

## SYNODALITY AND THE EXERCISE OF JUDICIAL POWER IN A PATRIARCHAL/MAJOR ARCHIEPISCOPAL CHURCH *SUI IURIS*

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### Abstract

Synodality in the Church implies walking together in the path of the Lord with a prompt heart to listen to the voice of the Holy Spirit revealed through the fellow brethren so as to fulfill the mission the Lord has entrusted to her. Though there have been minor aberrations, the Church of Christ, especially that of the East has been synodal in its functioning from the very beginning. This is all true in the administration of justice through tribunals, where issues and conflicts are to be resolved and rights are to be vindicated. Functioning synodally with the rightful autonomy they possess, the superior tribunal and ordinary tribunal of a patriarchal and major archiepiscopal Church stand out as epitomes of collegial ministry in the Church.

**Key Words:** Judicial Power, Synodality, Autonomy, Administration of Justice, Tribunals.

### Introduction

The study undertaken by the International Theological Commission during its 9<sup>th</sup> Quinquennium, on the topic “Synodality in the life and mission of the Church” gives a clear picture about the concept of synodality from a theological, biblical, pastoral and historical point

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of view. It explains how the ideal of 'walking together in the path of the Lord' outlined by synodality is important for effectively carrying out the ministry our Lord Jesus has entrusted to the Church.<sup>1</sup> It points out that "in the Eastern Churches, synodal procedure continued to follow the tradition of the Fathers, particularly on the level of patriarchal and metropolitan synods." (art. 31). The due recognition of the legitimate autonomy of the Eastern Churches and their genuine traditions by the Second Vatican Council find its expression in the Code of Canons of the Eastern Churches promulgated by Pope John Paul II on 18 October 1990. This article attempts to explore the extent of judicial autonomy exercised by the patriarchal/major archiepiscopal Churches *sui iuris* primarily through their superior tribunal and ordinary tribunal and to analyse how far the concept of synodality and communion ecclesiology are applied in it.

### 1. The Concept of Synodality

The term 'synod' has several meanings. It is from two Greek words σύν (syn) "with," "together, and ὁδός (odos) = way. Thus, synod would mean walking together. A synodal Church according to article 67 of the study "Synodality in the life and mission of the Church," is a Church of participation and co-responsibility<sup>2</sup>. In exercising synodality, she is called to give expression to the participation of all, according to each one's calling, with the authority conferred by Christ on the College of Bishops headed by the Pope. As the study specifies at the beginning "an authentic manifestation of synodality naturally entails the exercise of the collegial ministry of the bishops:" (Art. 7). From a historical study of the administration of the Church in the early centuries, it is clear that "in the ecclesiastical sense, the term synod means the assembly of heads of the Churches, regularly or canonically convoked to deliberate and legislate on religious affairs."<sup>3</sup>

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<sup>1</sup> <http://secretariat.synod.va/content/synod/en/news/synodality-in-the-life-and-mission-of-the-church--by-the-interna.html> assessed on 6 July 2021.

<sup>2</sup> <http://secretariat.synod.va/content/synod/en/news/synodality-in-the-life-and-mission-of-the-church--by-the-interna.html> assessed on 6 July 2021.

<sup>3</sup> Paul Pallath, *The Synod of Bishops of Catholic Oriental Churches*, Rome: Mar Thoma Yogam, 1994, 44.

Eastern Churches have traditionally administered their affairs synodally. As a result, CCEO recognizes synodal governance as the ordinary form of governance of patriarchal and major archiepiscopal Churches. Dimitrios Salachas writes: "The true and genuine origin of super-Episcopal and super-metropolitan powers of Patriarchs demand that such powers be limited *ad normam iuris* in the context of the synodal structure of the oriental *sui iuris* Churches, according to the spirit of canon 34 of the Apostles."<sup>4</sup>

## 2. Exercise of Judicial Power in General

The power of governance in the Church is divided into legislative, executive and judicial power (CCEO c. 985; CIC c. 135). Judicial power is that function of the power of governance that resolves conflicts and controversial questions.<sup>5</sup> The Roman Pontiff, who possesses supreme, full, immediate and universal ordinary power over the whole Church is the supreme judge in the Catholic Church (cf. CCEO c. 1059 §1; CIC c. 1417 §1). In a diocese/eparchy, the eparchial bishop is endowed with legislative, executive and judicial power. Thus, as per the law in each eparchy for all the cases not expressly excepted by law the eparchial bishop is the judge in the first grade of the trial (CCEO c. 1066 §1). However, as a rule he is obliged to erect an eparchial tribunal such that the ordinary judicial power is exercised not by himself but through the tribunal and its judges (*Dignitas Connubii* 22 §2). Making use of this power, individual judges or college of judges appointed by the bishop resolve controversies and make decisions based on law and fact, which are binding on the persons involved in the case.

However, when it comes to a patriarchal and major archiepiscopal Church, it is the synod of bishops that possesses the judicial power in the entire patriarchal/ major archiepiscopal Church and not patriarch/major archbishop who heads the Church as its *pater et caput*. Of course, like any other eparchial bishop in his eparchy, the patriarch/major archbishop possesses legislative, executive, and judicial power. The judicial power over the entire patriarchal/major archiepiscopal Church is the competence of the synod of bishops. The judicial power is exercised by way of two unique tribunals,

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<sup>4</sup> Dimitrios Salachas, *Istituzioni di Diritto Canonico delle Chiese Cattoliche Orientali: Strutture Ecclesiali nel CCEO*, Roma: Edizioni Dehoniane, 1993, 142.

<sup>5</sup> Cfr. Julio Garcia Martin, *Le norme generali del Codex Iuris Canonici*, Roma: Istitutum Iuridicum Claretianum, 2006, 483-484.

which exist only in Eastern Catholic patriarchal/major archiepiscopal Churches. These two tribunals are i) the Superior Tribunal, which is the synod of bishops itself, and ii) the Ordinary Tribunal.

### 3. Synodal Character of Judicial Power

From a historical study of the administration of Church in the early centuries it is clear that "in the ecclesiastical sense the term synod means the assembly of heads of the Churches, regularly or canonically convoked to deliberate and legislate on religious affairs."<sup>6</sup> An analysis of the means of conflict resolution existed in the Church from the first centuries reveals that it was synodal in character. The first proof of it can be found in the fifteenth chapter of the Acts of the Apostles. It speaks of the Council of Jerusalem - the assembly of the apostles and elders gathered in Jerusalem to settle a crisis arising out of two conflicting views on the question of necessity of observance of the Mosaic Law of circumcision for salvation.<sup>7</sup> Again in the last decades of the second century, Christian assemblies which later came to be called "synods" or "councils" were convened in the East to resolve certain questions that arose in the ecclesial communities.<sup>8</sup> Even the very first ecumenical council - the First Council of Nicea, in its fifth canon, establishes the prerogatives of the provincial synod stating that it is the competent organ to consider cases of excommunication pronounced by a bishop.<sup>9</sup> The Apostolic canons (nos. 34 and 35) make clear reference to the exercise of the authority of a Primate authority in dialogue with others.<sup>10</sup> The stipulation of canon 2 of the First Council of Constantinople (381) that empowers the provincial synod to manage affairs in each province actually recognizes the rather absolute competence of the

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<sup>6</sup> Paul Pallath, *The Synod of Bishops of Catholic Oriental Churches*, Rome: Mar Thoma Yogam, 1994, 44.

<sup>7</sup> Cfr. Jose Chiramel, *The Patriarchal Churches in the Oriental Canon Law*, Roma: Pontificium Institutum Orientale, 1972, 4.

<sup>8</sup> Cfr. Jose Chiramel, *Patriarchal Churches*, 4.

<sup>9</sup> Cfr. George Thanchan, *The Juridical Institution of Major Archbishop in Oriental Canon Law with Special Reference to Syro Malabar Major Archiepiscopal Church*, PIO, Rome, 1998, 22; Norman P. Tanner ed., *Ecumenical Councils*, vol.1, 8.

