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COURT PROCEDURE IN THE EASTERN CHURCHES SEVENTY YEARS AFTER THE PROMULGATION OF *SOLLECITUDINEM NOSTRAM*

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The Eastern legislation *Sollicitudinem Nostram* was the first common code on procedural law of the Eastern Churches. Seven decades have elapsed since its promulgation. Herein we examine the canons of SN and evaluate how this code influenced the revision of the Code of Canons of the Eastern Churches. In this attempt we underline the development of the procedural law in the Eastern canonical system. In our investigation we discuss the importance of safeguarding the rights of the faithful and respecting the just autonomy of Churches *sui iuris* in the light of the teachings of the Second Vatican Council. It is certain that SN has been a strong basis for the enactment of norms of procedure in the administration of justice.

Introduction

Pope Pius XII promulgated on 06 January 1950 the *motu proprio* on court procedure for the Eastern Churches that is known as *Sollicitudinem Nostram* (*SN*).[1] This is considered to be an excellent first unified Code on procedural norms for the Churches *sui iuris* of the

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[1] *AAS* 42 (1950) 5–120.

East which came into effect on 06 January 1951. The Pontifical Commission for the Eastern Codification rightly observed: “However, the canons relative to procedure should be improved by the introduction of some changes intended to reflect the particular structure of these churches, as well as by the simplification of the canonical procedures themselves.”[2] The main concern of the Code Commission was to codify the procedural norms in view of safeguarding and protecting the rights of individuals in harmony with the conciliar teachings and requirements of their living conditions in general and in fidelity to the ancient heritage of the Eastern traditions in particular. However, one of the guiding principles in this regard was that all Catholics shall observe the same procedural norms since they are equal and integral part of the ecclesiastical society. Here is an attempt to examine what constitutes the pre-eminence of *SN* and to what extent it influenced the formulation of the Procedural norms of the Code of Canons of the Eastern Churches (CCEO).[3]

1. Sources of Procedural Norms and the Scriptures

All procedures are aimed at an internal good order and the final end is the salvation of souls or the wellbeing of the individual persons. Jesus proclaimed the good news of the Kingdom of God on earth and thereby to bring about salvation of man (Mk.1:15). He prescribed a procedure to be observed by all. According to that procedure fraternal correction is considered to be the first step. The duty of correction is not limited to offences that are personal. A private attempt to gain the offending brother or stray sheep is to avoid all humiliation and to respect his human dignity. If a particular person is disobedient or resisting authority or discipline a few witnesses are to be called for another reproof of the Church. If he is a transgressor violating a social norm the ultimate judgement is with the Church. If he fails to listen to the Church he is considered an offender and banished from the community (Mt.18:15–18). Evidence of a single witness was not enough for conviction (Dt.19:15). As a rule witnesses add weight to reproof. If a more solemn warning only failed demanded a process before the Church or local Church community. If he failed to accept

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[2] *Nuntia* 3 (1976) 23.

[3] *The Code of Canons of the Eastern Churches* was promulgated by Pope John Paul II on 18 October 1990 with the Apostolic Constitution *Sacri Canones*. After the Second Vatican Council new procedural norms were enacted by Paul VI in the *Motu proprio, Causas Matrimoniales* (28 March 1971) for the Latin Church and another by name *Cum Matrimonialium* (08 September 1973) for the Eastern Churches.

verdict of Church he is to be expelled from membership of the community.

Words of excommunication were discordant with general tone of gospels. Jesus was friend of sinners, tax collectors and gentiles who were unacceptable with Jewish community. Jesus praised them for their faith and repentance. According to Mt.16:19 Jesus' command of 'bind … lose', 'condemn … acquit' is an act of the Church, of the whole Church, not simply an act of its officers. Apostolic Church was a true Assembly of God.[4]

Saint Paul did not at all approve litigation before pagans. It was an abuse to approach unbelievers (unjust) or heathen court. Saints (faithful) share in Christ's royal power and will participate in his judgement of the world. They are the elect who will participate also in His judgement. He would say, God alone is competent to pronounce a judgement or impose punishment to the unbaptised, (ICor.5:12; ITh. 3:11-13; Ap.20:4; Ap.7: 9; Dn.7:9, 17, 18, 22, 27).

The spirit of the Apostle's exhortation is that "the Christian community should institute its own courts or at least invite a prudent brother to decide disputes among the brethren."[5] Saint Paul insisted that testimony of two or three witnesses was inevitable to establish the veracity of a fact alleged or attributed to someone. His letters testify that he was inspired by the Old Testament teaching, (IICor.13:1; ITim.5:19; Dt.17:6; 19:15). The setup of society in those days necessitated such a procedure of depending on the veracity of testimony of witnesses to ascertain the truth of the allegations or to establish a fact with moral certainty: "In the absence of a system of crime detection, the role of witnesses was crucially important – hence the insistence on the number and the religious sanction to discourage perjury."[6] Presbyters were afforded special protection against false charges. Before an accusation is accepted two or three witnesses had to testify, (Dt.19: 15; Mt.18: 16; IICor.13: 1; ITim. 5:19).

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[4] Cf. John L. Mckenzie, "The Gospel according to Matthew," in Joseph A. Fitzmyer and Raymond E. Brown, (eds.), *The Jerome Biblical Commentary*, Vol. II, (New Jersey 1968; Indian Edition TPI Bangalore 1982) 95.

[5] Richard Kugelman, "The First Letter to the Corinthians," in *The Jerome Biblical Commentary*, 261.

[6] Joseph Blenkinsopp, "Deuteronomy," in *Jerome Biblical Commentary*, (Vol. I) 112.

