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FEDERICO MARTI

THE LEGISLATIVE POWER OF THE COUNCIL OF HIERARCHS IN THE METROPOLITAN CHURCH *SUI IURIS*

INTRODUCTION

The Metropolitan Church *sui iuris* is one of the ecclesiastical structures laid down in the Oriental Code. Its ecclesiological nature and its canonical structure nowadays is not fully understood by the scholars. Difficulties arise even in ascertaining who is the Superior Authority of this type of Church *sui iuris*, whether the Metropolitan or the Council of Hierarchs[1].

The Metropolitan Church *sui iuris* has been recognised with power and autonomy by which its legislative body, the Council of Hierarchs, can issue a valid and binding legislation for the whole metropolis. The legislative power not only contends for the Council of Hierarchs when the Code expressly grants it, but also in all cases in which the Code makes a referral to the particular law of the Church *sui iuris* (can. 167§ 1) 2. In virtue of this general reference, the Council of Hierarchs has ample legislative power. It is good to keep in mind that according to can. 985 §[2], the said power cannot be validly delegated[3].

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[1] Regarding the Council of Hierarchs cfr. F. MARTI, *Il Consiglio dei Gerarchi, natura giuridica e potestà,* in L. SABBARESE (ed.), *Strutture sovraepiscopali nelle Chiese Orientali,* Urbaniana University Press, Città del Vaticano 2011, pp. 143–186.

[2] Even though it clearly results from the canons of the Code, the list of different particular legislators of the Church *sui iuris* is found in "Nuntia" 27 (1988), 32.

[3] Cf. V. THANNICKAKUZHY, *The Power of Governance in a Metropolitan Church "Sui Iuris": with special reference to the Syro-Malankara Catholic Church,* Excerpta ex Dissertatione ad Doctoratum, Pontificio Istituto Orientale, Roma, 2001, p. 38.

Extensions and Limits of the Legislative Power of the Council of Hierarchs

The legislative areas of competence of the Church *sui iuris* are heated topics of discussion in doctrine, especially if the particular legislative bodies have a general or taxative competence, namely in cases in which the Code gives them direct competence or when the Code relegates the matter to the particular law. Equally debated is the question of the relationship between the particular legislation of the Church *sui iuris* and the legislation which each bishop can issue for his own eparchy[4]. Limiting this reflection solely to the Metropolitan Churches *sui iuris*, if one agrees with the doctrinal assumption whereby the Council of Hierarchs is somewhat comparable to the Latin Episcopal Conference[5], then the most logical consequence of this comparison would maintain it to be a taxative competence. In fact, the most accredited doctrine claims that if the Episcopal Conference, which is a body of mere aid and support, were to be furnished with a general legislative competence it would compromise, owing to its permanent nature, the integrity of the power which by divine right the bishop has in his own particular Church[6]. In this regard, one must not forget that safeguarding *munus episcopale* in particular Churches represented one of the most intense concerns of Vatican Council II. In fact, in *Christus Dominus*

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[4] Regarding the subject, cf. P. Szabó, *Autonomia disciplinare come carattere del fenomeno dell'*Ecclesia sui iuris: *ambito e funzioni,* in L. Okulik (ed.), *Le Chiese sui iuris. Criteri di individuazione,* Marcianum Press, Venezia 2005, pp. 67–96.

[5] Cf. J. D. Faris, *The Eastern Catholic Churches: Constitution and Governance, According to the* Code of Canons Eastern Churches, St. Maron Publication, New York 1992, p. 376; D. Salachas, *Can. 155,* in P. V. Pinto (ed.), *Commento al Codice dei Canoni delle Chiese Orientali,* Libreria Editrice Vaticana, Città del Vaticano 2001, p. 150; P. Pallath, *The Synod of Bishops of Catholic Oriental Churches,* The St. Thomas Fellowships, Roma 1994, p. 199.

[6] «Le Conferenze episcopali sono, infatti, istituti permanenti e, di conseguenza, se avessero il potere di legiferare su qualunque materia, potrebbero gravemente condizionare in ogni momento importanti aspetti del ministero dei singoli vescovi diocesani con l'evidente pericolo di limitare eccessivamente la loro autonomia», G. Feliciani, *Il potere normativo delle Conferenze episcopali nella comunione ecclesiale,* in Aa.Vv., *Comunione e disciplina ecclesiale,* Libreria Editrice Vaticana, Città del Vaticano 1991, pp. 90–91. Now, in doctrine, it is common that «al di fuori di questo ambito di competenze riferite in diverso modo dalla Santa Sede, la conferenza non ha potere normativo, né potrà emanare disposizioni vincolanti per i propri membri. Questo non è possibile neanche mediante il concorso unanime di tutti i vescovi, ai quali non è consentito disporre delle proprie attribuzioni a vantaggio, in questo caso, della conferenza stessa. In tali materie [those that don't entrust the Episcopal Conference], l'unanimità dei membri raggiunta in seno alla conferenza potrà trovare efficacia giuridica concreta non attraverso un atto giuridico da imputare alla conferenza stessa, bensì per mezzo degli atti di governo emanati singolarmente da ciascun vescovo nell'ambito delle loro rispettive diocesi», J. I. Arrieta, *Diritto dell'organizzazione ecclesiastica,* Giuffrè Editore, Milano 1997, p. 509.

