

PATRIARCHAL / MAJOR ARCHIEPISCOPAL ORDINARY TRIBUNAL AS TRIBUNAL OF THIRD AND FURTHER INSTANCES

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This article is an effort to evaluate the competence and the actual functioning of the patriarchal/major archiepiscopal ordinary tribunal as third instance tribunal. In that connection, a discussion is made on the necessity of third instance competence for a Church *sui iuris* to be judicially self-sufficient. The functioning of this tribunal is discussed in comparison with the Roman Rota and other territorial tribunals of third instance in the Latin Church. On the basis of the provisions of CCEO the study attempts to identify the possible means at the disposal of this Ordinary Tribunal to ensure just and impartial administration of justice at the third and further levels of appeal. The study also explains the rationale behind the incompetence of this tribunal to deal with some reserved cases and deliberates the competence of Roman Rota *vis-à-vis* the Ordinary Tribunal as the third instance tribunal.

1. Introduction

The guideline for the revision of Eastern procedural law unambiguously insisted that every Eastern Catholic Church be empowered to organize its own tribunal to resolve all cases except those not reserved to the Holy See in all three instances up to the final sentence.¹ Canon 1063 of the Eastern code, which obliges patriarchs and major archbishops to set up such a tribunal within the proper

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¹Principi 1974, Canonii "De Processibus" n. 3, in PCCICOR, "Principi direttivi per la Revisione del Codice di Diritto Canonico Orientale," in *Nuntia*, 3 (1976), 3-10.

territory of their Church *sui iuris*, partially realizes this principle. To understand the practical implications and applications of this canon, one must understand the necessity of hierarchy of tribunals and instances in ensuring proper and impartial administration of justice. Likewise, a proper appreciation of the uniqueness of the Eastern judicial system requires a thorough knowledge of the differences between the Eastern and Latin hierarchy of tribunals.

This article studies how the establishment of patriarchal/major archiepiscopal ordinary tribunals has restored much of the traditional autonomy of these Churches *sui iuris*. To this end, it strives to understand the competence of the Roman Rota and the third instance territorial tribunals in the Latin Church so as to compare and contrast them with that of the ordinary patriarchal tribunal. The article, which discusses the conflict of competence between the Roman Rota and the patriarchal/major archiepiscopal tribunal for cases that arise from the territory of their respective Churches, also analyses how the exclusion of certain cases from the competence of this tribunal is justified.

1. Hierarchy of Tribunals and the Concept of Instances

Though the Church of Christ is founded on the commandment of love, fallible human nature can lead to broken communion by violation of rights and conflicts. The Church, which is both divine and human, requires visible structures and appropriate measures to maintain good order and restore it when the bonds of communion are broken.² Canon 1055 §1³ of CCEO clearly articulates the intent to provide such means.⁴

Since the Church presently exercises its judicial power through tribunals, it is necessary to understand what this term means. The word tribunal, which meant among the Romans the place of administration of justice,⁵ is currently often used to indicate a “group of officials with the authority to settle certain types of disputes”⁶ and

²Zenon Grocholewski, “Theological Aspects of the Judicial Activity of the Church,” *The Jurist* 46 (1986), 552-567, at p. 554.

³CCEO c. 1055 §1: *Obiectum iudicii sunt: 1° personarum physicarum vel iuridicarum iura perseguenda aut vindicanda vel facta iuridica declaranda; 2° delicta, quod spectat ad poenam irrogandam.*

⁴Zenon Grocholewski, “Theological Aspects ...,” 554.

⁵Manuel Jesús Arroba Conde, *Diritto processuale canonico*, Roma: Institutum Iuridicum Claretianum, 2006. 144-145.

⁶Linus Neli, *Catholic Marriage Nullity Process, The Introduction of the Case* (Bangalore: Dharmaram Publications, 2007) 22-23.

at times only the judges.⁷ To ensure effective functioning of this judicial system, those appearing before the tribunals – the plaintiff and the respondent – must have appropriate means to safeguard their rights. Human error on the part of judges and other court officials can lead to injustice, making these safeguards a necessity.

The different grades of judgment, or "instances," contained in both codes (and even in the civil order) provide such a safeguard. When a lower tribunal denies a person justice, that person can appeal to superior tribunals⁸ to vindicate his or her rights.⁹ This pursuit of justice is not limited to the parties, however. The defender of the bond and the promoter of justice also may appeal a verdict to the next higher tribunal for confirmation or rejection.¹⁰ Number five of Guideline 9, on canons "De Processibus," clearly articulates how an impartial and effective administration of justice requires a hierarchy of tribunals ordered according to grade and kind:

"There must be a formal declaration to the effect that in Canon Law the principle of legal protection is to be applied in an impartial fashion to superiors and subjects alike, so that all suspicion of arbitrariness in the ecclesiastical administration may be removed.

This end can be achieved only if a system of appeals is wisely established by law, whereby anyone who has reason to believe his rights have been violated in the lower instance, is able to obtain redress in the higher. From this derives the necessity of ordering administrative tribunals according to grade and kind, so that the defence of rights may be provided with its own canonical procedure to be duly followed by the authorities of the different grades of competence."¹¹

⁷Piero Antonio Bonnet, "I Tribunali nella loro diversità di grado e di specie," in Piero Antonio Bonnet and Carlo Gullo (ed.), *Il Processo matrimoniale canonico* (Città del Vaticano: Libreria Editrice Vaticana, 1994) 183.