1.1 Norm of Procedure and the Notion of Canon

Canon originally means *reed* (Gk – *kanon*). It eventually began to signify any straight rod or bar or a measuring stick used by masons and carpenters. In metaphorical connotation it signifies a norm or standard, something serving to determine, rule, or measure other entities. In the second century A. D. it acquired a Christian meaning referring to a norm of revealed truth, a rule of faith. Similarly, disciplinary regulations of ecclesiastical authorities came to be called canon because they were a rule of life.[7] From the fourth century onwards we find a transition 'from signifying the thing contained to signifying the container.' Since the Scriptures contained rule of faith – the canon - they themselves were called the canon. Later on, canon was used to designate the collection of authoritative books. It is also said that besides meaning rule, canon can mean also a list or catalogue. Canon of Scripture means the list of books that compose the Bible. In that sense a canonical book means one that has been acknowledged as belonging to the list of books the Church considers to be inspired and to contain a rule of faith and morals.[8]

1.2 Israelite Terms of Procedural Law

Among the Israelites law was considered to be a revelation of Yahweh given through priests. They use the word *torah* to signify a divine response, a response through priests. It is a priestly instruction which dealt with cultic or moral precepts. Etymologically it means to throw or cast (lots – *yarah*). It is a revelation by the lot, (Is.8:20, Je.2: 8; Je.18: 18; Am.2:4). *Edot* means testimony. It is the promise of Yahweh or an obligation, which He imposes. The king wore written formula of the *edot* at his coronation, (Kg.11:12). People were expected to know the revealed will of Yahweh in the laws and the conception of law as a covenant obligation. Another term, which prevailed in the Israelite community, is *mispat*, meaning judgement. It implies a judicial decision based on the civil as well as criminal laws of the covenant community, (Ex.21:1). Judicial precedent is a source of law. It signifies a human origin of law. *Hok* means statute. Literally it means something engraved. It is an antithesis between customary law and written law. Public authority is the source rather than judicial precedent or custom. *Dabar* means sword signifying a divine

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[7] In the Latin Church the fixed or invariable of the Divine Liturgy is known 'Canon of the Mass'.

[8] James C. Turro & Raymond E. Brown, "Canonicity," in *The Jerome Biblical Commentary*, Vol. II, p. 518.

utterance. It is used for solemn laws like Decalogue. Words and judgements emphasise law as revealed will of Yahweh. *Miswah* is commandment meaning the ordinance of authority. It could be divine or human. In strict sense it is a common term applied to other ordinances rather than law.[9] In short the will of God is expressed through law, magisterium and ecclesial structures.

2. Development of Norms of Procedure

The Canons of the early councils, fathers and synods played an important role in the development of the Canons of the Eastern Code. The ancient rules and regulations contained in the Sacred Canons of the First Millennium were received or adapted in the new Code.[10] About the judicial power of the synod of bishops is mentioned in the canon 74 of the Sacred Canons of the Apostles. The procedure of the tribunal, credibility of parties and witnesses and the probative value of their depositions are dealt in detail. The fourth canon of the Council of Nicaea (325) recognised the synodal structure of the Church and canon five advocated the conformity of ecclesiastical discipline. The Synod of Antioch (341), Synod of Sardica (343–344), First Council of Constantinople (381), Synod of Constantinople (394), Synod of Isaac (410), Synod of Carthage (419), Council of Chalcedon (451), Council of Trullo (691/692) are examples. The particular Synods of the Second Millennium, like the Synod of Diamper of the Syro-Malabar Church (1599), Maronite Synod of Mount Lebanon (1736), the Romenian Synod, Provincial Synod of Alba Julia and Fagaras (1872), Melkite Synod of Sciarfe (1888), Alexandrian Coptic Synod (1898) bear testimony to it. The Canonical collections, namely, Rules of Ecclesiastical Judgdements and of Succession of Patriarch Timothy I (790 – 805), Fiqh an – Nasraniyah of Ibn At – Tayib (+ 1043), Synodicon, Nomocanon and The Rules of Ecclesiastical Judgements of Ebed Jesus.

The aforementioned Councils, synods and Canonical collections unveil the gradual development of the procedural norms in the Eastern Churches with respect to administration of justice.[11] There is a

[9] John L. McKenzie, *Dictionary of the Bible*, (Geoffrey Chapman, London 1976 – Indian print, Asian Trading Corporation, Bangalore 1983) 498.

[10] Apostolic Constitution, *Sacri Canones*, of John Paul II, 18 October 1990, *AAS* 82 (1990) 1034.

[11] It is noteworthy that Synod of Diamper (1599) is also included among the sources drawn from documents of Particular Law of the Individual

gradation of adjudication and final judgement from bishops, metropolitans, and patriarchs. Gradually, the power of the Roman Pontiff gets established as the supreme judge to decide on the possible appeals and recourses from the Orient. A shift of emphasis is mainly between the monarchic system in the west and synodal/collegial in the orient.

2.1 Canonical Procedure and the Saint Thomas Christians

Till the sixteenth century the Thomas Christians of India developed a unique system of Judiciary by an age-old custom, that is, *Yogam* in its triad forms of parish assembly, regional assembly and general assembly. According to a report of a Carmelite Missionary, Father Boniface of infant Jesus OCD submitted in 1750 to the Congregation for the Propagation of Faith, the authority of the system of *yogam* is explained. One who violated the customary practice of the community was imposed penalties and the disputes were settled by a consensus of the community. First there will be attempts for reconciliation under the initiative of the Archdeacon, the head and mediator. Penalties were imposed as a last resort in the attempt to repair the scandal and reformation of the offender. The assembly enjoyed legislative, executive and judicial powers. In the case of Chacko Cathanar, vicar of Edappilly (Kerala) no such procedure was followed. There was grave violation of divine law and fraternal charity. He was accused of having stolen a monstrance. He was subjected to inhuman torture and starvation unto death. The missionaries did not observe any

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Eastern Churches drawn especially from the acts of the preeminent synods *lawfully celebrated in former times.* CCEO c. 1461 conferral and reception of Sacred Ordination by simony deposition is imposed as penalty. (Italics is given by the author to indicate about the dispute, about the validity of the Synod and lawfulness of the Acts of the Synod of Diamper). CCEO c. 1461 establishes deposition as penalty for those found guilty of conferral as well as reception of the Sacred Ordination by simony. In the same way if other sacraments were celebrated or received by simony appropriate penalty is imposed not excluding major excommunication: Source - Synod of Diamper of the Syro-Malabar Church 1599, CLXXIX; Major Excommunication (CCEO c. 1434 §1): Source - Synod of Diamper 1599, CXLVIII.