decree number 8a, it was stated that the integrity of the resident bishop's power of government, was presumed.[7]

Upon this conciliar statement is based the theoretical assumption according to which *stability* of a body and the attribution of a *general* legislative competence were different incompatible characteristics. This statement, which has been the basis of the Latin legislation in force regarding the Episcopal conference[8], seems to have to be kept in mind when interpreting the *Codex Canonum Ecclesiarum Orientalium* although from the proceedings of the Oriental codification, where it frequently calls on the need to safeguard the integrity of the individual bishops' power of divine right, the lack of attention related to the question of the stability of supra-Episcopal bodies emerges.[9]

Having stated this, if one searches for an evaluation regarding the legislative power of the Council of Hierarchs, the content of canon 167 § 1 taken alone clearly and unmistakably states that this body can legislate only when the Code directly or indirectly establishes it by way of reference to the particular law of the Church *sui iuris*[10]. However, it is also true that if one takes the provisions

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[7] «[…] se la competenza di un'autorità superiore è descritta solo in modo vago ed impreciso, prevale l'integrità della potestà episcopale, non la limitazione (potenziale) della medesima a favore di un organo superiore» P. SZABÓ, *Competenza governativa e fisionomia degli organi sinodali. L'integrità della potestà episcopale nel sistema degli organi sinodali di carattere permanente,* "Ius Ecclesiae" 29 (2007), 448.

[8] Cf. L. MISTÒ, *Le Conferenze episcopali dalle origini al nuovo Codice di diritto canonico. Tratti per ripercorrere l'evoluzione giuridica dell'istituto,* "La Scuola Cattolica" 117 (1989), 428–440.

[9] Szabó observes that the Commission for Oriental codification «nell'elaborare la normativa sull'istituto patriarcale e su quello sinodale oltre che sull'OE voleva pure basarsi su tutta la dottrina conciliare, attribuendo pari importanza anche ai princìpi ecclesiologici delineati nel LG, CD ed UR. In questo contesto la difesa dell'integrità dell'autonomia di origine divina dei vescovi eparchiali venne giustamente dichiarata più di una volta, come compito di prima importanza. Tuttavia – e questo sembra essere significativo per la nostra problematica – salvo errore, queste affermazioni di principio, in modo alquanto strano, mai sono state collegate con indicazioni precise riguardo ai mezzi tecnico-giuridici da applicare a questo scopo. Così, mentre dalla direttiva citata è chiaro che la relazione tra la Sede Apostolica e le autorità supraepiscopali orientali era da elaborare in base ad un sistema di "riserve", non vennero determinati quali sarebbero i mezzi per garantire l'autonomia dovuta ai vescovi (e cioè se anche nella relazione del singolo vescovo all'ente sinodale come autorità superiore dovrebbe prevalere il sistema riservativo oppure al contrario quello della delimitazione tassativa delle competenze superiori)», P. SZABÓ, *La questione della competenza legislativa del Consiglio dei gerarchi (Consilium Hierarcharum). Annotazioni all'interpretazione dei cc. CCEO 167 § 1, 169 e 157 § 1,* "Apollinaris" 69 (1996), 491–492.

[10] Notwithstanding the precise words of the norm, there is who reads can. 167 § 1 as stating that the general competence of the Council of Hierarchs for everything that is not expressly disciplined by the common law, cf. J. MADEY, *The Autonomous Metropolitan Church according to the 1986 draft of the Code of Eastern Canon Law,* "Christian Orient" 9 (1988), 7–8. In favour of the taxative competence, one can quote Pospishil: «The council can legislate on matters expressly assigned to it in law and whenever the common law speaks of the particular law of an autonomous Church», V. J. POSPISHIL, *Eastern Catholic Church Law,* Second Revised and Augmented Edition, Saint Maron Publications, New York 1996, p. 198, and also T. KUZHINAPURATH, *Metropolitan Church* sui iuris, *juridical status and power governance,* "Christian Orient" 21 (2000), 45.

