"Nullum crimen nulla poena sine praevia lege poenali?"
Evaluation of c. 1399/CIC'83 in the Light of the *ius vigens orientale*

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Il can. 1399/CIC'83 è «una specie di polmone che ossigena la serie delle norme codificate» ?*

Introduction

As we know this topic, the direct punishability of a violation of non-penal laws, or in other terms, the only restricted observance of the "principle of legality" in the penal field, is a hotly debated characteristic of the discipline of the Latin Church.

According to tradition, often benevolence, exhortation and charity will prove more effective for those who sin through human frailty and for this reason is recommended to temper the severity in the punish-

* View expressed by Pio Fedele on can. 2222, § 1 of CIC'1917, parallel norm of actual can. 1399 of CIC'1983; see: Pio Fedele, Il principio «nullum crimen sine lege» e il diritto penale canonico, in Rivista italiana di dirittto penale 9 (1937), II, 504.

ment with meekness and to judge with mercy.[1] The importance of a pastoral approach is further emphasized in the recent codifications influenced by the same spirit of Vatican II.[2]

However, even today it is universally understood by notable authors that the Church cannot renounce penal measures to guarantee her self-defense, the reason being that, at least according to some canonists, can. 1399 is considered necessary and it must be maintained. Other authors in turn, while recognizing the complexity of the problem, rightly highlight inherent risks in this norm. Along this line, on the one hand, it has been admitted that the freedom left to the arbitrary decisions of ecclesiastical authority is clearly excessive, on the other hand, nonetheless it is evident that the Church has to steer clear of an uncritical imitation and mechanical transposition of "pro-

1 Cf. CIC'1917, can. 2214, § 2; cf. "First of all, the council judges they [the bishops] should be reminded that they are shepherds not oppressors, that they are to preside over their subjects but not lord it over them: they are to love them as children and brothers, and take pains by exhortation and counsel to deter them from what is unlawful, so that they may not be obliged, when they [their faithful] do wrong, to restrain them by appropriate penalties. Concerning those, however, who through human frailty have chanced to fall into sin, that precept of the Apostle has to be kept: that they reprove, beseech and rebuke them in all goodness and patience, since often kindness towards those to be corrected is more effective than severity, exhortation more than threat, charity more than command. But, since it is the duty of an attentive and kind shepherd first to apply gentle medicine to the ailments of the sheep, if there is need for the seriousness, of the rod because of the wrong done, then strictness should be tempered with restraint, judgment with mercy, severity with lenity, so that the discipline which is salutary and essential for the people may be kept without harshness, and those who have been corrected may improve; or, if they refuse to repent, others may be deterred from faults by the salutary example of the punishment imposed […]", *Council of Trent, Session 13, Decree on reform [before] can. 1*, in *Decrees of the Ecumenical Councils, Volume Two: Trent to Vatican II*, Norman Tanner (ed.), Washington-London 1990, 698–699. With a slightly different emphasize see also: can. 102 of Quinisext Council (692).

2 See: CCEO can. 1401.

tective or guarantee elements" (*forme garantistiche*) proper to contemporary civil law systems.[3] Fundamentally, in this field of duality are also found the real point of our topic: the dilemma of "inadmissibility to adhere" to the principle of penal legality and not less the "actual usefulness" of its non-observance.

It is well known that penal law is one of the areas in which the two Codes are really dissimilar. One of the most striking differences is precisely the strict observance of the principle under discussion in the existing system of Eastern canon law. In fact the CCEO'90 has eliminated the "general norm" stated in CIC'83 can. 1399, which, at least in some urgent cases, allows the direct punishment of the violation of *any* law, including norms not protected by an explicit penal sanction.

In this study I am addressing whether the best means to protect the indisputable right to the above mentioned self-defense is really the mechanism offered by can. 1399. In my presentation after a very brief summary of the most important views on a doctrinal level, expressed by Latin canon lawyers, I will try to focus my intention on two or three features of the actual system of Eastern canon law. In fact, these seems to allow one to come upon not only new insights, but also perhaps even real alternative solutions to the "vexata quaestio" of the effectiveness of penal law in the Church, community which is based on the divine rule of fraternal or neighborly love.

3 "... la questione è molto complessa: se da un lato lo spazio lasciato all'arbitrario del superiore gerarchico dalla legislazione vigente appare decisamente eccessivo, dall'altro occorre anche in questo campo guardarsi dall'equivoco di un'acritica imitazione e di una meccanica trasposizione di forme garantistiche proprie degli ordinamenti degli Stati contemporanei", Giorgio Feliciani, *Le basi del diritto canonico dopo il codice del 1983*, Bologna 1984, 123.

1. The Origin and Meaning of the Adage "Nullum Crimen…"

1.1 The question of the origin of this adage is not a simple one.[4] An Ulpian fragment traces this back to the Roman period,[5] and the dilemma inherent is reflected in medieval sources.[6] However, its exact formulation and coherent and systematical observance date only from the time of the Enlightenment.[7] The present formulation of the aphorism "Nullum crimen sine lege" in Latin is due to the philosopher and jurist Anselm Feuerbach (1773-1833).[8] The principle in an implicit form and limited way has also been adopted by the codification of canon law, though the applicability in this field has been traditionally questioned.[9]

1.2 Furthermore, the exact meaning of the phrase is not obvious because it has various formulations each of which allows slightly different interpretations. All of these interpretations are an expression of the principle of penal legality, but in different degrees of severity. The

4 Cf. Giuliano Vassalli, "Nullum crimen sine lege", in *Novissimo Digesto Italiano*, Antonio Azara – Ernesto Eula (dir. da), vol. II, Torino [1957], 497.

