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CHARACTERISTIC FEATURES OF THE PENAL LAW IN THE CODE OF CANONS OF THE EASTERN CHURCHES

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Dr. James Mathew Pamparam CMI, a specialist in Penal Law and Penal Procedures, presents the salient characteristic features of penal law and penal procedures under the following headings: 1. Abolition of *latae sententiae* Penalties in CCEO; 2. The Principle of Strict Legality in CCEO and in CIC; 3. The Medicinal Character of Penalties in CCEO; 4. Reserved Sins in the Eastern Code and 5. The Concept of Imputability.

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Introduction

The salvation history of the people of God narrated in the Bible is the story of God's initiative to save the humankind. This history also reveals that God employed even various punishments to save his chosen people. Salvation of souls is the supreme law of the Church (CIC c. 1752, CCEO c. 1519 § 1). To achieve this goal, the Church employs different means. Enacting of laws is one among them, though it is not always the most appropriate means to address the problems in the Church. However, since the pilgrim Church is and remains subject to human weakness, she needs laws that help her members to reach their goal. In her pastoral solicitude, the holy mother Church has also included some punishments in this body of laws and thus penal law also has become part of the legislation of the Church.

Penal law and penal procedure in the Church are analogous to crisis intervention in medicine. Salvation of each member is of the greatest importance for her and when all other means fail, she uses her coercive power to bring back the erring member, to re-establish the lost equilibrium in the community and as a deterrent. It is also part of the loving care of the Church. Certain diseases need special painful treatment. Due to pain, a child may refuse a particular treatment. However, the parents and the doctor, who know better, cannot remain indifferent in such a situation and would insist on it. Similarly, the holy mother Church too employs severe means sometimes for the ultimate good of the person. If properly understood and properly conducted, Church discipline is not harsh, unloving or unchristian. It is the compassionate effort to preserve people in the way of faith or to restore them to it.

Penal law is not the favorite subject of many, perhaps including canonists. A reason for this would be the extreme legalism and the harsh punishments of the past. As a reaction to the extreme legalism, crass individualism and permissiveness found their place even among some members of the Church. A popular tendency is to pitch punishment against the message of love and forgiveness proclaimed by Jesus Christ. In this attempt, very often one forgets that the goal of penal law also is the salvation of souls and that the Church is duty bound to use all means at her disposal to bring back the erring members of her folk and therefore she may have to use even penalties as a last resort.

Fortunately, the language of discipline is finding new acceptance in the Church, though it is happening perhaps at the backdrop of the very sad facts of sexual misconduct of her specially chosen children. Now one hears very often the demand for zero tolerance and severe punishments. In this context, one cannot forget that even at the face of the most heinous delicts, the Church cannot decide arbitrarily. She is duty bound to protect the youth from the abusers. At the same time, she is to see to it that no innocent person is punished based on false accusations. We can no more permit permissiveness and lack of accountability in the name of forgiveness if the youth are put in the way of danger. However, the solution is not imitating the Church leaders of the Council of Constance. The compassionate love of Jesus which pardoned the sinful woman of the Gospel should have a place in the Church. But it should not be at any cost. The cleansing of the temple by Jesus (Jn. 2, 13-16) may help us to see the Gospel message in a balanced way. Authentic community calls for attention to both interpersonal support (inclusion) and clarity about boundaries for the members (which may include exclusion).

This necessitates a thorough knowledge of the Penal Law and Penal Procedure in the Church. It is true that the Second Vatican Council mentions only twice the word *delictum* (LG 8, 37; 9, 25) and *de poenis* appears only once (GS 43, 15). But this fact does not diminish the importance of the Penal Law and the Penal Procedure. "Just as the Lord must not have liked speaking of sin and its punishment, the Church - even though she would prefer not to - must talk about sin and offenses."[1]

The penal laws in CCEO exhibit many characteristic features which are different from those of CIC 1983. Some of them are so conspicuous as to necessitate a separate treatment. This is an attempt to study the more important differences in this area between the two codes.

1. Abolition of *latae sententiae* Penalties in CCEO

One of the directive principles adopted by the first plenary session of PCCICOR was to abolish the *latae sententiae* penalties from the

[1]William H. Woestman, *Ecclesiastical Sanctions and the Penal Process. A Commentary on the Code of Canon Law*, second edition (Ottawa: St. Paul University, 2003) xi.

Eastern Code. According to the *Nuntia* this is because of the following reasons: In the authentic Eastern tradition we do not find any *latae sententiae* penalties. Such penalties do not exist in the Orthodox Churches. It did not seem necessary in the modern context.[2]

Petrus M. Seriski, in *Poenae in Iiure Byzantino Ecclesiastico*, a doctoral dissertation done under the guidance of Nikodim Milasch, the Orthodox bishop and canonist, however, holds that in the Byzantine Church there were *latae sententiae* penalties: "*Fere omnes poenae in iure byzantino ecclesiastico sunt ferendae sententiae, uti videbimus, sed etiam aliqua exempla habemus excommunicationis latae sententiae ..., duo praeterea pro depositione ... et unum pro suspensione ...*"[3] After this affirmation, the author cites canon 1 of the Council of Ephesus for the presence of *latae sententiae* excommunication. The terminology in question in this canon is the Greek word *enteuthen* (ἐντεῦθεν) which was translated into Latin using '*iam*': "*... omni ecclesiastica communione a praesenti iam hac synodo factus extorris atque privatus effectu*."[4] However, this *enteuthen* does not mean that the punishment is already inflicted *latae sententiae*. Actually the English translation of this canon in the edition of Norman P. Tanner did not even take into consideration this *iam* or *enteuthen* and translated the relavant part of the canon as follows: "He is thereby cast out by the synod from all ecclesiastical communion and deprived of all ecclesiastical authority."[5] This cannot be considered as an oversight or a mistake. In fact, Emil Herman observes rightly as follows: "Concerning the Byzantine Church, there is no sign that she ever had known *latae sententiae* penalties. The great canonists of the Middle Ages,

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[2]*Nuntia* 4 (1977) 73, 30 (1990) 67.

[3]Petrus M. Seriski, *Poenae in iure byzantino ecclesiastico*. Ab initiis ad saeculum XI (1054), (Rome: Officium libri cattolici, 1941) 17.

[4]Petrus M. Seriski, *Poenae in iure byzantino ecclesiastico*, 17 n 9; cf. also, Norman P. Tanner, ed., *Decrees of the Ecumenical Councils*, vol. I, 63. See also, Johannes D. Mansi, *Sacrorum Conciliorum*, vol. IV, col. 1471: "… ut qui iam inde a synodo totius ecclesiasiasticae communionis…". Périclès-Pierre Joannou, *Discipline Générale Antique* (II^{o}- IX^{o} s), t. I. I. *Les canons des conciles œcuméniques*, Fonti IX, Series I (Grottaferrata : 1962) 58 : "Omni ecclesisastica communione a presenti iam hac synodo factus extorris atque privatus effectu." "et est déjà exclu de toute communion et declare suspens par le concile."

[5]Norman P. Tanner, ed., *Decrees of the Ecumenical Councils*, vol. I, 63.

