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Instanţele de judecată după legislaţia canonică ortodoxă şi romano-catolică

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Thesis presentation

Entitled "Ecclesiastical courts. Comparative historical perspective", the paper sets out by using an interdisciplinary discourse specific for historical and canonical studies to try an analysis of the similarities and differences between the canonical norms concerning ecclesiastical courts between the Orthodox Church and, respectively, the Roman Catholic Church. The aim of the paper transcends the mere inventory of the differences and similarities between Eastern churches and the Roman Catholic one and tends towards their critical analysis in order to extract key points, which can be used for interfaith dialogue purposes. By way of a historical excursus, we shall try to determine those institutional elements that were common to the law of religious communities of old times, the way they were ranked and the way the courts were coordinated, how many and which are the primary elements which were given up during the definition process of Churches as distinct legal entities. This exercise is useful because it enables the sensing and a better understanding of some of the obstacles related to various institutional mentalities that render more difficult the path towards the reestablishing of the primary unity of the Church. On the basis of our research is the wish to promote dialogue between churches.

An attempt at the analysis of the evolution of ecclesiastical courts is urged to go beyond the boundary of historical study and to place itself at the interference with Church History and Patrology, but also with Canon law and Hermeneutics. For the orientation in a field of study so vast and complex, the theological formation has turned out to be of great help to me.

An introductory chapter and one of conclusions enframe the four chapters of the approach. The approach monitors the evolution of the Church’s historical reality, from the principled unit of the first millennium, to the precise fragmentation and individualization specific to the second, and concludes with a comparative analysis of the Catholic, and

respectively of the Orthodox canonic legal systems. In what follows we will present the content of the paper by chapters.

In the ***introduction*** we made some terminological specifications on some fundamental notions for the present research (court, judgment, canonical legislation, Orthodoxy, Catholicism, etc.), then we exposed the motivation for the choice of the subject, the importance and the timeliness of the topic addressed in the context of the dialogue between churches, the work methods used and we reviewed the sources and landmarks of specialized literature.

Wishing to observe the principles of historical study, we aimed, as far as possible, to present at the beginning of the chapters dedicated to the research of the courts within the Orthodox Church (chap. III) and, respectively, the Roman Catholic one (ch. IV), the canonical sources the analysis is based on. The second chapter of the paper, dedicated to the research of the ecclesiastical courts in the first Christian millennium, requires a historical study of an increased range and complexity, which involves the selective use of a variety of sources, reported in their rightful place.

Chapter II, entitled *Judgment in the first Christian millennium*, analyzes the basic principles of ecclesiastical judgment in the era of the undivided Church, beginning with the first church discipline rules established during the time of the Holy Apostles and their successors, continuing with the era of persecutions and ending with that of the Ecumenical Councils, when the canonical norms were finally established. For a better perception of the historical evolution of ecclesiastical courts, we focused on a number of significant historical processes, to which we have dedicated a number of case studies: confession of the sins and regulations regarding the judgment in the Old Church, the Apostolic council as an archetype of the council institution, the councils held to combat the Montanists, the councils of the second period of the Easter controversy, the North-African councils up to the middle of the third century.

In two subchapters, II.2.1 and II.2.2, we examined the issue of the confession of sins, as the early Church disciplinary proceedings. The analysis also had as stakes the revealing of the spiritual and curative character of ecclesiastical judicial proceedings. We thus revealed that the ultimate goal of ecclesiastical judgment is the reformation of the one who did wrong and their reintegration, after penance, in the eucharistic community. The most severe penalty was the exclusion for a period from the Eucharistic communion. This priority of the spiritual rationale and salute of the exercise of the Church's judicial power has remained to this day a constant of the Orthodox canon law.

Subchapter II.2.3 was dedicated to studying the certification by sources of the affirmation of the bishop's judicial responsibilities. The fact becomes more visible with the rise of the monarchical episcopate model, according to which the bishop was the leader of the cult, the teacher, the administrator of the philanthropic activity and the judge of the local community. The need to judge the cases in which the bishop was an involved party or of the discipline problems affecting several local communities has led to the emergence of the council institution (subchapters II.2.4 - II.2.5). Organized according to the model of the apostolic council held in Jerusalem in the year 49 probably, the council is the answer to the need for decisional and judicial coordination in the Church. The oldest councils the historical sources are talking about, held in the last quarter of the second century, were constituted by the bishops of a given region. As revealed by the case studies on the oldest known councils, they are an expression of an already existing *lawful habit* and of the instinct of articulation and coordination of the Church. Although laymen could also attend, only bishops had the right to vote. At the same time, the council also exercises the function of control and limitation of the episcopal power: although the bishop is the absolute judge in his community, he may in his turn be tried by a council of the neighbouring bishops or of the bishops of the region. The council institution is certified at the end of the second century in many regions of the Roman Empire, from Asia Minor to Gaul.