⁸Velasio de Paolis, "La giurisprudenza del Tribunale della Rota Romana e i tribunali locali," *Periodica* 98 (2009), 275-319, at pp. 276-277.

⁹Linus Neli, *Catholic Marriage Nullity Process...*, 22-23.

¹⁰Victor Joseph Pospishil, *Eastern Catholic Church law* (New York: Saint Maronite Publications, 1996) 709.

¹¹Principi 1974, Canoni "De Processibus" n. 5, in PCCICOR, "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," in *Nuntia* 3 (1976), 3-10.

The Latin and Oriental judicial systems have hierarchies of tribunals that differ in matters of nature, grade, and competence. At the level of procedural mechanism, there exists no significant difference between them, the Latin and Oriental norms. The mind of the legislator that justice in the one Church of Christ must be one and the same¹² was articulated in the guideline that “all Catholics may have the same procedural norms.”¹³ However, because of their disparate hierarchical constitutions, the structure of the Latin and Eastern Catholic tribunal systems differ significantly. This is especially true with regard to the patriarchal/major archiepiscopal Churches.¹⁴

The Latin code envisions four grades of ecclesiastical tribunals: diocesan, metropolitan, regional, and Apostolic. In the CIC, the judicial hierarchy follows the territorial division of particular churches.¹⁵ Thus, the metropolitan or second instance tribunal hears appeals of decisions made at the diocesan level. The Roman Rota, the tribunal of third and further instances (cfr. CIC c. 1444), hears additional appeals.¹⁶ The Oriental code differs from the Latin code in that it envisages a different third instance tribunal, the patriarchal¹⁷ or major archiepiscopal ordinary tribunal, competent to adjudicate all instances up to the final one. Consequently, these Churches can definitively resolve cases already tried at the eparchial and metropolitan levels without submitting them to the judgment of the Roman Rota.¹⁸ In other words, CCEO has empowered patriarchal and major archiepiscopal Churches *sui iuris* to be judicially self-sufficient, allowing them to conclude the cases in all the grades of judgments through their ordinary tribunal (CCEO c. 1063) without having to resort to the tribunals of the Apostolic See.¹⁹ However, metropolitan and other Churches *sui iuris* must rely on the Apostolic See as the tribunal of third and subsequent instances (CCEO c. 1065).

¹²Hanna Alwan, “Rapporto fra il Codice dei Canonici per le Chiese Orientali e il Codice di Diritto Canonico per la Chiesa Latina,” *Iura Orientalia* I (2005), 103-121, at p. 118.

¹³*Nuntia*, 3 (1976), 9.

¹⁴Linus Neli, *Catholic Marriage Nullity Process...*, 32.

¹⁵Hanna Alwan, “Rapporto fra il Codice dei Canonici ...,” 118.

¹⁶Hanna Alwan, “Rapporto fra il Codice dei Canonici ...,” 118.

¹⁷Victor Joseph Pospishil, *Eastern Catholic Church law*, 709.

¹⁸George Nedungatt, *The Spirit of the Eastern Code* (Rome: Centre for Indian and Inter-Religious Studies, 1993) 93.

¹⁹Hanna Alwan, “Rapporto fra il Codice dei Canonici ...,” 118.

The grade of tribunal does not always correspond to the grade of judgement (*gradus iudicii*), or "instance."²⁰ The 'grade of the tribunal' signifies the place a tribunal occupies in the Church's judicial hierarchy,²¹ while the 'grade of the case' or instance indicates the number of times the same case has been introduced at the various tribunals.²² A case in first instance is presented for the first time, while a second instance involves a second introduction at a superior tribunal.²³

Such a hierarchy of tribunals guarantees the right of appeal.²⁴ The tribunal of the first grade, the eparchial tribunal, can hear cases only in the first instance; it is incompetent to hear cases in any other instance. The metropolitan or second grade tribunal hears both second instance cases from lower tribunals and first instance cases from the eparchy of the metropolitan; however, it is absolutely incompetent to judge a case in the third instance. A patriarchal or major archiepiscopal ordinary tribunal of the third grade has competence to hear cases in the third and further instances, but it will also have to hear certain cases of the second and first instances. Even the tribunal of the Roman Rota may have to hear cases in the first (cfr. CIC c. 1417) and second instances.²⁵

3.1.1. The Necessity of Third and Further Instances

Tribunals with third instance competence examine cases at the third grade of judgment.²⁶ Because some cases never become final and certain conditions are susceptible to further examinations or processes, tribunals with this competence are essential to the self-sufficiency of a Church *sui iuris*.²⁷ As William L. Daniel puts it, "When a person

²⁰John P. Beal, James A. Coriden and Thomas Joseph Green (eds.), *New Commentary on the Code of Canon Law*, (New York: Paulist Press, 2000) 828-842 and 1622.

²¹Manuel Jesús Arroba Conde, *Diritto processuale canonico*, 145-146.

²²Manuel Jesús Arroba Conde, *Diritto processuale canonico*, 145-146

²³Javier Ochoa, "Tribunal," in Petri Palazzini (ed.), *Dictionarium morale et canonicum* IV (Romae: Officium libri catholici, 1965) 556-562, at p. 567.