<sup>10</sup> Cfr. Myroslaw Tataryn, "Papal Primacy, Local Primacy and Episcopal Collegiality," *Logos* 34 (1993), 117-141, at p. 121-122.

regional synods in the affairs of their Churches.<sup>11</sup> Canon 19 of the Council of Chalcedon (451), which made it obligatory the holding of the synod of bishops at least twice a year to put the things in right order also clearly underlines the synodal nature of judicial power. The council of Constantinople IV (869-870) in canon 10<sup>12</sup> stabilizes the rule that each judiciary instance has to be presided over by the "careful enquiry and judgment in synod."<sup>13</sup> Canon 15 of the Synod of Antioch (341) stipulates that when the members of the synod of bishops, with a general consensus have judged an accused bishop guilty, the accused has to admit their verdict. It is because this synod is a supreme instance and has full competence on the matter and there is no appeal against it.<sup>14</sup> Canon 12 of the Synod of Carthage (419) also says that when a bishop is accused of anything, he is to be tried by the synod of the province.<sup>15</sup>

It is true that in the course of history, when some of the patriarchs asserted themselves more and more, the synods lost most of their initial relevance but the Church administration in the oriental traditions is essentially synodal.

#### 4. Judicial Autonomy and Synodality

To have a clear idea about the extent of judicial autonomy enjoyed by the Eastern Catholic Churches especially patriarchal/major

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<sup>11</sup> Cfr. Eugenio Corecco, *La Formazione della Chiesa Cattolica negli Stati Uniti d'America attraverso l'attività sinodale: con particolare riguardo al problema dell'amministrazione dei beni ecclesiastici*, Brescia : Morcelliana, 1970, 54; Sunny Kokkaravalayil, *The Guidelines for the Revision of Eastern Code: Their Impact on CCEO*, Roma: Pontificio Istituto Orientale, 2009, 273.

<sup>12</sup> Constantinople IV (869-870), c. 10: As divine scripture clearly proclaims, Do not find fault before you investigate, and understand first and then find fault, and does our law judge a person without first giving him a hearing and learning what he does? Consequently this holy and universal synod justly and fittingly declares and lays down that no lay person or monk or cleric should separate himself from communion with his own patriarch before a careful enquiry and judgment in synod, even if he alleges that he knows of some crime perpetrated by his patriarch..." This canon is found in Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. 1, London, Sheed & Ward and Georgetown University Press, 1990, 8-9; Cfr. Jose Chiramel, *The Patriarchal Churches*, 82-83., vol.1, 174.

<sup>13</sup> Norman Tanner, *Decrees of the Ecumenical Councils*, vol. I, 174.

<sup>14</sup> Cfr. Sunny Kokkaravalayil, *The Guidelines for the Revision*, 275-276.

<sup>15</sup> Cfr. Sunny Kokkaravalayil, *The Guidelines for the Revision*, 276-277.

archiepiscopal Churches, down through the years, one must first of all know what it means by judicial autonomy. The Oxford dictionary defines autonomy as “the freedom for a country, a region or an organization to govern itself independently” or “the ability to make decisions without being controlled by anyone else.”<sup>16</sup> The judicial autonomy for a Church *sui iuris* would then mean the power to administer justice among its members and to resolve conflicts within its own structures without resorting to any higher authority. In this connection, it must be borne in mind that this judicial autonomy must be exercised according to the Divine Law and the Laws of the Church. This autonomy does not in any way negate the authority of the Roman Pontiff, the supreme judge for the entire Catholic world (CCEO c. 1059). Since this autonomy is a participation in the supreme authority of the Church, it is exercised by being subject to the Roman Pontiff who has the right to interfere in any case at any time in case of any gross injustice. Distinction must also be made between autonomy and autocephaly. Autocephalous Churches are independent Churches which elect their heads or Patriarchs who have the competence to organize their Churches in co-operation with local ecclesiastical synods.<sup>17</sup> Whereas autonomous Churches are those Churches that in organization and administration enjoy full freedom, but in certain matters of jurisdiction depend on some other central Church.<sup>18</sup> All the patriarchal and major archiepiscopal Churches in the Catholic communion enjoy autonomy and not autocephaly, because they are subject to the Roman Pontiff and bound by the universal laws of the Church.<sup>19</sup>

Judicial autonomy and individuality of a Church are closely connected. As George Punnakkottil writes: “The Canonical discipline of an individual Church is one of the main elements that projects the individuality of that Church. Together with the theological and spiritual celebration it forms a constitutive element of the

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<sup>16</sup> *New Oxford Advance Learner's Dictionary*, Oxford University Press: New Delhi, 2005, 89.

<sup>17</sup> Cfr. Mesrob K. Krikorian, “Autonomy and Autocephaly in the Theory and Practice of the Ancient Oriental Churches,” *Kanon* 5 (1981), 114-129 at p. 114.

<sup>18</sup> Cfr. Mesrob K. Krikorian, “Autonomy and Autocephaly,” 114.

<sup>19</sup> Cfr. Georgică Grigoriță, *Il Concetto di Ecclesia sui iuris*, Roma: Pontificia Università Gregoriana 2007, 43-45.

individuality of a Church."<sup>20</sup> While liturgical assembly hands over the Christ experience of a Church from generation to generation, ecclesiastical discipline regulates its life and activities.<sup>21</sup> Highlighting the importance of ecclesiastical discipline proper to each Church *sui iuris*, the Second Vatican Council decree on Ecumenism *Unitatis redintegratio* 15 clearly declares that the Churches of the East have the power to govern themselves according to their own disciplines which are best suited to the character of their faithful and better adapted to foster the good of the souls.

### 5. Judicial Autonomy in the Genuine Oriental Traditions

As seen before judicial power is that function of the power of governance that resolves conflicts and controversial questions.<sup>22</sup> Judicial autonomy would then imply the possibility and capability to exercise this power on its own without any unnecessary external interference. The concept of judicial autonomy in the genuine oriental traditions can be understood only against the background of the growth and development of the five patriarchates, namely, Rome, Constantinople, Alexandria, Antioch, and Jerusalem within the Roman Empire and the two Catholicates of Armenia and Persia outside the Empire. In the first millennium, all these Churches were of equal dignity, though Rome, being the See of Peter was considered *primus inter pares*. However, in the course of history, the Eastern Churches<sup>23</sup> became less powerful, and Rome emerged as the central power in the Church with the consequent effect that the patriarchs' position of pre-eminence came to be understood as mere participation in the *plenitudo potestatis* of the Pope.<sup>24</sup> These regional groupings of Churches had evolved their own system of governance in the legislative, administrative, and judiciary fields without depending on the authority of any other Church, including the See of

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<sup>20</sup> Placid Joseph Podipara, *The Canonical Sources of the Syro-Malabar Church*, Kottayam: Oriental Institute of Religious Studies, 1986, 21.

<sup>21</sup> Placid Joseph Podipara, *The Canonical Sources of the Syro-Malabar Church*, 22.

<sup>22</sup> Cfr. Julio Garcia Martin, *Le norme generali del Codex Iuris Canonici*, Roma: Istitutum Iuridicum Claretianum, 2006, 483-484.

<sup>23</sup> Among the five patriarchates and two catholicates mentioned only Rome is a Western Church, all others are Eastern.

<sup>24</sup> It was Pope Leo the Great (440-461), as heir of Peter, claimed for the first time *plenitudo potestatis* over the entire Church (cfr. Myroslaw Tataryn, "Papal Primacy, Local Primacy and Episcopal Collegiality," 123).

Rome. As Wilhelm de Vries mentions, the canonical autonomy of the patriarchates was a fact recognized by Rome and the ecumenical councils in the first millennium. It was a case of self-administration by the local Churches, based on prescriptive right obtained through customs and sanctioned by the early ecumenical councils and not the sum of exactly determined and limited individual privileges granted by Rome.<sup>25</sup>

### **5.1 Synodal Exercise of Judicial Power in the Eastern Catholic Churches**

It is a historical fact that in the first millennium, the Eastern patriarchs enjoyed far-reaching autonomy and governed their patriarchates with the help of the patriarchal synods.<sup>26</sup> Governing a Church would naturally imply that there existed legislative, executive and judiciary powers and the means of exercising these powers. As Jose Chiramel writes, "The patriarch watched over discipline and private and public morals throughout the territory entrusted to him. He regulated autonomously the discipline of the clergy, the monks, and the laity without the minimum of interference."<sup>27</sup> Here attention is focused only on the extent of judicial powers enjoyed by the ancient Eastern patriarchates and catholicates in the first millennium and the means of conflict resolutions they made use of in the exercise of this power.