The emphasizing of the institutionalization process led to the emergence of metropolitan councils (subchapter. II.2.5). Historians consider that already at the middle of the 3rd century, the metropolitan system was basically in use throughout the entire Empire. As a reflection of the civil administration of the Roman Empire, the bishop of the most important city of the province (or the metropolitan) becomes the coordinator of the council institution in the province in question. Leading Metropolitans were subsequently appointed archbishops and of these later came the patriarchs. Since the fifth century, the bishops of Rome who enjoyed the prestige and status of the court of Appeal in the West, seeks to formulate legal and dogmatic bases in favour of the claims to exercise the primacy in the Church (subchapter. II.3.2).

The passing into legality of Christianity, since the fourth century, made possible the increased articulation of council institutions, culminating in the holding of ecumenical councils (subchapter. II.3.3). Held thanks to the imperial support - that emperor being the one who convoked them, who supported and enforced their decisions – the ecumenical councils reunited, in intention, bishops from the entire Christian world, who deliberated on matters of dogma and ecclesiastical discipline of significance for the entire Christian world. In the conscience of the undivided Church it was imposed that the ecumenical council is the supreme court in the Church. Both the Orthodox and the Roman Catholic Churches recognize a number of (at least)

seven ecumenical councils held between 325 and 787. These councils were perceived as "everybody's", although they were only attended by a part of all the bishops of the Christian world of that time. The tensions between the Eastern Churches and the Western one, sharpened since the Ninth Century, and culminating in the "Great Schism" of 1054 made it impossible to convene a council that could be imposed as 'Ecumenical' simultaneously in the consciousness of the Eastern Church as well as in that of the Western Church.

Some other chapters have followed the evolution of the collaboration with the Roman imperial canon law, between the 4th and the 6th centuries (subchapters II.3.4 and II.3.5). A separate study object was the evolution of bishops' jurisdiction in civil matters, from clandestine jurisdiction (in the era of persecutions), to jurisdiction publicly recognized, by the Emperor Constantine the Great, and ending with relieving the ecclesiastical courts of civil law matters, through state intervention, even before the end of the fourth century. Subchapter II.4 was dedicated to an overview of the evolution of the legal and ecclesiastical proceedings and of church and canonical penalties on clergy and laity in the era of the ecumenical councils.

Chapter III, dedicated to *studying the courts in the Orthodox Church* in the era after the Schism of 1054, began with a presentation of Byzantine canon law sources (subchapter III.2) placed in their historical context (subchapter III.1). Besides the monuments of the Byzantine Tradition and the canonical collections, we have reviewed secondary sources, such as comments of renowned canonists Alexie Aristenos, Ioan Zonaras, Teodor Balsamon, from the 12th century and Matei Vlastares, from the 14th century. Another subchapter (III.2.3) has been dedicated to canonical collections from the late Byzantine era, which were the inspiration for the typology of mixed, political and Canonical law - the type of *nomocanons* very popular in Eastern Europe, in the post-Byzantine era, including the Romanian Countries.

Subchapter III.3 was dedicated to exploring the institutional diversity of the religious courts attested by the canonical tradition of the Church in the era of the Ecumenical Councils, from the old council court to the council-ecumenical ones, respectively autocephalous and exceptional. The old Eastern patriarchates have been reviewed, one by one: Constantinople, Alexandria, Antioch, Jerusalem and The Autocephalous Church of Cyprus (subchapter III.3.2) and, respectively, The Orthodox Autocephalous Churches recognized today: the patriarchates of Russia, Georgia, Serbia, Romania, Bulgaria, Greece, Poland, Albania, The Czech Republic and Slovakia, and Finland, noting the local specificities (subchapter III.3.3).