According to Ivan Žužek, Pro-Secretary of the Pontifical Commission for the Revision of the Eastern Code the first reference to the penalty *latae sententiae* in the Orient is found in the Synod of Diamper of the Syro-Malabar Church. The context is that Archbishop Alexis Meneses threatened with excommunication the bishops of Malabar if they did not attend the Synod of Diamper. Cf. James M. Pampara, "Salient Features of Penal Law in CCEO," *Canonical studies*, XXIV (2010) 4–5.

procedure. Paremmakkal Thoman Cathanar refers to this incident as follows: "The acts were unworthy of religion and against all the ancient customs. All are aware that according to the ancient custom of the Malabar Church no punishment could be inflicted unless the crime was proved before the representatives of four churches. The ecclesiastical and the civil laws prescribe that at least two witnesses should testify against statement of the accused before he could be punished. But in a very important case like this, the accused was not heard nor judged by any one; there was not heard even one witness."[12] In Eastern perspective imposition of a penalty must be preceded by a canonical warning and observance of a strict procedure as per norms of law.

The procedure prevailed in the Saint Thomas Christian community was an age old custom according to which the bishop did not promote candidates to priesthood, nor imposed penalties on the delinquents nor absolved anyone from the censures incurred, unless the petitioner brought a request of the assembly.[13]

Western practice was gradually introduced into the community of the Saint Thomas Christians in the administration of justice. However, according to a report of a European missionary the criminal cases were filed at the courts of the king (Raja) and civil cases were adjudged by the Tribunal of the bishop. The disputes or controversies in a parish were adjudged and resolved by the parish priest and the elders.[14]

3. Protection of Rights of Individuals

The administration of justice was the focal point in the formulation of procedural norms. The principle of legal protection is to be applied for both the superiors and the subjects alike without any partiality, without the suspicion of arbitrariness. This end is achieved by a procedure, that is, a way of proceeding either judicial or extra judicial. This *modus procedendi* is called as process. It is a complex of acts or

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[12] Paremmakkal Thoman Cathanar, *Varthamanappusthakam* (Travelogue), (English translation with introduction and notes by Placid Podipara, OCA 190, Pontifical Oriental Institute, Rome, 1971) 410.

[13] *Archivum de Propaganda Fide*, CP. Vol. 109, f. 90 in Jacob Kollaparambil, The *Sources of the Syro-Malabar Law*, ed. Sunny Kokkaravalayil, (OIRSI, Kottayam, 2015) 608.

[14] Paulinus of Saint Bartholomew, *Viaggio alle Indie Orientali*, (Rome, 1796) 136–139, in Xavier Koodapuzha, *Oriental Churches: Theological Dimensions*, (OIRSI, Kottayam 1988) 74–75.

solemnities prescribed by law. The competent superior or a public authority is supposed to observe these solemnities for solving disputes or settling a business. In order that a controversy between a plaintiff and a defendant is resolved, a trial (*iudicium*) is conducted as per norms of law. It is a hearing and discussion followed by the settlement by a judge. Ecclesiastical trial consists in discussion and settlement by an ecclesiastical tribunal of matters in which Church has power to intervene by competence. The material object of a trial can be any matter that can be addressed by a court (CIC c. 1400). The formal object consists in the precise claim or counter-claim made by the parties in a specific hearing (CIC cc. 1491–1500). The active subject in a trial is the judge or tribunal before whom the controversy is pending. Catholic Church has right to hear certain cases (CIC cc. 1404–1475). The procedures or solemnities adopted in the adjudication of a case, are termed the form of a trial.[15] It is noteworthy that the 1982 and 1986 Schema on Procedural norms gave due emphasis to the rights of individuals. The title of the schema was: "Canons for the Protection of Rights or Processes," (*Schema canonum de tutela iurium seu de processibus*).[16]

Though SN constituted the basis for the revision, the code Commission adopted the formulation of the corresponding canons in the Latin Schema in conformity with the guiding principle that all Catholics follow the same procedural norms.[17] However, Latin canons were not always adopted, for various reasons, like: 1) The differing ordering of tribunals in the East; 2) Personal statutes in force in certain regions; 3) A profound esteem for the Eastern mentality and culture; 4) An administration of justice that suits better the means of communication obtaining in various circumstances of places and times.[18]

4. Institute of Administrative Tribunal

Both CIC and CCEO practically omitted from the promulgated text the canons on institute of administrative tribunals. The Code Commission of CCEO tried to be faithful to the guiding principle: "In *de iudiciis* one thing only is important, notably: that the administration of justice be perfectly proportioned to the real state of things, to the conditions of

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[15] Lawrence G. Wrenn, "Processes," in *The Code of Canon Law: Text and Commentary*, (Bangalore 1986) 948 -949.

[16] *Nuntia* 17 (1983) 72.

[17] *Nuntia* 3 (1976) 23.

[18] *Nuntia* 14 (1982) 4.

the individuals involved and of the ecclesiastical society."[19] However, the application of this principle was not effectively done in the definitive text. It was proposed that system of appeals should be established in ecclesiastical administration. This is to enable the subjects of law, if rights are violated in lower instances, to approach the higher instances for redress. Hence it was foreseen, the necessity of ordering administrative tribunals according to grade and kind. It was also an important means for authorities of different kinds to follow canonical procedure so that defence of rights may be provided for individuals and justice can be administered properly. Recourse against administrative acts can be done either by judicial or by administrative recourse. CCEO Schema 1986 dealt with recourse to tribunal in cc. 1003–1021.[20] It was retained till 1989 but was omitted from the promulgated text. A stimulating discussion and an illuminating debate were conducted in the Plenary Assembly of the Members of the Commission held from 03 - 14 November 1988.[21]

In response to the seventh guiding principle of revision of Latin Code, canons on administrative tribunals were introduced to protect subjective rights: "There is need to establish administrative tribunals of various kinds and degrees to determine which action is to be brought before such tribunals and to clarify rules of administrative procedure."[22] The Code Commission of the Latin Church in its final plenary session voted for the administrative tribunal as a procedural innovation to introduce them into the Church's legal system as an option that Conferences of Bishops could consider for their own areas, rather than as an institute mandatory for all conferences. But the notion of administrative tribunals was entirely deleted from the CIC prior to promulgation.[23] The principle in the old system was that no judicial action may be advanced against administrative acts and there was no provision for administrative tribunals inferior to the Apostolic

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[19] *Nuntia* 3 (1976) 23.

[20] *Nuntia* 24, 25 (1987)

[21] *Nuntia* 29 (1989) 63–65. Among the twenty seven members present in the assembly the twenty - one members argued in the light of the guiding principle and voted to retain the section of canons on administrative tribunal as is given in the Schema (1986) and six members voted against. However, the promulgated text omitted those canons on administrative tribunals.

