities desired clarity in law; insofar as Eastern discipline was an obstacle to such clarity, it had to be rejected. The Pamphilian jurisprudence was likewise rejected in order to obtain this practical end. Re-acceptance of the Pamphilian jurisprudence as a rule of praxis once again in the pontificate of Pope Leo XIII made practical sense in light of the uproar due to attempts to suppress Eastern discipline. Those codifying Eastern law eventually settled on a single common Eastern code for a practical reason—non-acceptance of a single code for the whole Church by Eastern faithful. Only with *Orientalium Ecclesiarum* do ecclesiological considerations begin directly impacting the formulation of law. However, these considerations were set alongside the earlier, praxis-driven concepts in formulating modern canon law, as seen with the debates over the number of codes and in the binding force of legislation issued by patriarchal and major archiepiscopal synods.

Insofar as much of this development has resulted from practical considerations, the ecclesiological aspect still needs to be investigated more thoroughly. By understanding the true ecclesial nature of these communities, beyond the fact that they constitute Churches and possess some right and duty of self-governance, the law could be reformed such that these Churches' nature and autonomy could be better expressed.[3] Yet practical considerations still need to be

[3] Dimitri Salachas, "Le *status* d'autonomie des Églises Catholiques Orientales et leur communion avec le Siège Apostolique de Rome," *L'année canonique* 38 (1996) 90: "La question de l'autonomie des Églises orientales et du pouvoir central dans l'Église, vue à la lumière du nouveau Code, n'est point close; on pourrait envisager une ultérieure évolution, actuellement bien possible."

taken into account, even if they should no longer be the driving force in canonical development. A reform of the law cannot be carried out by academics focused exclusively on their own abstract ideas. Any canonical reforms should occur organically, guiding development rather than imposing a new order. As a result of such organic developments, opportunities may arise with the separated Eastern Churches; stronger recognition of the proper autonomy of each Church and a better manner of exercising the Petrine ministry towards these Churches resulting from such developments would benefit the efforts to restore communion with them.[4]

Finally, the Pamphilian jurisprudence, which constitutes the foundation for the recognition of Eastern juridic autonomy that followed, should always be affirmed. Such an affirmation will safeguard the juridic distinctiveness and proper autonomy of the Eastern communities. It has been objected that such jurisprudence does not fit with the statement of *Orientalium Ecclesiarum* declaring the equal dignity of all Churches; such an "exemption" for Eastern Churches makes them appear still to be oddities within the Catholic Church, requiring special norms. However, this jurisprudence can be justified as a form of subsidiarity; the Roman pontiff is to be presumed to act at the lowest reasonable level when he legislates. Thus, without any indication to the contrary, an apparently universal norm is in fact limited in application to the Latin Church. Hopefully, this discussion of the importance of the Pamphilian jurisprudence in recognizing Eastern juridic autonomy will support and even strengthen such recognition into the future.

[4] Cf. John Paul II, encyclical letter *Ut unum sint*, May 25, 1995, §95: *AAS* 87 (1995) 977–978: "Persuasum habemus peculiari nos officio obstringi, cum potissimum perspiciamus plerasque christianas Communitates oecumenica cupiditate flagrare cumque petitionem nobis subiectam exaudiamus, ut aliquam inveniamus formam primatus exercitii, quae, nihil essentiae suae deponens, in novam tamen condicionem pateat"; idem, apostolic letter *Orientale lumen*, May 2, 1995, §20: *AAS* 87 (1995) 768: "Novimus quidem nunc unitatem Dei amore effici posse tantum si Ecclesiae una simul id velint, singulis traditionibus plane observatis et necessaria autonomia."

