General Categories and "Common" Words in the "Long Navigation" Towards the CCEO: The Subtle Echo of *Rationabilitas*

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Summary: 1. The "trilemma" of Eastern codification and the legislator's caution; 2. The proportions of CICO; 3. The irreducibility of customary law, or, its *rationabilitas*; 4. The CCEO's verifications; 5. "Bonum spirituale christifidelium est iusta et rationabilis causa"; 6. "Easdem res iisdem vocibus": the subtle echo of *rationabilitas.*

Almost thirty years after the promulgation of the CCEO, the doctrine does not cease to question itself "whether or not the phenomenon of the (modern) Code remains compatible with the *ethos* of the Eastern disciplinary heritage";[1] and more specifically (among the issues still open) pays particular attention to the verification of the degree of "flexibility that this new codified system allows to hermeneutic-applicative and local nomopoietic activity",[2] that is, whether the system "is such as to permit the Code's functioning in an authentically Eastern way".[3]

Doubtless these questions are confined to the legal experience of the Catholic East; nevertheless, it would be at the very least reductive to isolate them from the wider context of contemporary legal experi-

1 Péter Szabó, "Tradizioni orientali e codificazione orientale", in *Ius Ecclesiae* 29 (2017) 3, 640.
2 *Ibid*., 641.
3 *Ibid*.

ence.[4] Indeed, because of its inherent fluidity, the latter provides the canonist with a decisive opportunity to revisit the original dynamics through which the vitality of canon law (even in the inflections that characterize its essentially pluralistic character) was first negotiated and continues to be negotiated today as it faces modern-day challenges. And it is precisely at this level that a balanced appreciation of the distinction between Latin discipline and Oriental disciplines may allow focus on those margins of elasticity that both codified systems offer in response to the need for flexibility that typifies Eastern praxis, but that are in no way extraneous to the Latin tradition, without reducing either system's inherent specificity, or ignoring their profound substantial similarities.

In this perspective, perhaps there is no more suggestive category to rethink than *rationabilitas*.

Rationabilitas doubtless originates from the natural instinct for law and order, which is the proper matrix of Western legal culture *tout court*: as Paul VI recalled, the Church, inspired by the law of Rome – when it imposed itself "through wisdom, balance, and a just appraisal of human affairs" – in it discovered "not only the will of a gifted legislator, but also that right reason conforming to nature (*recta ratio naturae congruens*, cf. Cicero, *De Rep*. III, 22), which confers on law the prestige of just and human reasonableness".[5]

This prestige becomes in the ecclesial order an irrepressible exigency, due to the profound tension between human law and the divine law that animates it, and due also to the ultimate aim of *salus aeterna animarum*, which qualifies any legislative or customary disposition

4 Cf., among the many contributions on this point, Guido Alpa, *La certezza del diritto nell'età dell'incertezza*, Napoli 2006, 76 and Paolo Grossi, *Introduzione al Novecento giuridico*, Roma-Bari 2012.

5 Paolo VI, Discorso alla Sacra Romana Rota [28. I. 1971], in AAS 63 (1971) 139.

as a *bona fide* canonical norm.[6] Mostly due to the resilience of the teachings of Thomas Aquinas,[7] this fundamental necessity continues to be an essential reference point for *rationabilitas*, whose roots lie in classic canonical thought, which (in Francisco Suárez's re-elaboration)[8] continued along the path of modern jurisprudence up until twentieth-century codification.[9]

Rationabilitas, then, thrives and draws sustenance without doubt from the riverbed of the canonistic culture of Western origin, even though its waters reflect those reasons that contribute to the making of the law of the Church as such "a peculiar order, unmistakable, whose foundations may not be reduced to those of any other legal order".[10] Of course, the increased weakness of references to this essen-

6 Ivo of Chartres (1040-1115) is responsible for this "decisive systematisation of canon law, without forcing, but rather providing thoughtful interpretations of the law's inherent peculiarities", Paolo Grossi, *L'Europa del diritto*, Bari 2007, 34–35. On Ivo of Chartres's canonical works cf. Péter Erdő, *Storia delle fonti del diritto canonico*, Venezia 2008, 98–101; Jean Werckmeister, "Le premier 'Canoniste': Yves de Chartres", in *Revue de droit canonique* 47 (1997) 53–70; Christof Rolker, *Canon Law and the Letters of Ivo of Chartres*, Cambridge 2010.

7 The reader is directly referred to the works of Saint Thomas, in particular to the *Summa theologiae*, I-II, q. 90, art. 1 and art. 2. Among the endless bibliography on the subject, for a particularly evocative reconstruction of the centrality and solidity of his teaching in the trajectory of Western legal thought see Michel Villey, *La formazione del pensiero giuridico moderno*, Milano 1985, 321 ff.

8 On this specific point see Franciscus Suárez, *De legibus ac de Deo legislatore in decem libros distributos*, Coimbricae 1612, I. 12. 3. as well as the Italian edition Id., *Trattato delle leggi e di Dio legislatore*, Ottavio de Bertolis – Franco Todescan (eds.), book I, Padova 2008, 205. For a framework of the issue taken into consideration here, see at least the introductory essay to the same volume by Franco Todescan, *ivi*, especially XXVII.

9 For a reconstruction of the entire question we will certainly recommended: Chiara Minelli, *Rationabilitas e codificazione canonica. Alla ricerca di un linguaggio condiviso*, Torino 2015.

10 Pio Fedele, *Il problema dell'"animus comunitatis" nella dottrina della consuetudine*, Milano 1937, 116.

tial dimension in the previous century's codifications demonstrates the gradual change in legislators' approach to the original conception of that norm that is so characteristic of canon law, "de tales valores sustanciales, que no admite posible paragon con ninguna otra de las realizaciones de la cultura jurídica de la humanidad".[11] Indeed, the choice not to reproduce, within the codified systems, the substantial definition of "law" – cf., for example, "lex nihil est aliud quam quaedam ordinatio rationis ad bonum commune, ab eo qui curam communitatis habet promulgata"[12] – limiting the recall of the *rationabilitas* to the sphere of the antinomic custom on the one hand and to the *causa dispensandi* on the other (which likely did operate on the basis of contingent evaluation of a practical nature), it draws a clear line of demarcation with regards to pre-codified law.

On the other hand, one cannot deny that the contemporary Latin canonistic has inherited pre-Code ideas regarding *rationabilitas* in their entirety, as demonstrated by studies (including recent ones) dedicated to the general norms and their associated themes, and (as documented) those handbooks that provide a holistic and systematic approach to the law in force and emphasise canon law's strengths and peculiarities.[13]

Moreover, this imbalance – between the poverty of the codified datum on the one side and the solidity of the doctrinal framework on the other – deserves adequate consideration, as it reflects the urgency of sense that has traversed the entire itinerary of postconciliar codification, culminating in the radical query raised by the Dutch bishops in the final stages of the revision of the Pio-Benedictine Code: "quid sibi vult verbum rationabilitas?"[14]

11 Pedro Lombardía, *Norma canónica,* in Id., *Escritos de derecho canónico*, Pamplona 1974, vol. III, 468.

12 St. Thomas Aquinas, *Summa theologiae*, I–II, q. 90, art. 4.

13 Cf. Minelli, *Rationabilitas* (ftn. 9), 142–143.

14 "Relatio Animadversiones systematice exponens factas ad indicem generalem provisiorium novi Codicis I.C. atque ad schema canonum 'de normis generalibus'", in Archivio Pontificia Università Gregoriana, *Fondo Giurisprudenza*.