²⁴Regarding the meaning of the expression 'grade of the tribunal' refer Javier Ochoa, "Tribunal," 557.

²⁵Linus Neli, *Catholic Marriage Nullity Process...*, 33.

²⁶Manuel Jesús Arroba Conde, *Diritto processuale canonico*, 159-162.

²⁷CIC c. 1644 §1: If a second concordant sentence has been rendered in a case concerning the status of persons, recourse can be made at any time to the appellate tribunal if new and grave proofs or arguments are brought forward within the peremptory time limit of thirty days from the proposed challenge.

approaches the judicial authority of the Church to initiate some kind of litigation, the person ultimately desires not a process but an authoritative response."²⁸ The response becomes fully authoritative only when an issue becomes an adjudged matter. Such a juridical situation²⁹ requires that two tribunals issue two conforming sentences for the same case. In other words, it is when "a case involving the same parties about the same object on the same ground has been resolved in the same way by two different tribunals at different instances."³⁰ Two concordant sentences, issued between the same persons regarding the same petition and arising out of the same basis for petitioning, render a case *res iudicata* (cfr. CCEO c. 1322, 10).

The jurisprudence of the Rota has interpreted this principle to include 'equivalent conformity' of sentences in marriage-nullity cases.³¹ When the first two sentences from the tribunals of the first and second instances are defective among themselves, a sentence must be given at the third instance to conclude a case.³² This is especially important in matrimonial cases, which require two conforming sentences on the same case and on the same grounds³³ (cfr. CCEO c. 1370). As per the

Within a month from when the new proofs and arguments are brought forward, however, the appellate tribunal must establish by decree whether a new presentation of the case must be admitted or not.

²⁸William L. Daniel, "The Publication of the Definitive Sentence," *Studia Canonica*, 42 (2008), 393-436, at p. 393.

²⁹The four conditions for a case to become Adjudged Matter are given in CIC c. 1641. According to the canon, "without prejudice to can. 1643, an adjudged matter occurs when: 1) there are two conforming judgements between the same parties about the same matter and on the same grounds; 2) no appeal was made against the judgement within the canonical time limit; 3) the trial has been abated or renounced in the appeal grade; 4) a definitive judgement has been given from which, in accordance with can. 1629, there is no appeal."

³⁰Gerard Sheehy and others, (eds.), *The Canon Law Letter and Spirit: A Practical Guide to the Code of Canon Law*, (Dublin 1: The Canon Law Society of Great Britain and Ireland, Veritas Publications, 1995) 920.

³¹McGrath, "Conformity of Sentence in Marriage Nullity Cases," *Studia Canonica* 27 (1993), 5-22.

³²Manuel Jesús Arroba Conde, *Diritto processuale canonico*, 159-162; Fernando Della Rocca, "Prospettive di riforma della legislazione processuale canonica," *Apollinaris* 40 (1967), 444.

³³Ernst Caparros, Michel Thériault and Jean Thorn (eds.), *Code of Canon Law Annotated* (Montreal: Wilson & Lafleur Itée, 2004) 1126.

provision of CCEO c. 1369, if a new ground of nullity is introduced at the appellate grade, the tribunal can admit it and judge it as if in the first grade. If a case is admitted and judged so, it is evident that no confirming decision can be made in the second grade of judgment. A study of the sentences issued by the Syro-Malabar Major Archiepiscopal Ordinary Tribunal at Kakkanadu, Kerala, India, showed instances where two tribunals, successive in grade, each found a marriage null on different grounds. There are also occasions where a superior tribunal annuls the sentence issued by the lower tribunal. Neither case results in two conforming sentences. Thus, the parties, the defender of the bond, or the promoter of justice will have to appeal to a third instance tribunal for a definitive resolution of the matter. It is only from "the conformity of sentences issued by two tribunals there arises a juridical effect which involves the execution of the sentence, the ability of the parties to exercise a defined right or to take exception to any future challenge against the right."³⁴ Therefore, it stands to reason that the provision of third instance is required by necessity to obtain a double conforming sentence so as to be able to celebrate a new marriage.³⁵

Legal provisions like *restitutio in integrum* and *nova causae propositio* further indicate the necessity of competence in third and further instances to the judicial autonomy of a Church *sui iuris*. According to CCEO c. 1327 §2, *restitutio in integrum* must be sought from the appellate tribunal if a precept of the law which is not merely procedural, was clearly neglected and the sentence is contrary to a previous decision which has become *res iudicata*. A patriarchal or major archiepiscopal Church can resolve this matter without turning to the tribunals of the Apostolic See only if that Church has competence to handle cases in third and further instances. According to the legal provision *nova causae propositio*, if a second concordant sentence has been rendered in a case concerning the status of persons, recourse can be made at any time to the appellate tribunal if new and grave proofs or arguments are brought forward within thirty days from the proposed challenge (cfr. CCEO c. 1325 §1). Because *res*

³⁴Joseph James Cuneo, "Towards Understanding Conformity of Two Sentences of Nullity," *The Jurist* 46 (1986), 568-601, at p. 568.