of can. 169 of the same title into account (where it urges the Council of Hierarchs to see to the pastoral needs of the faithful, giving it the power to rule over all that is necessary – in particular – to increase the faith, to favour pastoral activities, to regularise the customs and to grant a better observance of rite), and also the general principles involving the interpretation, it is possible to hypothesise, according to part of the doctrine, the existence of a general legislative competence[11]. In this regard, Szabó[12] observes that can. 169 allows an interpretation in favour of a general competence of the Council of Hierarchs for five reasons: Vatican Council II's wish (in particular *Christus Dominus*, n. 36 and *Orientalium Ecclesiarum*, n. 9) for a rebirth of Synodal bodies, which has always been characterised by a general competence; the formulation of the said can. 167, which is not so univocal in indicating a taxative competence, especially when compared to can. 455 § 1 of the Latin Code regarding the Episcopal Conference[13]; the source of can. 169 that contains elements in favour of a legislative and general competence[14]; reference to a real *ius statuendi* in favour of the Council of Hierarchs contained in can. 169; the fact that the taxative legislative competence of the Council of Hierarchs was not an indispensable condition to safeguard the autonomy of each Eparchial bishop. More recently, a sixth argument was adopted by Szabó in favour, that is, the fact that these bodies were expressly declared by the codification of a *legislative* nature, a qualification which is, according to Szabó, equivalent to a legislative

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[11] Cf., amongst others, J. D. FARIS, *Metropolitan Churches and other Churches* sui iuris *(cc. 155–176),* in G. NEDUNGATT (ed.), *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches,* Pontificio Istituto Orientale, Roma 2002, p. 218. Szabó writes: «della competenza normativa del Consiglio dei gerarchi invece si tratta anche in due canoni, ma purtroppo in maniera contraddittoria. Mentre è da riconoscere che il c. 167 opta più per la competenza tassativa (mancando comunque della particella *solo* che lo renderebbe univoco), da tale norma tuttavia non possiamo concludere sulla competenza meramente tassativa dell'organo in questione, a meno che esso non venga ermeticamente separato dal suo contesto, soprattutto dal can. 169, e non di meno da alcuni princìpi altrettanto fondamentali dell'interpretazione e della codificazione», P. SZABÓ, *Autonomia disciplinare come carattere del fenomeno dell'*Ecclesia sui iuris*: ambito e funzioni,* in L. OKULIK (ed.), *Le Chiese sui iuris. Criteri di individuazione,* p. 72.

[12] Cf. P. SZABÓ, *La questione della competenza legislativa del Consiglio dei gerarchi (Consilium Hierarcharum). Annotazioni all'interpretazione dei cc. CCEO 167 § 1, 169 e 157 § 1,* "Apollinaris" 69 (1996), 495–499.

[13] In fact, when writing can. 455 § 1 of the Latin Code, the legislator restricted the legislative competence of the Episcopal conference to taxative matters, indicating: «Episcoporum conferentia decreta generalia ferre *tantummodo* potest in causis, in quibus ius universale id praescripserit aut peculiare Apostolicae Sedis mandatum sive motu proprio ad petitionem ipsius conferentiae id statuerit», (italics have been added).

[14] In particular, the mention of can. 349 of the m.p. *Cleri sanctitati* in which a general competence at the Synod of bishops is entrusted: «patres in Synodo congregati studiose inquirant ac decernant quae ad fidei incrementum, ad moderandos mores, ad corrigendos abusus, ad controversias componendas, ad unam eandemque disciplinam servandam vel inducendam, opportuna fore pro suo cuiusque territorio videantur».

(potentially) general competence[15] in today's juridical system. Other authors who adhere to the doctrine of a general legislative competence of the Council of Hierarchs further conclude that: «Hence, the structure of c. 169 and the norm given in c. 985 § 2b about the validity of the laws which are not contrary to the common law lead to the conclusion that the deliberative force of the council of hierarchs extends to the laws and norms enacted in all cases in which the common law has not made an expressed legislation»[16].

However, against the alleged generality of can. 169, one could replicate that the Code, in reality, seems to specifically identify the cases in which the Council of Hierarchs can intervene regarding the various needs of the Metropolitan[17].

New Criteria to Solve the Question about the Legislative Competence of the Council of Hierarchs

To solve the problem whether the Council of Hierarchs has general or taxative legislative power, it is possible to suggest here a new interpretation that, with respect to common doctrine, it is more strictly anchored to the hermeneutic criteria of interpretation of the law. The starting point is what is certain and incontestable: the Council of Hierarchs is titular of ordinary legislative power. After having read canons 167 § 1 and 169, one soon realises that the whole problem regarding taxative or general legislative competence of the Council of Hierarchs revolves around the interpretation that is given to can.

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[15] Cf. P. Szabó, *Competenza governativa e fisionomia degli organi sinodali. L'integrità della potestà episcopale nel sistema degli organi sinodali di carattere permanente,* "Ius Ecclesiae" 29 (2007), 451, where the author quotes "Nuntia" 19 (1984), 14.

[16] V. Thannickakuzhy, *The Power of Governance in a Metropolitan Church "Sui Iuris": with special reference to the Syro-Malankara Catholic Church,* pp. 60–61.