This question makes even more alive the interest in a verification of the effective extent of a category as profoundly embedded within the vital ganglia of canonical order as *rationabilitas*, on the Eastern front of that *Corpus Iuris Canonici*[15] where we see the achievement of the legislator's wish for the Church to be "unico Spiritu congregata quasi duobus pulmonibus Orientis et Occidentis respiret atque uno corde quasi duos ventriculos habente in caritate Christi ardeat".[16]

In this essay, then, it is not our intention to face those aforementioned hermeneutic and nomopoietic issues that have emerged under the current CCEO. Instead, we wish to evaluate the impact of *rationabilitas* (or lack thereof) –intended as a vital category of the canonical order– with regards to the more decisive turning points in the codification process of the *Codex Canonum Ecclesiarum Orientalium*. We also wish to appraise any further potentialities for an organic de-

15 With this ancient expression John Paul II was referring, in addition to the Latin Code of 1983 and the Eastern Code of 1990, to the Apostolic Constitution *Pastor Bonus* of 1988, "quae utrique Codici adiungitur utpote 'communionis, universam Ecclesiam veluti conglutinantis' princeps Romani Pontificis instrumentum", cf. John Paul II, ap. const. *Sacri Canones*, 18. X. 1990, in AAS 82 (1990) 1038–1039 and ap. const. *Pastor Bonus*, 28. VI. 1988, in AAS 80 (1988) 1, 841 ff.

16 *Sacri Canones*, *op. cit*. Very suggestive, in this regard, is the testimony of Ivan Žužek, which deserves to be immediately recalled: "very well known was the Pope's desire that the universal Catholic Church breathe with both lungs, both from the East and from the West, but perhaps less well-known was his conviction that this would never be able to become a living and operative reality for as long as the Eastern Church did not have a Code that could place them, vis-à-vis legal certainty and 'tranquillitas ordinis', on-par with the Latin Church", Ivan Žužek, *Incidenza del "Codex Canonum Ecclesiarum Orientalium" nella storia moderna della Chiesa universale*, in Pontificium Consilium de Legum Textibus Interpretandis, *Ius in vita et missione Ecclesiae.* Acta symposii internationalis iuris canonici occurente X° anniversario promulgationis Codicis Iuris Canonici diebus 19–24 aprilis 1993 in Civitate Vaticana celebrati, Città del Vaticano, 1994, 706.

velopment that truly matches the need for flexibility that characterises the Eastern praxis as well as the Latin praxis, albeit with different accents. If such an evaluation could touch on all levels of the legal system (since it focuses on the pervasive dynamism of a fundamental principle, and one that is inherently difficult to confine within "both few and many codified canons"[17]), we certainly could not exclude, at least initially, the normative level, which regulates the very production of law. Indeed, this essay will largely dwell on this fundamental level, the riverbed of general norms, which reflects the marked structural differences of the CCEO compared to the Latin code,[18] as shown by the systematic placement of the *De lege, de consuetudine et de actibus administrativis* canons in the endmatter of the normative corpus promulgated in 1990.

1. The "trilemma" of Eastern codification and the legislator's caution

The lucky image of finally reaching a harbour after a long journey by sea, chosen by John Paul II to describe the process that (more than sixty years after its official beginning) resulted in the promulgation of the *Codex Canonum Ecclesiarum Orientalium*, in some way evokes that journey's remote preparation, which coincided with the preliminary phases of the First Vatican Council. These have already been explored in depth in other occasions,[19] but it is nevertheless worth

17 Paolo Grossi, Aequitas canonica, in *Scritti canonistici*, Carlo Fantappiè (ed.), Milano 2013, 220.

18 Cf. Chiara Minelli, *Le fonti dello "ius singulare" nell'ordinamento canonico. L'esperienza delle codificazioni*, Padova 2000, 237 ff.

19 Cf. *Ivi*, pp. 137 ff., Id., *Rationabilitas* (ftn. 9), 143–144. In this sense expresses himself Réné Metz, for whom there is no doubt that the Code in force is "l'aboutissement d'un projet qui remonte a cent vingt ans", Id., *Le nouveau droit des Églises Orientales Catholiques*, Paris 1997, 27. For an appropriate placement within the entire juridical experience of the Eastern Catholic Churches of the

focusing here on an aspect of method that most clearly reflects that recourse to *rationabilitas* that, though implicit, eventually emerged as a determining factor both at the originating moment of the codification process and in its successive evolution.

As is known, "praestantia ritus latini",[20] as a key for the way Eastern canon law was conceived for the entirety of the pontificate of Pius

votes expressed in preparation and during the course of the First Vatican Council as concerns the codification of the Eastern canons see Ivan Žužek, *Common Canons and Ecclesial Experience in the Oriental Catholic Churches*, in *Incontro tra canoni d'Oriente e d'Occidente*, Atti del Congresso Internazionale, Raffaele Coppola (a cura di), Bari 1994, vol. I, 21–56 and in particular pp. 35–43.

20 As for the use of the word *ritus* to mark the difference between the Latin Church and the Eastern Churches, which is no doubt rooted in the ramifications of the Christian preaching arised since Pentecost, cf. Žužek, Incidenza (ftn. 16), 723; Onorato Bucci, *Storia e significato giuridico del* Codex Canonum Ecclesiarum Orientalium, in Pontificio Consiglio per i Testi Legislativi, *Il Codice delle Chiese Orientali. La storia. Le legislazioni particolari. Le prospettive ecumeniche*. Atti del convegno di studio nel XX anniversario della promulgazione del Codice dei canoni delle Chiese Orientali, Roma, 8–9 ottobre 2010, Città del Vaticano 2011, 68–69. As concerns the expression "praestantia ritus latini", reference must be made to two of Benedict XIV's classical documents, that is to say, in the apostolic constitution *Etsi pastoralis* of 26 May 1742, § 2 no. 13 – "Ritus enim latinus propter suam praestantiam, eo quod sit ritus Sanctae Romanae Ecclesiae omnium Ecclesiarum Matris et Magistrae, sic supra Graecum ritum praevalet …" – and in the encyclical letter *Allatae sunt* of 26 June 1755, § 2 – "Cum Latinus Ritus sit, quo utitur Sancta Romana Ecclesia, quae Mater et Magistra aliarum Ecclesiarum, reliquis omnibus ritibus praeferri debet", see, respectively, *CIC Fontes* I, 739 and *CIC Fontes* II, 459. The expression coined by Benedict XIV, which revealed a more evolved conception than what had been asserted for the first time in the papal Brief of Pius IV *Pontifex Romanus*, where they spoke of "ridottione dei greci alla Chiesa Romana", reflects the now mature awareness "that the Roman rite, and consequently the cultural, theological, and spiritual heritage, and thus the historical-juridical heritage of the Church governed by the Bishop of Rome is superior to every other cultural, theological, and spiritual heritage of Christianity", Bucci, *Storia*, *op. cit*, 73. Cf. Edward G. Farrugia, "Latinizzazione",

IX,[21] and constituted the fundamental evaluative criterion with regards to the request (which emerged in the meetings of the preparatory Commission *super missionibus et Ecclesiis ritus orientalis*) for a code that would be "authoritative, comprehensive, generally applicable to all nations, and in harmony with the circumstances of the times".[22]

To a greater extent than the consequences of the traumatic separation from Rome, there is no doubt that, on the eve of the First Vatican Council, the disciplinary condition of Eastern Christianity clearly suffered from a marked divergence in its vision itself of the legal experience, based on a common "Hellenistic-Judaic" framework, that had matured following the first three centuries, that is, when "the two approaches to the codification and practice of the law (Eastern and Latin […]) changed, or, in any case, they took different paths".[23]

in *Dizionario Enciclopedico dell'Oriente Cristiano*, Roma 2000, 422–424; and Id., "Praestantia ritus latini", in *ivi*, pp. 611–612.

21 It's enough to note in this regard as in 1847 Pius IX was referring to this *praestantia* in his reply to a question from the Bishop of Palermo, see Pius IX, Litt. *Plura sapienter*, 11 July 1847, in "Congregazione per le Chiese Orientali", *Codificazione canonica orientale: Fonti* (Series I-fasc. II), Città del Vaticano, 1930, 533, no. 4. Furthermore, we cannot overlook the fact that "the *Commissione Orientale Preparatoria* of the First Vatican Council conducted a study to write up an outline of the constitution on the rites in which the counsellors suggested overcoming this unjust principle", Pablo Gefaell, "Il diritto canonico orientale nei lavori del Concilio Vaticano I. Voti dei cosultori della Commissione preparatoria per le missioni e le chiese orientali", in *Ius Ecclesiae* 18 (2006) 1, 40; Žužek, *Incidenza* (ftn. 16), 697.