Aristinos, Zonaras and Balsamon speak, for example, while explaining canon 1 of the Council of Antioch, only about *ferendae sententiae*."[6]

In fact, Canon 1 of Ephesus notifies those absent from the Council of the depostion from office of John of Antioch, Theodoret of Cyrus and Ibas of Edessa and of the thirty bishops who stayed with them.[7] Hence the term 'enteuthen' in the canon referred only to the fact of deposition *ferendae sententiae* already carried out during the Council.[8]

Emil Herman, after having gone through the works of various canonists and historians of canon law, comes to the conclusion that there were no *latae sententiae* penalties in the Byzantine Church. He acknowledges that bishop Nikodim Milasch, in his work *Pravila pravoslavnoj tserkvi s tolkovanijami II* of 1912 comments on the ancient canons by distinguishing between *latae sententiae* and *ferendae sententiae* penalties.[9] However, he observes that in the work *Kirchenrecht der morganlandischen Kirche* of 1905,[10] Nikodim Milasch does not make any mention of *latae sententiae* penalties. Since *Pravila*

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[6]Emil Herman, "Hat die Byzantinische Kirche von selbst eintretende Strafen (poenae latae sententiae) gekannt?," *Byzantinische Zeitschrift* 44 (1951) 264.

[7]D. Cummings, *The Rudder* (*Pedalion*), 226.

[8]Charles Joseph Hefele gives the following translation for this canon: "Since those who for any reason, whether of an ecclesiastical or of corporeal nature, are absent from the holy Council and have remained in their own town or district, ought not to be left in the ignorance of the Council's regulations regarding them, we make known to your holiness and love that if any Metropolitan of the province has apostatized from the holy and ecumenical Council and joined the convocation of apostasy, or has joined it thereafter, or has adopted them, he shall have no power whatsoever to perpetrate anything against the Bishops of the Province, being already expelled and bereft of every function and of all ecclesiastical communion by the Council here. Moreover, he shall be laible in any case, to be expelled from the rank of the episcopate by the very Bishops of the province and by surrounding Metropolitans who adhere to the beliefs of Orthodoxy." Charles J. Hefele, *A History of the Councils of the Church*, vol. III (Edinburgh: T. & T. Clark, 1883), 73.

[9]Emil Herman, "Hat die Byzantinische Kirche von selbst eintretende Strafen, 259 n 7.

[10]Cf. Nikodemus Milasch, *Das Kirchenrecht der morgenländischen Kirche*, Trans., Alexander von Pessic, (Mostar: Pacher & Kisic, 1905) 489-515.

is of later date, it is possible that Milasch later changed his view. According to Milasch, even in the Roman empire there were traces of *latae sententiae* penalties in the form of *infamia facti* and *infamia iuris* or as *infamia immediata* and *infamia mediata*. However, citing U. Brasiello, Herman concludes that *infamia* was originally not a strictly legal concept.[11] According to Emil Herman, the only legal concept in the Roman law which comes near to the *latae sententiae* penalties is *perduellio* or high treason whereby one loses his or her citizenship at the moment of this crime.[12]

Emil Herman presents a number of canon law historians on both sides of the spectrum, that is, those who hold the view that *latae sententiae* penalties were of ancient origin and those who hold the view that there were no traces of *latae sententiae* penalties before the seventh or eighth century. Franz Quirin Kober[13], Josef Hollweck[14] and Johannes Baptist Sägmüller[15] represent the former group whereas Paul Hinschius,[16] Edgar Loening[17] and Bertrand Kurtscheid belong to the latter group. Even before these canonists, Bernhard van Espen affirmed in his work *Ius ecclesiasticum universum* that there were no penalties in the Church that could be called *ipso facto* or *ipso iure* in the first ten centuries of Christianity.[18] On the other hand, Joseph Bingham affirmed in his book *Origines sive antiquitates*

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[11]Emil Herman, "Hat die Byzantinische Kirche von selbst eintretende Strafen, 259-260.

[12]Emil Herman, "Hat die Byzantinische Kirche von selbst eintretende Strafen, 260.

[13]Franz Quirin Kober, *Der Kirchenbann nach den Grundsätzen des canonisches Rechts*, (Tübingen: Verlag Laupp, 1863) 51ff.

[14]Josef Hollweck, *Die kirchlichen Strafgesetze*, (Mainz: Kirchheim, 1899) 87.

[15]Johannes Baptist Sägmüller, *Lehrbuch des katholischen Kirchenrechts*, vol. II, (Freiburg i. Breisgau: Herder Verlag, 1914) 348 n 4.

[16]Paul Hinschius, *Das Kirchenrecht der Katholiken und Protestanten in Deutschland*, (Berlin: Guttentag, 1888) vol. IV, 761, vol. V, 130ff.

[17]Edgar Loening, *Geschichte des deutschen Kirchenrechts*, vol. I, (Straßburg: Trübner, 1878) 272ff.

[18]Zeger Bernhard van Espen, *Ius ecclesiasticum universum antique et recentiori disciplinae praesertim Belgii, Galliae, Germaniae et vicinarum provinciarum accomodatum*, (Lovanii, Lugduni: Bruyset, 1778) Pars III, tit XI c. VII nn 19-25.

ecclesiasticae that the *ipso facto* excommunication existed at the time of christian persecution:

> Nam ipso facto, ut viri docti docent, excommunicati erant; quum facti ipsius evidentia perspecta omnibus satis esset ad declarandum illos excommunicatos, ut qui omnia christianae communionis iura ac privilegia perdidissent.[19]

From this short survey, it is evident that there were always differing opinions regarding *latae sententiae* penalties among the canonists and canon law historians. However, there is evidence in the writings of St. Augustine to show that he did not think of the possibility of *latae sententiae* penalties. For, he writes:

> Nos a communione prohibere quemquam non possumus quamvis haec prohibitio nondum sit mortalis, sed medicinalis... nisi aut sponte confessum aut in aliquo sive saeculari sive ecclesiastico iudicio nominatum atque convictum.[20]

Ivan Žužek, in his book *Kormcaja Kniga*, already in 1964 treated this issue of *latae sententiae*. He writes as follows:

> "Seriskij P. P., *Poenae in iure byzantino eccelsiastico ab iniitis ad saeculum X* (1054), Rome, 1941, p. 17. N. 9, tries to prove that there were *poenae latae sententiae* in the Byzantine Church. However, the Greek word *enteuthen* in cc. 1 and 13 Antioch and in c. 1 Ephesus would mean rather "hence, thence, henceforth, and thereupon". At any rate all these canons are included in the Kormcaja contain exclusively punishments *ferendae sententiae* (c. 1 Ephesus "otveržen da boudet"; c. 1 Antioch "da izveržetsja" and, in the commentary, "da izverženi boudut"; c. 13 Antioch "da izveržetsja"). No Greek commentator (Aristenus, Zonaras, Balsamon) ever interpreted these canons otherwise than in the sense of *ferendae sententiae*. Seriskij admits (p. 87): "Nisi expresse contrarium dicatur in canone vel evidentissime pateat ex contextu, excommunicatio est *ferendae sententiae.*"

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[19]Joseph Bingham, *Origines sive antiquitates ecclesiasticae*, (Halle: sumtibus orphanotrophei, 1728) lib. XVI, cap III § 10 (t. VII, p. 163).

[20]St. Augustine, *Sermo* 351 c. 10, *Patrologia Latina,* 39.