#### **5.1.1 Administration of Justice in the-Patriarchates of the Pentarchy**

The Eastern patriarchs who enjoyed far-reaching autonomy in the first millennium had the power to govern their patriarchates with the help of the patriarchal synods.<sup>28</sup> It was an autonomy which can be called canonical and extended to three main areas,<sup>29</sup> namely, 1) The power to choose freely its patriarchs and bishops and the right to rule its dioceses independently (it is to be noted that in the entire first millennium, there was not even a single instance where Rome appointed an Eastern patriarch). 2) The power to shape liturgy and to make canonical legislation (the patriarchs with their synods had

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<sup>25</sup> Cfr. Wilhelm de Vries, "The Eastern Patriarchates and their Relationship to the Power of the Pope," *One in Christ* (2 / 1966), 130.

<sup>26</sup> Cfr. Jose Chiramel, *The Patriarchal Churches*, 52.

<sup>27</sup> Cfr. Jose Chiramel, *The Patriarchal Churches*, 76.

<sup>28</sup> Cfr. Jose Chiramel, *The Patriarchal Churches*, 52-53.

<sup>29</sup> Regarding this autonomy in the above mentioned three areas see Wilhelm de Vries, *Rom und die Patriarchate des Ostens*, 19-22.



the power to shape liturgy and to make canonical legislation). 3) The power to handle independently the discipline of its clergy and the laity. The intervention of Rome in these areas was extremely rare in the first millennium. As a rule, the local authorities handled the discipline of the clergy and the laity, oversaw the observation of canons, punished the offenders, etc. The intervention of the Holy See sometimes occurred based on a true appeal from the East to higher authorities in Rome, but sometimes without such an appeal. There were only a very few cases in the course of the entire first millennium. Against these rare interventions of Rome in disciplinary matters, there are virtually innumerable disciplinary measures of local authorities without any interference from Rome.<sup>30</sup>

Many canons of the ancient councils and synods indicate the judicial autonomy enjoyed by the ancient Oriental Churches in the first millennium. Following are some of them:

**i. Canon 5 of the First Council of Nicea (325)** speaks of the resolution of a conflict arising out of the excommunications of the clergy or lay people by their bishops. According to this canon in case of lack of fairness in an excommunication, it is the prerogative of the semi-annual provincial synods to review the fairness of such excommunications.<sup>31</sup> This canon, thus, contains the idea of a judicial

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<sup>30</sup> Cfr. Wilhelm de Vries, *Rom und die Patriarchate des Ostens*, 19-22.

<sup>31</sup> Cfr. Brian E. Daley, "Primacy and Collegiality in the Fourth Century: A Note on Apostolic Canon 34," *The Jurist* 68 (2008), 5-21, pp. 10-11; George Thanchan, *The Juridical Institution*, 22. Council of Nicea, canon 5 says: "Concerning those, whether of the clergy or the laity, who have been excommunicated, the sentence is to be respected by the bishops of each province, according to the canon which forbids those expelled by some to be admitted by others. But let an enquiry be held to ascertain whether anyone has been expelled from the community because of pettiness or quarrelsomeness or any such ill nature on the part of the bishop. Accordingly, in order that there may be proper opportunity for inquiry into the matter, it is agreed that it would be well for synods to be held each year in each province twice a year, so that these inquiries be conducted by all the bishops of the province assembled together, and in this way by general consent those who have offended against their own bishop may be recognized by all to be reasonably excommunicated, until all the bishops in common may decide to pronounce a more lenient sentence on these persons. The synods shall be held at the following times: one before Lent, so that, all pettiness being set aside, the gift offered to God may be

autonomy not possessed personally by the head of the Church but by the synod.

**ii. Council of Constantinople I (381), canon 6** is very emphatic in its statement that one who has been wronged should get justice. It says:

...So if someone brings a private (that is personal) complaint against the bishop on the grounds that he has been defrauded or in some other way unjustly dealt with by him, in the case of this kind of accusation neither the character nor the religion of the accuser will be subject to examination. It is wholly essential both that the bishop should have a clear conscience, and that the one who alleges that he has been wronged should get justice....<sup>32</sup>

**iii. The Council of Chalcedon (451) canons 8<sup>33</sup> and 9** stabilize the order for the judicial instance of the clergy; that is the priests to the bishop, the bishop to the metropolitan, the metropolitan to the patriarch.<sup>34</sup> Prohibiting any clerics going to a secular court, Canon 9 of the Council of Chalcedon insists that they are to bring the case before their own bishop. The canon prescribes the course of action to be followed in disputes:

If any cleric has a case to bring against a cleric, let him not leave his own bishop and take himself to secular courts, but let him first air the problem before his own bishop, or at least with the permission of the bishop himself, before those whom both parties are willing to see act as arbiters of their lawsuit. If anyone acts in a contrary fashion, let him be subject to canonical penalties. If a cleric has a case to bring either against his own or against another bishop, let him bring the case to the synod of the province. If a bishop or a cleric is in dispute with the metropolitan of the same province, let him engage either the exarch of the diocese or the see of imperial Constantinople, and let him bring his case before him.<sup>35</sup>

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unblemished; the second after the season of autumn." (cfr. Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 8).

<sup>32</sup> Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 33-34.

<sup>33</sup> Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 91.

<sup>34</sup> Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 91.

<sup>35</sup> Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 91.

For the purpose of putting the things in right order canon 19 of the Council of Chalcedon (451)<sup>36</sup> spoke of the importance and necessity of the synod of bishops and made it obligatory to hold the synod at least twice a year.<sup>37</sup> Canon 28 of the Council of Chalcedon recognized to the archbishop of Constantinople the right to judge in appeal the cases of the three exarchates of Asia, Pontus and Thrace.<sup>38</sup>

**iv. Fourth Council of Constantinople (869-870):** From a brief study of the canons 10, 17, 19, and 26 of the Fourth Council of Constantinople (869-870), one can understand that in the ancient times, the patriarch in his patriarchate enjoyed broad judicial power for judging either in the internal forum or in the external forum, personally or through tribunals, the spiritual as well as those of the temporal affairs of the Church.<sup>39</sup> Canon 19 acknowledges the authority of the patriarch as supreme ecclesiastical judge in his territory with the power to enforce punishment on those who had violated or neglected the laws.<sup>40</sup> With the purpose of ensuring right and impartial judgment, canon 10 of the Council<sup>41</sup> made it

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<sup>36</sup> Canon 19 of the Council of Chalcedon (451) says, "We have heard that in the provinces the synods of bishops prescribed by canon law are not taking place, and that as a result many ecclesiastical matters that need putting right are being neglected. So the sacred synod decrees that in accordance with the synod of the fathers, the bishops in each province are to foregather twice a year at a place approved by the bishops of the metropolis and put any matters arising to rights. Bishops failing to attend who enjoy good health and are free from all unavoidable and necessary engagements, but stay at home in their own cities are to be fraternally rebuked." (cfr. Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 106).

<sup>37</sup> See council of Nicaea, canon 5; Apostolic canons 37; Council of Antioch (341), canon 20; Council of Carthage (419), canons 18, 73, 76, 77, 95; Brian E. Daley, "Primacy and Collegiality in the Fourth Century: A Note on Apostolic Canon 34," *The Jurist* 68 (2008), 13.

<sup>38</sup> Dimitrios Salachas, *Istituzioni di Diritto Canonico*, 133-134.

<sup>39</sup> Cfr. Francis Eluvathingal, "The Bishops of the Patriarchal/ Major Archiepiscopal Curia: A Study and Reflection," *Eastern Legal Thought* 8 (2009), 139.

<sup>40</sup> Cfr. Norman P. Tanner, *Decrees of the Ecumenical Councils*, 180-181.