5 Cf. Ulpianus: "poena non irrogatur nisi quae quoque lege, vel quo alio jure specialiter huic delicto imposita est" (L. 131, D 4. 16).

6 See for example: art. 39 of the "Magna Charta" (1215); cf. Vassalli, "Nullum crimen" (nt. 4), 498.

7 "…tale concezione si affermò però soltanto con gli scrittori rivoluzionari del secolo XVIII, sopratutto con Montesquieu dalla cui opera fondamentale può veramente dirsi che nacque il principio *nullum crimen sine lege*: il quale, introdotto nella *Petition of Rights* degli Stati Uniti d'America (1774), fu formulato per la prima volta come disposizione legislativa nel Codice austriaco di Giuseppe II (1787) e quindi, a breve distanza, ... nell'art. 8 della Costituzione francese del 1791", Vassalli, "Nullum crimen" (nt. 4), 498.

8 Marco Boscarelli, "Nullum crimen sine lege", in *Enciclopedia giuridica*, vol. 31, Roma [1990], 1; cf. Mario A. Cattaneo, *Anselm Feuerbach, filosofo e giurista liberale*, Milano 1970, 446 ss.

9 For opposite opinions see for example: Joseph Hollweck, *Die kirchlichen Strafgesetze*, Mainz 1899, pp.; Franciscus X. Wernz, *Ius decretalium*, VI, Prati 1913, n. 16.

adage "nullum crimen sine lege" demands the previous legal definition of the offense, while with the "nulla poena sine lege" is demanded the same definition of the exact penalty which can be inflicted.[10] The complete form of the adage "Nullum crimen, nulla poena sine praevia lege poenali", requires not only the previous determination of the offense and penalty, but also that it be formulated by the legislator and in the form of an explicit penal law.[11] What is more, by the progressive evolution of the civil penal systems, the principle of "penalty" (punishability) –beside the just mentioned substantial elements– today requires also different process guarantees, like for instance the principle of public prosecution, the pre-establishment of the judge, and the inderogability of the procedural norms.[12]

It is quite clear however that such an ideal system of penalty guarantees in its fullness is an idealistic rather than a realistic praxis. It is sufficient to recall at this point the obvious fact that it is simply impossible to preview and describe all possible crimes in all their details. Furthermore, it is impossible to fix "a priori" relative penalties in such a way that the activity of the judge excludes any possibility of discretionary reflection. In fact, in contrast to the complete diffidence of the epoch of the French revolution against the judge, today civil systems attribute to him a considerable amount of discretion in his or her decisions.[13]

10 Cf. *crimen* et *poena*: individuazione delle *condotte* punibili e le *conseguenze* sanzionatorie; Giuliano Marini, "Nullum crimen, nulla poena sine lege", in *Enciclopedia del diritto*, Costantino Mortati – Francesco Santoro-Passarelli (dir.), vol. 28, Milano [1978], 950–961, 959a.

11 "Correlativo al principio *nullum crimen sine lege* è il principo *nulla poena sine lege*. Le preoccupazioni garantistiche, reclamanti che solo la legge possa configurare una data condotta come reato, sarebbero infatti largamente frustrate se alla legge non fosse riservato anche di stabilire la pena connessa a una tale condotta", Boscarelli, "Nullum crimen" (nt. 8), 3.

12 Cf. Marini, "Nullum crimen" (nt. 10), 957.

13 Marini, "Nullum crimen" (nt. 10), 959 ; cf. "Senonché «pena stabilita dalla legge» è un'espressione non univoca, posto che risulta appropriata con riferi-

In the field of canon law the applicability of strict penal legality is even less possible.

2. The Penal Legality in Latin Canon Law and its Doctrinal Evaluation

As we know both in old and actual Latin Code this principle has been recognized in a quite limited way. While some authors argue that the new Code has restricted to some degree the liberty to deviate from this principle,[14] others rightly note that can. 1321/CIC'83 –in clear contrast to can. 2195/CIC'1917[15]– no longer declares as punish-

mento a due distinti modi di previsione legislativa della pena collegata al singolo reato, quali sono: *a)* la previsione di una pena tassativamente determinata nella specie e nella quantità (soluzione che l'astrattismo e la diffidenza verso il giudice, propri degli illuministi, suggerì ai legislatori francesi del 1791 quanto ai *crimina*); *b)* un modo di previsione della pena che riservi un dato spazio alla discrezionalità del giudice in vista dell'esigenza di adeguare la pena alle particolarietà del caso singolo senza misconoscere il principio *nulla poena sine lege* (come avrebbe invece se il giudice fosse assolutamente arbitro di determinare nella specie e nella quantità la pena da infliggere, sia pure scegliendola fra pene il cui tipo fosse definito dalla legge", Boscarelli, "Nullum crimen" (nt.8), 3.

14 See: Giuseppe di Mattia, *La riserva della legge penale nel nel 'Codex iuris canonici' e nel 'Codex Canonum Ecclesiarum Orientalium': armonica o conflittuale legislazione?*, in *Metodo, fonti e soggetti del diritto canonico.* Atti del Convegno Internazionale di Studi «La Scienza Canonistica nella seconda metà del '900. Fondamenti, metodi e prospettive in D'Avack, Lombardia, Gismondi e Corecco», Roma 13–16 novembre 1996, Città del Vaticano 1997, 613–614; Id., "La normativa di diritto penale nel *Codex iuris canonici* e nel *Codex canonum Ecclesiarum orientalium*", in *Apollinaris* 65 (1992) 161.