A larger case study (subchapter III.3.4) aimed at *The punctual organization of the courts in the Romanian Orthodox Church*. The following courts were described: The Deanery

Disciplinary Consistory, The Archdiocesan Consistory, The Metropolitan Consistory, The Metropolitan Council and the Holy Council - this being the supreme court in the autocephalous Church. Generous spaces were dedicated to the description of court procedures, from the preliminaries and the stages of the trial, to the lifting of penalties (subchapter III.3.4.2). Another subchapter was dedicated to the presenting of the courts for monks: the abbot and the spiritual board, the convent judgment board and the diocesan monastic consistory (III.3.4.3).

The fourth chapter was dedicated to a synthetic presentation of *Courts in the Roman-Catholic Church* after the *New Code of Canon Law*, which came into force in 1983. The chapter begins with a historical analysis (subchapter IV.1) of major official Western documents, subsequently Roman Catholic, marking the alienation from the canonical tradition of the undivided Church and illustrates the dissemination of the Roman Pontiff's claims of primacy over the whole Church. The documents had in view were: *Donatio Constantini*, *The Pseudo-Isidorian Decretals*, the so-called *Dictatus Papaei* (1075), the decisions of the unionist Council of Ferrara-Florence (1438-1439), the *Pastor aeternus* Constitutions (Vatican I, 1870), and respectively, *Lumen Gentium* (Vatican II, 1864).

A second chapter (IV.1.1) was dedicated to the systematic presentation of the sources of the Western canon law and their modern editions, ending with the new *Codex Juris Canonici*, promulgated on January 15, 1983 and in force since November 27, 1983 (IV.1.2), whose structure is presented in another subchapter (IV.1.3). If in the East, the Church kept the tradition of the canons from the Ecumenical and local Councils and of the Holy Fathers, through the legislative reform efforts, the Western Church chose to distance itself from the ethos of the first Christian millennium, through the recodifications of 1917 and especially of 1983, when they gave up nearly a third of the 2414 canons of the canonical tradition. The new canonical code appears as a very progressive group of laws, but with the risk that it might no longer be considered a code of ecclesiastical laws. If the ecclesiastical terms were removed from it, one could hardly notice a difference between it and the ordinary civil code. The canons are organized systematically, they are no longer repeated, as it happens when we refer to the collection of council decisions, but they no longer show their council character, and their impersonal structure, no matter how much anyone tried to prove the contrary, is clear. A clear character of the new code is also the situation of the papacy above its own laws, so that he himself can be judged by no one, and his judgments cannot be appealed, which demonstrates very clearly the *implementation of the doctrine of papal infallibility*. Following the publication of the new code, there is no longer a clear need for the council in order to amend it, but at certain

intervals the pope alone can proceed to its modification. A recent example is represented by the decree *Omnium in Mentem* of Pope Benedict XVI, through which, on December 15, 2009, five canons are amended (1008, 1009, 1086, 1117, 1124) to change the status of deacons: they are no longer members of the threefold sacramental hierarchy, but have only the right to exercise diaconate in word and deed. This was done to allow the diaconate access to marriage, strictly prohibited to Catholic clergy.

Having as a work source *Codex Juris Canonici* of 1983, we have attempted a description (subchapter IV.2) of the Roman Catholic canonical courts of first instance and, respectively, of last instance, as well as a presentation of the legal personnel. Among the courts of first instance we can mention the Episcopal courts, the episcopal collegiate or inter-diocesan courts; among the second instance ones, the metropolitan court, the superior court of religious orders, the court of an episcopal conference. The courts of last instance are: the Pope, the Apostolic Signatura, the Roman Rota, the Apostolic Penitentiary.

Other two subchapters regarded the systematic exposure of ecclesiastical sanctions provided by the last Roman canonical code (IV.3) and of the legal proceedings (IV.4). The new canonical code reflects the increased proportion of matrimonial trials among the Roman Catholic legal proceedings.

Chapter V of the paper was dedicated to *a comparative analysis of ecclesiastical judgment in the Roman Catholic Church and in the Orthodox Church*. After a brief look at the canonical courts of law in the East and in the West (subchapter V.1), we went on to the comparative analysis of the possible sanctions for laymen, clergy and monks, provided in Catholic canon law and in the Orthodox one (subchapter V.2). We tried to distinguish between various punishments such as excommunication, defrocking, anathema, etc., making historical excursions on defining these notions in the old canons of the Church and drawing parallels between their contemporary Eastern and Western sense.