> One might ask: from which of the texts given by Seriskij on p. 17 n. 9 does anything appear evidentissime? Herman E. in his short article 'Hat die byzantinische Kirche von selbst eintretende Strafen (poenas latae sententiae) gekannt', *Byzantinische Zeitschrift* 44 (1951) 258-264, finds "keine spur" of a poena *latae sententiae* in the Byzantine Church. The same is true about the Russian Church. Note that MICHIELS G. (*De delictis et poenis*, vol. II, Parisiis-Tornaci-Romae-Neo Eboraci, 1961, pp. 55-56) says that c. 1 Antioch "certocertius" contains a *poena latae sententiae*. Every introduction of such punishments in the oriental (Byzantine) canon law is, instead, a great innovation."[21]

The *latae sententiae* penalties do not give the accused the opportunity for self defense. The *sacri canones* very often emphasized the need of *ius defensionis* in penal processes.[22] In *latae sententiae* penalties the canonical warning is not required. The Eastern code gives much importance to the canonical admonition. These considerations also prompted the decision to abolish the *latae sententiae* penalties. Another added reason for the abolition of *latae sententiae* penalties in the Eastern code is the decision of the Code Commission to reduce all the penalties to the external forum.[23]

The present Latin code also reduced the number of *latae sententiae* penalties to a considerable extent. There were forty *latae sententiae* excommunications and three *latae sententiae* interdicts in CIC 1917. But CIC 1983 contains only seven *latae sententiae* excommunications, seven *latae sententiae* interdicts and six suspensions.[24] This trend also helped the Eastern Code Commission to abolish such penalties from the Eastern code.

The decision to abolish the *latae sententiae* penalties from the Eastern code was not acceptable to all. In the *coetus centralis*, two abstained

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[21]Ivan Žužek, *Kormcaja Kniga*. Studies on the Chief Code of Russian Canon Law, (Orientalia Christiana Analecta 168, Rome: Pontificium Institutum Orientalium Studiorum, 1964) 220 n 86.

[22]Cf. *The Council of Constantinople* (381), can. 6; Synod of Carthage, can. 87; Theophilus of Alexandria, cc. 6 and 9.

[23]*Nuntia* 30 (1990) 68-69.

[24]Angelo Urru, *Sanzioni penali nella Chiesa*, (Rome: Millennium, 1996) 209-210.

from voting. Ivan Žužek, the Pro-Secretary of the Code Commission, explained to the first plenary assembly of the commission the reasons to abolish the *latae sententiae* penalties completely. According to him, it is in the Synod of Diamper[25] that we find the first reference to the *latae sententiae* penalties in an Eastern Catholic Church[26]. Later too we see such instances because of the influence of the Latin Church. But these do not reflect the genuine Eastern spirit. Can. 1408 of the Eastern Code executes this decision to abolish the *latae sententiae* penalties. According to this canon, before the imposition of a penalty the guilty party is not bound by it.[27] Its repercussions are far reaching. For example, a religious in perpetual vows, who attempts marriage, incurs *latae sententiae* interdict according to the Latin code (CIC c. 1394 § 2). Hence he or she is forbidden to receive the Divine Eucharist. In such a delict, the Eastern religious is not forbidden to receive the Eucharist, since he or she is not under any penalty until one is imposed. It is true that CCEO c. 712 lays down that one who is publicly unworthy is forbidden to receive the Divine Eucharist. Such a norm is not sufficient to prevent such persons from

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[25]For details about the Synod of Diamper, cf. Jonas Thaliath, *The Synod of Diamper*, (Orientalia Christiana Analecta 152, Rome: Pontificium Institutum Studiorum, 1958) 1-174.

[26]"La prima *poena latae sententiae* che è entrata in Oriente sembra, fino a prova contraria, sia stata quella del Nunzio Apostolico [*sic*; read Archbishop of Goa] che minacciava di scomunica i Vescovi Malabaresi che non fossero andati al Sinodo di Diamper. Altre *poenae latae sententiae* sono state introdotte in seguito, ma l'Oriente ortodosso non le conosce... È vero che alcune *poenae latae sententiae* nel Codice latino sono inflitte per gravissimi delitti, si deve però dire, che esse di per sé, non corrispondono alle tradizioni orientali. Quindi se si decide di recepirle nel Codice orientale, ciò si faccia con piena consapevolezza che esse di per sé non appartengono alle tradizioni orientali. In *Communicationes*, si dice che queste punizioni sono ridotte a poche. *Communicationes* danno due ragioni di ciò: 1) alcuni delitti sono gravissimi; 2) essi spesso sono occulti. Ma si può pensare che anche nei riguardi di delitti gravissimi sia possibile sempre una gravissima pena *ferendae sententiae*. Se poi si tratta di delitti occulti, trovo delle difficoltà con l'altro principio, pure espresso in *Communicationes*, che dice totum ius penale ad forum externum reductum est. Come si fa allora a punire *delicta vera occulta*, non saprei dirlo. Quindi questo è il punto nodale nel testo proposto. *Nuntia* 30 (1990) 68-69.

[27]Cf. Sabine Demel, „Tatstrafe contra Spruchstrafe? Ein Vergleich des CIC/1983 mit dem CCEO/1990," *Archiv für katholisches Kirchenrecht*, 165 (1996) 95-115.

communicating since they are not under canonical penalties. One becomes publicly unworthy, according to the Eastern code, only when it is so pronounced by an ecclesiastical sentence or administrative decree. In the case of *latae sententiae* penalties, such declaration from the part of ecclesiastical authorities that one is under the penalty amounts only to an official declaration of the factual situation of the culprit who is already under penalty. But in the *ferendae sententiae* penalties, until the penalty is imposed, the accused is to be considered innocent, and he or she is juridically equal to others. In the example given above, however, even a member of an Eastern Church is bound in conscience not to receive the Eucharist because of the state of sin in which he or she lives and therefore, in effect, there will be no difference.

Though CCEO c. 1408 abolishes *latae sententiae* penalties from the Code, it contains an exceptive clause which recognizes the possibility of introducing the *latae sententiae* penalties binding the Easterner too. The Supreme Authority of the Church can introduce *latae sententiae* penalties binding the Easterners: "A penalty does not bind the guilty party until after it has been imposed by a sentence or decree, without prejudice to the right of the Roman Pontiff or an ecumenical council to establish otherwise" (CCEO c. 1408). The Roman Pontiff has already used this provision to establish a *latae sententiae* penalty that can bind members of the Eastern Churches also through the Apostolic Constitution *Universi Dominici Gregis* on 22 February 1996.[28] Nos. 58, 78, 80 and 81 prescribe *latae sententiae* penalties for various kinds of violations of law enshrined in this Constitution like the violation of the law of pontifical secrecy (no. 58), use of simony in the election process (no.78), etc. Since there are members of the Eastern Churches in the College of Cardinals, they are bound by these *latae sententiae* penalties in case they violate any of those norms. These *latae sententiae* penalties can affect not only the Cardinals, but those members who collaborate with the election process (nos. 46 & 58) and there can be members of the Eastern Churches to fulfil these duties.

Jesús Miñambres observes that it is difficult to interpret and apply these penalties on members of the Eastern Churches since the

[28]John Paul II, Apostolic Constituion *Universi Dominici Gregis*, 22 February 1996, Vatican City: Libreria Editrice Vaticana, 1996.