[17] «In metropolitan Churches the functions of the patriarchs together with the two synods is assigned to the council of hierarchs under the presidency of the metropolitan (c. 169). The *CCEO* mentions this council expressly fourteen times in connection with various needs, such as provision for retired bishops, preparation of program for clerical formation, establishment of a seminary for several eparchies, etc.«, V. J. Pospishil, *Eastern Catholic Church Law,* p. 199. Without going into detail, whilst one can agree with the idea that the author implicitly suggests regarding the taxative interpretation of can. 169, an idea shared amongst the majority in doctrine (cf. C. G. Fürst, *Die Synoden im neun orientalischen Kirchenrecht,* in R. Puza – A. Kustermann (edd.), *Synodalrecht und Synodalstrukturen. Konkretionem und Entwicklungen der "Syndalität" in der katholischen Kierche,* Freiburger Veröffentlichungen aus dem Gebiete von Kirche und Staat, Freiburg, 1996, pp. 76–77 e 81–82), on the other hand one must disagree with Pospishil's idea, according to who the Council of Hierarchs also carries out the duties expected of the Patriarch together with the Permanent Synod, since the Code states that such a role is carried out by the Metropolitan together with two older bishops.

169. If one believes that can. 169 does not affect the legislative power, the matter is immediately closed, since the content of can. 167 is so clear that there is no room for doubt on the taxative legislative power of the Council of Hierarchs, thereby excluding any attempt of interpretation under can. 1499. The question changes completely where one interprets can. 169 also referring to the legislative power. In fact, while can. 167 remains clear for the purpose of can. 1499, this time the jurist is faced with two rules stating the same matter, namely the legislative power of the Council of Hierarchs, in totally different terms: can. 167 in taxative terms and can. 169 in generic and general terms. At this point, a dyscrasia is formed and the jurist obviously needs a rule to guide it in order to give the right interpretation. In this regard, it must be noted that in the existing Code, as well as in the Latin Code, there is no existing canon that gives the jurist a general hermeneutic criteria when he interprets and applies the norms affecting the ordinary legislative power. The only rule that can come to the rescue in this matter is can. 898 (identical to can. 138 of the Latin Code) that provides «Potestas exsecutiva ordinaria necnon potestas ad universalitatem casuum delegata late interpretanda est, alia vero quaelibet stricte». However, the application of the interpretative criterion provided for executive power as well as legislative power, clashes with an initial objection, namely that can. 1501 of the Oriental Code, contrary to can. 19 of the Latin Code, does not provide the possibility to solve the *lacuna legis*, applying the laws issued in similar matters[18]. Another possible objection is that the legislator in both Codes has explicitly proceeded with respect to the interpretative criterion mentioned by reducing its application. In fact this criterion, originally extended to all *potestas regiminis* both in can. 200 of the 1917 Code and cans. 141 of *Cleri sanctitati* and 6 of *Sollicitudinem Nostram*[19], was restricted in the existing law solely to the executive power, although the motivation and juridical significance of such abatement are still totally unknown[20]. However, hypothetically assuming that it is possible to overcome these two objections, one arrives at a totally different solution. In fact, since the legislative power «est favorabilis et late intrepretanda (c. 200, § 1); id quod de potestate ordinaria in se inspecta intelligitur, nam

[18] An important author in this regard maintains that in the absence of a rule of law, the *lacuna legis*, notwithstanding the silence of can. 1501 of the Oriental Code could be overcome by the application of the principle *lex lata in similibus*, expressed in can. 19 of the Latin Code, cf. C.G. FÜRST, *Interdipendenza del diritto canonico latino ed orientale,* in K. BHARANIKULANGARA (ed.), *Il Diritto Canonico Orientale nell'ordinamento ecclesiale*, Libreria Editrice Vatican, Città del Vaticano 1995, p. 33.

[19] PIO XII, motu proprio *Sollicitudinem nostram,* January 6th, 1950, AAS 42 (1950), 5–120.

[20] The historical research in *Communicationes* and in *Nuntia* do not supply information that helps one understand the reasons for such a choice. In fact, the text of canons 895 of the Oriental Code and 138 of the Latin Code is the same that appeared in canon 105 of the first draft in 1977, within the Latin Codification where the expression *potestas iurisdictionis* disappears and is replaced by *potestas exsecutiva*.

restringenda forsan erit aliquando vel ex materia circa quam versatur, quae sit odiosa, vel ex concursu aliorum iurium ex quibus limitatur, etc.»[21], one should maintain that the legislative competence of the Council of Hierarchs is intended in a general way but with the important limitation of not interfering with the legislative competence of Eparchial bishops, except in taxative matters provided by the common legislation. If, on the contrary, the above-mentioned objections were not considered to be surmountable, one would be faced with a *lacuna legis* in the law which would be irremediable unless by the intervention of the Supreme Authority giving an authentic interpretation.