[22] John A Alesandro, "General Introduction," in James A. Coriden et at., (eds), *The Code of Canon Law: A Text and Commentary*, 6.

[23] John A. Alesandro, "General Introduction," in *The Code of Canon Law: Text and Commentary*, 20.

Signatura. A provision was envisaged during the entire revision process for the aggrieved party to approach an administrative tribunal or the administrative section of a tribunal. However, the problem was solved once for all by enacting a norm that the aggrieved party may approach the authority superior to the author of the administrative act, (SN c. 1; CCEO c. 1055 §2; CIC c. 1400).[24]

In both Codes there are canons, which govern the procedure for hierarchical recourse against individual administrative acts, (CCEO cc. 996-1006; CIC cc. 1732-1739) and methods of avoiding a trial by means of settlement or compromise through arbitrators (CCEO cc. 1164-1184; CIC cc. 1713-1716). According to CCEO c. 998 as an equitable solution, the Code foresees wise persons in mediation, study and voluntary emendation, just compensation and other suitable means. As a suitable means particular law can enact norms to this effect: "Synod of Bishops may legislate norms on administrative tribunals or similar reconciliatory bodies to find equitable solution for conflicts arising from administrative acts."[25]

The Syro-Malabar Particular Law envisaged the institute of administrative tribunal for redress and resolution of disputes and complaints concerning the conduct, proceedings, resolutions, decisions and actions of the *potuyogam* or *pratinidhiyogam*. It is constituted by the eparchial bishop. The aggrieved party shall lodge a complaint to this tribunal within seven days after the assembly (*yogam*). The procedural norm of the tribunal is stipulated by the Particular law as follows: "The tribunal shall dispose of the dispute or complaint within thirty days from the receipt of such complaints. A recourse shall lie on the decision of the tribunal to the eparchial bishop within fifteen days of such decisions of the tribunal. The eparchial bishop shall dispose of the recourse as expeditiously as possible and his decision shall be final," (art. 71).[26]

5. Reordering the Structure of the Tribunals

The juridical patrimony of the Church pertaining to the administration of justice was developed by individual Churches taking into account the rich heritage accumulated over the course of ages against the

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[24] *Nuntia* 5 (1977) 8; 14 (1982) 19; 21 (1985) 41; 24–25 (1987) 192; 29 (1989) 63-65.

[25] Andrews Thazhath, "The Patriarchal Churches and Administration of Justice," *Eastern Legal Thought*, 4 (2005) 42.

[26] Syro-Malabar Major Archiepiscopal Curia, *Code of Particular Law of the Syro-Malabar Church*, (Mount Saint Thomas, Kochi, 2013) 132.

background of each Church *sui iuris*. The procedural norms of the Churches *sui iuris* were codified in Pius XII's *motu proprio, Sollicitudinem Nostram*. It was revised by Titles XXIV and XXV of the CCEO. The guiding principle for the revision of procedural norms stressed the perfection of the norms of SN by modifying the norms with respect to the structure of Eastern Churches. Besides, canonical procedure shall be simplified and there must be maximum conformity of the common norms or all Churches *sui iuris* including the Latin Church. The Code Commission was of the opinion that though conformity with the Latin Code was a prerogative, the differences required by the hierarchical configuration of the Eastern Churches must be respected. At the same time the particular conditions of the East should be maintained.[27]

The Second Vatican Council unambiguously asserted that the Churches of the East have the right to govern themselves in accordance with their own proper discipline, which is sanctioned by the venerable antiquity as it is in conformity with the character and customs of the people and in assurance of the good of souls, (OE 5; UR 16). This recognition of the right to govern themselves according to their own discipline is an affirmation of the ecclesiological and canonical basis of the power for self-governance (CCEO c. 27) pervading the entire Eastern Code.

In the Eastern Code title XXIV is the revised definitive text of part one of SN on trials in general (SN cc. 1-225), while Title XXV is the revision of part two, section one of SN on the contentious trial in general (SN cc. 226-452). Section two on contentious trial before single judge (SN cc. 453-467); section three on matrimonial cases (SN cc. 468-500); section four on cases of Priestly Ordination, (SN. cc. 501-506). Part three deals with criminal (penal) trial, (SN cc. 507-576). The invariable passive or static part *(pars statica*) of the discipline of the procedural law is contained I title XXIV with the norms governing the hierarchical structures of tribunals, titles of competence, judicial offices, the litigants, and other general principles and regulations for judicial processes. On the other hand, the active dynamic part (*pars dynamica*) of the legislation is dealt in the title XXV, providing the prescriptions on processes in all of its phases (CCEO cc. 1055-1184; CIC cc. 1400-1500); contentious trial, (CCEO cc. 1185-1342; CIC cc. 1501-1670). Title XXVI is thoughtfully arranged to include certain other special

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[27] *Nuntia* 17 (1983) 73.

processes (CCEO cc. 1357-1384), namely, marriage processes of nullity, separation, presumed death and dissolution of non-consummated marriage and favour of faith marriages; Nullity of Sacred Ordination (CCEO cc. 1385-1387); Removal and Transfer of priests (CCEO cc. 1388-1396). Title XXVII is on Penal Sanctions in the Church, (CCEO cc. 1401-1467; CIC cc. 1311-1399) and title XXVIII is set apart for the procedure for imposing penalties, (CCEO cc. 1468-1487; CIC cc. 1717-1731). The previous Eastern legislation had a section for canonical norms on the nature, structure and procedure of the different organs of ecclesiastical governance to assist the Supreme Pontiff, that is, Roman Curia (CS cc 188-210). It was omitted in CCEO since the Apostolic Constitution *Pastor Bonus* covers this section and is applicable to both the East and West.[28]

The Instruction *Dignitas Connubii*[29] issued on 25 January 2005 by the Pontifical Council for Legislative Texts is a synthesis of declarations of the Pontifical Magisterium, authentic inter-pretations of law, and the common apostolic jurisprudence on procedural questions. The apostolic letters issued *motu proprio* by Pope Francis, namely, *Mitis et misericors Jesus*[30] (for the Eastern Churches) and *Mitis Judex Diominus Jesus*[31] (for the Latin Church), published on 15 August 2015 deal with simplified procedural norms for the declaration of nullity of marriages.