³⁵Miguel Angel Ortiz, "La potestà giudiziale in generale e i tribunali (artt. 22-32)," in Piero Antonio Bonnet and Carlo Gullo (eds.), *Il giudizio di nullità matrimoniale dopo l'istruzione "Dignitas connubii"* (Città del Vaticano: Libreria Editrice Vaticana, 2007) 63-102, at p. 87; CIC c. 1684 §1 and DC art. 301 §1.

iudicata requires at least two instances, appealing such a matter necessarily requires a tribunal with competence over third and further instances. The idea of a minimum of two conforming sentences is to remedy any injustice that may be caused by fallible human judgements.³⁶ Added to these factors is the provision of CCEO c. 1325 §1 concerning the status of persons. According to this canon, a decision concerning the status of persons can be challenged at any time to an appellate tribunal under certain conditions. If new and serious proofs or arguments are brought forward within the peremptory time period of thirty days from the proposed challenge, the appellate court will hear a case even if two conforming sentences have already been given. Again, such an appellate tribunal is possible only if the patriarchal and major archiepiscopal tribunals have the power to constitute *turnus* of tribunals of third and further instances.

A Church *sui iuris* is judicially self-sufficient only when it has the power and the faculty to conclude cases with an authoritative final sentence without having to resort to a higher tribunal. Such self-sufficiency necessarily requires the competence to handle all cases, except the reserved ones, up to the final instance without having to appeal to higher authorities.

3.1.2. Tribunals with Competence for Cases in the Third Instance in the Latin Church

According to CIC canons 1443 and 1444, only the Roman Rota has competence to receive appeals in the third instance. Though the Latin code has no provision for tribunals of third instance at the territorial level (despite proposals made during the revision process),³⁷ the Latin Church does have some third instance tribunals constituted at the territorial level - some permanently established and some with renewable power.³⁸ The tribunal of the Roman Rota, the tribunal of Rota of the Nuntiature of Madrid or the Spanish Rota which is erected in a stable manner, the primate of Hungary erected with immemorial

³⁶Joaquín Llobell, "I tribunali competenti nell'istruzione Dignitas Connubii," in Héctor, Franceschi and Miguel Angel Ortiz (eds.), *Verità del consenso e capacità di donazione: temi di diritto matrimoniale e processuale canonico*, (Roma: EDUSC, 2009) 337-385, at p. 348.

³⁷Cfr. Manuel Jesús Arroba Conde, *Diritto processuale canonico*, 159-162.

³⁸For a detailed study of territorial tribunals of third instance in the Latin Church see Zdzislaw Marian Bieg, *Struttura e Competenza dei Tribunali Territoriali e Personali della Chiesa* (Roma: Pont. Univ. Lateranense, 1989).

custom, the third instance tribunals constituted *ad casum* to respond to the certain necessities of times and of the particular Churches are examples of tribunals with such competence.

3.1.3. Patriarchal/Major Archiepiscopal Ordinary Tribunals in the Oriental Catholic Churches

Patriarchal or major archiepiscopal ordinary tribunals are appellate tribunals established by common law for and are distinct from the tribunals of the eparchy of the patriarch or major archbishop. With the assistance of judges who serve in rotation, these tribunals have competence to judge in second and further instances cases already judged in lower tribunals within the territorial boundaries of their Churches (cfr. CCEO c. 1063). Canon 1063 §1 of CCEO³⁹ clearly obliges the patriarch or major archbishop to establish such a tribunal for their Churches.

Because of "the characteristics of its organic composition, of its procedural modalities, and matters of competence this tribunal appears very similar to the Tribunal of Roman Rota."⁴⁰ According to Ivan Žužek, the tribunal *ordinarium Ecclesiae patriarchalis* which the patriarch has to constitute becomes a type of "Rota" for the patriarchal Churches which can judge in all the "gradus iudicii" (CCEO c. 1063).⁴¹ Just as the Roman Rota, which is part of the Roman Curia, is established for the universal Church, "the patriarchal or major archiepiscopal tribunal which forms part of the patriarchal or major archiepiscopal curia (CCEO c. 114) is established for the whole territory of a Church sui iuris as a tribunal distinct from that of the eparchy of the Patriarch or the Major Archbishop."⁴²

³⁹CCEO c. 1063 §1: Patriarcha erigere debet tribunal ordinarium Ecclesiae patriarchalis a tribunali eparchiae Patriarchae distinctum.

⁴⁰Hanna Alwan, "L'evoluzione storico-giuridica della competenza della Rota Romana circa le cause delle Chiese Orientali," *Quaderni dello Studio Rotale* 20 (2010) (Libreria Editrice Vaticana) 153-187, at p. 175-176.

⁴¹Ivan Žužek, "Alcune note circa la struttura delle Chiese orientali," in *Understanding the Eastern Code* (Roma: Pontificio Istituto Orientale, 1997), 136-148, at p. 141.

⁴²Andrews Thazhath, "Administration of Justice in the Patriarchal Churches," in *Ius Ecclesiarum Vehiculum Caritatis* (Città del Vaticano: Libreria Editrice Vaticana, 2004) 465-513, at p. 499.