A final subchapter (V.3) has been dedicated to the comparative study of the modalities of application of ecclesiastical laws, to the organization and functioning of the courts of law and to the judging of monks. We have highlighted a number of local particularities in the organization and functioning of the Orthodox courts. The analysis revealed that the differences in the constitution of trial courts in the various autocephalous Orthodox Churches are related to local customs and tradition and are not fundamental ones. In essence, the organization of Orthodox canonical courts reflects fidelity to the undivided Church's canonical tradition and, secondarily, to Byzantine jurisprudence, and manifests with vigor the ethos of conciliarity,

according to which, all bishops are equal among themselves. In general, the Orthodox Church judgment recognizes also in contemporary times the preeminence of spiritual (salvific) and irenic principles, and generally reflects the centrality of the Eucharist in church life.

In the Roman Catholic Church, the highest instance of judgment is *the Pope*, the supreme judge for the entire Catholic world, exercising his function either personally, or through the intermediary of ordinary courts of the Holy See, or through judges appointed by him. The Canon of 1404 of the *Canon Law Code* states that the pope cannot be judged by anyone, and in the case of judgments made by him, there can be no appeal (1629, art. 1). This is the canonical proof of the implementation of the infallibility doctrine after the First Vatican Council (1870). Moreover, the pope can arrogate to himself the judging of any case he wishes, so that no judge is competent any longer for a case reserved for him (1405 and 1406, art. 2), because, according to the Catholic hierarchical meaning, all judges are representatives of the pope in the courts where they operate. This can be considered a consequence of the ecclesiology promoted by the Second Vatican Council (1962-1965), in whose sense, the pope, as the vicegerent of Christ, is the only mediator between God and men - so that *de jure* the only priest and bishop, therefore, the only subject of canon law. From the dogmatic and canonical point of view, all Roman Catholic priests and bishops are authorized delegates of the pope.

Conclusions

Our research revealed that the Orthodox and Roman Catholic canon law systems share, in terms of organization of the courts and the penalties system a considerable number of common elements. The fact is based on the common canonical tradition of the first Christian millennium, compared to which, however, the Roman Catholic Church has allowed itself a series of emancipations and innovations.

The similarities between the Orthodox and Catholic canonical trial systems are found in the observation area *1) the spiritual or salvific principle*, according to which, the penitent's reformation and his Eucharistic reintegration have priority in front of any material repairs or the imposition of legal correctness; and *2) the principle of hierarchy*, according to which, each level of church administration has at its disposal specific local judicial bodies able to try to resolve the canon law conflict. Thus, a case will be referred first to the local ecclesiastical trial bodies, which correspond to the first instance level, and only then, if unsettled, will be submitted to the higher court bodies, that is to the second instance. From the practice of the Old Church, both the Orthodox and the Roman Catholic churches retained the conception according to which, *the judge par excellence of the community is the bishop*. In latter times, the Roman Catholic Church has tried to redefine the state of the episcopate to articulate the dogmas of

primacy and infallibility, according to which the entire authority and sacramental power of the clergy is derived from that of the pope, the only one who possesses them in himself, in virtue of the Petrine office. Even in the context of asserting papal primacy and infallibility, the Roman Catholic Church continues to pulsate with an *ethos of synodality*, manifested at the institutional level in collegiate bodies and courts. The synodal principle is defining for Orthodoxy, so that its manifestation in the Roman Catholic Church structures can only be a cause for joy for the Orthodox.

The attitude towards the sources of canon law from the era of the undivided Church and the conception of authority are points that best highlight ***the differences*** between the Orthodox and respectively the Roman Catholic canonic conceptions. In the attempt to give a clearer substantiation to the claims of precedence over secular authority as well as in the whole Church, the papacy has preferred *to innovate in the area of canon law, disregarding the canonical tradition of the undivided Church* or forcing interpretations favorable to its cause. The church has tried to adjust to the pressures of modernity by "updates", which in the space of canon law, involved not only innovations, but also giving up part of the canonical inheritance, considered obsolete. The result is that the new *Code of Canon Law* of 1983 has more points in common with a civil law code than with a traditional canon law.