The previous legislation in SN contemplated only contentious and criminal trials. But in the present judicial system of the Church three species of trials are considered: ordinary contentious, penal and contentious – administrative. The ordinary contentious trial concerns the vindication of subjective rights or declaration of a juridical fact. In penal trial with due regard for the norm of law a judge determines whether the commission of a delict has been proved consequent upon the imposition of a penalty. The penal trial is governed by the norms on trials in general, ordinary contentions trials and the special norms for penal procedure. Penal trials being a matter of public good, the commission of a delict involves the disturbance of the good order of the Church. The contentious-administrative trial is conducted by the sole administrative tribunal in the Catholic Church, the Supreme

[28] John Paul II, Apostolic Constitution, *Pastor Bonus*, 28 June 1988, *AAS* 80 (1988) 841–923.

[29] Pontifical Council for Legislative Texts, Instruction, *Dignitas Connubii,* Città del Vaticano: Libreria editrice Vaticana, 2005.

[30] *AAS* 107 (2015) 946–957.

[31] *AAS* 107 (2015) 958–970.

Tribunal of the Apostolic Signatura, (PB, 58 §2; 123 §1). The scope of trial in the Signatura consisted mainly of an administrative act which violated a norm of law in the substance of the decision, procedure used. The question of reparation of damages also is to be settled by this tribunal, (SN c. 2). The contentious-administrative trials did not exist in the legislation of SN. According to SN there was no appeal against administrative decisions of hierarchs but envisaged only administrative recourse to the Apostolic See, (CS c. 36; CS c. 345).[32]

The CCEO does not mention the general norms on apostolic tribunals because of the unique nature of the Eastern Churches and does not have direct application in a stable manner given the nature of the Eastern Churches, respecting, however, the freedom of the Eastern Catholics and the authorities thereof by deferral (provocation), recourse or appeal.[33]

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[32] The species of administrative trial was introduced into Canonical science after the establishment of *Sectio altera* of the Apostolic Signatura by Paul VI with the apostolic constitution of *Regimini ecclesiae universae*, 15 August 1967, *AAS* 59 (1967) 885–928, see n. 106.

[33] *Nuntia* 14 (1982) 5. The three stable tribunals of the Apostolic See are: 1) Tribunal of the Roman Rota. As ordinary appellate tribunal it is governed by its own norms issued in 1994. Its jurisdiction and competence are governed by Latin Code, Pastor Bonus, Rota's norms and Eastern Code. Cf. Tribunal of Roman Rota, Normae Quam Maxime decet, 18 April 1994, AAS, 86 (1994) 508-540, see n. 5; Secretary of State, "Rescriptum ex audientia Sanctissimi quo Normae Rotales in forma specifica approbantur", 23 February 1995, *AAS* 87 (1995) 366. 2) The Supreme Tribunal of Apostolic Signatura. It is the Department of justice for all the tribunals of the Church. It is governed by its *Lex propria* issued by the Supreme pontiff in 2008, which explicitly remits itself to the Eastern Code when it does not provide for something. Cf. Benedict XVI, motu proprio *Antiqua Ordinatione*, 21 June 2008, *AAS* 100 (2008) 513-538, see n. 122 and PB n. 125. 3) The Supreme Tribunal of the Congregation for the Doctrine of Faith adjudicates causes involving more serious delicts (*graviora delicta*), governed by norms issued in 2010, which likewise remit themselves to the Eastern Code. Cf. CDF, *Normae de gravioribus delictis*, *AAS* 102 (2010) 419-430, see n. 31, also *PB* n. 52; John Paul II's apostolic letter, *Sacramentorum Sanctitatis tutela*, issued motu proprio on 30 April 2001, AAS 93 (2001) 737-739. *Madre amorevole* is an apostolic letter issued *motu proprio* on 04 June 2016 by Pope Francis and entered into force on 05 September 2016. This *motu proprio* cautions the removal of bishops and Major Superiors from office due to grave negligence or omission through which minors and vulnerable adults had to undergo sexual abuse resulting in physical, moral, and spiritual harm. *Vos estis lux mundi* is an apostolic letter

6. Nature of Judicial Power of Synod of Bishops

The Synod of Bishops in the CCEO is the *superior tribunal* within the territory of the Church *sui iuris*. In earlier schema at various phases of revision the phrase *supreme tribunal* of the Patriarchal Church was included instead superior tribunal. This was unacceptable to the legislator because of the supreme power of the Apostolic Signatura and the Congregation for the Doctrine of Faith. It is because they enjoy the universality in the canonical system and have jurisdiction over the entire Church. Moreover, the Synod of Bishops is not competent to judge causes proper to the Roman Pontiff, Apostolic Tribunals, Ordinary tribunal of the Patriarchal/Major Archiepiscopal Church and other Tribunals. The jurisdiction of the Synod of Bishops is limited within the Church *sui iuris*, not outside the proper territory. Hence the judicial autonomy of the Synod of Bishops is restricted and it is known as superior tribunal.[34]

6.1 Superior Tribunal

The judicial authority of the Synod of Bishops is new in the Code. Previously in the SN it was entrusted to Patriarch/Major Archbishop himself or together with permanent Synod, (SN cc. 17, 18 §§1, 3). According to previous legislation of *Cleri sanctitati* principal areas of competence of the Synod of Bishops were legislative and administrative spheres. Synod of Bishops only judged causes of more serious importance, (CS cc. 243, 248).

The guiding principle foresaw more judicial authority to the Patriarchal Synod as a tribunal of major criminal actions with due regard for the right to *provocatio ad Sedem Apostoliocam* (SN c. 32). It was incorporated to the CCEO as an exception and does not, in fact, constitute a real appeal.

The Central Study group for the revision of CCEO observed that CIC (1917) c. 1578 did not consider expedient for the bishop to exercise his judicial power in his diocese, as it is odious and less suitable to his

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promulgated *motu proprio* by Pope Francis on 07 May 2019. It establishes new procedural norms for sexual offence cases and to ensure that bishops and religious superiors are held accountable for their actions. Apostolic Penitentiary (PB, nn. 117-120), is not strictly a tribunal conducting processes and making judicial pronouncements. It grants favours in the internal forum and issues norms on indulgences.