15 CIC 1917, can. 2195 – § 1: *Nomine* delicti*, iure ecclesiastico, intelligitur externa et moraliter imputabilis* legis violatio *cui addita sit* sanctio canonica *saltem indeterminata.* (This canon here quoted was a *clear formal recognition* of the principle of penal legality: [legislator] "elementum legale seu legem… requirit modo certo e absoluto", Matthaeus Conte a Coronata, *Institutiones iuris canonici*, IV, *De delictis et poenis*, Taurini 1945, 4.)

able the violation of *penal* law or *penal* precept, but rather the violation of law or precept *without* an *adjective*,[16] and this fact makes it clear that in canon law the punishment of negative behaviors can*not* be limited to only those formal offences of which a penalty had already been established in the time when it was committed. This basic policy then, as we know, is reconfirmed by can. 1399/CIC'83, which continues to vindicate the direct possibility to penalize the external transgression even of *non-penal* laws, in those cases in which the seriousness of the violation and an urgent need to preclude (or repair) scandal is demanded.

Canon law doctrine has been struggling since the time of the previous Code to explain *how* this striking exception can be *harmonized* with the observance of the principle of penal legality. In the previous literature, for some authors, can. 2222 § 1 (CIC'1917) represented a *derogation*. This opinion, however, understandably met with serious criticism because a so vast exception would have overwhelmed the rule itself.[17] For others, on the contrary, can. 2222 was nothing more than a practical *application* of can. 2195, as this last norm allowed that the sanction (the legal element) could be "saltem indeterminate". This thesis, however, at least from a technical point of view, was also

16 CIC'1983, can. 1321 – § 1: *Nemo punitur, nisi externa* legis *vel* praecepti *violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa*. Cf. "... il canone 1321 parla solanto della trasgressione intenzionale (dolosa) o colposa, ma comunque eserna. Il legislatore *non* menzione ancora in questo paragrafo, che tale legge o precetto dev'essere *sin dall'inizio* di carattere *penale*, ossia dev'essere connessa nel testo stesso della disposizione o altrove (!) con una sanzione penale. Il canone 2195 § 1 del Codice precedente chiama invece ancora espressamente *delitto* la violazione della legge *provvista di sanzione penale*", Péter Erdő, *Il peccato e il delitto. La relazione tra due concetti fondamentali alla luce del diritto canonico* (Monografie giuridiche 44), Milano 2014, 80 (*il corsivo* è mio).

17 Alfredo Gomez de Ayala, "Nullum crimen b) diritto canonico", in *Enciclopedia del diritto*, vol. 28, Milano [1978], 965; di Mattia, *La riserva* (nt. 14), 609–610.

questionable since it destroyed none the less the same principle like the first opinion, transforming the Code into a sort of "pancriminal" system.[18]

In spite of these critics the mission of the Church seems to exclude a strict and unconditioned observance of the principle in question. In this regard the clear observations of Pio Fedele are still absolutely valid. As he highlighted, the law of the Church is undoubtedly the area which is less suitable for the full and unconditional application of the principle of the reserve of penal law, because in canon law there are principles at stake unknown to the state law, and the strength of these higher axioms is more to neutralize the principles and the rules proper to the logic of civil penal law for an indefinite series of cases.[19] In fact, according to Fedele, the provision in question is nothing other than one of the many significant reflections of the supreme goal of "salus aeterna animarum", to which the whole canon law system is ordered and to whose supreme rule all the other principles and norms, ever so important, remain subordinated, including the very rule of legal certainty in which all the penal principles here discussed find their ultimate foundation.[20]

18 Idem.

19 "«il diritto della Chiesa è indubbiamente il territorio *meno adatto* per la piena ed incondizionata applicazione del principio della della riserva della legge penale o della regola del divieto dell'analogia che di questo principio non è che un'applicazione» [...] in quanto in quel diritto «vengono *in gioco princpi ignoti* al diritto statuale, e la *forza* di tali principi è tanta da *neutralizzare quel principio* e quella regola per una serie indeterminata di casi» in giusia che l'esigenza sulla quale essi trovano fondamento «deve cedere di fronte alle affermazioni di altre esigenze supreme, che non hanno riscontro nel diritto secolare»"; see: de Ayala, "Nullum crimen" (nt. 17), 963.

20 "In effetti, la norma in esame altro non è che uno dei tanti significativi riflessi del fine supremo della 'salus aeterna animarum', cui, come si è datto, tutto il diritto della Chiesa è ordinato ed al quale devono restare soggette le altre pur primarie esigenze del'ordinamento, ivi compresi, conseguentemente anche il

In the very same line contemporary authors note that strict observance of penal legality is far from required by natural law. Just on the contrary –at least in the realm of canon law– it would be quite dissonant to hold up the popular conclusion, in a positivist lecture easily derivable from the principle discussed, according to which everything is allowed which is not prohibited by an explicit penal law.[21] Far from this conclusion, in a deeper understanding, in fact "illegal" is (all) that, which is contrary *to justice*, independently from the fact that if the value offended is protected (or not) by an explicit penal provision.[22] While during the work of codification there was a

principo di stretta legalità, e, ancor prima, la stessa regola della certezza del diritto, quindi dei rapporti giuridici, regola sulla quale quel principio trova, appunto, il suo ultimo fondamento", see: de Ayala, "Nullum crimen" (nt. 17), 963; "[...] l'esigenza di evitare il grave scandalo, sempre generatore di peccato, costituiscano il criterio direttivo di tutto il diritto canonico, e, quindi, anche di quella norma fondamentale, rappresentata, appunto, dal citato can. 2222 § 1, che, atteggiandosi quale riflesso di un precetto di diritto divino, così come di diritto divino è il fine della «salus aeterna animarum», concede al legittimo superiore la potestà di punire *aliqua iusta poena* la trasgressione di una legge sprovvista di specifica sanznione, proprio nela dupplice ipotesi in cui «scandalum forte datur» oppure «specialis transgressionis gravitas it ferat»", Idem, 964.