APPENDIX

Transcription of the Acts of the Particular Congregation of the Sacred Congregation for the Propagation of the Faith Held on June 4, 1631

Introduction

The Pamphilian decision is contained within the minutes of the particular congregation of the Sacred Congregation for the Propagation of the Faith held on June 4, 1631. There are four works that give the entirety of the text of the decision (i.e., both the documents reviewed by the members and the decision eventually reached): Mansi, 50:36*–37* note 1; *Collectanea S. Congregationis de Propaganda Fide, seu Decreta Instructiones Rescripta pro Apostolicis Missionibus* (Rome: Typographia Polyglotta S.C. de Propaganda Fide, 1907) 1:252 note 1; *Fontes*, 7:8 (#4449) (derived from the *Collectanea* transcription); *Fonti*, 1/2:279–281. However, as was mentioned in the main body of this dissertation, there are discrepancies among these transcriptions, the most notable being that the transcription given in Mansi and *Fonti* uses "ut in casu schismaticorum bullae Coenae" for the second exception, whereas the *Collectanea* and *Fontes* versions have "et in casu schismaticorum bullae Coenae." Further, the confusion over the citation to "Gregorium Cyzicenum," who appears to be a non-existent person, led me to the question of how faithful these transcriptions were to the actual text.

Therefore, I present in the following pages a new transcription of the text of the entire minutes of the June 4, 1631 particular congregation. This transcription is based on copies of the original pages of the minutes of the congregation, contained in the archives of the Sacred Congregation for the Propagation of the Faith, graciously sent to me by Father Cherian Thunduparampil, CMI, through the assistance of Chorbishop John D. Faris.

Physical Description of the Minutes

The minutes of the June 4, 1631 meeting are found over four pages (two leafs). The first and third pages are each numbered in the upper right corner in three different ways. Of these three, the numbers found on the line even with the heading, immediately above the right margin of the body of the text, written in ink, appear to be the earliest. These numbers on the first and third pages are "80" and "81," respectively. To the right of these numbers, there are stamped numbers of "338" (on the first page) and "339" (on the third page). Under the stamped numbers are found other numbers, written in a light ink or pencil, giving what appears to be "333" on the first page and "334" on the third page (although, because of how light the ink/pencil is, these could also be "338" and "339," respectively).

The text of the minutes appears, for the most part, as a solid column of text, written in ink and heavily abbreviated. At the beginning of major sections of the minutes, the line begins slightly more leftward than the rest of the text. Lines finishing major sections of the minutes are not forced to extend to the right margin. While each page as a whole exhibits ink bleeding through from the other side, this is quite strong in the lowest lines on the page.

Each page has a heading, as does the beginning of the minutes for June 4, 1631. There are two marginal notations, the first (80r) in the same hand as the minutes, the second (81v) in a different hand.

Notes on the Transcription

This transcription has attempted to replicate the minutes as closely as possible. Thus, the numerous abbreviations used in the text, which previous transcriptions have expanded, have been retained in this transcription. The use of a single quotation mark— ’ —in the transcription indicates the presence of a slightly off-vertical, somewhat wavy line over the word in the original minutes, signifying the abbreviation of the word. Note that the word as appears in the original text has no space where the wavy line appears—for example, “ap’licis” in the transcription would mean that the word appears in the original text as “aplicis” with the line roughly above the “p.”

In addition, the layout of the text in the original minutes has been replicated in this transcription as closely as possible. Lines of text are divided as they are in the minutes. The left margin has been formatted to mimic that of the original minutes—a line beginning a major section of text starting slightly left of the rest of the text. Unfortunately, due to computer formatting, the generally consistent right margin could not be replicated.

To avoid confusion, the three page numbers found on the first and third pages are not given in the transcription; instead, the transcription numbers each page in accord with the presumed earliest numbering—80r, 80v, 81r, 81v. They are placed in the top center of each page, in brackets to note that they are not part of the original text.

Again, due to computer limitations, the characters for certain letters have been expanded:

The character  has been rendered as a word-ending “m.”

The character  has been rendered as a word-ending “rum.”

The character  has been rendered as a word-ending “tur.”

The character  has been rendered as “ae.”