Eastern penal law does not know *latae sententiae* penalties.[29] He raises an added problem because of the terminology of the oath to be taken by the collaborators of the election process: it only refers to "the spiritual and canonical penalties which the future Supreme Pontiff will see fit to adopt, in accordance with Canon 1399 of the Code of Canon Law" (no. 48). However, in our view, the problem is only apparent. Actually we have to distinguish two groups of persons: the first group is the College of Cardinals who is under the *latae sententiae* penalties in case of violation irrespective of their ecclesiastical affiliation. The second group is the collaborators who take the above mentioned oath. Their punishment can be broader if they are members of the Latin Church because of the reference to CIC c. 1399. However, in our context, it is evident that they also incur *latae sententiae* penalties if they violate the law regarding secrecy based on no. 58 of *Universi Dominici Gregis* which states as follows:

> Those who, in accordance with the prescriptions of No. 46[30] of the present Constitution, carry out any functions associated with the election, and who directly or indirectly could in any way, violate secrecy – whether by words or writings, by signs or in any other way – are absolutely obliged to avoid this, lest they incur the penalty of

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[29]Jesús Miñambres, "Il governo della Chiesa durante la vacanza della Sede Romana e l'elezione del Romano Pontefice," *Ius Ecclesiae* 8 (1996) 726.

[30]Universi Dominici Gregis, no. 46: "In order to meet the personal and official needs connected with the election process, the following individuals must be available and therefore properly lodged in suitable areas within the confines mentioned in No. 43 of this Constitution: the Secretary of the College of Cardinals, who acts as the Secretary of the electoral assembly; the Master of Papal Liturgical Celebrations with two Masters of Ceremonies and two Religious attached to the Papal Sacristy; and an ecclesiastic chosen by the Cardinal Dean or by the Cardinal taking his place, in order to assist him in his duties.

There must also be available a number of priests from the regular clergy for hearing confessions in the different languages, and two medical doctors for possible emergencies.

Appropriate provisions must also be made beforehand for a suitable number of persons to be available for preparing and serving meals and for house keeping.

All the persons indicated here must receive prior approval from the Cardinal Camerlengo and the three Cardinal Assistants.

> excommunication *latae sententiae* reserved to the Apostolic See.

According to John D. Faris, CCEO did not adhere fully to the principle of strict legality.[31] His argument is based on CCEO c. 1464 § 1:

> In addition to the cases already foreseen by law, a person who, by act or omission, has misused power, an office, a ministry or another function in the Church, is to be punished with appropriate penalty, not excluding their privation, unless another penalty has been established by law or precept for such an abuse.

For John D. Faris, the insertion of the phrase "in addition to the cases already foreseen in law" makes the code to depart from the principle *nulla poena sine lege*. However, here the penalty stipulated is for the abuse or misuse of power and the phrase refers only to the way in which these misuses can take place and thus does not violate the principle of strict legality.

1.2. The Principle of Strict Legality in CCEO and in CIC

The principle of strict legality is an important principle in secular penal law according to which no one can be punished who has not violated a penal law or a penal precept which already exists. This principle is expressed in canon law in the formula *nulla poena sine lege poenali praevia*.[32] According to Antonio Calabrese this principle existed in the civil law and also in the ecclesiastical legislations at

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[31]John D. Faris, "Penal Law in the Catholic Churches: A Comparative Overview," *Folia Canonica* 2 (1999) 73 n 43.

[32]Usually authors use the shortened forms such as *nulla poena sine lege* or *nulla poena sine lege praevia*. Also the elaborated version "*nullum crimen, nulla poena sine lege*" is seen; cf., Franco E. Adami, "Il diritto penale canonico e il principio «nullum crimen, nulla poena sine lege»," *Ephemerides iuris canonici*, XLVI (1990) 137-173. Wilhelm Rees states that this principle is first formulated by Anselm von Feuerbach: Wilhelm Rees, *Die Strafgewalt der Kirche.* Das geltende kirchliche Strafrecht – dargestellt auf der Grundlage seiner Entwicklungsgeschichte, (Kanonistische Studien und Texte, Band 41, Berlin: Bunker & Humblot, 1993) 485.

least from the twelfth century.[33] According to many other scholars, however, this principle is the product of individualism, which evolved and asserted itself in the seventeenth and eighteenth centuries. Its main proponents were Montesquieu, Beccaria and Feuerbach and it was to protect the individuals from the arbitrary punishments of the dictators.[34] This principle of strict legality was presented as the *Magna carta* of the offenders by penalists.[35] It was even presented as one of the basic human rights.[36]

The Eastern Code contains this principle but decided not to mention it explicitly in the Code. The *Nuntia* reports as follows:

> In the *coetus*, there was a profound discussion regarding the principle *nulla poena sine lege poenali praevia*. Even though this principle is seen in some of the eastern civil *fonti*, it is not certain whether it was being applied in the Church and it does not seem, to the present state of scientific research, to be of the common tradition of the Eastern Churches. Moreover, it is not certain whether this principle always and in every case corresponds more to the *salus animarum* or to the nature of the Church as a *societas*. In conclusion, although in substance the schema *de delictis*, as proposed by the group conforms to this principle, it is not considered opportune to mention explicitly in CICO.[37]

The principle of strict legality is contained in the first part of CCEO c. 1414 § 1: "Only those are subject to penalties that have violated a penal law or a penal precept". This canon is the application of the fundamental right of all the Christian faithful elaborated in CCEO c. 24 § 3: "The Christian faithful have the right not to be punished with

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[33]Antonio Calabrese, *Diritto penale canonico*, Third Edition (Vatican City: Libreria Editrice Vaticana, 2006) 347.

[34]Franco E. Adami, "Il diritto penale canonico,"137-173.

[35]Franco E. Adami, "Il diritto penale canonico,"139; Reinhold Sebott, *Das kirchliche Strafrecht*. Kommentar zu den Kanones 1311-1399 des Codex Iuris Canonici (Frankfurt am Mein: Verlag Josef Knecht, 1992) 233-234; Richard Adolf Strigl, "Die einzelnen Straftaten," *Handbuch des katholischen Kirchenrechts*, eds. Joseph Listl, Hubert Müller and Heribert Schmitz (Regensburg: Verlag Friedrich Pustet, 1983) 948-950.

[36]Richard Adolf Strigl, "Die einzelnen Straftaten," 949.

[37]*Nuntia*, 4 (1977) 79.

canonical penalties except in accordance with the norm of law. This fundamental right is present in CIC c. 221 § 3 of the Latin code too: Christ's faithful have the right that no canonical penalties be inflicted upon them except in accordance with the law. This fundamental right is taken by both Codes from can. 21 of the *Schema legis Ecclesiae fundamentalis* according to which no one is to be punished except in cases which the law defined and in the mode prescribed by it.

Although this fundamental right is present in the Latin code, it does not contain the principle of strict legality. CIC c. 1399 stipulates: "Besides the cases prescribed in this or in other laws, the external violation of divine or canon law can be punished, and with a just penalty, only when the special gravity of the violation requires it and necessity demands that scandals be prevented or repaired." Hence this canon gives the possibility of penalty when a divine or ecclesiastical law is violated even though it is not protected by a penal law. It is true that CIC c. 1399 places two restrictions and thus makes the imposition of penalties for the violation of non penal laws very difficult. However it provides such a legal possibility and thus derogates from the principle of strict legality. But it does not contradict the fundamental right enunciated in canon 221 § 3, because the punishment is to be in accordance with the law (CIC c. 1399).

CIC c. 1399 is not something new in the canonical tradition of the Latin Church. CIC 1917 c. 2222 § 1 already contained this norm:

> Even though a law has no sanction attached to it, the legitimate Superior may nevertheless punish its transgression by a just penalty, even without a previous mentioning of the penalty if the scandal perhaps was given or the special gravity of the transgression makes it necessary; otherwise a defendant cannot be punished unless he was first warned with the mention of the penalty, [whether] automatic or formal, in case of transgression, and nevertheless violates the law.[38]

[38]English translation taken from: Edward N. Peters (curator), *The 1917 Pio-Benedictine Code of Canon Law.* In English Translation with Extensive Scholarly Apparatus, San Fransisco: Ignatius Press, 2001.