[34] Evolution of the revision of canons on the judicial power of the 'Synod as supreme tribunal' see *Nuntia* 5 (1977) 13; *Nuntia* 14 (1982) 20; *Nuntia* 21 (1985) 41; *Nuntia* 24 – 25 (1987) 193; *Nuntia* 28 (1989) 132.

character as father.[35] It is also evaluated the figure of Patriarch is not a judge by divine right for the entire patriarchate. But the tribunal of the Synod of Bishops exercises the administration of justice.

The tribunal of the Synod of Bishops is competent to judge contentious cases of eparchies and bishops. This is a recognition of the ancient heritage of the Patriarchal Churches of the East. In the Latin Church it is the Roman Rota who judges bishops and dioceses in contentious cases, (CIC c. 1405 §3; PB art. 129 §1). The Eastern Code confirms that in diaspora of the patriarchal churches and other Churches *sui iuris* the cases are adjudged by tribunals of the Apostolic See (CCEO cc. 1060 §2; 1061). Appeals from the sentence of the tribunal of the Synod of Bishops are forwarded to the Synod of Bishops. In any case the right to deferral of the case to the Apostolic See is safeguarded.

The previous legislation *Sollicitudinem Nostram* foresaw three different tribunals in the Patriarchate: the permanent synod, the patriarchal ordinary tribunal and the tribunal proper to the eparch y of the patriarch. Patriarch/Major Archbishop together with the permanent synod was competent to judge within the proper territory and the appellate authority was the Apostolic See (SN cc. 17-20, 74). The Patriarch/Major Archbishop was authorised to adjudge certain civil cases of bishops (SN 18 §3). SN prescribed that Patriarch together with permanent synod judged minor criminal cases of bishops. Major criminal cases were instructed by patriarch together with the permanent synod and the acts of the case were forwarded to the Apostolic See for decision. In major Archiepiscopal Churches Major Archbishop together with permanent synod had competence only to instruct minor criminal cases of Bishops and to transmit the acts to the Apostolic See (SN c. 17 §2). Moreover, permanent synod was endowed with the power to adjudicate contentious cases of Bishops and eparchies within the proper territory in first instance and the appellate authority was always the Apostolic See, (SN cc. 18 §§1-2; 73-74).

The Code commission for revision tried to translate the directive principles into canonical language in fidelity to the venerable patrimony of the Sacred Canons. In such a way the intention was to recognise the authority of the patriarchal churches to constitute their own tribunals in all grades and degrees up to the final instance. Besides patriarchal synod shall be the competent tribunal for major criminal case with due regard for the deferral to the Apostolic See. But

[35] *Nuntia* 5 (1977) 13.

with mature study and reflection the study group reached a consensus to reserve all cases of disputes and controversies concerning Patriarchs and Major Archbishops and all penal cases of bishops to the Roman Pontiff.[36] After several modifications at different phases of the development of the CCEO c. 1062 it was clarified by the Pontifical Commission that the Synod of Bishops is an autonomous higher tribunal.[37] Imbibing the spirit of the Second Vatican Council (OE 9) and recognising the supremacy of the Apostolic Signatura in the universal Church, the Synod of Bishops came to be known as superior tribunal, a unique tribunal of the Eastern Patriarchal Churches.

6.2 Ordinary Tribunal

As per CCEO c. 1063 Patriarch is obliged to erect an ordinary tribunal for the patriarchal Church which is distinct from the tribunal of his own eparchy. Though the tribunal personnel are appointed by the patriarch with the consent of the Permanent Synod they can be removed from office for a serious reason by the Synod of Bishops. The Code commission was of the view that the authority of the judges and more so their freedom to pronounce sentences are safeguarded and they cannot be deprived of their office against their will except by the Synod of Bishops.[38] However, the patriarch has the freedom to accept a resignation from office on his own.

6.3 General Moderator for the Administration of Justice

This general moderator for administration of justice is a new canonical figure in the common Code. He is elected by the Synod of bishops for a five-year term and together with other two constitute a tribunal representing the Synod of bishops. He enjoys episcopal character and has full participation in the *munus regendi* of the judicial and executive power. He is the presiding judge in the tribunal of the Synod of bishops erected to adjudicate contentious cases of bishops. He has the obligation to resolve exceptions of suspicion and recusancy against judges of ordinary tribunals of Patriarchal/Major Archiepiscopal

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[36] *Nuntia* 5 (1977) 11–12; 14 (1982) 4; 23 (1986) 114.

[37] The Study group had a detailed discussion and made a reference to CIC 1917 c. 1578 which articulated that bishop though being the only judge in the diocese by divine right did not exercise that judicial power. A fortiori a patriarch not being a judge by divine right for the entire patriarchate is inappropriate to have judicial power either alone or together with the permanent synod. It is noteworthy, however, that SN accorded such a power in the previous legislation (SN cc. 17-18). Cf. *Nuntia* 5 (1977) 13.

[38] *Nuntia* 5 (1977) 14–15.

Churches, excepting the rule of canons 1107 §1. If there is an objection against a judge it is to be resolved by the moderator of Ordinary Tribunal (CCEO c 1063 §2).

He is also bound to exercise his executive power. He has right to exercise vigilance over tribunals within the territory of the Patriarchal/Major Archiepiscopal Church. This cannot be considered as an exclusive right of the moderator of administrator of justice because eparchial bishops are also moderators with respect to their eparchies.[39]

7. Uniqueness of Procedural Norms in the Eastern Code

Although it is undisputable that there must be conformity of the procedural norms in both the Codes, taken into account the difference of traditions and cultural circumstances certain characteristic features can be identified in the Eastern Code. The Latin Code being the forerunner of Eastern Code, the eight years of canonical experience in the interpretation and application of the juridical norms in practical life has contributed in the refinement of the norms in CCEO.

7.1 Prescription of Contentious Actions

As regards the prescription of contentious actions the previous law enacted that contentious actions are extinguished by prescription according to the norm of law (SN c. 221). The Code commission was confronted with a difficulty to clarify which norm of law applies in the context. Since it refers to civil law and Church accepts generally prescription as it exists in civil law (CCEO c. 1540; CIC c. 197) the problem is the choice from several possibilities: civil law of the petitioner, of the respondent or of the place of the tribunal. In spite of the fact that CIC c. 1492 simply stated "as norm of law," Eastern Code established a definite period of five years that contentious actions are extinguished by prescription before ecclesiastical tribunals. The five-year rule included in the Eastern legislation provides clarity, precision and certitude about the outcome of the trial.[40]

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[39] William A. Daniel, "Trials in General," in John D. Faris & Jobe Abbass, (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, vol. II, (Wilson & Lafleur, Montreal, 2019) 2005 – 2006.