Another way of posing the question of dyscrasia, which inevitably emerges when interpreting can. 169 as also referring to the legislative power, is not to take can. 167 § 1 and can. 169 into consideration as two distinct and conflicting norms that must be harmonised according to the method just mentioned, but to consider them as only one legal provision. Therefore, this allows us to invoke can. 1499 and the criteria contained therein since the resulting regulation would be obscure and dubious. By doing this, however, does not lead to any relevant result since the application of these criteria does not solve the problem of the general or taxative competence of the Council of Hierarchs. In fact, if the parallel situations seemed to be inclined towards a general competence, nothing sure is obtained by taking the purpose and circumstance of the law and *mens legislatoris* into account.

Lastly, no help in solving the question comes from the theological and juridical nature of the Council of Hierarchs. In fact, its nature of collective but not collegial ecclesiastical office which shares pontifical power in an ordinary way[22], is not relevant in order to determine if the Council of Hierarchs has general or taxative legislative power. In any case, even if one wants to maintain that the Council of Hierarchs has legislative power only in taxative matters provided by the law, nevertheless its competence would be wide and relevant[23].

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[21] PH. MAROTO, *Institutiones Iuris Canonici,* Apud Commentarium pro Religiosis, Romae, Editio Tertia Diligentius Recognita, p. 837, n. 703. Of the same opinion: M. CONTE A CORONATA, *Institutiones Iuris Canonici,* vol. I, Marietti 1950, Editio quarta aucta et emendata, p. 329, n. 282.

[22] Cf. F. MARTI, *Il Consiglio dei Gerarchi, natura giuridica e potestà,* in L. SABBARESE (ed.), *Strutture sovraepiscopali nella Chiese Orientali,* op. cit., pp. 161–169.

[23] In many cases, the legislative intervention of the Council of Hierarchs is mandatory, such as canons. 204 § 3, 242, 266 n. 1, 295, 377, 385 § 2.

Difficulty in Applying *recognitio* to the Legislative Acts of the Council of Hierarchs

Reference to can. 167 § 1 regarding the Council of Hierarchs' right to legislate those areas in which the Code refers to the particular law of the Church *sui iuris* allows the comparison between the legislative competence of the Council of Hierarchs and that of the Patriarchal Synod of the Church. Having said this, the respective degree of autonomy in using legislative power is very different. Whilst according to can. 111 § 3 the duty of notifying the Holy See regarding the acts concerning laws or decisions taken by the legislative bodies of the Patriarchal Church do not affect their validity, on the contrary, with regard to Metropolitan Churches *sui iuris*, can. 167 § 2 explicitly invalidates the promulgation of laws approved by the Council of Hierarchs by the Metropolitan, without the Holy See having been notified before and without the Metropolitan having obtained from the Holy See written notification of receipt[24]. According to some, such notification should even explicitly attest that the Apostolic See does not have any objection regarding the enforcement of the particular law *de qua*[25].

It is not easy to understand the juridical mechanism enacted by can. 167 § 2, since the interpretation of the norm must be conducted from a general assumption, which is valid also *mutatis mutandis* for Patriarchal Churches, that on the

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[24] A wider interpretation of the written notification was proposed in doctrine, including the fax and email, cf. J. D. Faris, *Metropolitan Churches and other Churches* sui iuris *(cc. 155–176)*, in G. Nedungatt (ed.), *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches,* p. 219. It must be pointed out that if, from a strictly practical and legal point of view, the use of such instruments would in itself be suitable for the scope, from a formal and diplomatic point of view it is inappropriate given the importance of the juridical act *de quo agitur*.

It is worth mentioning that throughout the long process of codification nobody noticed that the competent legislative body deputed to issue the laws of the Metropolitan Church *sui iuris* was lacking. It was only at the last minute, or, rather, with amendments to the *Codex Canonum Ecclesiarum Orientalium* issued from 28 January 1989, date of presentation of the *Schema novissimum* of the Code to John Paul II until its promulgation, a new paragraph was inserted to can. 167, which would then become the current § 3, wherein it was established that «Metropolita est curare promulgationem legum et publicationem decisionum Consilii Hierarcharum», cf. "Nuntia" 31 (1990), 39. Regarding the enactment of particular laws of Patriarchal Churches, no prerogative was foreseen on behalf of the Supreme Authorities for their approval and promulgation, cf. can. 111. It was noted that «the fact that metropolitan Churches have no synod of bishops as in the patriarchal Churches, that the particular law as metropolitan Church can be promulgated only after the metropolitan has received a written notification from the Roman Ap. See (c. 167 § 2), […] and many others demonstrate that there is still room for more extensive application of the principle of subsidiary in CCEO», S. Kokkaravalayil, *The guidelines for the revision of the eastern code: their impact on CCEO,* Pontificio Istituto Orientale, Roma 2009, p. 297.