CIC 1917 c. 2222 § 1 is also not entirely new in the canonical tradition. Its *fonti* include many references to the *Corpus Iuris Canonici* and to various other legal documents.[39]

While CIC 1917 c. 2195 § 1 expressly recognized the principle of strict legality by defining delict as "an external and morally imputable violation of a law to which a canonical sanction, at least an indeterminate one, is attached", CIC 1917 c. 2222 § 1 expressly diluted the same principle. During the codification process, there was a suggestion that this canon was to be suppressed.[40] In fact, the number of canonists who were critical of this norm was impressive.[41] However this suggestion was rejected saying that the principle *nullum crimen nullaque poena sine lege*, which was proper to the civil law, should not be applied in the strict sense in the canonical penal law and the canon should remain.[42]

There are several canonists, who agree with the decision to retain this canon though it violates the principle of strict legality. Antonio Calabrese explains:

> Questa norma intende stabilire un giusto equlibrio tra le esigenze della certezza del diritto, sancita dal principio «nulla poena sine lege», comune negli ordinamenti statali e vigente in quello della Chiesa fin dal sec. XII, e quella cui spesse volte abbiamo fatto riferimento in questo nostro lavoro, la *salus animarum*, che deve essere tutelata anche quando l'ordinamento canonico non ha considerato delitto un determinato comportamento illecito, contrario alla legge divina o canonica, o, pur avendolo previsto e proclamato illecito, non vi annesso pene. Lo richiede la natura particolare

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[39]Cf. Petrus Gasparri, ed., *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus.* Fontium annotatione et indice analytico-alphabetico, (Vatican City: Typis Polyglottis Vaticanis, 1974) 693 n 3.

[40]*Communicationes* 7 (1975) 94.

[41]Wilhelm Rees enlists Bruno Priemetshofer, Horst Hermann, Alexander Dordett, Albin Eser, Gerhard Luf, Werner Böckenförde, and Corrado Bernardini as having written against the presence of this norm: cf. Wilhelm Rees, *Die Strafgewalt der Kirche,* 485 n 425, 486 n 426.

[42]*Communicationes* 9 (1977) 318; 15 (1984) 51; see also: Pio Vito Pinto, *Commento al codice di dirito canonico* (Rome: Urbanianum, 1985) 823.

> della Chiesa, che non è una società come quella statale, ma ha come esigenza e fine primario proprio la *salus animarum*.[43]

Velasio De Paolis does not consider the principle of strict legality as a natural human right. For him the natural human right is *nulla poena sine culpa*, and hence he also justifies the presence of CIC c. 1399.[44] Wilhelm Rees too justifies the presence of this norm affirming that it is acceptable and needed because of the spiritual character of the Church and of the Canon Law.[45] Richard Adolf Strigl[46] and Reinhold Sebott[47] are also of the opinion that the Church cannot accept the principle of strict legality as an absolute. Instead they propose another principle to be held always in the Church, namely, *nulla poena sine culpa*.[48] This principle is found in the *regula iuris* of Boniface VIII. The *regula iuris* XXIII of *Liber VI°* runs: *Sine culpa, nisi*

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[43]Antonio Calabrese, *Diritto penale canonico*, Third Edition, (Vatican City: LEV, 2006) 347.

[44]Velasio De Paolis, *De sanctionibus in Ecclesia.* Adnotationes in Codicem: Liber VI (Rome: Editrice Pontificia Università Gregoriana, 1986), 122-123: In statibus modernis generatim, quoad sistema poenale, admittitur principium: "nulla poena sine lege" (poenali previa). Nemo puniri potest nisi punitio iam praevisa sit in lege poenali et secundum ipsam legem poenalem. Hoc principium introductum est praesertim contra absolutismum principum; ad difendenda iura civium. Ita hodie principium acceptatur inter principia iurium hominis fundamentalium. Tamen non est decendum principium esse iuris naturalis. Iuris naturalis est potius aliud principium: nulla poena sine culpa.

[45]"Diese dem heutigen Rechtsempfinden nicht leicht verständliche Allgemeine Norm steht im Zusammenhang mit dem geistlichen Charakter der Kirche und des Kirchenrechts. Die Kirche als Heilsgemeinschaft kann nicht zulassen, dass jede Handlung oder Unterlassung, die nicht ausdrücklich durch eine mit einer Strafe bewehrten Norm verboten ist, straffrei bleiben solle." Wilhelm Rees, *Die Strafgewalt der Kirche*, 486.

[46]Richard Adolf Strigl, "Die einzelnen Straftaten, 948-950.

[47]Reinhold Sebott, *Das kirchliche Strafrecht*, 234: "Der spezifische Charakter der Kirche als Heilsgemeinschaft bietet Angriffsflächen, die nicht alle von vornherein kalkulierbar sind, so dass sich möglicherweise auftretenden Verletzungen ihrer Ordnung auch nicht in ausschließender Aufzählung fest gelegen lassen. Die Kirche wird sich daher nicht dazu verstehen können, dass alles, was nicht ausdrücklich durch eine mit Strafsanktion bewehrte Norm verboten ist, straffrei bleiben solle. Deshalb hat die Kirche die Generalklausel des can. 1399 aufgestellt."

[48]Reinhold Sebott, *Das kirchliche Strafrecht*, 235.

subsit causa, non est aliquis puniendus.[49] So Thomas H. Green concludes: Hence the Eastern Code reflects a strict adherence to the maxim *nulla poena sine lege* or the so-called principle of strict legality whereas the Latin code might better be said to embody the maxim *nulla poena sine culpa*.[50] This conclusion is not warranted. Actually the principle *nulla poena sine culpa* is very much present in CCEO c. 1414. In addition to this, CCEO adheres to the principle of strict legality.

The adherence to the principle of strict legality by the Eastern Code is very much appreciated by Giuseppe Di Mattia.[51] But such an adherence to this principle is not without disadvantages. It is not always possible to foresee all the possible violations of divine and ecclesiastical laws. Hence instances may arise where someone violates a divine law or ecclesiastical law which creates a great scandal. In such occasions the general norm enunciated in can. 1399 of the Latin code provides a tool for the Western Church, whereas the Eastern Churches may find themselves helpless. Thus one may argue that the Eastern Churches are now in a more vulnerable position and thus their canonists are to find all possible transgressions of ecclesiastical and divine laws and to attach penalties to them in their particular laws to avoid all scandalous situations. However, it need not be as problematic as it appears. Many such probable violations can be prevented by the use of penal

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[49]Aemilius Friedberg, ed. *Corpus iuris canonici*, vol. II, 1122. Alphonse Borras mistakenly affirms that this principle is seen in Boniface VII: Alphonse Borras, *Les sanctiones dans l'Église*. Le nouveau droit eccleisial. Commentaire du livre VI du Code de Droit Canonique (Paris : Editions Tardy, 1990) 211.

[50]Thomas H. Green, "Penal Law in the *Code of Canon Law* and in the *Code of Canons of the Eastern Churches*: Some Comparative Reflections," *Studia Canonica* 28 (1994) 441.