22 Thus were the words of Mons. Simeoni in the assembly held on 4 December 1868, in J. D. Mansi, *Sacrorum Conciliorum nova et amplissima collectio, Sacrosanti Oecumenici Concilii Vaticani*, Graz 1961, (hereinafter Mansi), vol. 49, c. 1012 C.

23 See in this regard, Onorato Bucci, "La genesi della struttura del diritto della Chiesa latina e del diritto delle Chiese Cristiane Orientali, in rapporto allo svolgimento storico del diritto romano e del diritto bizantino", in *Apollinaris* 65 (1992) 1–2, 106 and ff. On the entire subject it may be of use to compare, among others, the studies of Giorgio La Pira, in particular *La genesi del sistema*

It was therefore in a context that was markedly skewed towards the Latin legal and dogmatic tradition, rather than its Eastern counterpart, that potential directions for future developments emerged.

This is the "famous trilemma",[24] which, in its peremptoriness, constitutes that most conspicuous legacy of the First Vatican Council with regards to the debate on the Eastern codification, and which, to some extent, still questions juridical thought even in the aftermath of the promulgation of the CCEO:[25] "either a future Council will produce a single law, common to East and West; or a law for the West and a distinct law for the Eastern Churches; or, finally, a law for the West and as many laws for the East as there are different Eastern Churches with different rites".[26]

The tendency (already evident in the preparatory phases) to eliminate on the basis of the Latin law "every dualism of codes and laws", as well as the increased tension between Eastern prelates wishing to preserve their autonomy and the latinizing vision of the majority of the Delegation for ecclesiastical discipline,[27] suggests a cautious approach that, though favouring disciplinary uniformity, considers it

nella Giurisprudenza romana, Firenze 1972 and the contributions of the "Atti del Colloquio Italo-Francese", *La filosofia greca e il diritto romano*, Roma, 14–17 April 1973, t. 2, Accademia Nazionale dei Lincei, Roma 1976–1977, t. 2.

24 Ivan Žužek, *L'idée de Gasparri d'un* Codex Ecclesiae Universae *comme 'point de départ' de la codification canonique orientale*, in Id., *Understanding the Eastern Code* (Kanonika 8), Roma 1997, 431.

25 See at least the aforementioned recent contribution by Szabó, "Tradizioni" (ftn. 1), 640 ff.

26 In these terms the secretary of the Preparatory Commission *super missionibus et Ecclesiis ritus orientalis*, Serafino Cretoni, considered summarizing the guidelines that emerged during the course of the debates, Mansi, vol. 50, cc. 31* and 32*.

27 Significant of this dialectic are the request made by the Melkite patriarch Gregory II Youssef (1827-1897) for a collection of regulations for the Eastern Catholic Churches discussed and rejected by the Conciliar Commission, and the interventions made during the Council by the patriarch Giuseppe VI Andò and the Greek-Catholic Bishop Josef Papp-Szilagyi di Gran Varadio, neither of

inopportune to "demand it all, now and in its entirety, for fear of losing many souls":[28] "attamen aliud est loqui de stricto iure, aliud vero loqui de eo quod ex prudentia, et non ex estricto jure, exigi potest".[29]

The codification project was therefore abandoned on the basis of a perceived need for caution, in light of the fundamental principle of *salus animarum*. Certainly, *rebus sic stantibus*, far from achieving the disciplinary uniformity longed for by the majority of the Council Fathers, any resulting code would have exacerbated the problem of dualism, as it could only have transformed those differences considered indispensable by Eastern prelates into a rigid legal system, the cost of which would have been excessive: "si nimis vellemus urgere, multas forsitan animas perderemus".[30]

Nevertheless, if we consider the more striking consequences of the First Vatican Council's lack of results, though the issue was left unresolved, the way it was debated shed light on the criteria for a "reasonable" solution to the trilemma, as well as its categorical alternatives.

Indeed, though explicit references to *rationabilitas* are lacking in this phase, the threads of the summarised debates provide a relatively clear reflection of one of its characteristic indicators, that is, the judgement of proportionality, which always underlines it.

whom succeeded in scratch the dominant conviction concerning the *praestantia iuris latini*. On this issue see Gefaell, "Il diritto" (ftn. 21), 51 ff.

28 Gefaell, "Il diritto" (ftn. 21), 53.

29 This position, on the part of Cardinal Capaldi, President of the *Congregazione Particolare della Deputazione per la Disciplina Ecclesiastica,* and previously a member of the *Commissione Orientale Preparatoria,* in the *Congregatio VI* of 2 May 1870, captures the dominant concern vis-à-vis disciplinary uniformity, see Lajos Pásztor, *Concilio Vaticano I. I Verbali della deputazione per la disciplina ecclesiastica,* in *Miscellanea in onore di Monsignor Martino Giusti, Prefetto dell'Archivio Segreto Vaticano*, vol. II, Città del Vaticano 1978, 226.

30 *Ibid*.

2. The proportions of CICO

A noticeable improvement with regards to the disciplinary situation in the Catholic East took place in the decades between the interruption of the First Vatican Council and the Pio-Benedictine codification, thanks to the promotion of synods for all the different Churches, which "aimed at providing each Church with its own code".[31] At the same time, the emerging tendencies in Leo XIII's approach to Eastern affairs, which eventually found confirmation under Benedict XV,[32] made a decisive contribution to the full reception of principle of the equal *dignitas* of all rites, contained in the 1917 Code.[33]

With regards to this rich and promising phase, it behooves us to at least emphazise that (from the perspective of discipline) it owed a debt to the *ius decretalium*, which acquires much greater consistency if we look at the discipline of so-called general norms, which, as would eventually happen during the actual codification process, were already seen almost as a common "terminology",[34] and one that (though certainly capable of giving rise to formal variants and mild substantive reforms) was also resistant overall to radical or extensive change.

31 Cf. Bucci, *Storia* (ftn. 20) 99 and Žužek, *L'idèe* (ftn. 24), 432-433. See in this regard Ex Actis Comm. Cardinalitiae Pro Studiis Praeparatoriis Codificationis Orientalis, *Sulla opportunità della codificazione del diritto canonico orientale*, in *Communicationes*, 1994, 121–123.

32 It is a well-known fact that the doctrine of Benedict XIV on the *praestantia iuris latini* was surpassed in 1894 by the *Orientalium dignitas Ecclesiarum* of Leo XIII. This document is part of a far-reaching programme characterising the pontificate of the successor of Pius IX in a markedly orientalistic sense. Benedict XV, in turn, acted in complete accordance along the lines dictated by his predecessor, for whom he was the Substitute to the Secretary of State, cf. Bucci, *Storia* (ftn. 20), 98–99.

33 Cf. Alexius Petrani, "An adsit ritus praestantior", in *Apollinaris* 6 (1933) 74–82.

34 Cf. Ex Actis Comm. Cardinalitiae Pro Studiis Praeparatoriis Codificationis Orientalis, "Codificazione Orientale. Verbali delle Adunanze [hereinafter "Verbali Adunanze, op. cit."], 1 Marzo 1930", in *Communicationes* 26 (1994) 100.

Moreover, and it could not be otherwise, the beginning of the process of Eastern codification the day after the entry into force of the Pio-Benedictine Code is strongly determined by the methodological question.

With the resurfacing, in all its peremptoriness, of the Council's "trilemma", Gasparri's hypothesis of a single code, of which four out of five sections "should already be done", met with a cautious response from Pius XI, who believed that, even at an advanced stage of debate, "further study"[35] could "provide new views and make things mature".[36] The determination of the Pontif in this regard will be decisive: "no to a single code for the Church of Rome, no to a *tot codices tot ritus*, yes to a single code for all Eastern catholic Churches to exist in parallel to the Latin Code".[37]

Nevertheless, the fecundity – especially for the purposes of this study – of the biennium between Gasparri's proposal and Pius XI's decision cannot be denied.