Understanding church sanctions reveals other differences between Orthodox and Roman Catholic canonical practice. Thus, Eastern jurisprudence emphasizes the spiritual side of healing coming through the application of epithymy, while Roman Catholic canonists distinguish between censorships (with the aim of reformation) and expiatory sanctions (with the purpose of defending the Church body), thus making an artificial distinction of the gravity of the sins. This attitude, which sometimes contaminated also the theory of Orthodox canon law, endangers the spiritual unity of pastoral care. The issues referring, for example, to ordination, in contrast with deposition, defrocking or degradation, emerged due to a misunderstanding of the Sacrament of Ordination, which means applying a grace that cannot go away with a simple court order. Sometimes it was ignored that the establishment of priesthood is not of a legal, but of a spiritual nature. Such a vision has led to the emergence of canonical-liturgical aberrations such as the degradation of the episcopal function into the priestly, unthinkable in the East and entirely outside the canons.

In general, Roman Catholic canon law tends to become a hyper-specialized reality, irrelevant for the vast mass of believers, and maintained artificially. The rift between the canonical and the spiritual sphere pushes Catholic canon law either towards public irrelevance

or towards formalism. In the minds of most Catholic believers, ecclesiastical courts are places where measures are being taken to address violations of matrimonial law. Or, it is precisely the strictness regarding the celibacy of priests and the remarriage of believers that are among the causes for the diminution of priestly vocation and of the resentment of the believers towards the Roman Catholic Church. Naturally, no judicial practice of the Orthodox Church is exempt from the danger of formalism, bureaucracy, arrogance, isolation, lack of relevance for the laymen or society.

The new Roman *Code of Canon Law*, enacted in 1983, implements canonically the dogmas of papal primacy and infallibility proclaimed at the First and Second Vatican Councils. Thus comes into force *a new understanding of authority* in the Church, which sees in the affirmation of the Pope's supreme authority the principle of safeguarding the unity of the Church. For the Orthodox Church, unity is maintained by the genuine and free exercising of synodality. It can be argued that, from the perspective of the Orthodox Churches, papal primacy represents the only truly insurmountable administrative difficulty in the way of the unification of the Churches.

Historically, papal primacy emerged in an era in which political realities such as the migration of peoples, the fall of the Western Roman Empire, the Arab conquests and the cultural rift between the West and the East made it difficult to maintain the unity of the Church synodally. On the eve of and during the works of the Second Vatican Council (1962-1965), the hopes of theologians and bishops for the recognition of a more important role for the episcopate in the Church leadership were renewed. But the last great Catholic council left it to the discretion of the papacy to determine the degree in which the College of Bishops may be involved in Church leadership.

In the spring of 2014, the leaders of the Orthodox Churches agreed upon convening in 2016 of *The Holy and Great Council of the Orthodox Church*. In the intention of the promoters, this approach aims to break an inter-Orthodox council pause of more than twelve centuries, formally instituted together with the holding of the last Ecumenical Council, in the year 787. Certainly, a council break that long brought along a certain erosion of the prestige of council authority and of the confidence in its effectiveness today. It is to be expected that this pan-Orthodox council to re-credit the idea of council articulation of the Orthodox Churches, often separated both by differences of rite, administrative conflicts or cultural animosities.

If through post-modern innovations, the Roman Catholic *Code of Canon Law* came to be infused with elements of civil or economic law, it is not excluded including on the judicial

and administrative level, for it to become increasingly marked by practices until now specific to economic institutions or companies with a multinational character. If this trend continues, it is likely for the Roman Catholic jurisprudence to become increasingly marked by decentralization and promotion of local autonomy - all with the intent of administrative simplification and streamlining. In this perspective, papal primacy becomes a less threatening notion: it will still be stated formally, but practically papal competences will be delegated to the central bodies and, to a growing extent, to the local ones. If the desire of the Roman Catholic decentralization will be materialized including at the judicial level, the contact and *local dialogue* with the courts of law and the administrative bodies of the Orthodox Church shall be much facilitated.

As always, better mutual knowledge uproots prejudices and promotes mutual respect, without which dialogue cannot exist. In the era of fierce consumerism, where religious indifference reaches new highs, Churches are called to make a common front in highlighting the spiritual side of reality and of the eternal stake of existence.