21 Velasio de Paolis – Davide Cito, *Le sanzioni nella Chiesa*, Roma [2000], 367: "Spesso si dice che il principio è un ennunciato di diritto naturale. Ma tale affermazione è insostenibile. Se è vero, infatti, che il diritto naturale vieta di punire un innocente, non si può affatto affermare che non si possa punire chi ha commesso una violazione della norma anche se tale punizione non è prevista dalla legge. E tanto meno si può dire che sia lecito ciò che non è previsto come delitto e quindi punito. Tale concezione rispecchia una mentalità positivistica inaccettabile dei diritto".

22 Ángel Marzoa, "Delito", in *Diccionario General de Derecho Canónico*, Javier Otaduy – Antonio Viana – Joaquín Sedano (dir.), Pamplona 2012, vol. 2, 126; cf. Erdő, *Il peccato* (nt. 15), 81; and: "Così sembra comprensibile perché il Codice di diritto canonico non menziona, riguardo alla nozione del delitto, nemmeno nella sua descrizione indiretta (can. 1321 § 1), che per compiere un delitto fosse assolutamente necessario violare una legge *penale* o un precetto

dispute weather to preserve this canon, in the end it was not excluded exactly by the same reason, arguing that it is simply hopeless to listing exhaustively all the possible ecclesiastical offenses.[23] What is necessary here in canon law, for the identification of the exact content or extension of some offences, we need to have recourse to meta-juridical considerations, first of all to moral theology.[24]

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It is interesting to note, however, that, while defending the right of the Church to inflict penalties in a direct way, some authors recognize that on the *practical level* can. 1399 raises series difficulties.[25] As has

penale. Ciò significa che l'accentuazione eccessiva della *sicurezza giuridica* in una visione positivista, diffusa nel pesiero giuridico generale del XX secolo, la quale spingeva in secondo piano il criterio della *giustizia* del diritto, comincia a lasciar spazio anche a delle concezioni più sobrie", Idem, 84.

23 "…there was a dispute among those evaluating the original scheme (c. 73). Some favored the canon because of the *impossibility of exhaustively listing all ecclesiastical offenses*. Other opposed it because of a *fear of arbitrary action by church authorities* which might possibly violate the basic rights of believers", in *The Code of Canon Law. A Text and Commentary [commisioned by the CLSA]*, James A. Coriden – Thomas J. Green – Donald E. Hentschel (eds.), New York/Mahwah 1985, 930 [*Thomas J. Green*], *emphasise is added*.

24 See: Erdő, *Il peccato* (nt. 16), 83.

25 Cf. de Paolis–Cito, *Le sanzioni* (nt. 21), 368: "...l'inclusione del can. 1399, che rispecchia fedelmente il tenore del canone 2222 § 1 del Codice del 1917, ha suscitato alcune perplessità, non tanto in linea teorica, quanto piuttosto sulle sue reali *possibilit*à operative, al punto che il CCEO non contiene una simile prescrizione normativa"; Bruno Pighin, *Diritto penale canonico*, Venezia 2008, 521–522: "Sul piano dell'utilità pratica, il ricorso al can. 1399 appare piuttosto discutibile, dal momento che il sistema penale canonico prevede un'alternativa meno problematica e forse più efficace: la possibilità di costituire, come già contemplato nel Libro VI, pene determinate e non perpetue, mediante il precetto penale, intervenedo così prontamente a fronte di violazioni gravi di una legge senza copertura penale... l'*applicazione* delle medesime pene può avvenire

been clearly demonstrated, this canon is simply *un*suitable to achieve the goal expected from it, since really *no* serious punishment can be imposed in basis of it. In fact, in a situation described in can. 1399 there are by law *excluded* all of the following types of penalties:

(1) all automatic (*latae sententiae*) penalties, as they require by nature an *a priori* definition of the relative offence;

(2) all "medicinal penalties" (*censurae*) since for their application the previous admonishment and a suitable time left for repentance are conditions of validity (can. 1347, § 1);

(3) it is not possible to impose either any perpetual penalty, since in case of an indeterminate penalty (which is envisaged also in canon 1399) this type of sanction is also explicitly excluded by law (cf. can. 1349).[26]

(4) In addition, seems to be excluded all culpable behaviors attributable to mere negligence (albeit severe) or to omission of due diligence.[27]

per via amministrativa... una strada particolarmente *celere* in confronto con quella giudiziale, che, per i suoi tempi necessariamente non brevi, non gode, di fatto, del favore dell'autorità ecclesiastia".