The single instance of the character  has been rendered as “prae.”

In addition, the character “u” has been transcribed here as “u” or “v” based on context.

One should note that all superscript lettering has a dot beneath it in the original text; unfortunately, I have been unable to reproduce this in the transcription. Finally, the number “1” in the original text is written like “i”; I have simply used “1.”

Punctuation is intended to mirror that in the original text; however, due to ink bleed-through on pages, it is sometimes unclear if a punctuation mark is present. The use of periods—. —middle dots— · —and colons—:—in the transcription is meant to approximate the placement of the dot(s) in the original text, and there is not necessarily a grammatical distinction among them. The same can be said of the use of - and = at the end of lines. Capitalization is intended to mirror the original text as closely as possible; however, with certain letters like “s” the difference between a capital and lower case letter is not readily apparent.

There appears to an error in original text on page 81v, where the heading gives the date as June 5; the apparent error is retained in the transcription. Any other doubts about the words of the text will be footnoted.

Text of the Minutes

[80r]

Cong^{o} 141 coram Card· a'ls[1] 142·

[The beginning of this page has 12 lines of text, with a marginal notation, from the minutes of the previous meeting.]

Die 4 Iunii 1631

Fuit Cong^{o} par'lis super[2] dubiis Missionariorum orientis in Palatio Emin^{mi} D'ni Card: Pamphylii, cui sua Emin^{a} interfuit cum R^{mis} P're m'ro sac· Palatii, et P· Horatio Iustiniano ac P're Thoma de Afflictis Theatino·

Cong^{o} p'lis super[3] dubiis missionariorum orientis

In ea p^{o} recitatis[4] iis, quae in praecedenti Cong^{ne} die 7 maii circa p'ta dubia fuerunt resoluta P'res rursus omnia probarunt excepto art^{o} de matrimonialibus dispensationibus cum Graecis, quem iterum examinandum esse censuerunt[5]

[1] The word appears to be an abbreviation for "alias"; there may have been a misnumbering of the meetings at some point. It seems this heading references the transcription of the minutes prior to those of the June 4, 1631 meeting, as it is said to concern a congregation before cardinal(s), whereas on 81r the June 4 meeting is said to be a particular congregation.

[2] There appears to be a wavy line over the "e" in "super," but the word is not abbreviated; perhaps it is an error by the secretary.

[3] The word "super" is conjectured based on the first line of the minutes; that part of the original page is bent into the binding on the picture provided to me, so the actual writing could not be made out clearly.

[4] There is some doubt about this word; it certainly begins with "re" and ends with "tis," but the intervening letters may be open to interpretation.

[5] This would be the form of the word that makes the most sense here (the word certainly begins with "cens"). However, the second-to-last letter on the line appears to be the character for a word-ending "m."

Die 4 Iunii 1631

ut praecisius[6] ad petitionem missionariorum respondeatur.

2° Fuit latissime discussus Arts An summus Pontifex in= tendat Graecos, et alios sedibus Patriarcharum schismaticorum subditos compraehendere in Bulla Caenae D'ni, aliisq· Con= stitutionibus Ap'licis, in quibus casus sibi, et Sedi Ap'licae reservat·

Et post allegatum, et ponderatum Canonem 6· Nicaen· pae Synod·[7] Cap· 17. sessne xa, synodi 8, et simul synodum Chalcedon· circa epistolam sancti Leonis Papae, et eundem Canonem 6. Epist· pam Marcelli Papae ad Antiochenos Anacle= ti Epist· 2am, cap· Licet de Baptismo cap· Antiqua de privileg· Gregum Cyzicaenum Canones orientales· Azorium part· pa· lib. 5· cap· xi ·§·7· et salas: sanctum Gregorium de tribus Patriarchis factum Ep'orum Egyptiorum qui noluerunt subscribere praefatae Ep'lae sancti Leonis Papae quia tunc vacabat eorum sedes Patriarchalis E= pistolam synodicam eiusdem Concilii Chalcedon· Can· 2 Constantinop· Conc· pi, et ad hoc sanctorum Leonis, et Damasi Rom· Pontificum contradictionem, in quibus de Pt'ate[8] Papae et Patriarcharum, divisioneq· Provin= ciarum[9] inter Patriarchas late agitur, aut ex eis

[6] Another somewhat doubtful word; it begins with "prae," but the remaining letters are not entirely certain.