In particular, as regards the discipline of the *Normae Generales*, at this stage matures the persuasion that it would have achieved "its definitive form […] only at the end",[38] that is, only after a thorough comparison with the Pio-Benedictine Code in its entirety. Indeed, this project was compared to "a statue, to which the first book serves as a base, and it is after the statue has been completed and the weight, size and elements of aesthetics will be ascertained, to it will be adapted a suitable base".[39] From this perspective, even the work that had

35 "Verbali delle Adunanze, op. cit., 13 Luglio 1929", *ibid*., 87.

36 *Ibid*.

37 Bucci, *Storia* (ftn. 20), 101. As was observed by Žužek, in that context "il n'y eut que le pape, semble-t-il, à percevoir la vraie dimension des choses et à les redresser", *L'idée* (ftn. 24), 440.

38 So the Rev. Pietro Sfair, as concerns the Syro-Maronites, in "Sacra Congregazione 'pro Ecclesia Orientali'", *Codificazione Orientale, Siro-Maroniti. – Studio del Lib. I CIC (Rev. Pietro Sfair)*, no. 29/30, vol.1, p. 2.

39 *Ibid*.

already been carried out on the book of *Normae Generales*, "studied by oriental consultors on the lines or order of the same",[40] must be freed from "any shadow of Latinization",[41] despite the widespread conviction that the norms were essentially didactic in nature, and therefore applicable to any form of legislation.

If it did not seem necessary at the time to abandon the order of the *Codex*, which most believed to be "optimal",[42] not only was it already clear that "having it as a guide does not mean submitting to its influence",[43] but, more importantly, interested parties became more aware that, "instead of abolishing, destroying, or censuring this or that",[44] it was more important to "intimately penetrate the Eastern soul, and develop the good, healthy principles it contains, so that the peoples of the East may spontaneously reform and perfect themselves, until they achieve the same progress they enjoyed during the Church's early centuries".[45]

Overall, then, "the current study" had to "certainly prepare the *substance*";[46] "as for the *form*", it would have to be considered "further ahead in the process".[47]

40 "Verbali delle Adunanze, *op. cit*., 1 Marzo 1930", in *Communicationes* 26 (1994) 99.

41 *Ibid*., p. 100.

42 In this sense see in particular the intervention of Fr. Korolewsky during the same assembly, *ibid*., p. 103.

43 *Ibid*.

44 Cardinal Sincero expressed himself in these terms in a report dated 20 November 1935 as concerns the underlying criteria of the work, see "S. Congregazione per la Chiesa Orientale, Codificazione canonica orientale", *Criteri generali per la redazione del codice di diritto canonico*, Prot. no. 425/35, 3.

45 *Ibid*.

46 "Verbali delle Adunanze, op. cit., 12 Luglio 1930", in *Communicationes* 26 (1994) 119.

47 *Ibid*.

Now, it is precisely this choice to dedicate the earliest phase of the process to "the extraction […] of material, especially if it is taken from and with the guidance of the sources",[48] postponing the study of "how to order it and give it a form",[49] that merits careful consideration from the perspective favoured in this essay. The precedence that substance takes over form doubtless reflects one of the more distinctive aspects of the oriental mindset; but at the same time, it evokes "the *proprium* of canonical order"[50] itself, down to its profoundest depths, its constant tension "between positivity and equity",[51] "certainty and *charitas*",[52] to its search for a proportionate solution to each concrete case in need of regulation, as well as the *salus* that must be sought in every single case.

3. The irreducibility of customary law, or, its *rationabilitas*

The increased awareness regarding the fact that the originality of the project, and therefore also how effectively it addressed the real needs of the Catholic East, would depend to a considerable extent on the conception and associated comparison with the *Codex*, and, even more so, on the pre-eminence assigned to the discipline's substantive nucleus relative to any considerations as to its form, paradoxically does not disqualify the studies that have already been carried out on the basis of Book I, which simply become part of the general paradigm under which the project might continue.

The normative section of interest belongs to the series of unpublished canons, of which it is possible to find a first organic draft in a

48 *Ibid*.
49 *Ibid*.
50 Orio Giacchi, *La norma nel diritto canonico*, in Aa. Vv., *La norma en el derecho canónico*. Actas del III Congreso international de derecho canónico, Pamplona, 10–15 de octubre de 1976, vol. I, Pamplona 1979, 26.
51 *Ibid*.
52 *Ibid*.

printed work of 1945 and bearing the title *Codex Iuris Canonici Orientalis*.[53] The following draft, dated to 1958 and incorporating the fifth *motu proprio De sacramentis* (which was never promulgated), is an almost identical replica of the previous one, though, unlike the first draft, this one includes references to the sources.[54]

The little data that emerges from these texts that are relevant here essentially concern the discipline of custom, with no observations regarding the formal definition of the law or not even the need for a "iusta et rationabilis causa" for the validity of a dispensation: the 1945 text simply reproduces the Pio-Benedictine Code, with no changes, while the 1958 draft envisages a variant that places the need for *rationabilitas* in relation to the derogation of canon law on the part of the antinomic custom that had prevailed for the previous forty years, and, not, generally, to the custom's prejudicial effect with regards to the ecclesiastical norms it opposes.[55]

However, one should not forget that, from the earliest meetings on, the intention was to "treasure"[56] the observations of canonists regarding the discipline codified in 1917, so that the Eastern Code may

53 (Sub secreto) *Codex Iuris Canonici Orientalis, Pii XI Pontificis maximi iussu digestus Pii Papae XII auctoritate promulgatus*, Typis Polyglottis Vaticanis, MCMLV.

54 See "Testi dalle bozze 1958", in *Nuntia* 2 (1976) 65 ff.

55 Canon 3 of the draft is formulated as follows: "§ 1. Iuri divino sive naturali sive positivo nulla consuetudo potest ullo modo derogare; sed neque iuri canonico derogat, nisi fuerit rationabilis et legitime per annos quadraginta continuos et completos praescripta; contra legem vero ecclesiasticam quae clausulam contineat futuras consuetudines prohibentem, sola praescribere potest rationabilis consuetudo centenaria aut immemorabilis. § 2 Consuetudo quae in iure expresse reprobatur, non censetur rationabilis", *Testi dalle bozze 1958* (ftn. 54), 65.

56 "S. Congregazione Orientale, Pontificia Commissione per la redazione del Codice di diritto canonico orientale, Ventesima Plenaria", *Proposte di modifiche del testo del "Codex Iuris Canonici", Libro I, Norme generali*, Prot. Num. 479/36, Fasc. I, p. 1.

constitute a true step forward in the field of canonical science, one that "benefited from the Latin Code through opportune technical and scientific modifications".[57]

Think of the importance of Mario Falco's note that, due to a not-infrequent opacity of the terminology adopted by the Latin Code, the distinction between the words *lex* and *ius* was never observed, particularly with regards to the effectiveness of custom.[58] Over the course of the consultations, this note was specifically addressed by the proposal of substitution of the expression "vim legis obtinet"[59]

57 It is worth recalling here the opinion of the consultor Herman; by observing how the state laws are "freely criticised by the jurists" and how the legislators greatly take "into account the progress of jurisprudence", he believes that "ignoring all that has been written in the past twenty years about the CIC would be (…) to the great detriment of the authority of the Holy See". In fact, "it is one thing to promulgate a Code in which the critics can find something that should be corrected – this occurs in every law – while it is another to promulgate a Code which repeats what jurisprudence has unanimously criticized for years". In this case one would be exposed to "harsh criticism" whose "echo" in the East "would negatively affect the minds". At a time when the fact that "the minds must be well prepared to receive the new laws" it assumes crucial importance, *ibid.*, p. 2.