<sup>41</sup> Constantinople IV (869-870), c. 10: "As divine scripture clearly proclaims, Do not find fault before you investigate, and understand first and then find fault, and does our law judge a person without first giving him a hearing and learning what he does? Consequently this holy and universal synod justly and fittingly declares and lays down that no lay

mandatory that each judiciary instance had to be presided over by the careful inquiry and assessment in synod.<sup>42</sup> The judicial power the patriarch had over the bishops and metropolitans of his patriarchate can be clearly understood from canon 17 of the Council, which states:

This great and holy synod decrees that in old and new Rome and the sees of Antioch and Jerusalem, the ancient custom must be preserved in all things, so that their prelates should have authority over all the metropolitans who they promote or confirm in the Episcopal dignity, either through the imposition of hands or the bestowal of the pallium; that is to say, the authority to summon them, in case of necessity, to a meeting in synod or even to reprimand and correct them, when a report about some wrong doing leads to an accusation.<sup>43</sup>

v. **Constantinople IV (869-870), c. 19**<sup>44</sup> speaks of punishments from the patriarch to erring metropolitans or archbishops who go to other Churches on the pretext of an official visit and by their greed become a burden to the bishops by consuming the revenues which they have at their disposal and for feeding the poor. Canon 26 of Constantinople IV (869-870) speaks of the right of a cleric who has been deposed or suffered an injustice at the hands of his bishop, to take his case to the highest authorities in the Catholic Church, namely the Supreme Pontiff.<sup>45</sup> According to the provisions of this canon, the bishops can appeal to the patriarch against the decision of the metropolitan.<sup>46</sup> The canon also ordained that a metropolitan bishop should not be judged by the neighbouring metropolitans, even though it is alleged that he has committed serious crimes, but

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person or monk or cleric should separate himself from communion with his own patriarch before a careful enquiry and judgment in synod, even if he alleges that he knows of some crime perpetrated by his patriarch..." (Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 174.)

<sup>42</sup> Cfr. Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 174.

<sup>43</sup> Norman Tanner, *Decrees of the Ecumenical Councils*, vol. I, 179.

<sup>44</sup> Cfr. Norman Tanner, *Decrees of the Ecumenical Councils*, vol. I, 180-181.

<sup>45</sup> Cfr. Norman Tanner, *Decrees of the Ecumenical Councils*, vol. I, 185.

<sup>46</sup> Constantinople IV c. 26: "...Similiter etiam episcopus concurrere ad patriarchale caput decernimus, qui a metropolitans sui talia se pertuulisse fatentur, ut apud patriarcham et metropolitan qui sub ipso sunt, iustam et sine suspicione sententiam quod movetur negotium accipiat..." (cfr. Norman Tanner, *Decrees of the Ecumenical Councils*, vol. I, 185).

he may only be judged by his patriarch.<sup>47</sup> The Patriarchs made the judgment in various instances in the following way: he "judged the metropolitans in the first instance, and the bishops in the second instance of every kind of process and the clergy in third instance in ecclesiastical processes."<sup>48</sup> The full text of canon 26 of the Council of Constantinople IV (869-870) is as follows:

This holy synod has also decided that any priest or deacon who has been deposed by his bishop for some crime, or who alleges he has suffered some kind of injustice and is not satisfied with the judgment of his bishop, saying that he doesn't trust him and that he has been wronged, either because of the enmity which the bishop has for him or because of favours the bishop wants to bestow on certain others, such a person has the right to have recourse to the metropolitan of his province and to denounce his deposition from office, which he thinks is unjust, or any other injury. The metropolitan should be willing to take up such cases and to summon the bishop who has deposed the bishop or injured him in any way. He should examine the case himself, with the help of other bishops, so as either to confirm the deposition of the cleric beyond all doubt or to quash it by means of a general synod and the judgment of many persons. In the same way we decree that bishops may have recourse to the patriarch, their head, if they complain that they have suffered similar thing from their metropolitan, so that the business in question may receive a just and right decision from their patriarch and the metropolitan under him. No metropolitan bishop may be judged by his neighbouring metropolitan bishops, even though it is alleged that he has committed serious crimes, but he may only be judged by his patriarch; we decree that his judgment will be just and beyond suspicion because a number of esteemed people will be gathered

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<sup>47</sup> Constantinople IV c. 26: "...Insuper etiam nullo modo quisquam metropolitanorum episcoporum a vicinis metropolitibus episcopis provinciae suae iudicetur, licet quaedam incurrisse criminali perhibeatur, sed a solo patriarcha proprio iudicetur: cuius sententiam rationabilem, et iudicium iustum, ac sine suspitione fore decernimus, eo quod apud eum honorabiliores quique colligantur, ac per hoc ratum et firmum penitus sit quod ab ipso fuerit iudicatum..." (cfr. Norman Tanner, *Decrees of the Ecumenical Councils*, vol. I, 185).

<sup>48</sup> Cfr. Jose Chiramel, *The Patriarchal Churches*, 75-76.

around the patriarch, and for this reason his judgment will be fully ratified and confirmed.<sup>49</sup>

**vi. Canon 5 of the Fourth Council of Lateran (1215)** stabilized an organization of tribunals of patriarchs, defining their competence and allowing the possibility of appeals to the Roman Pontiff.<sup>50</sup> Of the judicial power of the patriarchs the canon says, "... In all the provinces subject to their jurisdiction let appeals be made to them, when it is necessary, except for appeals made to the apostolic see, to which all must humbly defer."<sup>51</sup>

In this context, a special judicial power the patriarch of Constantinople possessed in his capacity as the Ecumenical Patriarch it is to be mentioned. According to ancient canonists Aristenus and Balsamon, the Ecumenical Patriarch could handle appeals made not only against his own metropolitans, but also against metropolitans, who were under another patriarch, but according to Zonaras the patriarch of Constantinople could not bring before his tribunal, and judge metropolitans from other sees against their will.<sup>52</sup> In case of encroachments of their rights by their own metropolitans bishops or clergy had the right to appeal to the patriarch of Constantinople, and the Ecumenical Patriarchate was competent to decide on the matter.<sup>53</sup> Not only the patriarch but the metropolitan also could convoke the provincial councils and preside and judge in the second instance the penal cases judged in the first instance.<sup>54</sup>

### 5.1.2 Judicial Autonomy Enjoyed by the Catholicos of the Persian Church

The head of the Persian Church (Chaldean Church), namely, the bishop of Seleucia-Ctesiphon, known synonymously as both

<sup>49</sup> Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 185.

<sup>50</sup> Lateran IV, constitution 5, in Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 236; See also Francis Eluvathingal, "The Bishops of the Patriarchal/Major Archiepiscopal Curia," 139.

<sup>51</sup> Norman P. Tanner, *Decrees of the Ecumenical Councils*, vol. I, 236.

<sup>52</sup> Vasil T. Istavridis, "Prerogatives of the Byzantine Patriarchate in Relation with the Other Oriental Patriarchates," *Orientalia Christiana Analecta* (181) Roma, PIO, 1968, 37-53, at 50.

<sup>53</sup> Cfr. Vasil T. Istavridis, "Prerogatives of the Byzantine Patriarch," 50.

<sup>54</sup> Francisco Xaver Wernz, *Ius canonicum ad codicis normam exactum*, vol. II, Romae: Pontificia Universitas Gregoriana, 1928, 548; Jose Chiramel, *Patriarchal Churches*, 11.

patriarch and catholicos, had all the powers and authority of the patriarchs of the Empire. A declaration of independence and autonomy on judicial matters is clearly visible in the abolition of the right of appeal to the Western Fathers made at the Synod of Markabta in 424.<sup>55</sup> Many canons of the Chaldean Church indicate that the head of that Church had been given a power of jurisdiction similar to that of the Bishop of Rome.

Canon 21 of the First General Synod (410) of the Chaldean Church is unequivocal in its assertion that the see of the Bishop of Seleucia-Ctesiphon is the first and principal see, and the occupant of this see is the Great Metropolitan and head of all the bishops.<sup>56</sup> This primacy is further reiterated in canon 12 of the same synod. He had the power to control the liturgical life of the Church<sup>57</sup> and had supremacy over a General Synod.<sup>58</sup> The bishop of Seleucia-Ctesiphon who was independent of any ecclesiastical authority exercised his powers in the erection, suppression, and dismemberment of ecclesiastical provinces and eparchies and had the power to appoint metropolitans and bishops.<sup>59</sup>

Since the focus of this study is on the judicial powers enjoyed by the oriental Churches in the first millennium, more attention is drawn on the powers the bishop of Seleucia-Ctesiphon exercised in the judicial field. Synod of Dadiso (424) expresses the general principle that the patriarch is the judge of all who are under his authority.<sup>60</sup> The 18<sup>th</sup>

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<sup>55</sup> Wilhelm De Vries, "Antiochien und Seleucia-Ctesiphon: Patriarch und Katholikos?," Auszug aus *Mélanges Eugene Tisserant*, v. 3, Città del Vaticano: Biblioteca Apostolica Vaticana, 1964, 429-450; According to Vries the right of appeal to the "Fathers of the West meant right to appeal to the bishops or the patriarchs of the empire, and was not a recognition of the bishop of Antioch as a special appeal instance for the Persian Church".