By stating that “the tribunal of third instance is the Apostolic See, unless common law expressly provides otherwise,” CCEO c. 1065⁴³ clearly points to the exceptional nature of the competence that CCEO c. 1063 §3 provides to patriarchal Churches inside their proper territory.⁴⁴ Outside the territory of a patriarchal Church and in the other Eastern Catholic Churches, the tribunal of third instance is the Roman Rota (PB 128, n. 2).⁴⁵ The stably erected tribunals of the third grade provided for the patriarchal Churches (CCEO c. 1063) cannot be compared with the territorial tribunals established “ad casum” in the Latin Church,⁴⁶ the competence of which is restricted to the particular case or time for which they are constituted.

The patriarchal Oriental Catholic Churches which have such ordinary tribunals as per the provision of CCEO cc. 1062-1063 are the Coptic, Melkite, Syrian, Maronite, Chaldean and Armenian Churches.⁴⁷ Though the canon does not speak explicitly of such an appellate tribunal for major archiepiscopal Churches, by virtue of the provisions of CCEO c. 152⁴⁸ it is evident that the three major archiepiscopal Churches, namely, Ukrainian, Syro-Malabar and Syro-Malankara Churches, also have the same juridical structure and powers⁴⁹ and, hence, the right to have such a tribunal. Unlike the territorial third instance tribunals in the Latin Church, which are considered as concessions or privileges granted through the particular laws issued

⁴³CCEO c. 1065: Tribunal tertii gradus est Sedes Apostolica, nisi aliter iure communi expresse cavetur.

⁴⁴Pablo Gefaell, “Tribunali delle Chiese sui iuris...,” 572; Manuel Jesús Arroba Conde, *Diritto processuale canonico*, 159-162; Stefan Killermann, *Die Rota Romana Wesen und Werken des päpstlichen Gerichtshofes im Wandel der Zeit* (Frankfurt am Main: Peter Lang, 2009) 362.

⁴⁵Jobe Abbass, “Trials in General,” in George Nedungatt, *A Guide to the Eastern Code* (Roma: Pontificio Istituto Orientale 2002) 720; PB art. 128 states: Hoc Tribunal iudicat:... 2° in tertia vel ulteriore instantia, causas ab eodem Tribunali Apostolico et ab aliis quibusvis tribunalibus iam cognitatas, nisi in rem iudicatam transierint.

⁴⁶Pablo Gefaell, “Tribunali delle Chiese sui iuris non patriarchali,” *Ius Ecclesiarum Vehiculum Caritatis*, 2004, 572.

⁴⁷Andrews Thazhath, “Administration of Justice ...,” 477.

⁴⁸CCEO 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.

⁴⁹Andrews Thazhath, “Administration of Justice ...,” 477.

by the Roman Pontiff, the patriarchal and major archiepiscopal ordinary tribunals are established by the common law taking into account hierarchical configuration of the Oriental Churches and the ancient Oriental traditions.⁵⁰

The guideline wished to empower "every Oriental Church" – not just the patriarchal and major archiepiscopal Churches – with the faculty to constitute its own tribunal to hear cases up to the final instance.⁵¹ Due to lack of sufficient means and personnel to constitute such tribunals, the metropolitan Churches and the other Churches *sui iuris* (cc. 155-176) have not been given that competence for the time being.⁵² For these Churches, and for those outside of patriarchal territory,⁵³ the Roman Rota adjudicates cases at third instance. Thus, for them, the judicial system in this regard resembles that of the Latin Church (CCEO cc. 1064-1065 and CIC c. 1438).⁵⁴

3.2. Notable Differences between Diocesan Tribunals and Patriarchal Ordinary Tribunals

A patriarchal ordinary tribunal and a diocesan tribunal notably differ in the following two ways:

3.2.1. Subject Not to a Single but to a Collective Authority

According to canons 17-20, 73 and 85 of the previous Oriental legislation *Sollicitudinem nostram*, the patriarch or major archbishop had the sole competence over the constitution and administration of the patriarchal/major archiepiscopal tribunal. The permanent synod

⁵⁰Though in conformity with the view held by PCCICOR in 1974, one of the ten Guidelines for the Revision of Oriental Canon Law namely that on procedures expressed in its number 2 the view that all Catholics may observe the same procedural norms (Nuntia, 3 (1976), 9), the same Guideline in its number 3 laid down that taking into account the hierarchical configuration of the Oriental Churches and the ancient oriental traditions, every Oriental Church may be empowered in such a way that it will be able to constitute its tribunals to deal with the cases in all the three instances, without prejudice to *provocatio ad Sedem Apostolicam*, which is not a real appeal.

⁵¹Nuntia, 3 (1976), 3-10

⁵²Pablo Gefaell, "Tribunali delle Chiese sui iuris ...," 572.

⁵³Joaquin Llobell, "The Contentious Trial," in George Nedungatt (ed.), *A Guide to the Eastern Code...*, 745-770, at p. 767.