[40] *Nuntia* 5 (1977) 36.

7.2 Conflicts of Competence between Tribunals

The regulation of conflicts between tribunals was done by the Apostolic Signatura as stipulated by *Pastor Bonus* art. 122. 4 and CIC c. 1416. However, it differs from the norm stipulated by the Eastern Code. The previous Eastern legislation established that conflicts of competence was generally decided by their superior tribunals (SN c. 127 §1) and resolved by the superior tribunal of that judge before whom the action was introduced by a bill of complaint. The revised new formulation of the Eastern canon brings about a direct resolution of conflicts not to a common appellate tribunal but to the appellate tribunal of that judge before whom the action was first introduced. Eastern canon foresees that even when either of the tribunals concerned is the appellate tribunal of the other, the conflict is to be decided by the tribunal of third instance. It also points out that in the Patriarchal Churches' resolution of conflicts, in normal circumstances, will not necessitate the intervention of the Apostolic See.[41]

7.3 Security to abide by the Ecclesiastical Judgement

At the request of respondent the judge *ex officio* is to safeguard the right of the respondent to oblige the petitioner to provide an appropriate security to abide by the ecclesiastical sentence pronounced by the judge as per norms with moral certainty. This is a unique Eastern norm present in the previous legislation (SN c. 141) and absent in the Latin code. It is also in conformity with the provisions in civil law: "The norm also parallels the now common procedural rules of civil law which permit an analogous application by the respondent (defendant) for security for costs."[42]

7.4 Erection of Common Tribunals for Churches *sui iuris*

The provision for the erection of common tribunals for various Churches *sui iuris* is an innovation in the Eastern Code. Both the Latin and the Eastern codes have provided for a common tribunal of first instance for several eparchies of the same Church *sui iuris* (CCEO c. 1067; CIC c. 1423). The CCEO c. 1068 having no precedent in SN nor in the CIC established that bishops of various Churches *sui iuris* having jurisdiction in the same territory can consent to constitute a common tribunal of first instance. This tribunal is competent to instruct and adjudicate contentious as well as penal cases of Christian faithful

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[41] Jobe Abbass, *Two Codes in Comparison*, (*Kanonika* 7, third edition, PIO, Roma 2018) 239.

[42] Jobe Abbass, *Two Codes in Comparison*, 228.

subject to them. This is applicable to the Latin Church *sui iuris*. Besides being a welcome idea to administer justice without delay, it is an explicit manifestation of the communion in the mystery of Church of Christ. It is also in harmony with the norms of CCEO c. 322 according to which the pooling of the hierarchs' resources "… is achieved for the common good of the Churches, so that unity of action is fostered, common works are facilitated, the good of religion is more readily promoted and ecclesiastical discipline is preserved more effectively." The common tribunal shall have statutes approved by the same authority. The requisites of the statutes governing the common tribunal are mentioned in the Eastern canon (CCEO c. 1070) which does not have a Latin equivalent. The statutes pertain to the internal functioning of the tribunal and have the nature of administrative acts approved by the moderator of the tribunal. The appellate authority for this common tribunal was a matter of competence discussed in the Code Commission and finalised after the *denua recognitio* to be designated by the Apostolic See.[43]

7.5 New Forum of Competence

Eastern law and especially the canonical system has introduced a new norm which has no Latin equivalent namely, forum of common consent of a possible title of competence of the judge. The competence of judge is concerning mainly, the place where administration was carried out in causes pertaining to the administration of goods and the domicile or quasi domicile or place of residence of one who left a pious will *mortis causa.* At least three juridical acts are posited to acquire this title of competence: consent of the petitioner, of the respondent/s and of the governing authority of the tribunal – bishop moderator or group of bishops (CCEO c. 1080). The efficacy of the common consent is an equitable means to assist the parties to defend their rights adequately with tranquillity. In addition to that there is the presumed efficiency of the instruction of the case and the execution of the sentence.

7.6 Provision for Maintenance Grant

Eastern Code practically included the norms of SN (cc. 194-195) on interim maintenance for the support of a person. The petitioner may be a spouse in a case of separation. The petition involves an incidental matter, namely, maintenance of the spouse or security for minor children in a pending matrimonial case for nullity or dissolution of the

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[43] *Nuntia* 5 (1977) 17; 14 (1982) 23; 24–25 (1987) 195.

bond.[44] In order that the decree or sentence may be valid the judge ought to consult the other interested parties (CCEO c. 934 §2, 2). The objective truth and personal wellbeing are inherent in the procedural System of the Church. However, the immediate good of the person is to be protected without prejudice to the truth. The incidental question of maintenance is settled by an interlocutory decree / sentence before pronouncement of the definitive judgement. This canon is unique to the Eastern Code safeguarding the right of an individual and protecting the values of equity and justice.

8. Procedure in Avoiding a Trial

The Eastern perspective of arranging the canons on methods of avoiding the trial is significant. The Canons in the CCEO (cc. 1164-1184) are placed before the beginning of the contentious trials. The Code Commission has a justifying reason for such a decision, namely, as an invitation to the Christian faithful to settle their disputes with the brethren in harmony with the Christian precepts.[45] The moral obligation of the Christian faithful to address the disputes peacefully based on charity and of the pastors and judges of the Church to promote reconciliation (*conciliatio*) is implied (SN c. 97 §1; CCEO c. 998).

8.1 Settlement

In substance settlement (*transactio*) is an obligatory contract to put an end to a litigation already begun or prevent litigation from arising. In the light of the previous legislation (SN c. 98), "Arbitration agreement (*compromissum in arbitros*) is contractual act by which the parties, instead of resolving the controversy between themselves or in the judicial forum, entrust (*committere*) the matter to one or more arbiters for a resolution or just and equitable arrangement."[46] Concerning the limitations on the use of the out-of-court settlement CCEO has brought forth in general only such matters pertaining to the public good affecting what is most personal to one or more parties (CCEO c. 1165 §1). The previous legislation (SN c. 96 §1) provided examples like commission of delicts, validity or perpetuity of the bond of marriage, ecclesiastical offices, validity of holy orders or other sacraments and other spiritual matters. *Sollicitudinem Nostram* characterises the happy

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[44] *Nuntia* 14 (1982) 9.