58 *Ibid.,* p. 8. The reference is to the observations made by Falco, according to whom "the language used by the Code, which, based on the instructions of 11 April 1904, had to be worthy 'quantum liceret, sacrarum maiestate legum, in iure romano tam expressa feliciter' and was praised for its simplicity and clarity, its fluidity and precision, as well as for its sober elegance, is in truth almost always simple and clear, but rather often neglected and almost unrefined, and at times also unequal and imprecise". More specifically, as concerns the issue at hand here, it is worth quoting the observation relative to the "uniformity of the terminology", which, "at times owing to the textual reproduction of passages from ancient laws, at others owing to the lack of coordination between the parts due to various collaborators, is not always rigorously observed". Cf. *ivi*, pp. 5 and 7 with M. Falco, p. 39.

59 In this sense see the proposal by the Ruthenian Mgr. Njaradi, p. 23.

with "iuridice vim obligatoriam obtinet",[60] which not only covers a wider field, but also is more evocative of the overall physiognomy of customary law in its distinctive and pervasive capacity of legal experience as such.

Though it was not incorporated in the CICO drafts, this modification not only proved to be decisive for the post-conciliar re-elaboration of these texts, but also – by distancing itself from the latin solution – it constitutes a precious testimony of a non-legalistic conception of the law within the context of a scholarly approach to the custom, the discipline that was most susceptible to the positivistic reductionism that was in fashion at the time.

As part of the same trend, developing thought regarding the aforementioned validity requirements of the *consuetudo contra legem* matured within a context that was notable for its acute sensitivity towards customary law, including from an ecumenical perspective. This is demonstrated, on the one hand, by the concern directed towards the schismatic brethren, that they "may do whatever they can not to move away from their customs and traditions, which date to the remotest past";[61] and, on the other, by the perplexity expressed towards the Pio-Benedictine prevision of a complete and uninterrupted forty-year period for the legitimation of the *consuetudo contra legem*, even in consideration of the Islamic law, "which extends such a significant influence on the laws and lives of so many Eastern Christians, and which operates in consideration of a similar customary law known as 'Adah' or 'Urf'".[62]

60 *Ibid*.

61 In this sense the Syrian Efrem Haddad expresses himself already on 13 January 1920, See Sacra Congregazione "pro Ecclesia Orientali", Codificazione orientale, *Siri-puri: studio sul lib. 1, C.J.C.*, Prot. 31/30, p. 2.

62 Sacra Congregazione "pro Ecclesia Orientali", Codificazione Orientale, *Siro-Maroniti, studio del Lib. I CIC (rev. Pietro Sfair)*, *op. cit.*, p. 2. As concerns the intense and dramatic relationship even at a disciplinary level between the Eastern Christian communities and Islam, see, in particular, Bucci, "La genesi" (ftn. 22), 133–134.

With this in mind, one can better comprehend the only proposal for the reformation of Book I that was advanced during this phase, that is, the streamlining, requested by the representative of the "pure" Syrians, of canon 27: specifically, the proposal was to eliminate a reference to *rationabilitas* in relation to *consuetudo contra legem*, as a response to the removal of the lemma "consuetudo quae in iure expresse reprobatur, non est rationabilis".[63] Clearly, this proposal aimed more to promote the efficacy of customary law, also in relation to the aforementioned corresponding aspects of Islamic law, than to obscure its founding principle, that is, *rationabilitas*. According to this reform proposal, this principle would not have lost its centrality (thanks to the simplification of the formula) with the fact that the word *rationabilis* preceded *consuetudo* and was linked to the adjectives *centenaria* and *immemorabilis* still emphasised, in relation to the further qualifications, its unbreakable bond with the very essence of customary law.

Moreover, as previously hinted, any reference to *rationabilitas*, in itself irreducible to the pure and simple absence of reprobation on the part of the law, remained untouched till the schema's final draft.

It is interesting to note that these results must have matured enough by the summer of 1930, if, in the hearing held on July 12, "the study carried out on the Book I" could already be indicated as "something like a model" for the other sections.[64] Indeed, it is because of this state of affairs (which evidently pleased the Pontiff) that it was possible to advance towards a more thorough comprehension of the very meaning of the comparison with the Latin Code, which "could

63 Sacra Congregazione "pro Ecclesia Orientali", Codificazione Orientale, *Siro-Maroniti, studio del Lib. I CIC (rev. Pietro Sfair)*, *op. cit.*, p 5. On the basis of these indications canon 27 should be drafted as follows: "1) Iuri divino, sive naturali sive positivo nulla consuetudo potest aliquatenus derogare; contra legem ecclesiasticam sola praescribere potest rationabilis consuetudo centenaria aut immemorabilis; 2) omittitur". *Ibid*.

64 *Verbali delle Adunanze*, cit., *12 Luglio 1930*, in *Communicationes* 26 (1994), 118.

even be a code to imitate, just as civil codes imitate that of Napoleon, hence the fact that they are known as 'Napoleonic'";[65] however, this "imitation" must "be seen as akin to Dante's imitation of Virgil, or Raphael's of Michelangelo".[66] In other words, it was clear to all that the Latin Code should be used as "a basis for the Eastern Code";[67] but at the same time, it must have clearly "appeared" to all that the latter would be "truly Eastern", in its "sources, omissions, additions, and modifications"[68] as well as in its "form".[69]

In this sense, the event of the norms of interest here is truly paradigmatic.

On the one hand, it reflects that aforementioned growing tendency towards the establishment of a uniform legislation, at least in those normative sections where Latin dispositions are "evidently superior in terms of order and clarity".[70] In this regard, it is significant that no proposal was accepted to reduce the number of spaces dedicated to *rationabilitas*, which had already been sacrificed in the Latin Code. In a juridical experience deeply characterized by customary law it would be hardly allowed for a further diminishment of the expression of its fundamental principle, that is the fact that it was *rationabilis*.

On the other hand, the widespread perception of a true commonality of the foundational categories, to the point where it was a challenge to identify the proper Eastern sources that had been used, did not impede an original and typically Eastern evaluation of the weight given

65 *Ibid*., p. 119.
66 *Ibid*.
67 *Ibid*., p. 118.
68 *Ibid*.
69 *Ibid*.
70 Thus in the "Ponenza" prepared in the Sacred Congregation *pro Ecclesia Orientali*, after the Assembly held on 22 February 1927, for a discussion before the Holy Father on the following 25 July, "Sulla opportunità della Codificazione del diritto canonico Orientale", published as "Allegato I ai Verbali delle Adunanze", in *Communicationes* 26 (1994) 123. *Ponenza*, *op. cit*., p. 127.

to this part in relation to the overall normative corpus. Indeed, before definitively committing to work on the statue's base, it was necessary to have a clear sense of its features and (more importantly) its proportions: only then could the sculptor decide how best to support it.

Once again, the search for proportions played a fundamental role, touching, in this phase, the substance of the phenomenon in need of regulation. Indeed, not only the base on which the Eastern Code was going to be built should guarantee those margins of flexibility necessary for the development of a discipline that drew from ritual traditions whose roots were both deep and distinct one from the other; but it's very progress, at least in projects of the supreme legislator's work, should have adhered to a realistic extent to the legal experience of Catholic East in all its specificities, respecting its physiognomy (which was characterised by pluralism), even in its conception of the comparison with the Latin Code.

This explains the residual position of these norms in the project's economy, which is evident in the final *motu proprio* that was relegated to the archives following the death of Pius XII.[71] A position that, as we shall see, will remain substantially the same over the course of the post-conciliar codification.

71 On the reasons for the decision of the Supreme legislator to proceed by way of partial promulgations in the codification of Eastern law, no official stance has ever been taken. The most plausible explanation, according to some authors, is to be found in the "latinization" that influenced – in spite of the efforts made by the Commission and the profound intentions of the Pope – the entire project. Hence, it was substantially a compromise: the partial promulgations were meant to realistically measure the reactions to the various texts gradually published. Cf. Richard Potz, *Die Kodifikation des katholischen Ostkirchenrechts*, in *Handbuch des katholischen Kirchenrechts*, Joseph Listl – Hubert Müller – Heribert Schmitz (Hrsg.), Regensburg 1983, 58; Metz, *Le nouveau* (ftn. 19), 32. It should also be noted that Eastern law manuals often follow the Latin settings, so that the sources are dealt with before the substantial discipline of the *status*, the government and the sacraments. See, for example, Jan Řezač, *Institutiones Juris Canonici Orientalis*, Romae 1961, vol. I, 3–139.