[25] Cf. J. D. Faris, *Metropolitan Churches and other Churches* sui iuris (cc. 155–176), in G. Nedungatt (ed.), *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches,* p. 219.

one hand is the right and duty of the legislative body of the Church *sui iuris* to elaborate and approve its own particular law, but, on the other hand, conformity of this legislation to the common law must be safeguarded[26]. Since any attempt to qualify the mechanism of can. 167 § 2 as an "approval" given by the Apostolic See[27] must be excluded, an interpretative hypothesis could be to take in to account the institution of *recognitio* provided by the Latin Code regarding decisions of Particular Councils[28], or regulations issued by the Episcopal Conference[29]. In fact, both *recognitio* and can. 167 § 2 would achieve the result of conforming the inferior legislation with the superior ones. In this way, from a technical point of view, the intervention of the Supreme Authorities would not be a real and formal approval. According to the prevailing doctrine, *recognitio* does not mean any attribution to the Supreme Authority of the act *de qua*, which remains solely attributable to the body that issues it (the Particular Council, the Episcopal Conference, or, as in our case, the Council of Hierarchs). In fact by the *recognitio*, the Holy See simply but officially declares that in its opinion there is nothing that precludes the promulgation of the act[30]. This interpretation was recently welcomed by the Pontifical Council for Legislative Texts, the opinion of which:

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[26] «*Segretario*: ha confermato quanto detto da *D* [the need of the Holy Sees' approval of the particular law before enforcing it] ed ha aggiunto che infatti spettava al Sinodo dei Vescovi o al "Consilium Hierarcharum" delle singole Chiese "sui iuris" fare il proprio diritto particolare ed approvarlo. Tuttavia ha rilevato che tra il diritto comune e quello particolare ci doveva essere conformità e le norme del diritto particolare non dovevano essere in contrasto con quelle del diritto comune», "Nuntia" 29 (1989), 53–54.

[27] As proof, one must keep in mind that can. 350 § 1 del m.p. *Cleri sanctitati* expressly required the approval of the Apostolic See. Agreeing with the exclusion that in the existing legislation one can speak about approval is K. Bharanikulangara, *Particular Law of the Eastern Catholic Churches,* St. Maron Publications, New York 1996, p. 71, who refers to Nedungatt. However, that «if deemed necessary, the Holy See can intervene by correcting the laws or by ordering their correction before their promulgation», *ivi*.

[28] Cf. can. 446 of the Latin Code.

[29] Cf. can. 455 § 2 of the Latin Code.

[30] «Tale *recognitio* non trasforma in atti pontifici le deliberazioni della Conferenza ma è un presupposto per la liceità e la validità della loro promulgazione. La sua funzione non è tanto quella di conferire ad esse una maggiore autorevolezza – così come avviene nella *confirmatio* – quanto di permettere alla S. Sede di accertarsi, prima che divengano obbligatorie, che non contengano nulla di contrario o di poco consono al bene della Chiesa e, in particolare, all'unità della fede e della comunione», G. Feliciani, *Le Conferenze Episcopali,* Il Mulino, Bologna 1974, p. 541; cf. also F. Uccella, *Le conferenze episcopali in diritto canonico,* Jovene, Napoli 1973, pp. 119–125. Regarding the juridical essence of *recognitio*, it must be considered as «un atto della suprema autorità con il quale si permette autoritativamente (si autorizza) la promulgazione di una legge o decreto legislativo dell'autorità inferiore. […] Tale termine tecnico indica, quindi, un modo di intervento specifico della superiore autorità che non si sostituisce né fa proprio l'atto dell'organo inferiore che ne rimane responsabile, ma ne certifica la conformità con la normativa universale autorizzandone la promulgazione», S. Di Carlo, *Il potere normativo delle conferenze episcopali,* "Ius Ecclesiae" 13 (2001), 171.

> […] la *recognitio* è una condizione imprescindibile per la promulgazione di leggi o la pubblicazione di documenti da parte delle Conferenze Episcopali, che restano, però, anche per la loro forza vincolante, dell'autorità che li emana»[31].

Singularity of the Mechanism Provided in can. 167 § 2

The mechanism of *recognitio* is, without doubt, respectful of the autonomy of the body that issues and approves the law, nonetheless its application to the legislative activity of the Council of Hierarchs does not seem to be in keeping with the most incisive and extensive right of autonomy that should be recognised to a Metropolitan Church *sui iuris* with regard to an Episcopal Conference[32]. Even though it is clear to anyone that in the legislator's mind the underlying mechanism of prior notification and subsequent written notification of receipt there is an implicit but proper judgement by the Apostolic See regarding the particular legislation, judgement to which the Council of Hierarchs must comply. Nevertheless, it is equally clear that applying the institute of *recognitio* other than involving a few problems of juridical coherence, it injures the dignity of the Metropolitan Church *sui iuris*. The injury, together with the problems, would be determined if the Apostolic See should think it necessary to make some changes to the particular law sent by the Metropolitan according to can. 167 §2. In fact, by *recognitio* the Holy See can set clauses as conditions of validity to the act[33]. If it is true that «le condizioni di efficacia contenute nell'atto di *recognitio* sembra vadano interpretate come condizioni di efficacia dell'atto della conferenza, ferma restando per questa la possibilità di sostituire la precedente delibera con un'altra e di richiedere l'ulteriore *recognitio*»[34], this means that the *actus recognitus* enters into force in the resulting text according to the clauses