26 Josemaría Sanchis, *La legge penale e il precetto penale* (Monografie giuridiche 7), Milano 1993, 54–55; *Exegetical Commentary on the Code of Canon Law*, Ángel Marzoa – Jorge Miras – Rafael Rodríguez-Ocaña (eds.), Montréal-Chicago 2004, vol. 4.1, 560–561; cf. de Paolis–Cito, *Le sanzioni* (nt. 21), 369.

27 See: "… i comportamenti eventualmente ricompresi in questa fattispecie devono possedere i caratteri enunciati nel can. 1321, ossia di violazione esterna, gravamente imputabile e deliberata. Vanno quindi esclusi tutti i comportamenti colposi attribuibili a mera negligenza (seppur grave) o ad ommissione della debita diligenza", de Paolis–Cito, *Le sanzioni* (nt. 21), 368; "… si può invocare il can, 1399 solo per i reati dolosi; per reprimere quelli colposi occorre sempre una diposizione espressa dalla norma costitutiva della pena (cfr. can. 1321, § 2)", Pighin, *Diritto penale* (nt. 25), 522.

(5) Finally, for some authors just the term "iusta poena" refered to by our norm *a priori* precludes any grave penalty.[28]

As all the above mentioned types of penalties are excluded, it is not clear which –among the only possible "ferendae sententiae", expiatory temporal ones– there could be a *proportionate* penalty to the *grave* situations envisaged by can. 1399/CIC'83. If this is not the case, it should be asked whether the infliction of a *clearly inappropriate* penalty *could really help* to clarify the situation. Could it not rather increase the scandal as a sign of the incapacity to adequately face the challenge? This question is still more urgent if we take into consideration that in the case of the application of can. 1399 all the norms of penal process are to be followed.[29]

So we cannot but agree with the statement according to which "the actual scope and practical operability of the juridical instrument provided in this canon is very limited, almost nonexistent. Only with difficulty can it be considered as pastorally effective measure against urgent and grave situations that can be more speedily resolved with greater effectiveness and justice by other means; including non-penal ones, as provided by law; for example by correction (cf. c. 1339, § 2)".[30]

28 Cf. "Quelli maggiori sono già stati previsti dalla legge penale e adeguatamente puniti sia con pene medicinali sia con pene espiatorie, sia *latae* sia *ferendae sententiae*. L'autorità competente, quindi, non dovrebbe far ricorso alle pene maggiori, ma soltanto a quelle medie o minori" Antonio Calabrese, *Diritto penale canonico*, Cinisello Balsamo [Mi] 1990, 292; refered by Sanchis, *La legge* (nt. 26), 54.

29 Sanchis, *La legge* (nt. 26), 48; cf. "Inanzitutto, sebbene sia preceduta dal titolo, forse un po' ambiguo di «Norma generale», essa, per la sua collocazione nella parte II del Libro VI non deroga al regime giuridico previsto per le altre norme tipicizzatrici di comportamenti delittuosi, ma è assoggettata ai limiti legali previsti dalle norme contenute nella parte I, che fungono da principi fondamentali dell'attuale sistema penale canonico", de Paolis–Cito, *Le sanzioni* (nt. 21), 368.

30 *Exegetical Commentary* (nt. 26), vol. 4.1, 561 [*Josemaría Sanchis*].

Indeed, as it is emphasized by the doctrine, the *practical un-usefulness* of can. 1399/CIC'83 is also verified by the fact that its aim can even be *better* realized by a simple *penal precept* or by an equivalent warning with the threat of penalty.[31]

In conclusion, as it seems to be quite clear from all which I have said above, can. 1399/CIC'83, at least from practical point of view, is not really capable in a significant way to aid the efficiency of penal law in the Latin Church. This insight indeed is not really new, the greater part of penal canon lawyers hold this opinion, as we have seen above.

Our real contribution, as I hope, which could possibly be the object of further discussion is not about this obvious fact, but on some considerable *differences* of *Eastern penal law* regarding this same topic.

3. The Penal Legality and Guarantees of Self-Defense in Eastern Code

Well, let us see, now, what are the alternative guarantees of the same requirement [of the penal efficiency, and, ultimately, of the protection of the *communio ecclesiastica*] in the Eastern Code where, as it is known, there is completely absent a norm similar to that of can. 1399/CIC'83.

31 See for example: Sanchis, *La legge* (nt. 26), 61; Juan Arias-Gómez, *El sistema penal canónico ante la reforma del CIC*, in *Ius canonicum* 15 (1975) 237–238; Roberto Gottero, "La «norma generale» del diritto penale canonico (can. 1399)", in *Quaderni di diritto ecclesiale* 10 (1997) 353–354; Thomas J. Green, "Penal Law. A Review of Selected Themes", in *The Jurist* 50 (1990) 246: "… we need to be alert to the risk […] of arbitrary actions by church authorities inattentive to the extraordinary nature of can. 1399. At times the good of the community requires an expeditious procedure in dealing with especially serious and scandalous legal violations to which a penalty is not attached. Yet perhaps an appropriate penal precept (c. 1319) might enable church authority to cope with such a problematic situation without necessarily having recourse to this canon [c. 1399]…"; see also: Pighin, at footnote 25, above.

I think there are at least three characteristics worthy of special attention.