⁵⁴Andrews Thazhath, "Administration of Justice ...," 477.

or the Synod of Bishops had no control over them.⁵⁵ However, under CCEO a collective authority now governs the tribunal. In this regard, it is worth mentioning why the code assigns the judicial role to the synod of bishops and not to the patriarch and permanent synod: "During the revision process, it was decided that it was not appropriate to assign a judicial role to the patriarch and the permanent synod since the patriarch does not exercise *iure divino*, a judicial role over the entire Church and the permanent synod is an institution to assist the patriarch with administrative responsibilities."⁵⁶ Thus the new code reserves the legislative and judicial powers to the Synod of Bishops and concedes only administrative powers to the Patriarch/Major Archbishop.⁵⁷

In a diocesan tribunal, the eparchial bishop constitutes the tribunal, appoints and removes its judges, and keeps vigilance over the tribunal. In the patriarchal/major archiepiscopal tribunal, these roles are shared by the patriarch, the synod of bishops, and the moderator for the administration of justice, respectively. According to CCEO c. 1063 §1, the patriarch alone is competent to establish the tribunal. However, he needs the consent of the permanent synod in order to appoint the president, judges, promoter of justice, defenders of the bond, and other necessary officials (CCEO c. 1063 §2). Though it is within the competence of the patriarch or major archbishop to appoint the president, the judges, the promoter of justice and the defenders of the bond, he cannot remove them: CCEO c. 1063 §2 clearly stipulates that only the synod of bishops has power to do so. The right of vigilance over this tribunal and of deciding when objections are raised against a judge of an ordinary tribunal of the patriarch/major

⁵⁵Andrews Thazhath, "Administration of Justice in the Syro-Malabar Church," in Francis Eluvathingal (ed.), *Syro-Malabar Church Since the Eastern Code* (Mannuthy: Mary Matha Publications) 2003, 57-85, at p. 76.

⁵⁶John D. Faris, "The Synod of Bishops and Council of Hierarchs in the Code of Canons of the Eastern Churches," *Studies in Church Law* 2 (2006), 125-146, at p. 134-135; See *Nuntia*, 5 (1977), 13 and 14 (1982), 5-6.

⁵⁷Jose Chiramel, "Archbishop Major and the Syro-Malabar Church," *Synodal News*, No. 1, August 1993, 43-48, at p. 45. In the foot note (no. 7 on the same page) he writes: "The Synod of Bishops has however, no competence in the administrative acts. Synod of Bishops in an Eastern Church is the conference of all the ordained bishops of that Church. The Synod enjoys by law far more powers than a Bishops' Conference in the Latin Church. The Synod of Bishops is to be distinguished from the Permanent Synod which acts as an advisory body to the Major Archbishop."

archiepiscopal Church belongs to the general moderator for the administration of justice (CCEO c. 1062 §§5, 1). This official assumes the traditional competence of the Supreme Tribunal of *Apostolic Signatura* (CIC c. 1445).⁵⁸ At the universal level, however, it is subject to the vigilance of the *Signatura*, which watches over the exercise of justice in the Catholic Church worldwide in the name of the Roman Pontiff.⁵⁹

Reserving the removal of judges, defenders of the bond, and promoters of justice to the synod of bishops gives these officials, who were appointed by their patriarch or major archbishop, the freedom necessary to properly administer justice. On the other hand, the vigilance of the general moderator for the administration of justice and of the *Apostolic Signatura* over this tribunal guarantees that the tribunal administers justice correctly.

3.2.2. The System of *Turnus* to Handle Cases in Various Instances

As required by the provisions of the common law, the patriarchal/major archiepiscopal ordinary tribunal consists of the president, the judges, the promoter of justice, the defender of bond, the notaries, and others nominated as needed, especially as auditors or substitutes (CCEO c. 1063 §2). Since the same tribunal sometimes has to take up the same case in various instances, it follows the *turnus* system of judges (CCEO c. 1063 §3) according to the model used by the Roman and Spanish Rota. According to the Church's usual procedure, a case judged in the first instance at one tribunal is judged in second instance at another tribunal, and in third instance at the Roman Rota. The Latin code does not permit a second *turnus* of judges in an ordinary tribunal to judge in second instance a case already judged in first instance at the same tribunal.⁶⁰ However, the Eastern code permits such a *turnus* for the ordinary tribunal of the patriarchal Church (cfr. CCEO c. 1063 §3).

The above precaution ensures that judges who adjudicated a case in one instance in no way participate in the adjudication of the same case in another instance. Needless to say, care must be taken so that no one

⁵⁸John Paul II, Ap. Cost. *Pastor Bonus*, arts. 121-125; Hanna Alwan, "Rapporto fra il Codice dei Canonici ...," 118-119.

⁵⁹Cfr. Preamble of the Statutes of the Ordinary Tribunal of the Syro-Malabar Church.

⁶⁰Raymond Leo Burke, "The Distinction of Personnel in Hierarchically-Related Tribunals," *Studia Canonica* 28 (1994), 85-98 at pp. 85-86.

works on the same case in both instances, even in different offices.⁶¹ In this regard, CCEO c. 1105 stipulates that, “A person who has taken part in a case as judge, promoter of justice, defender of the bond, procurator, advocate, witness or expert, cannot afterwards in another instance of the trial validly resolve the same case as a judge or act as an assessor in the same instance.” In the same way, though the law permits a person appointed as promoter of justice to substitute the defender of bond and vice versa, the law does not permit them to fill both the roles in the same case (CCEO c. 1100 §1). Thus, the system of *turnus* and the prohibition on an official’s participation in more than one instance of the same case safeguard the independence and impartiality of the tribunal.