[7] It is unclear if the middle dot is actually the dot on an "i" that is not readily apparent at the end of the word.

[8] The ink bleed-through makes it difficult to determine how "potestate" is being abbreviated. "Pt'ate" is a conjecture based on the visible letters and the length of the word.

[9] The bleed-through is quite bad for this word, so while "Provinciarum" seems correct and is attested to by the other transcriptions, I cannot be absolutely certain that it is the word in the minutes, or is hyphenated as above.

[81r]

Cong^{o} par'lis super dubiis missionariorum orient·

deducuntur diversa argumenta pro, et contra sup'tam Papae potestatem ·

P'res p'ti quoad d^{m} Articulum convenerunt in negativam sententiam, quam t'n limitarunt tripliciter·

P^{o} In mat^{a} dogmatum fidei· 2^{o} si Papa explicite in suis Constitutionibus faciat mentionem, et disponat de p'tis subditis Patriarchalium[10] sedium, ut in casu schismaticorum Bullae Caenae· 3^{o} si implicite in eisdem Constitutionibus de eis disponat, ut in casibus appellationis ad futurum Concilium, et deferentium arma ad Infideles, et simil·

3^{o} Fuit disputatum, an in Casibus, in quibus praefati subditi compraehenduntur, quoad ligamen excomunicat^{is}[11] vel alterius censurae sint etiam compraehensi quoad punctum reservationis, ita ut a suis sacerdotibus, vel Ep'is Metropolitis, et Patriarchis absolvi non possint, et in hoc art^{o} p'res fuerunt discordes· Nam Emin^{mus} D'nus Card· et P'r Horatius affirmativam tenuere sententiam, quod s'lt sint compraehensi, et non possint absolvi ob claram mentem Papae in reservatione,[12] R^{mus} vero P· m· sac· Palatii, et P'r Thomas negativam, tum quia apud

[10] This word appears to have been originally written as "Patriarchalibus." The secretary, realizing his error, corrected it to "Patriarchalium" by putting two lines through the top of the "b," blotting out the lower part of the "b," and adding a script "n" to the end so that "sn" appeared to be a script "m."

[11] This word is transcribed as written, with only one "m."

[12] There appears to be a comma-like superscript character over the "es" in this word, but its possible significance is not known.

[81v]

Die 5· Iunii 1631

Graecos nulla est casuum reservatio, tum quia subditi p'ti censuris irretiti ad sedem Ap'licam sine periculo vitae vel magna iactura bonorum accedere non possunt·

4° Et postremo repetito par'li dubio p'torum missionariorum occasione, cuius fuit disputatus praecedens articulus, An silicet[13] sacerdotes Armeni, et Graeci Uniti S·R·E· possint absolvere eorum subditos a casibus sedi Ap'licae reserva= tis; attento quod in Patriarchatibus orientalis Eccl'ae non est in usu reservatio casuum· Post diversas consi- derationes factas tam circa resolut^nem ipsius par'lis dubii de Iure, quam circa prudentialem admonitionem Mis= sionariis tradendam p'ribus placuit, ut diligentius p'tum dubium examinaretur

Non amplius examintum[12] fuit –

[There follows on this page the heading, four lines, and a marginal notation for a meeting of June 25, 1631 concerning Japan.]

[13] The word as written in the original text (and transcribed above) appears to be misspelled, omitting the first "c" in "scilicet."

[14] The word as written in the original text (and transcribed above) appears to be misspelled, omitting the second "a" in "examinatum."

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