1. The first is the difference we can find between can. 1341 (CIC'83) and 1403 (CCEO'90), on the limits defined by law as for the possibility to start a penal process. In fact, while the Latin Code simply *excludes* it (cf. "tunc tantum promovendam curet") when there is a hope that the situation can be sufficiently repaired even by fraternal correction, rebuke, or other means of pastoral solicitude, can. 1403 of the Eastern Code, in contrast, refers *only* to the *possibility* to abstain (cf. "abstinere potest") from penal reaction in a similar situation.[32] In other words, while in the Latin Code the rule is that there is no possibility to start a penal process when there is an alternative possibility, in the Eastern Code the Hierarch is not obliged (but only authorized) to abstain from it. I think it is not necessary to emphasize how the apperception and practice of this difference, at first glance perhaps not so evident,[33] could be important to support the real efficiency of Eastern penal law.

32 CCEO can. 1403 – § 1. *Etsi de delictis agitur, quae poenam secumferunt iure obligatoriam, hierarcha audito promotore iustitiae a procedura poenali, immo a poenis irrogandis prorsus* abstinere potest*, dummodo ipsius hierarchae iudicio haec omnia simul concurrant: delinquens in iudicium nondum delatus suum delictum hierarchae in foro externo sincera pœnitentia motus confessus est necnon de reparatione scandali et damni congrue provisum est.*
CIC'83 can. 1341. — *Ordinarius proceduram iudicialem vel administrativam ad poenas irrogandas vel declarandas* tunc tantum promovendam curet, cum *perspexerit neque fraterna correctione neque correptione neque aliis pastoralis sollicitudinis viis satis posse scandalum reparari, iustitiam restitui, reum emendari.*

33 For an opposite opinion which try to minimize the difference deductible from the above reported oriental norm, see: "il citato canone [c. 1341] trova pieno riscontro nel CCEO can. 1403 la cui formulazione è meno perentoria, ma non meno incisiva, per il conseguimento dela medesima finalità", di Mattia, "La normativa" (nt. 14), 161.

What is more, according to § 2 of can. 1403 (CCEO) in case of an offense which carries a penalty whose remission is reserved to a higher authority, the Eastern Hierarch cannot at all abstain from penal reaction unless he obtains the permission in this sense from the same higher authority.

2. A second and very important but actually very scarcely known and hardly ever applied feature of the updated Eastern penal law is represented by the fact that the *authorities seems to be not obliged to grant the remission of any penalties until the damage caused by the offence is repaired*. Let me quote here a passage from the history of the Eastern codification to make clear this diversity of key importance:

> "In regards to the «ius ad absolutionem» or «ad remissionem poenae», the schema adheres to the rule by which «ex natura rei» the «ius ad remissionem» does not in fact exist, since every punishment is fundamentally expiratory «ex natura rei». Therefore, the offender never merits of his own accord, a true «ius ad absolutionem» until he has fulfilled the penalty inflicted upon him for the offense committed. On the other hand, the Church is fully willing to absolve the offender, as soon as all the damage caused by the offence is repaired and he is completely amended."[34]

We cannot deal here with the difficult question of the reason and limits of the subdivision of ecclesiastical penalties into "medicinal" and "expiatory" ones,[35] distinction eliminated from the text of the

34 See: *Nuntia* 20 (1985) 7: "Per quanto riguarda lo «ius ad absolutionem» o «ad remissionem poenae», lo schema si attiene alla regola secondo cui «ex natura rei» lo «ius ad remissionem» di per sé non esiste, perché ogni punizione è fondamentalmente espiatoria «ex natura rei». Pertanto il deliquente non acquista mai da parte sua un vero «ius ad absolutionem», finché non abbia scontatto la pena inflittagli per il delitto commesso. D'altronde, da parte della Chiesa c'è piena disponibilità ad assolvere il reo, non appena tutti i danni arrecati dal suo delitto siano stati riparati ed egli sia totalmente emendato."

35 Cf. for example: Gommarus Michiels, *De delictis et poenis, Commentarius libri V Codicis iuris canonici, II: De poenis in genere*, Parisiis-Tornaci-Romae-Neo Eboraci 1961, 36 ss.

Eastern Code.[36]

Now, according to can. 1424 (CCEO), in contrast to can. 1358, § 1[b] of CIC'83, the *withdrawal of the contumacy in itself is not enough for the obligatory remission of the penalty ("medicinal" ones included!)*, but in addition it is also required that *suitable provisions have been made to repair* the scandal and harm. What is more, even in case when these conditions have been fulfilled, the remission is said only "not to be denied" ("remissio… ne denegetur"), while in case of Latin penal law if the offender has withdrawn from contumacy, the remission of a censure *cannot* be denied ("denegari nequit").[37] The differences are conspicuous: while in Latin canon law, after having withdrawn from contumacy and the promise to repair scandal and harm,

36 For the understanding of the true nature of ecclesiastical penalties in the Eastern canon law the following observation of the codification seems to be fundamental importance: "sotto l'aspetto del fine, inteso dalla legge, non vi è differenza tra pene espiatorie e e medicinali». Ciò significa che *tutte le pene sono fondamentalmente «partim expiatorie»* (la completa espiazione dei delitti ecclesiastici su questa terra non sembra possibile), *ma «ex fine* a lege intento» *sono tutte medicinali* nel senso dato alla parola «medicina» dal can. 102 Trullano, cui si ispira il can. 1 dello schema [= CCEO can. 1401]"; *Nuntia* 20 (1985) 7 (*emphasise is added*). I think we should understand within the framework of this observation the view according to which in Eastern canon law all the penalties are "medicinal" as for their nature; cf. "Nel CCEO non esistono pene espiatorie oppure vendicative. Tutte le pene sono punizioni medicinali (censure) il che rende superflua la distinzione terminologica tra i due tipi di pena", Carl G. Fürst, "Diritto penale (CCEO)", in *Dizionario enciclopedico dell'Oriente cristiano*, Edward Farrugia (ed.), Roma 2000, 239. (See also: "Veramente tutte le pene ecclesiastiche... si possono considerare dirette principalmente alla restaurazione dell'ordine sociale; e per tutte le pene ecclesiastiche si può dire che, tra i fini secondari, vi sia quello dell'emanda del deliquente", Pio Ciprotti, "Censure ecclesiastiche", in *Enciclopedia del diritto*, vol. 6, 734.)