[51]Giuseppe Di Mattia, "La normativa di diritto penale del *Codex Iuris Canonici* e nel *Codex Canonum Ecclesiarum Orientalium*," *Apollinaris* 65 (1992) 164: "Nell'ambito dello *ius poenale* CCEO va presentato con particolare risalto un *dato*, che nel contesto di tutto l'ordinamento canonico, assume una portata di incalcolabile valore, riflettendosi nel campo speculativo e operativo del diritto canonico. Il *Codex canonum Ecclesiarum orientalium* accoglie il *principio di stretta legalità,* radicato nell'altro fondamentale *principio della certezza del diritto* ed espresso nel notissimo assioma: *nullum crimen, nulla poena sine praevia lege poenali*, che è ritenuto come la Magna carta del reo.

precepts by the concerned authority. Since the use of penalty should be the last resort, it is indeed better to adhere to the principle of strict legality as is followed by the Eastern code.

The adherence to the principle of strict legality can create confusion in the interecclesial context too. For example, both Codes forbid making a collection without the permission of the local Ordinary (CIC c. 1265, CCEO c. 1015). But this prohibition is not reinforced by adding penalties to it. Hence a violation of such an ecclesiastical law will not become a delict under normal conditions according to both Codes. In such cases, the Latin Ordinary can invoke CIC c. 1399 to punish the one who belongs to the Latin Church. But since such a canon is absent in the Eastern Code, the Eastern Hierarch does not have such an easy tool at hand if a member of one of the Eastern Churches comes to his eparchy and makes a collection without his permission. Once he comes to notice such an abuse, he can prevent further abuses by giving a warning according to CCEO c. 1406 § 2. But the first violation will go unpunished, unless there is a particular law which prohibits such actions. Since the principle *locus regit actum* is unacceptable in penal laws too, if an Easterner goes to the Latin Diocese and makes a collection without the needed permission, he or she cannot be punished using CIC c. 1399. On the contrary, if a faithful of the Latin Church commits the same violation, can. 1399 can be invoked because he or she is bound by the canon. This example illustrates the difficult situation which can arise due to this major difference between the Codes. However, in the given example, there are possible solutions too, without diluting the principle of strict legality like enacting particular laws governing these matters or by issuing penal precepts.

1.3. The Medicinal Character of Penalties in CCEO

One of the most important characteristic marks of the Eastern thinking is its conception of delicts as illness and penalties as medicine. This idea is explicit in canon 102 of the Council of Trullo of 691/692. The Eastern Code takes up this idea in its first canon on penalties (CCEO c. 1401) thus subscribing to this mentality without any reservation. Hence the Eastern code does not divide the penalties into medicinal and expiatory as does the Latin code.[52] In

[52]CIC 1917 used the term '*poenae vindicativae*'. During the revision process, even in the report of 20 May 1967, the terminology '*poenae*

this way, it presents all penalties as medicinal.[53] It includes as penalties positive acts such as prayers, pilgrimages, acts of charity, etc (CCEO c. 1426).[54] These are 'medicines' which the patient should take for the cure of the 'disease'. If the patient is not ready to take such medicines, then other penalties are to be imposed and there are no perpetual penalties.[55]

This profound vision permeates many of the canons of the Eastern Code and hence it can be rightly presented as a person-centred one. Each person and his or her well-being is the focal point in the penal laws. Hence it gives much importance to canonical warning. It stipulates that the imposition of penalties should be done through penal trial except in certain special situations (CCEO c. 1402). It clearly demarcates a significant number of penalties which cannot be imposed through administrative decrees (CCEO c. 1402 § 2). It permits the hierarch to abstain from penalties if the good of the offender suggests otherwise and the other conditions are being fulfilled (CCEO c. 1403).[56] All these are instances which illustrate the person-centred approach visualized by the medicinal character of penalties in the Eastern Code.

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vindicativae' existed. In the meeting of May 1967, it was proposed to change this term and to use instead '*poenae expiatoriae*' or '*poenae purgatoriae*'. The former terminology was accepted and being used since 11 July 1967. Later the terminology '*poenae reparatoriae*' was suggested as an alternative, though later abandoned. Cf. *Communicationes*, 1976, 169; Pio Ciprotti, "Qulache punto caratteristico della riforma del diritto penale canonico," *Ephemerides iuris canonici*, XLV (1989) 117-118.

[53]According to CIC 1917 c. 2215, the goal of a penalty is "the correction of a delinquent or the punishing of a delict". In CIC c. 1341, the goal of penalty is presented as "repair the scandal, restore justice [and] reform the offender". Here one may note that the order of the three goals where the reform of the offender occupies the last place. On the other hand, the CCEO, though all these goals can be found, the primary goal is always the reform of the offender.

[54]CIC does not consider such positive acts as part of penalties. That is why the book VI of CIC is called 'de sanctionibus in Ecclesia" whereas the title XXVII of the Eastern code is entitled "de sanctionibus poenalibus in Ecclesia".

[55]Carl Gerold Fürst, "Penal Sanctions in the Church," in *Guide*, 793.

[56]The conditions include reparation of damage and harm and from these conditions one can conclude that the societal aspects are also taken care of in CCEO.

The Latin code also speaks of the medicinal aspect of penalties and it also contains medicinal penalties (CIC c. 1312 § 1 n 1°). But it contains another category of penalties too called expiatory penalties. It does not emphasize such a vision of penalties as does the Eastern Code. On the contrary, it begins by asserting the inherent right and duty of the Church to punish (CIC c. 1311). It also shows a certain preference to the judicial way of imposing the penalties, but at the same time, leaves the question to the discretionary judgment of the competent authority to decide and it excludes from administrative imposition the perpetual penalties only (1342). All these illustrate the differences in the basic vision of penalties in the Codes.

According to Jobe Abbass, there is already an *expiatory* penalty in the Eastern code in the form of dismissal of religious.[57] For him, the *ipso iure* dismissal of a religious stipulated in CCEO c. 497 is an automatic penalty. His authority in this regard is John Martin, who, commenting on CIC c. 1336 § 1, gives as an example for expiatory penalties the dismissal from a religious life.[58] He also cites an opposite view expressed by Dariuz Borek, but rejects it as unhelpful since the author treated the issue only in the conclusion of the article mentioned.[59] However, Jobe Abbass does not refer to the doctoral dissertation of the same author defended in the Lateran University that treated the question whether the dismissal of a religious was a

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[57]Jobe Abbass, "The Consecrated Life: "donum caritatis" in the East and the West," in *Ius Ecclesiarum vehiculum caritatis*. Atti del simposio internazionale per il decennale dell'entrata in vigore del *Codex Canonum Ecclesiarum Orientalium*, Città del Vaticano, 19-23 novembre 2001, (Vatican City: Libreria Editrice Vaticana, 2004) 355-357.

[58]Jobe Abbass, "The Consecrated Life: "donum caritatis" in the East and the West," 355 n 87. According to John Martin, the list of expiatory penalties given in the canon CIC c. 1336 § 1 is not exhaustive and the universal or particular legislator can add other penalties and the dismissal is such a penalty: "Five examples of this type of (expiatory) penalty are listed in the canon. The list is not exhaustive. The universal or particular legislator may decide to add other expiatory penalties, e.g. dismissal from a religious institute." John Martin, "Expiatory Penalties," in Gerard Sheehy, et.al., eds., *The Canon Law Letter and Spirit*, 767.