[45] *Nuntia* 14 (1982) 9. The CIC placed those canons after the canons on contentious and other special trials, (CIC cc, 1713–1716).

[46] William L. Daniel, "Trials in General," *A Practical Commentary to the Code of Canons of The Eastern Churches*, 2147.

outcome of a settlement as joining together or agreement (*compositio or concordia*, in SN c. 97 §1). Such terms are absent in the revised legislation.

8.2 Arbitration

Chapter X, article II of the Title XXIV of CCEO (cc. 1168-1184), dealing with the norms on arbitration, was considered to be one of the most important sections of the Code as it is based on the law of charity and fraternity. The Code Commission observed: "Arbitration is an efficacious means to avoid controversies."[47] The necessity of avoiding litigation and the desire of Christ's disciples to keep away from it are founded on Pauline teaching (ICor. 6:1-8). Therefore on two reasons the canons of the SN on the methods of avoiding trials were retained. Those two reasons are: first to maintain the ecclesial context, and second, to avoid recourse to civil law, which may vary from nation to nation. Arbitration agreement remains unique to the Eastern Code and hence it has incorporated practically most of the canons of the previous Eastern legislation after minor modifications.

9. Procedure for the Causes of Saints

The Eastern as well as the Latin Code did not enact norms for regulating causes of the Saints. The Code Commission had a plan to work on the initial texts on this matter.[48] The previous Eastern legislation had established certain norms of procedure on this matter (CS c. 200 §§2, 3). The competence for the specialized processes of the canonization of saints was relegated to the special laws established by the Supreme Pontiff. The matter is provided for in the Apostolic Constitution *Divinus Perfectionis Magister* and declared the right of the hierarchs/ordinaries to inquire into the life, virtues or martyrdom and reputation of sanctity or martyrdom. This inquiry can be *done ex officio* or at the request of the faithful.[49] *Pastor Bonus* reserved the whole process to the exclusive competence of the Congregation for the Causes of Saints (PB 58 §2; 71). Two decades later, the same Congregation issued an Instruction, *Sanctorum Mater* stipulating norms governing the process at different levels, especially at the

[47] *Nuntia* 9 (1979) 109.

[48] *Nuntia* 9 (1979) 90-106.

[49] John Paul II, Apostolic Constitution, *Divinus Perfectionis Magister*, 25 January 1983, I §1, *AAS* 75 (1983) 352.

eparchial/diocesan level.[50] The Instruction explicitly remits itself to the procedural norms given in the Eastern Code concerning *modus procedendi* for the collection of documentary proof in an ancient cause and examination of witnesses in a more recent cause. The apostolic letter issued *motu proprio* by Pope Francis on 11 July 2017, *maiorem hac Dilectionem* establishes offering of life, a new case for procedure of beatification and canonization of Saints, distinct from the cases based on martyrdom and on the heroic practice of virtues.[51]

Conclusion

"Serva ordinem, ordo servabit te." Keep the order, the order will keep you. Canonical norms serve the purpose of bringing about order and tranquillity in a community. It is all the same in the civil society or ecclesiastical society. As the first unified common Code of ecclesiastical procedural norms *Sollicitudinem Nostram* has succeeded to a certain extent. It is significant that SN has incorporated in the canons the legacy of the Eastern Churches with respect to judicial system. The judiciary is so arranged as Patriarchal/Major Archiepiscopal Superior Tribunal and Ordinary Tribunals (SN cc. 17-20; 72-74; 85-91). The three levels of adjudication, namely, Patriarch / Major Archbishop with Permanent Synod, Patriarchal/Major Archiepiscopal Ordinary Tribunal and the Tribunal proper to the Eparchy of the Patriarch/Major Archbishop. The role of Permanent Synod is to resolve the disputes or cases with respect to Bishops and the appeal is forwarded to the Apostolic See. The Ordinary Tribunal is competent to instruct cases of persons below the rank of bishops at all instances in accordance with norm of law. The tribunal of the eparchy of the Patriarch/Major Archbishop has the competence to process cases in the first instance and the appeal goes naturally to the immediately higher tribunal (metropolitan tribunal). SN did not accord a judicial power to the Synod of Bishops. In handling the criminal cases the difference between the Patriarchal and Major Archiepiscopal tribunals was conspicuous.

Although CCEO recognised the Synod of Bishops as superior tribunal in the Patriarchate/Major Archbishopric the right of Supreme Pontiff/Apostolic See as the Supreme judicial authority is reserved by canons on recourse, appeal or deferral. This reservation to the (authority) primacy of the Supreme Pontiff even in judicial matters is a

[50] Congregation for the Causes of Saints, instruction, *Sanctorum Mater*, 17 May 2007, *AAS* 99 (2007) 465 – 517.

[51] *AAS* 109 (2017) 831 – 834.

clear example of not translating the teachings of the Second Vatican Council and not respecting the venerable ancient patrimony of the Eastern Churches handed down through the ages by Fathers, Ecumenical Councils and Local/provincial synods through the Sacred Canons.

All the canonical legislations, *Sollicitudinem Nostram*, *Codex Canonum Ecclesiarum Orientalium* and the *Codex Iuris Canonici* confirmed that the supremacy of the rule of law is to be upheld by observing correct procedure. This will enable those in authority to avoid all circumstances leading to arbitrary exercise of power. They should cling to the demands of justice, equity, and thereby strive for common good of the ecclesiastical society and the wellbeing of individual persons. It will help those entrusted with pastoral governance to intend and help others under their care to attain salvation as the supreme end. The unanimous verdict of a special bench of five judges of the Supreme Court of India dismissed petitions challenging the election of Mr V. V. Giri as President of India on charges of electoral irregularities and corrupt practices. The court reassured the people that "no one is immune from the due processes of the Law and the humblest in the land may seek justice from the courts."[52]

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[52] *The Hindu*, India's National Newspaper, (From the Archives fifty years ago, May 12, 1970), May 12, 2020, p. 7.