37 CCEO can. 1424 – § 1: *Remissio poenae dari non potest, nisi reum delicti patrati sincere paenituit* necnon de reparatione *scandali et damni congrue* provisum est. § 2. *si vero iudicio illius, cui remissio poenae competit, impletae sunt hae condiciones, remissio, quatenus natura poenae spectata fieri potest,* ne denegetur.

in case of medicinal penalties there is no any possibility to put off the absolution from censure, the Eastern discipline permits to maintain even such a penalty until "all the damage caused by the offence is repaired", as has been confirmed even by the following statement of the codification process.

While this high degree of discretion (on upholding censures) could seem inadmissible to an expert accustomed to the Latin doctrine, beyond the above indicated norm just in itself it is sufficiently clear, there are also two other points which clearly prove it.

Firstly, during the codification a proposal was refused which tried to conform the Eastern project to the Latin norm with the following explanation: the modification proposed is not acceptable because it supposes, at least with regard to the so-called censures, that the offender obtains a real "right to be absolved" as soon as he has withdrawn from contumacy. As the official answer highlights, this proposal "does not seems to be consistent with the genuine traditions of the East nor to the scheme that considers all the punishments as medicines and the remission of the penalty is possible only when all the 'wounds inflicted by the offense' (can. 1) are healed".[38]

CIC'83 can. 1358 — § 1: *Remissio censurae dari non potest nisi delinquenti qui a contumacia, ad normam can. 1347, § 2, recesserit; recedenti autem* denegari nequit.

38 "2) Un oragno di consultazione ha solevato, a proposito del § 1 [can. 25 dello Schema = can. 1424/CCEO] la seguente questione: «Pourquoi changer de sujet au troisième élément indiqué: *reparatum fuerit et non reparaverit?* Veut-on préciser par là que le scandale peut avoir été réparé par d'autres?»
Nel gruppo di studio si è risposto che in effetti questa era l'intenzione dei *Coetus* precedenti, perché, infatti, spesso è molto difficile che il reo possa riparare lo scandalo totalmente solo con le proprie forze e i propri mezzi, anche se sopporta la punizione inflittagli in modo esemplare", *Nuntia* 20 (1985) 31.
"3) «§ 1 huius canonis hoc modo redigatur: Remissio poenae dari non potest nisi illi qui delicti patrati sincere paenituerit, quique praeterea congruam damnorum et scandali reparationem dederit vel saltem serio promiserit».

Secondly, the possibility to defer the remission of medicinal penalties in the external forum seems to be confirmed also by the fact that in the Eastern system even the sacramental absolution itself can be postponed on discretion of the confessor until after the complete implementation of the sacramental penitence.[39]

In brief, the Eastern penal law system gives much more possibilities to the ecclesiastical authority, not only in the imposition of punishments, but first of all in the upholding of medicinal sanctions.

3. If I had more time I would speak in more details about a third quite important feature of the Eastern tradition which consists in the attribution of a significant penal responsibility (and empowerment) to the higher authorities. In the CCEO (Code of Eastern Catholic Churches) actually it seems that it is limited only to two significant

Non si accetta. La proposta: *a)* confonde le condizioni richieste per poter essere certi che il reo «a delicto destitisse dicendus est» (can. 7, § 2; oppure, come nel CIC, «a contuacia recessise dicendus est» – can, 1347, § 2), con quelle che si richiedono per la «remissio poenae»; *b)* suppone una netta distinzione tra pene medicinali (censurae) e pene espiatorie; *c)* suppone, almeno per quanto riguarda la cosidette censure, che al reo, cessata la contumacia, venga concesso un vero «ius ad remissionem» (CIC can. 1358)", *Nuntia* 20 (1985) 31.

"Tutti questi punti, come spiegato nelle osservazioni generali (pp. 6–8), non sembrano essere conformi alle genuine tradizioni orientali né allo schema presente che considera tutte le pene come medicinali e la «remissio poenae» possibile solo quando tutti i «vulnera a delicto illata» (can. 1) sono sanati", *Nuntia* 20 (1985) 31.

39 See: "Si è rivelato inoltre nel gruppo di studio che agli Orientali non crea particolari difficoltà teoretiche, il fatto che, dopo un delitto di cui ci si pente sinceramente, non solo si è esclusi dalla Comunione Eucaristica, ma anche privati della stessa assoluzione dal peccato fino a che non si abbia compiuto la penitenza imposta dal confessore", in *Nuntia* 20 (1985) 10, 37; cf. also: Péter Szabó, *Coordinazione interecclesiale nell'amministrazione della penitenza: Questioni intra-cattoliche sorte dal possibile rimando dell'assoluzione sacramentale nel diritto orientale*, in *La disciplina della pentitenza nelle Chiese orientali*. Atti del simposio tenuto presso il Pontificio Istituto Orienale, Roma 3–5 giugno 2011, a cura di George Ruyssen (Kanonika 19), Roma 2013, 357 ss.

competencies: (1) the penal responsibility of the Patriarch about all the clergy of his Patriarchate except Bishops,[40] and (2) the possibility to reserve the remission of penalties to higher authorities.[41]

However the higher penal competence in Eastern Traditions is still wider, namely, their Patriarchal Synods are entitled (or at least should be) also to proceed against Bishops. Though this last competence in the end, by purely practical reasons, has not been attributed by CCEO to the Synods of Bishops of the Catholic Churches,[42] in the future it will be probably gained –or at least could be gained– also by them, due to the growing number of Bishops in many of these Churches.