[59]Jobe Abbass, "The Consecrated Life: "donum caritatis" in the East and the West," 355 n 87; Dariuz Borek, "La dimissione dei religiosi a norma del c. 694 del '*Codex*' del 1983: è una pena espiatoria '*latae sententiae*'?," *Commentarium pro religiosis et missionariis* 81 (2000) 93-95.

penalty.[60] For Dariuz Borek, dismissal of a religious is not a penalty. It is just a *sui generis* administrative procedure which has elements of penal procedure.[61] His argument goes like this: there are two ways of exercising the power of coercion, namely by imposing penal sanctions or by the exercising the provision given in the law to dismiss from the state of consecrated life.[62] He argues that the dismissal cannot be considered a penalty because one can be dismissed even for grave short comings which are not delicts:

> Si osserva, inoltre, che la dimissione dallo stato di vita consacrata non può essere considerata come una pena perché non sempre sono richiesti i delitti, in alcuni casi, infatti, per la dimissione bastano le mancanze gravi. Una pena espiatoria perpetua, tale carattere avrebbe dovuto assumere la dimissione se fosse considerata come una pena, non può essere irrogata mediante un decreto (can. 1342 § 2).[63]

In our view, the dismissal from consecrated life is not a penalty. If it were a penalty, it would have been given in the section of penalties. No one has any fundamental right to belong to any institute of consecrated life. One is admitted when he or she agrees to follow the norms of the institute and one loses the membership also according to the same norms. In the strict sense, the dismissal is not a canonical penalty and it does not expect the 'return' of the lost sheep to the Institute in question. It only implies that the way to God for the person is no more through that Institute.

Another criticism regarding the affirmation that all penalties in the eastern code are medicinal in nature is the nature of the penalty of deposition. This penalty is usually considered as a permanent penalty. However, one has to bear in mind that the sacrament of orders is not a basic right of any one and even a deposition, even if

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[60]Dariuz Borek, *L'esercizio della potestà coattiva nella Chiesa con particolare riferimento alla dimissione dei religiosi*. Studio giuridico-storico, Rome: Pontificia Università Lateranense, 1999.

[61]Dariuz Borek, *L'esercizio della potestà coattiva nella Chiesa con particolare riferimento alla dimissione dei religiosi*, 261.

[62]Dariuz Borek, *L'esercizio della potestà coattiva nella Chiesa con particolare riferimento alla dimissione dei religiosi,* 256.

[63]Dariuz Borek, *L'esercizio della potestà coattiva nella Chiesa con particolare riferimento alla dimissione dei religiosi*, 261.

permanent, can help the spiritual well being of the offender in question. A deposed priest is *per se* not denied the sacraments, the means of salvation. The deposition, when permanent, only says that the ministerial priesthood is not conducive for the *salus animae* of the person deposed and the *salus animarum* of the community in the present conditions. Moreover, theoretically, there is the possibility that a deposed priest can be reinstated to the clerical state. One may also argue that the provision in CCEO to deny burial as a penalty which is not medicinal in character. However, this argument does not hold because CCEO stipulates that all penalties cease with death and the provision of denial of burial is not seen in the section on penalties.

One may wonder how one can affirm that all the ancient canons in the East were medicinal in nature if one see canon 5 of the Synod of Isaac of 410 that stipulated as follows:

> Auguries, divinations, and alien works of impiety and sin which are related to paganism, and knots, amulets, witchcraft, and the service of demons, these all and their workers shall be anathema and accursed, and shall be removed from our churches and fellow-believers. Whoever is found in any of these things shall be cast out without mercy from the whole Church of Christ and there shall never be mercies for him.[64]

However, the same synod concludes with another directive from which it is possible to assume that "there shall never be mercies for him" found in the above mentioned canon need not be taken literally and the possibility of conversion and consequent pardon is present in the understanding the synod:

> Concerning the others who are headstrong and disorderly, who have called themselves by an episcopal title by way of seizure and have led many astray, the synod of bishops has determined them to be bound and anathematized in heaven and on earth, as well as anyone who fellowships with him, receives them, prays with them, or brings them into their house. They are cast out of the entire Church and flock of Christ and their memory shall be blotted out from beneath

[64]Jean Baptist Chabot, *Synodicon Orientale*, 264.

> the heavens. But if they show the fruit of repentance and act simply like the rest, so that they come to the great metropolitan and write that they repudiate themselves, and if they act in accord with whatever is commanded them, then there will be mercy for them.[65]

1.4. Reserved Sins in the Eastern Code

The abolition of *latae sententiae* penalties from the Eastern Code gave rise to another characteristic feature in the Eastern Code, that is, the presence of reserved sins.[66] The Eastern Code contains two canons where the absolution of the sin is reserved to the Apostolic See, that is, the sin of the direct violation of the sacramental seal and the absolution of the accomplice in the sin against the sixth commandment (c. 728 § 1 nn 1°-2°). In the Latin code these sins are not reserved, but the penalty is *latae sententiae* excommunication reserved to the apostolic See. These delicts are very often occult and hence it is difficult to punish in the external forum. But the reservation of the sin makes it almost equally difficult for the culprit to ignore the delict and lead a normal ecclesial life without approaching the Apostolic See. CCEO c. 728 § 2 reserves absolution of the sin of abortion to the eparchial bishop. The Latin code does not contain such a reserved sin. But the penalty is *latae sententiae* excommunication which is not reserved. Hence it is of the competence of the local Ordinary to remit such penalties directly or indirectly.[67]

This comparison can mislead one to think that the presence of reserved penalties in the Latin code and the presence of reserved sins in the Eastern Code, though theoretically different, are practically of the same effect. Though most of the time such a conclusion can be correct, there are some exceptions. According to CCEO c. 729, there are many instances where such reservation of sin has no force. For example, in the case of a sick priest who is unable to go out of his residence but guilty of the direct violation of the sacramental seal, according to the Eastern Code, the ordinary confessor can absolve his

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[65]Jean Baptist Chabot, *Synodicon Orientale*. 34-35, 273.

[66]Cf. Lorenzo Lorusso, *Gli orientali cattolici e i pastori latini*. Problematiche e norme canoniche, (Kanonika 11, Rome: Pontificio Istituto Orientale, 2003) 196-201.

[67]Angelo Urru, *Sanzioni penali della Chiesa*, 207.

sins and there is no need of further recourse. Likewise, in the case of a spouse who confesses, in order to celebrate marriage, the sin of procuring a completed abortion, the confessor can absolve the sin and here also there is no need of a further recourse. Though the Latin code also permits the confessor to remit reserved penalties on some occasions (CIC c. 1357), it prescribes that the offender is bound to make recourse to the competent authority within a month directly or through the confessor. According to CCEO c. 729 n 2°, if in the prudent judgment of the confessor, the faculty cannot be requested from the competent authority without grave inconvenience to the penitent or without danger of violation of the sacramental seal; the reservation of absolution will have no force. A parallel norm to this is absent in the Latin code regarding the remission of penalties.

1.5. The Concept of Imputability

The term 'imputability' is not present in the Eastern code whereas it exists in the Latin code. Carl Gerold Fürst considers the absence of this concept from the Eastern code as at least a helping hand to make the code a *vehiculum caritatis*.[68] For him, imputability is a concept that can be termed "a headache for teachers and students and a *tormentum confessariorum*" and therefore it was right to eliminate the term from the Code.[69] In fact, the decision not to include the concept of imputability in the Eastern code was taken after much thinking and discussion in the PCCICOR.[70]

Though the term imputability is not present in the Eastern code, the idea can be seen there too. However, the presumption of imputability found in CIC c. 1321 § 1 is different from that of its corresponding canon in CCEO, namely, c. 1414 § 1. According to CIC c. 1321 § 1, "no one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence (sit graviter imputabilis ex dolo vel ex culpa). CCEO c. 1414 § 1 not only omits the term *imputabilis* here, but also avoids the term '*ex dolo vel culpa*' and uses '*aut deliberatae aut ex graviter culpabili omissione debitae diligentiae aut ex graviter culpabili*

[68]Carl Gerold Fürst, "Diritto penale e carità," in *Ius Ecclesiarum vehiculum caritatis*, 531.