<sup>56</sup> Cfr. William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," in *I Patriarchati Orientali nel Primo Millennio in Orientalia Christiana Analecta* 181, Roma 1968, 178-200 at p. 181; Jean Baptiste Chabot, *Synodicon orientale, ou, Recueil des synodes nestoriens*, Paris: Imprimerie nationale, 1902, 33: 12-4/272.

<sup>57</sup> *Synodicon Orientale*, c. 13.

<sup>58</sup> Cfr. *Synodicon Orientale* c 6; William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 181.

<sup>59</sup> Cfr. William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 187.

<sup>60</sup> Cfr. William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 188.

canon of the Synod of Isaac (410) is unequivocal in its assertion that the Great Metropolitan of Seleucia-Ctesiphon possessed a judicial autonomy independent of any other authority on earth.<sup>61</sup> According to the canon when a metropolitan does not succeed to settle quarrels that concern the bishops of his province by persuasion and counsel, or when he fails to correct them when they transgress the canons of their office, he is duty-bound to write to the Great Metropolitan who has the authority to write and settle the affair.<sup>62</sup> Canon 31 of the Synod of Ezekiel in the process of establishing an order of procedure to be followed in appeals, asserts the judicial supremacy of the patriarch. According to the canon, complaints against one's own bishop should be first brought before the metropolitan. If they do not obtain justice from him, or if the complaint is against the metropolitan himself, the course of action is to bring the case before the patriarch, who has the authority to decide on the matter.<sup>63</sup> Further indications of the judicial powers of the patriarch can be found in the apocryphal literature. William F. Macomber writes thus in this regard:

The apocryphal literature goes still further in its expression of the judicial powers of the patriarch. The Letter of the Western Patriarchs to Papa, gives him full power over all the metropolitans and bishops of the entire Church of the East, to ordain them, as he judges to be suitable, and depose them for transgression. In the first Letter of the Western Fathers, moreover, he is given authority to judge all bishops, to absolve, depose or inhibit. Furthermore, the 15<sup>th</sup> of the Arabic Canons of Nicea authorizes the patriarch to absolve from censures imposed by those under his authority, even when the censure was justly imposed and the censurer is still alive, which authority is explicitly denied to priest and bishops including metropolitans.<sup>64</sup>

In case of lack of unity among the other bishops of the province about the culpability of an accused bishop canon 14 of the Synod of

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<sup>61</sup> Cfr. William Francis Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 188.

<sup>62</sup> Cfr. *Synodicon Orientale* 31: 15-22/270; William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 188.

<sup>63</sup> Cfr. *Synodicon Orientale* 126: 24-7/385; William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 188.

<sup>64</sup> Cfr. William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 188-189.



Antioch (341)<sup>65</sup> leaves open to the metropolitan the possibility to invite the bishops of the neighbouring province to settle the matter. However, the canon makes it clear that the other bishops can intervene only at the invitation of the metropolitan.<sup>66</sup> From a study of the above-cited canons it stands to reason that the catholicos/patriarch of Seleucia-Ctesiphon had in the regions under his jurisdiction practically all of the powers that the Bishop of Rome traditionally exercised in the Universal Church.

According to the canon, when a metropolitan does not succeed to settle quarrels that concern the bishops of his province by persuasion and counsel, or when he fails to correct them when they transgress the canons of their office, he is duty bound to write to the Great Metropolitan who has the authority to write and settle the affair.<sup>67</sup>

## 6. Concept of Synodality Reinforced Through Vatican II

The Second Vatican Council which was declared open on 11 October 1962 by Pope John XXIII played a significant positive role in recognizing the distinct identity and autonomy of the Eastern Catholic Churches. It was in sharp contrast to the vigorously and aggressively implemented Latinization policies of the past which had done everything possible to destroy the ecclesial identity of most of the Eastern Catholic Churches and made an all-out effort to conform them to the Latin Church. The council came forward with teachings, instructions and means to protect and promote the identity, autonomy and liturgical, spiritual and disciplinary heritage of all these Churches. Contrary to the prevalent idea at that time that the Latin Church is the only true Church and every one must conform to the laws and discipline of the Latin Church, the Second Vatican Council came with the concept of communion and equality of Churches. The council made it clear that all the oriental Churches have the right and duty to govern themselves according

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<sup>65</sup> Cfr. Henry Robert Percival, *The Seven Ecumenical Councils of the Undivided Church: their Canons and Dogmatic Decrees, Together with the Canons of all the Local Synods Which have Received Ecumenical Acceptance*, Michigan: William B. Eerdmans Publishing Company, 1979,, 115.

<sup>66</sup> Cfr. Sunny Kokkaravalayil, *The Guidelines for the Revision*, 275-276.

<sup>67</sup> Cfr. *Synodicon Orientale* 31: 15-22/270; William F. Macomber, "The Authority of the Catholicos Patriarch of Seleucia-Ctesiphon," 188.

to their own special disciplines while preserving their ancient traditions.

*Orientalium Ecclesiarum* (OE), the decree of the Second Vatican Council on the Catholic Eastern Churches, promulgated on 21 November 1964<sup>68</sup> has an added significance on this matter.<sup>69</sup> Its clear message that the Church not only values the institutions of the Eastern Churches but also wants them to flourish (OE 1) was a clear acknowledgment and recognition of the distinct identity and individuality of these Churches. Considering the Church as a communion of different Churches with their own hierarchy, the decree expresses the desire of the Church to see the traditions of each particular Church or rite to remain whole and entire, and likewise to adapt its own way of life to the needs of different times and places (OE 2). The council emphasizes equality of all Churches and insists that no church is superior to the other (OE 3). Making it clear that the Church views the heritage of these oriental Churches as the heritage of the whole Church and stressing that the Churches of the East like the Churches of the West have the right and duty to govern themselves according to their own special disciplines (OE 5), the council calls for the preservation of the ancestral tradition of these Churches (OE 6). About the possibility to set up new patriarchates it states "Since the patriarchal system is the traditional form of government in the Eastern Churches, the holy ecumenical council wishes, wherever there is need, new patriarchates to be set up." (OE 11).

In the same line of *Orientalium Ecclesiarum*, the Second Vatican Council decree on ecumenism *Unitatis Redintegratio* makes it clear beyond doubt that far from being an obstacle to the Church's unity, the discipline the Churches of the East followed from the ancient times and the diversity of customs and observances only add to her beauty (UR 16). According to the decree, the entire heritage of spirituality and liturgy, of discipline and theology in the various traditions, belong to the full Catholic and apostolic character of the Church (UR 17).

To bring into effect these desired results one of the main intentions of the council was to reform the Church and to revise the Code of

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<sup>68</sup> Cfr. AAS 57 (1965), 76-112.

<sup>69</sup> Cfr. Andrews Thazhath, *The Juridical Sources of the Syro-Malabar Church*, Kottayam: St. Joseph's Press, 1987, 285.

Canon Law.<sup>70</sup> This was accomplished through the promulgation of Code of Canon Law for the Latin Church in 1983 and the Code of Canons of the Eastern Churches for all eastern catholic Churches in 1990.

### **7. Judicial Powers of a Patriarchal Church, Patriarch and Patriarchal Tribunals According to *Sollicitudinem Nostram***

Any study on the judicial autonomy granted to the patriarchal and major archiepiscopal Churches by the *Code of Canons of the Eastern Churches* (CCEO) would be incomplete without first understanding the extent and application of this power as per the canons of pre-conciliar Eastern Code, *Codex Iuris Canonici Orientalis* (CICO) promulgated by Pius XII in the form of four *motu proprio* during the years 1949 to 1958. The four *motu proprio* were *Crebrae Allatae* (CA), *Sollicitudinem nostram* (SN), *Postquam Apostolis Litteris* (PAL) and *Cleri Sanctitati* (CS). The *motu proprio Cleri sanctitati* in canon 298 § 1 gives the instruction that "in the patriarchal curia a patriarchal tribunal must be established according to the norms of law, distinct from the tribunal of the patriarchal eparchy,"<sup>71</sup> an instruction that is repeated *verbatim* in SN c. 85 § 1. However, all the details and specific norms concerning procedure and that of judicial powers are given only in the *motu proprio Sollicitudinem nostram*, the procedural law promulgated by Pius XII for the Eastern Churches in 1950. From a study of certain canons of *Sollicitudinem Nostram* one can understand the extent of judicial powers granted to the patriarchal Church, patriarch and patriarchal tribunals by the pre-conciliar Eastern Code, *Codex Iuris Canonici Orientalis* (CICO).