I think needless to say that greater competence means more responsibility. If the higher authorities fail to comply with this supplemental function, they themselves become *accountable* for their inaction. Exactly this *immediate supplemental responsibility* for *all* the *penal* issues related to *clerics* of their Churches provides an additional guarantee that legal discipline be not ignored, penal laws included.[43]

Finally it is worthy to remember that Eastern penal law has also other characteristics which may result helpful for its efficiency.[44]

40 See: CCEO can. 89, § 1 (but CCEO can. 1060, § 1, 2°).

41 See: CCEO can. 1423, § 1.

42 Cf. Ivan Žužek, *The Patriarchal Structure according to the Oriental Code*, *The Code of Canons of the Oriental Churches. An Introduction*, Clarance Gallagher (ed.), Rome 1991, 48.

43 One could ask if analogue competence in case of Latin metropolitans could not bring similar favorable results as for the efficiency of ecclesiastical penal law.

44 Cf. CCEO can. 1414, § 1/CIC'83 can. 1321, § 1–2; CCEO can. 1414, § 2/CIC'83 can. 1321, § 3; CCEO can. 1420/CIC'83, can. 1357; CCEO can. 1421/CIC'83 can. 1360; for a recent English comparative study on this characteristics, see: Thomas J. Green, "Penal Law: an Eastern Perspective", in *Studies in Church Law* 8 (2012) 87–114, 100–103.

Conclusion

1. There is no doubt, that a greater flexibility to ensure for the Church an efficient means for self-defense is to be consider as useful from theoretical point of view. However, the way envisaged for this guarantee by can. 1399 is not really helpful. As we have seen, this norm is controversial not so much because it is hardly compatible with the aphorism "nullum crimen", but rather because *it is simply inefficient*, and *its goal can be fully achieved by penal precept*[45] as it is widely recognized in doctrine.

Eastern canon law offers at least two other significant means of the penal efficiency and therefore of self-defense of the Church, namely a *fuller discretionality in the remission of medicinal penalties* and *a remarkable supplemental responsibility of higher authorities* to enforce the application of penal law.

2. What is more, according to some recognized authors, paradoxically it is can. 1399/CIC'83 itself that involves some virtual devastating consequences for the efficiency of penal law system.[46]

45 Eastern Code allows a still wider use of penal precept than Latin one, foreseeing its application also for perpetual penalties, like for example deprivation of office, title, insignia, demotion to a lower grade, or deposition; cf. CCEO can. 1406, § 1[b]/CIC'83 can. 1319.

46 See: "I may be that c. 1399 deprives of their meaning the canonical provisions on exercising legislative and perceptive power in penal patter, thus *rendering them useless*. […] On the other hand the norm *favors a passive attitude by the authorities*, since, in any case, a penalty can be applied if there is a particularly behavior that causes grave scandal", *Exegetical Commentary* (nt. 26), 561 *[Josemaría Sanchis]*, *emphasise is added*; see also: Ángel Marzoa, *Los delitos y las penas canónicas*, in Aa.Vv., *Manual de derecho canónico*, Ángel Marzoa, *Los delitos y las penas canónicas*, in Aa.Vv., *Manual de derecho canónico*, Pamplona 1988, 694.

3. It is true that rigid application of the principle in question is open to criticism even in secular doctrine,[47] and obviously some aspects of it elaborated by state law systems cannot be applied uncritically in canon law. However, some new findings of the doctrine and first of all of the means and solutions offered by Eastern Code, lead us to doubt on opinions, past and present, that argue for the indispensability of can. 1399/CIC'83.[48] In my opinion the "pan-criminal" solution detectable in can. 1399/CIC'83 is not necessary at all.

Accordingly, in response to our initial question whether the observance of the principle of "nullum crimen, nulla poena sine praevia lege poenali" is compatible with requirements arising from the special mission of the Church, the answer seems to be affirmative.[49]

47 Cf. Marini, "Nullum crimen" (nt. 10), 559; Boscarelli, "Nullum crimen" (nt. 8). 3.

48 "[il c. 2222/c. 1399] non può essere del tutto omesso, se non si vuol privare l'autorità ecclesiastica di uno strumento che, per quanto vagamente, può essere in qualche caso assolutamente necessario", Pio Ciprotti, *Il diritto penale della Chiesa dopo il Concilio*, in Aa.Vv., *Atti del Congresso Internazionale di diritto canonico. La Chiesa dopo il Concilio*, I, Milano 1917, 532; cf. Alphonse Borras, *Les sanctions dans l'Église. Commentaire des canons 1311–1399, Livre VI*, Paris 1990, 24; Erdő, *Il peccato* (nt. 16), pp.

49 A mitigated version, more in keeping with the special nature of church discipline could be the following: "nullum crimen nulla poena sine praevia *iure* vel *dispositione* poenali".