4. The CCEO's verifications

The novelty of the Second Vatican Council left profound marks in the codification process of Eastern canon law, both in terms of method and in terms of substance.[72]

In this mutated cultural context, what happened with general norms emerges as clearly paradigmatic, both at the methodological and substantive levels, particularly with regards to the new perception of references to *rationabilitas* in places where (aside from a few oscillations) they had remained intact, partly as a reflection of analogous Latin dispositions.

72 The clear and definitive rejection of the "praestantia iuris latini", along with the full acknowledgement of the "ecclesiastical and spiritual patrimony" of the Eastern Catholic Churches as the "patrimony of the whole Church" and, consequently, the solemn affirmation, during the Council, of the right-duty to "bound to rule themselves, each in accordance with its own established disciplines" insofar as "they are praiseworthy by reason of their venerable antiquity, more harmonious with the character of their faithful and more suited to the promotion of the good of souls" constitute the safe riverbed within which develops "the boldest and most successful attempt to condense all of the tradition of Eastern legal history updating it to the needs of the present". An attempt well outlined in the ten directives for the revision of the Code of Eastern Canon Law and pursued by a meticulous comparison between the texts of the *Motu proprio* and the conciliar dispositions, with one eye always on the *Codex* of 1917 and the works of the parallel Commission for the revision of the Latin Code. Cf. Decr. Conc. *Orientalium Ecclersiarum*, no. 5 and "Principi direttivi per la revisione del Codice di diritto canonico orientale", in *Nuntia* 2 (1976) 3–10. Moreover, there was no doubt that the guidelines for the Revision of the Code of canonical law of the Eastern Churches had to necessarily "be different from the guidelines for the revision (and the drafting) of the Latin Code"; "they concerned ten moments of reflection understood as directives drafted in such a way that they could hardly be disregarded", Bucci, *Storia* (ftn. 20), 108. Cf. on this point John D. Faris, *Historical Introduction*, in George Nedugatt edited by, *A Guide to the Eastern Code. A Commentary on the Code of the Canons of the Eastern Church* (Kanonika 10), Roma 2002, 46–48; Sunny Kokkaravalayil, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO* (Kanonika 15), Roma 2009.

The growing awareness of the originality of the Eastern Church's juridical experience (which was due to the provisions of *Orientalium Ecclesiarum*)[73] stimulated a renewed conception of the instrumental aspect of this normative section, as soon as it was destined for the description of the ordinamental's dynamics, almost as if it had constituted a "common terminology",[74] but one that was perceived more profoundly in its function of serving the "mirabilis communio", that is, the system's very life. From this perspective, more so than their residual position, what emerges most clearly is the pre-eminence of those vital dimensions that must be regulated, and which the norms must bend to accommodate with a degree of flexibility that varied on a case-by-case basis. The *Coetus*'s confirmation of their placement at the end, then, not only would not have resulted in any kind of juridical prejudice, but it would have proven to be functional in the development of the system in-line with those directives that, while preserving the oriental and ecumenical aspects of the Code,[75] also reaffirmed its juridic nature, and, in tune with the Latin *principia directiva*, advised that their pastoral character be preserved as well.[76]

Given this context, it is interesting that the examination of the 1958 drafts was carried out by the same study group that was also

73 An awareness that is clearly reflected in the proceedings of the Commission for the revision of the CICO and that is recalled with decision by, among others, the vice-president of *Coetus studii "de normis generalibus"* Clément Ignace Mansourati: "OE has opened a door and inaugurated a new era", in *Communicationes* 40 (2008) 1, 191.

74 See above.

75 See, to this regard, the study by Kokkaravalayil, *The Guidelines* (ftn. 72), 139–216.

76 Cf. "Proposta del 1973 della Facoltà di diritto canonico del Pontificio Istituto Orientale circa le norme per la ricognizione del diritto canonico orientale", in *Nuntia* 26 (1988) 104–15; "Principi direttivi per la revisione del Codice di diritto canonico orientale", in *Nuntia* 3 (1976) 6. See, on this point, Kokkaravalayil, *The Guidelines* (ftn. 72), 217–264.

tasked with the re-examination of the notion of Rite and the search of a new terminology to describe the many particular Churches of the East and West.[77] Indeed, it is this very tension towards capturing the "*substratum commune* that unites the Churches, rather than their differences",[78] that pervaded the study of the issues that gradually emerged from the revision of the CICO schemes which took place in parallel to the final phases of the Latin *recognitio*.

It should not be a surprise, then, that from the very start it was a pressing concern to define a common juridic language, that is, one that could be shared in the multiplicity of the involved diachronic and synchronic ranges.

77 This is the *Coetus studii "de normis generalibus"* which met from 1974 to 1979. It is interesting to note that the first work session was not aimed at formulating canons, but rather at a first joint study on the problems summed up, among others, on the following questions: "1. Which ancient Eastern canons must be taken into consideration as a basis for the canons (relative to the general norms, the Eastern rites, physical and juridical persons) as desired by the Holy Father on last March 18 and requested by the title 'Carattere Orientale del CICO' of the Principles for a Revision (…)? 2. Which implications for a revision of the canons (in question) are contained in the documents of Second Vatican Council (*Orientalium Ecclesiarum*, *Unitatis Redintegratio*, *Lumen Gentium*, etc.) and the titles of the Principles for a Revision of the CICO, especially as concerns the notion of *Ritus* (…) and the limitation of the new CICO to the discipline that is common to all the Eastern Churches (…)? 3. Which scientific bibliography should be studied by the Consultors of this *Coetus* so they have a better knowledge of the problems they will have to solve (which post-conciliar documents can be related to the matter assigned to this *Coetus*)? 4. To what extent can the "initial texts" of prott. 22 (De fide catholica), 23 (De legibus ecclesiasticis), 25 (De rescriptis) and 26 (De privilegiis), dated to 1943-1945, be considered a basic text for the revision of the CICO? 5. What problem involved in the revision of Prot. 29 (or others) is created by the fact that a large number of Eastern Catholics have permanently settled in the West? 6. Whether or not it is opportune to introduce into the "General Norms" some of the principles on the inter-ritual relationships between the particular Churches (Rites), including the Latin one", in *Communicationes* 40 (2008) 184–185.

78 *Ibid*.

First of all, starting with the presupposition that work on notions such as "rite" is as important for Westerners as it is for Easterners, the search for a harmonizing terminology would appear to concern the *Lex Ecclesiae Fundamentalis*[79] project, and, in any case, it would require a constant interchange between the two Commissions, to the extent that one might even envisage an inter-ecclesiastical Commission for the definition of the meaning of words.[80]

However, neither of these paths was truly practicable. Leaving aside the unconcealed aversion towards the LEF expressed in the *Coetus de Sacra Hierarchia*, which clearly favours the terminology adopted in both partial promulgations and in the *Orientalium Ecclesiarum* with regard to that phase of elaboration of the fundamental law, [81] the inter-rituality of language requires a previous judgement regarding the adoption or rejection of the "CIC terminology".[82] Indeed, not only are there some who wish for "a more precise terminology, because few like the Western one",[83] but, most of all, there are many who point to the intention underlining the use of certain words to describe the reality of Eastern Churches: the authors of such words were themselves concerned not so much with "providing juricial terminologies",[84] but rather with "explaining a reality".[85]

Once again, the project is characterised by the pre-eminence of the concrete case over its *nomen iuris*. Because of this, a proposal according to which "eandem vocem semper rem eamdem in duobus codicibus designare debere"[86] is reformulated by placing *res* before *voces*: "easdem res iisdem vocibus exprimi debere".[87]

79 *Ibid*., 186–187.
80 *Ibid*., 189–190.
81 *Ibid*., 187.
82 *Ibid*., 189.
83 *Ibid*.
84 *Ibid*., 188.
85 *Ibid*.
86 *Ibid*., 201.
87 *Ibid*.