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<sup>70</sup> The Pope had solemnly announced his intention to celebrate a Roman Synod and an Ecumenical Council three years ago on 25 January 1959 (AAS 51 [1959] 65-69).

<sup>71</sup> *Cleri Sanctitati* (CS) c. 298 § 1: In curia patriarchali constitui debet ad normam iuris tribunal patriarchale, a tribunali eparchiae Patriarchae propriae distinctum. § 2. Tribunal patriarchale proprios iudices, promotorem iustitiae et vinculi defensorem habeat, atque instructum sit auditoribus, notaries, aliisque necessariis ministris. § 3. Iudicibus, auditoribus atque promotore iustitiae exceptis, ceteri in § 2 recensiti iidem esse possunt in tribunali patriarchali et eparchiali.; SN c. 85 repeats *verbatim* CS c. 298.

### 7.1 Organization of the Judicial Organs According to *Sollicitudinem Nostram*

For the administration of justice in the Patriarchal and major archiepiscopal Churches, the motu proprio *Sollicitudinem Nostram* (SN) instituted two superior tribunals, namely the permanent synod (cfr. SN cc. 86-90) and the Ordinary Patriarchal Tribunal of Appeal (cfr. SN c. 85). The permanent synod was entrusted with penal and contentious judiciary power (cfr. SN cc. 17-18). While §1<sup>72</sup> and §2<sup>73</sup> of canon 17 mention respectively the cases the patriarchs or the major archbishops with their permanent synod are competent to judge, canon 18<sup>74</sup> lists the cases reserved to the judgement of the patriarch/major archbishop<sup>75</sup> with the permanent synod. The motu proprio also conceded a wide judicial power to the Patriarch

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<sup>72</sup> SN c. 17 § 1, 1°: Patriarchae cum Synodo permanenti competit iudicare Episcoporum sibi subiectorum, qui domicilium vel quasi-domicilium in patriarchatu habent, causas criminales minores, quae nempe poenam privationis officii aut depositionis minoris seu depositionis simplicis vel maioris seu degradationis non secumferant; 2° In causis vero maioribus, Patriarcha cum Synodo permanenti processum instruere debet Romano Pontifici, ferendae sententiae causa, transmittendum. Patriarcha, insuper, ad scandalum vitandum, remedia opportuna interim adhibere potest.

<sup>73</sup> SN c. 17 § 2: Archiepiscopo cum Synodo permanenti, quod attinet ad causas criminales minores Episcoporum sibi subiectorum, qui in archiepiscopatu domicilium vel quasi-domicilium habent, competit processum instruere; sententia autem ferri non potest nisi praevia Romani Pontificis speciali delegatione.

<sup>74</sup> SN c. 18 § 1: Patriarchae cum Synodo permanenti est iudicare: 1° Causas contentiosas Episcoporum, etiam titularium, gravioris momenti, et, si agatur de re pecuniaria, illas in quibus agitur de summa vel re cuius pretium excedat triginta milia francorum aureorum; 2° Eparchiarum contentiosas causas; 3° Causas de iuribus aut bonis temporalibus Episcopi aut mensae seu domus vel curiae eparchialis.

§ 2: Causae gravioris momenti, de quibus in § 1, definiri et, quoad fieri potest, recenseri debent in Synodo patriarchali.

§ 3: Patriarchae competit iudicare ceteras contentiosas causas Episcoporum, etiam titularium, firmo can. 46 § 1, 10.

<sup>75</sup> SN c. 20 § 1 grants to the major archbishop with the permanent synod the same competence the patriarch with the permanent has on this matter according to the provisions of SN c. 18. The canon states "Quae can. 18 de competentia Patriarchae, cum vel sine Synodo permanenti, praescripta sunt, intelligi debent etiam de Archiepiscopo et Synodo permanenti archiepiscopatus."

granting to him in can 73 § 1 the power to designate a Tribunal *ad casum* for the cases handled in first and second grade of tribunals of his Church within his proper territory, except those were judged by him in person.<sup>76</sup> The *motu proprio* which did not give any role to the synod of bishops in the administration of justice in the Church entrusted this task to the patriarch or major archbishop with the permanent synod (cc. 17-18).<sup>77</sup>

## 7.2 Ordinary Tribunal According to *Sollicitudinem Nostram*

The *motu proprio Sollicitudinem Nostram* in its canon 85 § 1, instructed that an ordinary patriarchal tribunal distinct from the tribunal of the eparchy of the patriarch must be constituted in the patriarchal curia according to the norm of law. The constitution and administration of this tribunal, however, were the prerogative of the patriarch or archbishop without any control of the permanent synod or synod of Bishops.<sup>78</sup> The *motu proprio Sollicitudinem Nostram* had given detailed norms on the competence and procedures of the patriarchal and major archiepiscopal tribunal in cc. 19-20 and 85-91.<sup>79</sup>

The ordinary patriarchal tribunal of appeal was given the competence to judge in second instance all the decisions of the inferior tribunals in the patriarchate or the cases appealed to the patriarch (cfr. *SN* cc. 19 and 72).<sup>80</sup> *SN* c. 19<sup>81</sup> specifies the cases

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<sup>76</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-Giuridica della Competenza della Rota Romana circa le Cause delle Chiese Orientali," *Quaderni dello Studio Rotale* 20 (2010), Città del Vaticano: Libreria Editrice Vaticana, 153-187, at p. 165.

<sup>77</sup> Cfr. Andrews Thazhath, "The Superior and Ordinary Tribunals of a sui iuris Eastern Catholic Church," *Studia Canonica* 29 (1995), 375-396, at pp. 385-386.

<sup>78</sup> Cfr. Andrews Thazhath, "Administration of Justice in the Syro-Malabar Church," in Francis Eluvathingal, ed., *Syro-Malabar Church since the Eastern Code*, Mannuthy: Marymatha Publications, 2003, 56-85, at p. 76.

<sup>79</sup> Cfr. Andrews Thazhath "The Superior and Ordinary Tribunals," 390.

<sup>80</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-Giuridica," 160-161.

<sup>81</sup> *SN* c. 19: *Tribunali ordinario sedis patriarchalis de quo in can. 85 competit iudicare: 1° Hierarchas locorum, Syncellis exceptis, Patriarchae Syncellos atque delegatos qui non sint Episcopi; 2° Personas physicas vel morales Patriarchae immediate subiectas, firmo praescripto can. 51, § 1; 3° Religiones iuris pontificii exemptione pontificia fruentes, firmo praescripto can. 51, § 1; 4° Causas contentiosas vel criminales Superioris in religione iuris pontificii exemptione pontificia fruenta, qui in eadem religione*

ordinary tribunal of the patriarchal Church is competent to judge in the first and succeeding instances: 1) Local hierarchs except Syncellus and patriarchal delegates who are not bishops, 2) Physical or moral persons immediately subject to the patriarch without prejudice to c. 51 § 1<sup>82</sup>, 3) Religious of pontifical right enjoying pontifical exemption without prejudice to c. 51 § 1 4) Religious superiors of pontifical right who do not have a superior within the same institute who possesses judicial power and 5) cases reserved to the patriarchal tribunal by the prescript of law. However, the same *motu proprio* in canon 20 § 2<sup>83</sup> grants to the ordinary tribunal of major archiepiscopal Church the competence only to judge non-Episcopal local hierarchs except *Syncelli* who are not bishops. According to SN c. 72 § 1, 2<sup>o</sup>,<sup>84</sup> from the tribunal of the eparchy of the patriarch or of the archbishop, and from the tribunals from the places of the patriarchate and archiepiscopate where eparchies have not been erected without prejudice to canon 73 §2 appeal had to be made to the patriarch or archbishop. The same was the case with appeals from the tribunal of metropolitan subject to the patriarch or archbishop (SN c. 72§1, 3<sup>o</sup>).<sup>85</sup>

### 7.3 Appeals from Patriarchal/Major Archiepiscopal Churches According to *Sollicitudinem Nostram*

*Sollicitudinem Nostram* c. 74 established that the appeal against the cases reserved to the tribunals of the patriarch in canons 17 and 18 had to be made to the Apostolic See, that is to the Roman Rota which was the Ordinary Tribunal, but always through the delegated power

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Superiorem iudiciali potestate praeditum non habeat; 5<sup>o</sup> Causas ex iuris praescripto tribunali patriarchali reservatas.