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[31] Pontificio Consiglio per i Testi Legislativi, note of April 28th 2006, *La natura giuridica e l'estensione della "recognitio" della Santa Sede,* "Communicationes" 38 (2006), 10–17, quoted from p. 16. Regarding the juridical value of the notes of the Pontifical Council for Legislative Texts cf. J. Miñambres, *La natura giuridica della "recognitio" da parte della Santa Sede e il valore delle "note" del Pontificio Consiglio per i testi legislativi,* "Ius Ecclesiae" 19 (2007), 521–525.

[32] This opinion is shared by W. Aymans, *Diritto canonico e comunione ecclesiale, saggi di diritto canonico in prospettiva teologica,* Giappichelli, Torino 1993, p. 90.

[33] The competent Dicastery to allow *recognitio* is usually the Congregation for Bishops, with the exception of the Episcopal Conference (or local councils) pertaining to missionary areas which are under the care of the Congregation for the Evangelization of the Peoples or to territories exclusively entrusted to the Congregation for Oriental Churches, in which case either one Dicastery or the other will be responsible.

[34] J. I. Arrieta, *Diritto dell'organizzazione ecclesiastica,* p. 511.

laid out by the Holy See, unless the approving body (Episcopal Conference or Provincial Council) issues a new resolution to substitute the previous one, where the clauses are acknowledged and incorporated.

Therefore, it is evident that there are some characteristics by which this institution is inapplicable with regard to a legislative act approved by the Council of Hierarchs since it is anomalous to enforce a particular law of the Metropolitan Church *sui iuris* which would be interpreted and applied according to the conditions posed by an institution (Apostolic See) that is not the legislator of that law. Thus, other than creating problems of logical coherence with the fundamental juridical rule under can. 1498 § 1, it would result in serious damage of autonomy of the Metropolitan Church *sui iuris*. In fact, the Metropolitan Church *sui iuris* would find itself with a law that, because of *recognitio*, it would remain attributable to its legislative body and based on its own autonomy, but in reality this law does not engender from it's own will, since it is more the result of two distinct and overlying wills, that is the Metropolitan Church *sui iuris* and that of the Apostolic See.

Since the scholars in charge of the Oriental Codification were certainly aware of the institute of *recognitio*, if they intentionally avoided using it by creating the mechanism of giving prior notice and sending written notification, then they have done so to safeguard, from a formal point of view, the full legislative autonomy of the Metropolitan Church *sui iuris*, preventing the possibility of having particular laws adulterated by authoritative impositions coming from outside the Metropolitan Church *sui iuris*. The mechanism of can. 167 § 2 in the Oriental Code, which is unique, seems very ingenious since it manages to reconcile the Supreme Authority's need to control the particular law with the legislative autonomy of the Church *sui iuris*. In fact, the Holy See, via the Congregation for the Oriental Churches, cannot intervene (obviously in an ordinary manner) in the law-making process of the Council of Hierarchs, integrating and correcting it directly by adding clauses as a condition of validity, otherwise for reasons mentioned above the law would become a legal *hybrid* which is difficult to classify. Instead, the Dicastery for Oriental affairs only has the power to veto, thanks to which it can intervene by inducing the legislative body (the Council of Hierarchs) to reconsider its decisions according to the advice indicated or suggested by the Congregation, but the Council of Hierarchs retains the freedom to decide whether to adopt it or not: and here lies the difference with regard to what happens in the Episcopal Conference! To avoid a harmful paralysis in the legislative function of the Metropolitan Church *sui iuris*, in case of a veto from the Congregation for the Oriental Churches against a legislative act that has been approved (veto enacted by the lack of written notification of receipt), because the Council of Hierarchs does not wish to modi-

fy the legislative act according to the Dicastery's advices, it is necessary to open a dialogue between these two autonomous bodies – the Council of Hierarchs, which is free to legislate; the Apostolic See, which is free to hinder the promulgation. It is obviously a dialogue that isn't seeking a compromise or mediation, as in a political context, but aims at the righteous and common judgement for the good of the Church. Once the differences regarding the initial text have been smoothed out, the Council of Hierarchs will issue the integrated and corrected legislative text, which at this point *de plano* will be accepted by the Apostolic See which will give written notification of the receipt.