3.2.3. Limitations on the Competence of the Ordinary Tribunal

The patriarchal/major archiepiscopal ordinary tribunal’s competence to handle cases in various instances is limited territorially and materially. Territorially, the competence is confined to the proper territory of the patriarchal/major archiepiscopal Church.⁶² Materially, the tribunal is incompetent to judge contentious or penal cases reserved to the Superior Tribunal (CCEO c. 1062), to the Apostolic See (CCEO cc. 1056, 1057, 1061) and to the person of the Roman Pontiff (CCEO c. 1060).⁶³ The cases reserved to the Superior Tribunal⁶⁴ are the contentious cases of eparchies and bishops, including titular ones (CCEO c. 1062 §3). On the other hand, the Roman Pontiff alone has the right to judge patriarchs, bishops in penal cases, those who hold the highest civil office in a state, and other cases he has called to his own judgment (CCEO c. 1060 §1).

Sollicitudinem Nostram c. 15, n. 2 also reserved to the Roman Pontiff cases concerning the heads of Eastern Catholic Churches. Since

⁶¹Raymond Leo Burke, “The Distinction of Personnel...,” 85-86.

⁶²Mathew Madappallikunnel, *The Tribunals of a Major Archi-episcopal Church* (Romae: Pontificia Universitas Sanctae Crucis, 1999) 51.

⁶³Mathew Madappallikunnel, *The Tribunals of a Major Archi-episcopal Church*, 51.

⁶⁴Superior tribunal is a tribunal consisting of a general moderator for the administration of justice elected by the synod of bishops from among its members by secret ballot for a five-year term and two other bishops. Regarding appeal from this tribunal CCEO c. 1062 §4 makes it clear that appeal in these cases is to be made to the synod of bishops of patriarchal Church without any further appeal, with due regard for c. 1059.

patriarchs throughout history were often deposed by their synods of bishops (at times with mandatory consent of other patriarchs), some consulters proposed courageously reaffirmation of this tradition; however, others advocated maintaining the law contained in *Sollicitudinem Nostram* c. 15, n. 2.⁶⁵ The arguments in favour of reserving the cases of patriarchs to the Roman Pontiff were the following:⁶⁶ 1) it does not seem appropriate that the head of a Church be judged by his fellow brothers in the episcopate; 2) such judgement could create factions and divisions in the bosom of the same Church; 3) it would be a clear diminution of the authority of the patriarch/major archbishop and 4) the existing law has created no problems in this regard, was well-accepted by the bishops and the faithful of all the Churches, and corresponds to the profound honour that must be accorded to the patriarch/major archbishop. Although the argument for change was based on ancient traditions, papal reservation was found more suitable to contemporary needs.⁶⁷

The *ratio legis* of the norm reserving the right of judging bishops in penal cases to the Roman Pontiff is to safeguard the prestige and dignity of the patriarchal and Episcopal office.⁶⁸ The purpose of reserving the cases of those who hold the highest civil office in a state "to the Holy See is not to provide a privilege to the government head but rather to remove the possibility of a local judge being pressurized to give a favourable decision."⁶⁹ According to CIC c. 1405 §1, 2o, the exclusive right to judge cardinals also belongs to the Roman Pontiff. The cardinals' high dignity accounts for this reservation, which is effective from the very moment of their public proclamation in consistory.⁷⁰ Unlike its parallel in the Latin code, CCEO c. 1062 §3 is silent about the reservation of the cases of cardinals and legates of the Apostolic See.

⁶⁵Pio Vito Pinto (ed.), *Commento al Codice dei Canonici delle Chiese Orientali* (Città del Vaticano: Libreria Editrice Vaticana, 2001), 882.

⁶⁶Pio Vito Pinto (ed.), *Commento al Codice ...*, 882.

⁶⁷See *Nuntia*, 3 (1976), 23, n. 3; 5(1997), 10-14; 14 (1982), 4.

⁶⁸Dimitrios Salachas, "Ecclesial Communion and the Exercise of Primacy in Codex Canonum Ecclesiarum Orientalium," *Studies in Church Law* 1 (2005), 147-198, at pp. 194-195.

⁶⁹John Philip Beal, James A. Coriden, and Thomas Joseph Green (eds.), *New Commentary on the Code of Canon Law*, 1618-1619.

⁷⁰Luigi Chiappetta, *Il Codice di Diritto Canonico: Commento giuridico-pastorale*, vol. 3 (Roma: Edizioni Dehoniane, 1996) 12.

Along with the above-mentioned cases, the ordinary tribunal lacks competence over physical persons who are not bishops and juridic persons who do not have a superior authority below the Roman Pontiff. The right to judge them is within the competence of the tribunals of the Apostolic See (cfr. CCEO c. 1061). However, in virtue of CCEO c. 1063 §4, 3-4°, the cases of these persons are within the competence of the ordinary tribunal of the patriarchal/major archiepiscopal Church within that Church's proper territory.⁷¹ Considering their seriousness and universal importance, nullity of sacred ordination is reserved to one competent dicastery of the Roman Curia (CCEO c. 1368) and *delicta graviora* are reserved to the Tribunal of the Congregation for the Doctrine of Faith through the m.p. *Sacramentorum sanctitatis tutela*⁷² of 30th April 2001.