<sup>82</sup> SN c. 51 § 1: Si controversia sit inter religiosos eiusdem monasterii sui iuris, iudex primae instantiae est Superior eiusdem monasterii; si inter monasteria eiusdem confoederationis, est praeses eiusdem confoederationis; si inter monasteria stauropegiaca non confoederata, est ille quem Patriarcha designaverit.

<sup>83</sup> SN c. 20 § 2: Tribunali vero ordinario Sedis archiepiscopalis competit iudicare Hierarchas locorum, Syncellis exceptis, qui Episcopi non sint.

<sup>84</sup> SN c. 72 § 1, 2<sup>o</sup>: A tribunali eparchiae Patriarchae vel Archiepiscopi propriae et a tribunali locorum patriarchatus vel archiepiscopatus ubi eparchiae erectae non sunt appellari debet ad Patriarcham vel Archiepiscopum, firmo can. 73, § 2.

<sup>85</sup> SN c. 72 § 1, 3<sup>o</sup>: A tribunali Metropolitae Patriarchae vel Archiepiscopo subiecti fieri debet appellatio ad Patriarcham vel Archiepiscopum.

namely by way of commission from the part of the Congregation of the Oriental Church.<sup>86</sup> The canon specifically ordained that appeal from judgment made according to the provision of canons 17, § 1, n. 1, and § 2 and 18, §§ 1, 3, has to be made to the Apostolic See.<sup>87</sup> Regarding the appeals in cases judged in the first or second instance by this tribunal *SN* c. 73 § 1<sup>88</sup> offered two possibilities: either to the Apostolic See when the parties are so willing or to other Judges nominated by the patriarch or archbishop. Nevertheless *SN* c. 73 § 2<sup>89</sup> made it mandatory that if the patriarch or archbishop had intervened in the case, the appeal had to be lodged with the Apostolic See.

In this connection a new development that took place regarding appeals from the patriarchal and major archiepiscopal Churches has to be mentioned. *SN* c. 79 § 2<sup>90</sup> made it clear that the Roman Rota judges the cases that concern the faithful of the oriental rite and referred to the Apostolic See through appeal, if referred to it by the Sacred Congregation for the Oriental Churches. In spite of this clause, the Roman Rota after the promulgation of the *motu proprio Sollicitudinem Nostram* began to receive appeals from the Oriental Churches without being referred to it by the Sacred Congregation for the Oriental Churches and began to act as in the case of the Latin Church.<sup>91</sup> The Rota did so on the basis of *SN* c. 78 § 1 which states: "*Tribunal ordinarium a Romano Pontifice constitutum pro appellationibus recipiendis est Sacra Rota Romana.*"<sup>92</sup> Later on, all the cases appealed by the oriental tribunals were directly accepted by the Roman Rota without any commission from the part of the Sacred Congregation for the Oriental Church, if in the act of appeal the instance was

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<sup>86</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-giuridica," 163-164.

<sup>87</sup> *SN* c. 74: Appellatio a sententiis de quibus in can. 17, § 1, n. 1, et § 2, et in can. 18, §§ 1, 3, fieri debet ad sedem Apostolicam.

<sup>88</sup> *SN* c. 73 § 1: A tribunali Patriarchae vel Archiepiscopi iudicante in prima vel secunda instantia appellatio fieri potest ad Sedem Apostolicam vel ad alios iudices a Patriarcha vel Archiepiscopo nominatos, firma § 2.

<sup>89</sup> *SN* c. 73 § 2: Quoties ipse Patriarcha vel Archiepiscopus partes iudicis per se egit, appellatio interponi debet ad Sedem Apostolicam.

<sup>90</sup> *SN* can. 79 §2: Causas quae ad fideles rituum orientalium spectant et per appellationes ad Sedem Apostolicam deferuntur, Sacra Rota iudicat in secunda et ulteriori instantia, si a Sacra Congregatione pro Ecclesia Orientali ad eam remittantur.

<sup>91</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-giuridica," 164.

<sup>92</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-giuridica," 164-165.

addressed to the Roman Pontiff.<sup>93</sup> The Orientals themselves did no longer submit their appeals to the Sacred Congregation for the Oriental Church, but directly to the Roman Rota.<sup>94</sup>

### 8. Code of Canons of the Eastern Churches 1990

The Pontifical Commission for the Redaction of the Oriental Canon Law (PCCICOR) instituted in June 1972 by Pope Paul VI was instructed to bring out a common Code for all the Eastern Churches guided by the spirit of Vatican Council II, rooted in the genuine Eastern traditions and at the same time relevant to the present day needs of these Churches.<sup>95</sup> For this purpose, the commission formulated ten 'Guidelines for the Revision of Oriental Canon Law' and had them approved in its first plenary assembly of 20-23 March 1974 held in Rome.<sup>96</sup> The ten principles for revision<sup>97</sup> are 1) single code for the Eastern Churches 2) Eastern character of Code 3) Ecumenical character of Code 4) juridical character of Code 5) pastoral character of Code 6) principle of subsidiarity 7) rites and particular Churches 8) the laity 9) procedures 10) penalties.<sup>98</sup> The Guidelines stipulated that "the revision of the Code should be carried out in accordance with the principles and the spirit of the Council and the Code 'should draw its inspiration from, as well as express, the common discipline, based on the apostolic tradition, the Oriental canonical collections, and customary norms common to the Eastern Churches.'"<sup>99</sup> Each of these principles had an impact on the codification of CCEO and in giving greater autonomy to patriarchal and major archiepiscopal churches in matters connected with the exercise of judicial power. One main point to be emphasized is the greater and decisive role given to the synod of bishops in the exercise of judicial power.

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<sup>93</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-giuridica," 165.

<sup>94</sup> Cfr. Hanna Alwan, "L'Evoluzione Storico-giuridica," 164-165.

<sup>95</sup> Cfr. Sunny Kokkaravalayil, *The Guidelines for the Revision*, 17; *Nuntia* 1 (1975), 4-8.

<sup>96</sup> Cfr. *Nuntia* 3 (1976), 3-10.

<sup>97</sup> Cfr. Thomas J. Green, "Reflections on the Eastern Code Revision Process," *The Jurist* 51 (1991), 18-37 at p.18.

<sup>98</sup> The English version of the text of the Guidelines is given in *Nuntia* 3 (1976), 18-24.

<sup>99</sup> Cfr. *Nuntia* 3 (1976) 18-19; George Thanchan, *The Juridical Institution*, 2.



## **9. Synodal Exercise of Judicial Power Through Superior and Ordinary Tribunals in CCEO**

The Code of Canons of the Eastern Churches (CCEO) gave a greater role to the synod of bishops of the patriarchal and major archiepiscopal churches in the judicial power of governance and in giving greater autonomy to these Churches in the exercise of this power. This is realized mainly through its superior tribunal and the ordinary tribunal.

### **9.1 Synod of Bishops as Superior Tribunal**

The synod of bishops of a patriarchal/ archiepiscopal Church, with due regard for the competence of the Apostolic See, constitutes the highest tribunal within its territorial boundaries (CCEO c. 110 §2 & 1062 §1).<sup>100</sup> The synod exercises its judicial function either in full session or, ordinarily and in the first instance through an elected portion of three bishops of the same synod constituted as a tribunal called synodal tribunal. For that matter CCEO c. 1062 §2 obliges the synod of bishops of a patriarchal/ archiepiscopal Church to elect by secret ballot for a five-year term from among its members a general moderator for the administration of justice and other two bishops.