Even the text over which, at the end of the debate, the majority's endorsement coalesced, after asserting the opportunity and even the necessity "ut verba communia in Codicibus Latino et Orientali semper eadem significent",[88] confirms the primacy of concrete cases, "eadem res eodem modo exprimatur".[89] Hence the hope "ut definitiva electio verborum iuridicorum quae in usu duorum Codicum aptabuntur a duobus Commissionibus una fiat collatis consiliis et unitis iudiciis".[90]

Even here,[91] however, there are those who sense the need that "the common meaning of words also be taken into consideration".[92]

Therefore, the inevitable partiality of the search for a shared language regardless of history and the common meaning of word, is only overcome by paying attention to the specific case in need of regulation: in other words, the commonality of *res* generates the commonality of *voces*, not vice versa.

This way, the *Coetus de normis generalibus* saw the maturation of an approach to the revision of the canons that are relevant to this paper that includes not only a frank critique of the Latin *voces* that lack relevance to the East, but also a careful consideration of the semantic capacity of key terms with regards to the genuine juridical experience of the Catholic East.

88 *Ibid*.
89 *Ibid*.
90 *Ibid*.
91 For its author, indicated as the "tenth Consultor", this formulation underscores "what is truly important, that is, the principle that common terminology should be agreed upon without going into detail", *ibid.*, 202.
92 A realism that must have animate great part of the *Coetus* if, upon the request for a "stronger" text, the Vice-president had to recall the Arabic proverb "we want to eat grapes, not kill the watchman". *Ibid*.

5. "Bonum spirituale christifidelium est iusta et rationabilis causa"

In this context dominated by the need for a detailed verification of the concrete vitality of the so-called *normae generales* within Eastern juridical experience (that is of whether it was truly practicable to re-interpet these norms anew in a way that agrees to the greatest extent with the tradition of *sui iuris* Churches, along with an eventual translation into the Code of the more original elements of their disciplinary heritage), the attempt was made to codify the discipline of the most dynamic factor within the oriental discipline: "oikonomia".[93] This need was perceived during the study of matrimonial law, but the widespread awareness of the theme's general and decisive capacity resulted in the inclusion of the small *ad hoc* group dealing with the *Coetus de matrimonio* in the discussion of *Coetus de normis generalibus*, also because, at the beginning of the discussion of the protocol dedicated to dispensation, someone had proposed its imme-

93 Of the vast bibliography on the subject, here are some of the more recent and significant ones concerning the topic discussed here: Elias Jarawan, "Révision des canons De normis generalibus – Canon préliminaires au Code tout entier", in *Nuntia* 10 (1980) 87–118; Ivan Žužek, "L'économie dans les travaux de la Commission Pontifical pour la Révision du Code de droit canonique", in *«Kanon» [Jahrbuch]* VI, Wien 1983, 67–83; John H. Erickson, "Sacramental 'Economy' in Recent Roman Catholic Thought", in *The Jurist* 48 (1988) 653 ff.; Id., *The Value of the Church's Disciplinary Rule with Respect to Salvation in the Oriental Tradition*, in *Incontro* (ftn. 19), I, 246–274; Hubert Müller, *Oikonomia und aequitas canonica*, in *Incontro* (ftn. 19), I, 293–315; Gian Paolo Montini, "Il diritto canonico dalla A alla Z. E. Economia. Oikonomia", in *Quaderni di diritto ecclesiale*, 6 (1993) 4, 470–484; Victor Pospishil, *Eastern Catholic Church Law*, New York 1996, 845–851; Pablo Gefaell, "Fondamenti e limiti dell'oikonomia nella tradizione orientale", in *Ius Ecclesiae* 12 (2000) 419–436; Id., "Oikonomia", in *Diccionario General de Derecho Canónico*, Javier Otaduy – Atonio Viana – Joaquín Sedano [dir.], Pamplona 2012, vol. 5, 695–700; Elie Haddad, "L'économie dans les Églises orientales", in *Studia canonica* 38 (2004) 175–190.

diate substitution with a *De oeconomia* protocol.[94] In reality, the question had already been addressed "broadly and from multiple points of view",[95] "historical, theological, canonical, pastoral",[96] comparing the approaches of both the Catholic and Orthodox traditions, "as well as the terminology used by both to express such a notion and its opposite (*aequitas canonica*, *epicheia*, *benevola interpretatio legis*, *relaxatio legis*, *misericordia*, *benignitas*, *rigor iuris*, *acribia*, *ius strictum*, *destrictio iuris*…)".[97] These studies shined a bright light on the theological nature of the concept of *oikonomia*, with particular regard to humanity's plan of salvation.[98] Normally, *akribia*, in other words "la pleine conformité avec l'Evangile et les canons de l'Eglise",[99] is "le moyen de salut pour tous",[100] while *oikonomia* "c'est le pouvoir de l'Eglise de suppléer, dans l'abondance de sa grâce et de son amour, à ce qui manque à l'homme concrètement pour être en pleine conformité avec l'Evangile et les saints canons":[101] "l'on recourt à l'*oikonomia* […] justement dans le cas où il est impossible d'appliquer *l'akribia*".[102] Moreover, *oikonomia* is also a power that touches the Church's pastoral mission in its entirety: in other words, it is not limited to "the

94 See "Coetus studii 'de normis generalibus', Sessio I, Riunione antimeridiana del 9 dicembre 1974", in *Communicationes* 40 (2008) 1, 186; "Coetus studii 'de normis generalibus', Sessio I, Riunione antimeridiana del 13 dicembre 1974", in *ivi*, pp. 198-199; "Coetus studii 'de normis generalibus', Sessio V (diebus 23 januarii-1 februarii 1978 habita), Riunione antimeridiana del 30 gennaio 1978", in *Communicationes* 42 (2010) 1, 179 and 182–183.

95 "Coetus specialis 'de normis generalibus et officiis', Sessio I", *op. cit.,* "Riunione antimeridiana del 12 marzo 1980", in *Communicationes* 44 (2012) 2, 610.

96 *Ibid*.

97 *Ibid*.

98 Jarawan, "Révision" (ftn. 93), 92.

99 *Ibid*., 93.

100 *Ibid*.

101 *Ibid*.

102 *Ibid*.

juridical-canonical order".[103] When one speaks of *oikonomia*, then, "il s'agit d'un concept qui va bien au-de là des compétences mêmes du code tout entier".[104]

All this did not prevent the *Coetus minor* from submitting a draft for the consultors' examination, who themselves attempted to formulate their own proposals.[105]

In any case, this basic text clarified the conditions in which the authorities may exercise the principle of *oikonomia*, and (contextually) its aim: "oeconomia ecclesiastica, qua opus salvificum Domini Nostri Jesu Christi hominibus applicatur, sub pastorali sollicitudine et vigilantia Hierarcharum exercenda; quapropter Hierarchae in lege canonica urgenda magis salutem animarum quam strictam observantiam litterae legis intendant".[106] Alternative texts, meanwhile, demonstrate both a concern to be alert "ne abusus et morum relaxatio christifidelium in hoc exercitio irrepserint"[107] and an intention to "further accentuate" references to "mercy".[108]

These proposals were also followed by reflection on whether it was opportune to systematically place them among the preliminary canons, or, as some also suggested, even in the *de legibus ecclesiasticis* section.[109] However, not all were convinced of the project's substance: some, for example, wrote that "it is almost meaningless to the Orthodox, and, conversely, too suggestive to Catholics, potentially encouraging legal abuse or false interpretations, such as the

103 Cf. *ibid.*, 92.
104 *Ibid*.
105 See "Coetus studii 'de normis generalibus', Sessio V", *op. cit.*, in *Communicationes* 42 (2010) 1, 183.
106 *Ibid.*, 182.
107 *Ibid.*, 183.
108 Cfr. *ibid.* and *ivi*, 185.
109 See "Coetus studii 'de normis generalibus', Sessio V", *op. cit.*, "Riunione antimeridiana del 31 gennaio 1978", in *ivi*, p. 185.

one that may allow a *hierarcha loci* to dissolve a *ratum et consummatum* marriage".[110]

Indeed, as the debate progressed, perplexities did not diminish but rather intensified, finally resulting in the emergence of two decisive objections: "*oikonomia* is not a canonical category"[111] and "the institution of dispensation addresses the same needs in an entirely satisfactory manner."[112]

Considering that the starting point was the idea of replacing the discipline of dispensation for the sake of *oikonomia*, the decisions summarized in the preceding paragraph demonstrate the multiple orientations present within the *Coetus*, and, even more so, they cast precious light on the recurring theme that animates the revision of the *de normis generalibus*.