A delicate question could arise when the Congregation for the Oriental Churches does not reply to a Metropolitan notification of the particular law – notwithstanding formal solicitations by the Metropolitan – for a much longer time with respect to the technical study and evaluation of the legislative act that could be usually required according to the Dicastery's praxis. We are obviously taking a *formal silence* into consideration since it is unlikely that the Dicastery does not keep contact with the authorities of the Metropolitan Church *sui iuris* in an informal way in order to try to solve possible contrasts in advance, striving for a straightforward dialogue to obtain amendments to the legislation that the Dicastery deems fit. The hypothesis we are speaking about is what happens when, notwithstanding the goodwill of both sides, there is such a profound difference in opinion to cause a standstill between the legislative body of the Metropolitan Church *sui iuris* and the Congregation for the Oriental Churches. In cases where this situation should go on for a long time, it seems reasonable to qualify the Dicastery's silence, not only substantially but also formally, as a *veto* against the enforcement of the particular law. This behaviour according to the principle sanctioned both in the Oriental Code (cf. can. 1002) and in the Latin Code (cf. can. 57) would be legally considered as a decree of refusal. However, there is the difficulty of establishing the correct time limit, after which the *silenzio rigetto* enters into force, since the analysis and study *in casu de quo* require more time than what is provided for in can. 1002[35]. However, there appears to be no objection to the hypothesis that the lack of written notification of receipt by the Holy See could qualify as in the case of *silenzio rigetto*, since the written notification of receipt must be qualified as a decree rejecting the petition. Therefore, against the *silenzio rigetto* there seems to be the possibility to formally recourse to the said Congregation for the Oriental Churches (the same author of the tacit decree of rejection), and also subsequently the

[35] Cf. J. D. Faris, *Metropolitan Churches and other Churches* sui iuris *(cc. 155–176)*, in G. Nedungatt (ed.), *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches,* p. 219.

right to recur at the Apostolic Signatura under the article 123 § 1 of the Apostolic Constitution *Pastor Bonus* must be recognised as a remedy in favour of the authority of the Metropolitan Church *sui iuris*.

It is also worthwhile mentioning the territorial effectiveness of the legislative acts issued by the Council of Hierarchs and promulgated by the Metropolitan. It must be said that there are no provisions *ad hoc*, like Patriarchal Churches, to address the issue. It seems very consistent to maintain that can. 40 § 1 of the Code authorises the analogical application of the rule under can. 150 §§ 2 and 3 to the legislation of the Metropolitan Churches *sui iuris*[36].

Finally, it is interesting to note that the Code does not explicitly set the question of authentic, but temporary, interpretation of the particular legislation of the Metropolitan Church *sui iuris*, something that instead is verified in the Patriarchal Churches. In fact, can. 112 § 2 states that until the forthcoming synod, the authentic interpretation of laws of the synod of bishops of the patriarchal Church is the competence of the patriarch, having consulted with the permanent Synod. This probably derives from the fact that it is easier to gather the Council of Hierarchs than a Synod of Patriarchal Churches, so it is easy to implement what is provided in can. 1498 §1 under which the laws are only interpreted by the legislator or whoever has been granted the same power to genuinely interpret. Thus, it is not necessary to issue a rule about authentic and temporary interpretation.

Conclusion

The Council of Hierarchs, and in particular its legislative power, is without doubt one of the most difficult questions affecting the Oriental Code. And this fact is the reason why highlighting critical profiles of the actual interpretative solution offered by the canon doctrine, and suggesting new points of reflection is the main objective of this study.

The question of whether the legislative competence of the Council of Hierarchs is taxative or general, which is far from being solved, can however be studied in detail with new energy, starting with the proposal to use the norms of interpretation of the law laid down in cans. 1499 and 1501.

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[36] Cf. P. Szabó, *La questione della competenza legislativa del Consiglio dei gerarchi (Consilium Hierarcharum). Annotazioni all'interpretazione dei cc. CCEO 167 § 1, 169 e 157 § 1,* "Apollinaris" 69 (1996), 512–513. Also in favour of the universal effectiveness of the liturgical laws is V. Thannickakuzhy, *The Power of Governance in a Metropolitan Church "Sui Iuris": with special reference to the Syro-Malankara Catholic Church,* p. 59.

Regarding the conditions in connection with the exercise of the legislative power, I think I have furnished sufficient elements that reasonably demonstrate the absolute peculiarity and alterity of the rule laid down in can. 167 § 2 with regard to the *recognitio* provided by the Latin Code for norms of Particular Councils and Episcopal Conferences. Moreover, a few operative difficulties and more juridical institutions have been brought to light, such as *silenzio rigetto* and the possibility to recur to the Apostolic Signatura, both connected by the mechanism of control posed in can. 167 § 2.

Without doubt, canonists must study and discuss the legislative power of the Council of Hierarchs at length, and more in general, all that concerns the Metropolitan Church *sui iuris*, since this juridical institution is very important for the future of the Catholic Oriental Churches.