This tribunal judges contentious cases of eparchies and bishops, even titular ones exercising their power within the territorial boundaries of the patriarchal/major archiepiscopal Church. (c. 1062 §3). Whenever, i) one of the three bishops is a party in the case, ii) is unable to be present, or iii) has an objection is raised against him, the major archbishop substitutes another bishop with the consent of the permanent synod (c. 1062 §2). Appeals of the tribunal's decisions are made to the synod of bishops of the patriarchal/major archiepiscopal Church without any further appeal; however, per c. 1059, recourse can be made to the Roman Pontiff (c. 1062 §4).<sup>101</sup> However, for those eparchies and bishops constituted outside the territorial boundaries as in the Latin Church and non- patriarchal/major archiepiscopal Churches, the contentious cases of bishops are reserved to the tribunal designated by the Roman Pontiff.

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<sup>100</sup> CCEO c. 110 §2.

<sup>101</sup> John D. Faris, "Patriarchal Churches," 175; Cfr. Pio Vito Pinto (ed.), *Commento al Codice dei Canonici delle Chiese Orientali*, Città del Vaticano: Libreria Editrice Vaticana, 2001, 116.

Despite the recommendation that the synod of bishops of the patriarchal Church be able to adjudicate major criminal causes, the supreme legislator insists that such causes – namely those in which a bishop is accused- be reserved to himself.<sup>102</sup>The imposition of penalty on a bishop is proper to the Roman Pontiff. 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 Episcopal office.<sup>103</sup>

### **9.1.1 Special Role of General Moderator for the Administration of Justice**

The figure of general moderator for the administration of justice which didn't exist before the promulgation of CCEO in 1990, is another indication of the synodal way of exercising judicial power in patriarchal/major archiepiscopal Churches. General moderator, being a bishop elected by the synod of bishop, acts as the representative of the synod in certain matters connected with the administration of justice. Apart from being the presiding judge of the synodal tribunal, he possesses the right of vigilance over all tribunals within the territorial boundaries of the patriarchal Church, as well as the right of deciding when objections are raised against a judge of an ordinary tribunal of the patriarchal Church (CCEO c. 1062 §5).

### **9.2 Patriarchal/Major-Episcopal Ordinary Tribunal**

CCEO granted to patriarchal and major archiepiscopal Churches to erect ordinary tribunals empowered to adjudicate matters not reserved to the Holy See and in all three instances up to the final sentence (CCEO c. 1063 §§1, 3). This tribunal is also competent to judge in second and third instance cases judged by metropolitan tribunals in first instance (§ 1).

It is also competent to judge in third instance cases judged in second instance by the metropolitan tribunals, which are competent to receive cases judged in first instance by the eparchial tribunals of their respective provinces (§ 2). Highlighting the judicial self-sufficiency of the patriarchal Churches after CCEO came into force,

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<sup>102</sup> See *Nuntia* 3 (1976) 9 at no. 4; Cf. SN 17 §1, 20. The legislator's choice was recognized already in the *praenotanda* to the 1982 schema; see *Nuntia* 14 (1982) 4.

<sup>103</sup> Pio Vito Pinto (ed.), *Commento al Codice dei Canonici delle Chiese Orientali*, Città del Vaticano: Libreria Editrice Vaticana, 2001, 883.

George Nedungatt writes, "In matrimonial cases, too, the third trial is done at home, not in Rome before the Rota."<sup>104</sup>

### 9.2.1 Synodality in the Functioning of the Ordinary Tribunal

A patriarchal/major archiepiscopal ordinary tribunal is distinct from an eparchial or metropolitan tribunal in many respects. As far as an eparchial/metropolitan tribunal is concerned, the eparchial bishop/metropolitan is the authority competent to constitute the tribunal, to appoint the judges and the officials and to remove them. Where as in the case of patriarchal/major archiepiscopal ordinary tribunal, though it is the patriarch/major archbishop who constitutes the tribunal, he cannot appoint the president,<sup>105</sup> judges, promoter of justice, defender of bond and the other officials of that tribunal on his own. He can appoint them only with the consent of the permanent synod. Coming to the removal of the president, judges, promoter of justice and the defender of bond it has to be noted that they can be removed neither by the patriarch/ major archbishop nor by the permanent synod. Only the synod of bishops is competent to remove them against their will. This system is aimed at ensuring stability of office and freedom to judges so that they can pronounce just and impartial judgments without fear or favor (CCEO c. 1063).

### 9.2.2 System of Benches

While the eparchial and metropolitan tribunal can handle a given case only in one instance,<sup>106</sup> the patriarchal/major archiepiscopal ordinary tribunal like the Roman Rota<sup>107</sup> can handle a given case in one, two or more instances with the assistance of judges who serve in rotation through a system of benches (*turnus*). Appeal against the decision of one bench of the ordinary tribunal is lodged at the bench

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<sup>104</sup> George Nedungatt, *The Spirit of the Eastern Code*, Rome: Centre for Indian and Inter-religious Studies, 1993, 93.

<sup>105</sup> The president of the ordinary tribunal has the same power which a judicial vicar possesses over an eparchial or metropolitan tribunal.

<sup>106</sup> An Eparchial tribunal handles in the first instance cases from its eparchy and a metropolitan tribunal handles in the first instance cases from its eparchy and in the second instance, the cases from its suffragan dioceses. However, the metropolitan tribunal can handle a given case only in one instance.

<sup>107</sup> Cfr. Hanna 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.

of the same tribunal that immediately follows it. To ensure impartial judgments the law stipulates that a person who has taken part in a case as judge, promoter of justice, defender of bond, procurator, advocate, witness or expert in one instance, cannot afterwards in another instance of the trial validly resolve the same case as a judge or act as an assessor (CCEO c. 1105).

### **9.3 Synodality in Presentation of Cases and Appeal**

In each eparchy for all the cases not expressly excepted by law the eparchial bishop is the judge in the first grade of the trial and the cases are to be presented to the eparchial tribunal through which the bishop usually exercises his judicial power (CCEO c. 1066 §1). However, cases concerning the rights or temporal goods of a juridical person represented by the eparchial bishop are an exception to the rule. The eparchial curia, eparchial trust, eparchial seminary and the eparchy itself are examples of juridical persons represented by the eparchial bishop. As per the stipulations of law the appellate tribunal will be the competent tribunal to deal with such cases (CCEO c. 1066 §1).

For cases handled in the first instance by an eparchial tribunal, the metropolitan tribunal which is not distinct from the tribunal of the metropolitan is the appeal tribunal of second instance (CCEO c. 1066 §1). However, when it comes to cases from its own eparchy handled in the first instance by a metropolitan tribunal, the appeal has to be made to the tribunal which the metropolitan or eparchial bishop has designated in a stable manner with the approval of the Apostolic See (CCEO c. 1066 §2). In a patriarchal/ major archiepiscopal Church, within the proper territory, the patriarchal/major archiepiscopal ordinary tribunal acts as the appellate tribunal in the second instances for cases tried in the first instance by a metropolitan tribunal.

With regard to appeal in the third instance, CCEO c. 1065 clearly states that "the tribunal of the third instance (grade) is the Apostolic See (Roman Rota), unless the common law expressly provides otherwise. Thus, in the Latin Church and in Eastern Churches which are neither patriarchal nor major archiepiscopal, Roman Rota is the tribunal on third instance. However, on the basis of the explicit provision of common law contained in CCEO c. 1063 §3 within the territorial boundaries of a patriarchal/major church, its ordinary tribunal is competent to handle cases in the third and further grades

of judgment with judges serving in rotation. Thus, the patriarchal/major archiepiscopal ordinary tribunal exactly similar to the Roman Rota, has its own in-built mechanism to ensure the just and impartial adjudication of a case at the final instance.

### **Conclusion**

Synodality has been the hallmark of the Church since its inception. The Council of Jerusalem - the assembly of the apostles and elders gathered in Jerusalem which settled the crisis arising out of two conflicting views on the question of the necessity of observance of the Mosaic Law of circumcision for salvation<sup>108</sup> stands out as a shining example of the exemplary and effective way of settling conflicts and controversies and to go ahead as a community united in the love of Christ. The more prominent role given by CCEO to the synod of bishops in the administration of justice in a patriarchal/major archiepiscopal Church is indeed a reaffirmation of the synodal way of life that must that the life and mission of the Church. Giving more participation to all the Christian faithful and listening to their concerns and aspirations Church needs to walk together in the path of the Lord and needs to see that justice always prevails in the Church of Christ founded on the commandment of love.

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<sup>108</sup> Cfr. Jose Chiramel, *Patriarchal Churches*, 4.