[69]Carl Gerold Fürst, "Diritto penale e carità," in *Ius Ecclesiarum vehiculum caritatis*, 531.

[70]*Nuntia* 4 (1977) 82-83; 12 (1981) 49-52.

ignorantia legis vel praecepti' (either deliberately or by seriously culpable omission of due diligence or by seriously culpable ignorance of the law or precept. While CCEO penalises those who violated a penal law *ex graviter culpabili omissione debitae diligentiae*, according to CIC c. 1321 § 2, such persons are normally not punished:

> A penalty established by a law or precept binds the person who has deliberately violated the law or precept; however, a person who violated a law or precept by omitting necessary diligence is not punished unless the law or precept provides otherwise.

Another difference is found in CCEO c. 1414 § 2 and its corresponding canon 1321 § 3 of the Latin code. According to CCEO c. 1414 § 2, "when an external violation of a penal law or precept has occurred, it is presumed that it was deliberately done, until the contrary is proven (*donec contrarium probetur*).[71] According to CIC c. 1321 § 3 it is not presumed as deliberate, or to use the Latin terminology, *dolus* is not presumed. What is presumed is just imputability: "When an external violation has occurred, imputability is presumed unless otherwise apparent (*nisi aliud appareat*)." Since imputability can be based on malice or negligence (*ex dolo vel culpa*) and since the Latin code does not necessarily punish violation of law *ex culpa*, the presumption of imputability does not necessarily lead to a penal process. In the Eastern code, on the contrary, the presumption is more severe because it is presumed that the action was deliberate[72] until the contrary is proven.[73] However, it is

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[71]*Nuntia* reports that the formulation of this canon was difficult due to the concepts *imputabilitas* and *dolus*: *Nuntia* 4 (1977) 82-83; 12 (1981) 49-52; 20 (1985) 24; 31 (1990) 45.

[72]Actually CIC 1917 c. 2200 § 2 also presumed *dolus*: "Where there has been an external violation of a law, malice is presumed in the external forum, unless the contrary is proved." Cf. also: Michael Hughes, "The Presumption of Imputability in Canon 1321, § 3," *Studia Canonica* 21 (1987) 19-36; Eugen Psiuk, "Deliktswircklichkeit und Strafentscheidung. Erwägungen zum kanonischen Dekretverfahren in Tatstrfen," *Österreichisches Archiv für Kirchenrecht*, 44 (1995-1997) 333-334; Andrea D'Auria, „L'imputabilità nel diritto penale. Un'analisi comparata tra il C.I.C. e il C.C.E.O., *Apollinaris*, LXXV, 1-2 (2002) 93-157.

noteworthy that the canon does not place the obligation to prove the contrary exclusively on the shoulders of the accused or denounced person.

Nuntia explains in detail the reasons that led to formulation of CCEO c. 1414 § 2 excluding the concept of imputability and *dolus*:

> Nella prima riunione del *Coetus*, il giorno 3 marzo 1980, il consultore, a cui è affidato lo studio preparatorio, ha dato un'ampia relazione su questo canone, avvalendosi anche di alcuni studi recenti, riguardanti piuttosto lo schema della Commissione per la Revisione del CIC. Tutto considerato, il consultore ha ritenuto opportuno accettare la linea seguita fondamentalmente dal Coetus del 1976, e cioè l'abbandono del concetto della *imputabilitas* (come spiegato nei *Nuntia* n. 4, p. 83),[74] che in ogni caso per diversi lati si riduce sempre o al *dolus* o alla *culpa*, che sono i soli concetti importanti nella materia. Tuttavia il predetto consultore ha giudicato inaccetabile la locuzione « *gravis dolus*», che appariva nel testo del 1976, in quanto essa rende il canone inapplicabile. Infatti se si evitano le discussioni circa cosa sia *imputabilitas*, ritornano quelle circa la *gravitas doli*. L'importante, secondo

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[73]CCEC-2 translated incorrectly 'donec contrarium probetur' as 'unless the contrary is proven'. Actually CCEC-1 had it correct, namely, 'until the contrary is proven'.

[74]*Nuntia* 4 (1977) 82-83: "Difficile e laboriosa era la formulazione di questo canone (cfr. CIC cann. 2199, 2200) soppratutto a causa dei concetti *imputabilitas* e *dolus*. Al Gruppo non era del tutto chiaro perché oggi si tenda a presumere l'imputabilità, anziché il *dolus*, quando si ammette da tutti che nessuno può essere *graviter imputabilis* se non abbia agito *ex dolo vel ex culpa*. Pertanto presumere l'imputabilità sembra implicare anche la presunzione del dolo o colpa cosicché dire *praesumitur dolus vel culpa* (nei casi ove si punisce espressamente il delitto colposo) non sembra differenziarsi sostanzialmente.

Allo stato attuale il Gruppo ritiene la presunzione del *dolus*, non essendo convinto delle ragioni di coloro che desiderano cambiarla con la presunzione della imputabilità, che anzi on si giudica necessario menzionare nel canone, perché anche essa avrebbe bisogno, come sembra, di qualche più chiara definizione.

Da qui nel § 1 si ribadisce che 'nemo poenae canonicae est obnoxius, qui a gravi dolo vel a gravi culpa in violatione legis vel praecepti excusari potest'."

> questo consultore, è di dire nel canone che la violazione di una legge è punibile, quando è stata fatta deliberatamente, il che si può supporre. Se poi dimostra che l'autore nel commettere questa violazione non è gravemente colpevole secondo le leggi della Chiesa, si potrà sempre dare una sentenza assolutoria.[75]

Nuntia reports further that the decision not to include the term 'imputability' in the Eastern code was followed by the decision to exclude the use of the term 'dolus' also from the Code.[76]

Conclusion

In the preceding analysis, we have tried to highlight some of the basic differences between the codes in the matter of penal laws. The points selected are not the only differentiating ones, but they are the ones which can have far reaching consequences. This study reveals that on many occasions, the differing fundamental vision which permeated throughout the codification process of the penal laws resulted in the differences in the codes. This difference is natural because the sources and traditions which served as the bases for the canons were different. It does not mean that each code should take either an exclusivistic or a syncretic approach. At the same time, each code can sometimes profit by looking with an open mind into the parallel norms in the other code. For example, if the Eastern code has problems because of the strict adherence to the principle *nulla poena sine lege*, there should be the readiness to rethink and accept the stance of the Latin code in this regard. On the other hand, the Latin code can also advance further in its path to reduce the *latae sententiae* penalties to such an extent as abolishing them altogether, if it proves that the absence of *latae sententiae* penalties does not create many problems as some thought. Hence these differences in the penal laws can contribute to the amelioration of the penal laws of the Catholic Church and at the same time illustrate the beauty of diversity in ecclesiastical discipline.

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[75]*Nuntia* 12 (1981) 49-52.
[76]*Nuntia* 12 (1981) 49-52.