3.3. Competence of the Roman Rota vis-à-vis the Ordinary Tribunal as the Third Instance Tribunal

Regarding the Roman Rota's competence over cases from the proper territory of the patriarchal/major archiepiscopal Churches, there are two diametrically opposed schools of thought. While one school strongly affirms the exclusive competence of these tribunals and the consequent absolute incompetence of the Rota over unreserved cases from the proper territory of these Churches, the other school holds that the Roman Rota has concurrent and prevalent competence with these tribunals in the second, third, and subsequent instances. Even 20 years after the *Apostolic Signatura* sought resolution by proposing a *dubium iuris*⁷³ to the Pontifical Council for the Interpretation of Legislative Texts, no authentic interpretation has emerged to resolve the issue.⁷⁴

⁷¹Jobe Abbass, "Trials in General," 717.

⁷²John Paul II, *Motu Proprio Sacramentorum sanctitatis tutela quo Normae de gravioribus delictis Congregatio pro Doctrina Fidei reservatis promulgator*, 30 April 2001, in AAS 93 (2001), 737-739.

⁷³Hanna Alwan, "Rapporto fra il Codice dei Canoni ...," 177; The doubt was addressed to resolve a conflict arose in the wake of an appeal lodged at the Tribunal of Roman Rota by the defendant in a case of nullity of marriage against the first affirmative sentence of first grade (instance) of the Greco-Catholic Melkite Church in Lebanon.

⁷⁴*Communicationes* 27 (1995), 31: "Hæ sunt quaestiones inter alias quae, sive in Congressu, sive in adunationibus quorundam Consultorum, a mense ianuario usque ad mensem iunium huius anni 1995 studio submissae sunt Pontificii Consilii, iuxta modum procedendi in eodem adhibitum: [...] de

However, the historical facts, the provisions of the present oriental legislation and of its predecessor *Sollicitudinem nostram*, the iter of the relevant canons of CCEO, and the conflicting expert opinions on this matter have firmly convinced the author of the incompetence of Roman Rota in such cases. The Rota's competence over oriental cases is limited to some reserved cases and to *provocatio ad Romanum Pontificium* cases. Even regarding these matters, the competence of the Rota is conditional and limited. Arguments that excluding the competence of the Rota would restrict the Roman Pontiff's authority and exclude the special value of Rotal jurisprudence are insufficiently founded. The Roman Rota is only one of the organs that helps the Roman Pontiff to administer justice; it can in no way be equated with the Roman Pontiff. As is clear from CCEO c. 1059, being the supreme judge for the entire Catholic world, the pope acts either personally, or through tribunals of the Apostolic See, or through judges delegated by him. The same logic that explains the Rota's incompetence in cases from the Spanish tribunal can also be applied in the case of patriarchal and major archiepiscopal tribunals. Although the "normal" will of the Roman Pontiff is "tribunal "ordinarium" a Romano Pontifice constitutum appellationis recipiendis est Rota Romana,"⁷⁵ the Roman Pontiff can nevertheless dispose differently in a single case or through a particular norm.⁷⁶ In the case of patriarchal and major archiepiscopal Churches, the Roman Pontiff has willed differently through the disposition of CCEO c. 1063 §3, which modifies the previous norms given by SN and PB. Regarding the Roman Rota, it can achieve the unity of jurisprudence entrusted to it by correctly interpreting and applying the law in judging the innumerable cases that come to it, and not by getting necessarily involved directly in the cases of Oriental Churches.⁷⁷ Therefore, as Llobell puts it, "the judicial incompetence doesn't exclude the special value of the jurisprudence of the Roman Rota."⁷⁸ Given the stated official position of the Church to respect the rightful autonomy of the Oriental Churches, one can reasonably assume that a resolution of the aforementioned *dubium* would favour

competentia Romanae Rotae quoad appellationes de quibus in can. 1063 §3 CCEO."

⁷⁵CIC 1917 c. 1598 §1 and CIC 1983 c. 1443.

⁷⁶Joaquín Llobell, "Le norme del 1999 della Rota della Nunziatura Apostolica in Spagna," *Il Diritto Ecclesiastico*, 111/1 (2000), 779-808, at p. 788.

⁷⁷Joaquín Llobell, "La competenza della Rota Romana..." 36-38.

⁷⁸Joaquín Llobell, "La competenza della Rota Romana..." 36-38

the exclusive competence of the patriarchal and major archiepiscopal tribunals.

Conclusion

The ability to vindicate one's rights by appealing to a superior tribunal and subsequent instance of judgment is essential to the administration of justice in the Church. Since an affirmative concluding sentence often can't be reached at second instance, a Church or tribunal must be able to handle internally cases in all instances in order to be judicially self-sufficient. While the Latin code provides for only one ordinary tribunal of third instance, namely, the Roman Rota, the common law of CCEO establishes clear norms regarding the erection, competence and functioning of such tribunals in the patriarchal and major archiepiscopal Churches. The territorial tribunals of third instance in the Latin Church can in no way be compared with the stably established patriarchal tribunals; the former are established by special concession of the Holy See only for a limited time and number of cases, but the latter have general competence over all cases except reserved ones. In short, it can be stated that the hierarchy of tribunals and instances, the *turnus* system of adjudication, and the subjection of the ordinary tribunal to a collective authority rather than to an individual help these tribunals to function effectively in their respective Churches.