The attempt to replace Eastern categories with ones that are apparently analogous from those of the latin juridical culture clashed with a limitation that proved difficult to overcome: that is, the fact that *voces*, in this case *oeconomia* and *dispensatio*, though certainly concerning the same *res*, approach them in such distinct manners as to be impossible to assimilate.

The vitually unanimous acknowledgment of the essential theological character of economy, of its profound connection with the properly pastoral dimension of ecclesiastical government, and therefore also of the fact that it was not merely limited to the Code's area of competence brought about the definitive abandonment of the project, and, even more importantly, the stark division of the juridic plain through the choice of certain technical words such as "epikeia, aequitas canonica, dispensatio" to prepare the necessary correctives to *rigor iuris*.[113]

110 *Ibid*.

111 Cf. Jarawan, "Révision" (ftn. 93), 94.

112 *Ibid*.

113 Cf. *ibid*. Therefore not far from the truth are those who noted how the Eastern code did not wish to "gather any explicit reference to the oikonomia", Gefaell, "Fondamenti" (ftn. 93), 436.

Moreover, the expectation to find a truly effective way of tempering the rigidity of the norms of the Code while also respecting Eastern sensitivities seemed likely to be imminently disappointed.

At first, the protocol dedicated to dispensation, which gathered canons that are based on the Pio-Benedictine Code but in light of the reforms that had already been approved by the Latin Commission, did not result in particularly notable discussions.[114] This is easily understood by considering the scope of the investment in the study of the aforementioned alternative *de oikonomia* project.[115]

By contrast, unresolved and problematic issues emerged when the *Coetus specialis* was tasked to re-examine the protocol that had been accepted without any particular problems by the preceding working group.

The main objection remains the same, and it is nicely summarised by the note that "the whole *de dispensationibus* section is not in itself Eastern".[116]

Indeed, the more notable critiques from this perspective regard the expression "sine iusta et rationabili causa" when referring to the conditions of the dispensation's validity.[117]

This "simple repetition of the CIC"[118] failed to please, having "resulted in several casuistic distinctions (*causae motivae*, *impulsivae*, *intrinsecae*, *extrinsecae*, *canonicae*)",[119] and ultimately determining an approach to causes that is limited to their "material" classification:

114 "Coetus studii 'de normis generalibus', Sessio V, *op. cit.*, Riunione antimeridiana del 1 febbraio 1978", in *Communicationes* 42 (2010) 1, 195.

115 See above, § 3.1.

116 "Coetus specialis 'de normis generalibus, de bonis temporalibus, necnon de delictis et poenis', Sessio II, *op. cit.,* Riunione antimeridiana del 5 dicembre 1980", in *Communicationes* 46 (2014) 273.

117 *Ibid*.

118 *Ibid*.

119 *Ibid*.

"is there a canonical cause? Is it sufficient?"[120] A generic approach that tends to relegate the substantial question of "spiritual good and the absence of scandal" within the sphere of "presumption".[121]

In order to escape generality and give the measure's fundamental principle the weight it deserves, it would be sufficient (according to a consultor) to go back to Paul VI's authentic interpretation of the meaning of "iusta et rationabilis causa", that is, referring directly to the "bonum spirituale fidelium".[122]

Moreover, while work was being carried out on "custom", Plöchl had attempted to focus on the substantial parameter of *rationabilitas*, casting light on its link to the common good.[123] His proposal, which concerned "custom" conditions of efficacy,[124] was intended to dissolve the expression "sit rationabilis" within the more explicit "ex rationabili causa in bonum commune ipsius communitatis".[125] Plöchl would therefore have maintained the reference to cause – "'rationabilis causa' is better than simply 'sit rationabilis'"[126] – exactly because, according to him, it implied a callback to the aim of legally relevant conduct.

At the same time, the presented hypothesis for the dispensation, on the basis of the suggestions that have been summarized, erased all explicit references to "cause" in a technical sense with its attributes of

120 *Ibid*.

121 *Ibid*.

122 *Ibid*. The reference here is to the *De Ep. Mun. VII* which calls in a footnote *Ch. D. 8b*, in *Acta Apostolicae Sedis*, 1966, p. 469.

123 We need to at least recall Willibald M. Plöchl's *Storia del diritto canonico* (Italian translation) in two volumes, respectively *Dalle origini della Chiesa allo scisma di Oriente*, vol. I and *Il diritto canonico nella civiltà occidentale*, vol. II, Milano 1963.

124 This is prot. 1151/75/3, an eight-page typescript, preserved at the Archivio PCCICOR, made available thanks to the courtesy of the Pontifical Council for the Legislative Texts.

125 Prot. 1151/75/3 in *Archivio PCCICOR*, *op. cit*., p. 4.

126 *Ibid*.

"iusta et rationabilis": "A lege ecclesiastica ne dispensetur nisi ad spirituale fidelium bonum, habita ratione boni spiritualis ipsius communitatis, pro concretis adiunctis et gravitate legis a qua dispensatur".[127]

Though bold, this hypothesis is not entirely persuasive. Indeed, it seems preferrable to accept the text based on the Latin Code as it is, with due consideration to its conformity with the relevant conciliar dispositions, especially the Decree *Christus Dominus*, no. 8, letter b, about a bishops' power to dispense the faithful from a universal law when such a thing would spiritually benefit them. At most, one could maintain the text that is being discussed, but add a second, explicative paragraph taken from Paul VI's *motu proprio De episcopalis potestatis*, "which interprets 'iusta et rationabilis causa' as 'causa legitima est bonum spirituale fidelium'".[128] Note that, as in the Latin *revisio*,[129] this version maintains the reference to "cause" in a technical sense, but qualifying it as "legitima" as opposed to "iusta et rationabilis".

Faced with these proposals, the minutes record "great hesitation and perplexity with regard to the path to take".[130] Eventually, the decision was made to retain the basic text as the first paragraph "sicut iacet",[131] and to add a second paragraph in the following vein: "bonum spirituale fidelium est iusta et rationabilis causa".[132]

127 "Coetus specialis 'de normis generalibus, de bonis temporalibus, necnon de delictis et poenis', Sessio II", *op. cit.*, Riunione antimeridiana del 5 dicembre 1980, in *Communicationes* 46 (2014) 273.

128 *Ibid.*

129 Very significant to this regard is the contribution by Orio Giacchi, *La causa negli atti amministrativi canonici*, in Aa. Vv., *Scritti giuridici in onore di Santi Romano*, vol. IV, Padova 1940, 254 ff.

130 "Coetus specialis 'de normis generalibus, de bonis temporalibus, necnon de delictis et poenis', Sessio II", *op. cit.*, "Riunione antimeridiana del 5 dicembre 1980", in *Communicationes* 46 (2014) 274.

131 *Ibid.*

132 *Ibid.* Cf. "Schema canonum 1981", can. 173, in *Communicationes* 46 (2014) 2, 571.

Based on the available information, it is also clear that this conclusion did not depend solely on the substantial re-evaluation of the Latin formula but rather on the concern (present in the *Coetus*) "not to take too much of a distance from the PCCICR in the matter of printing texts."[133]

After all, it is not difficult to notice how the object of the entire discussion had as its object a technical sense, regardless of the notes characterising "iusta et rationabilis"; that is, the discussion essentially concerned whether or not a rejection should be made of a dogmatic category that had become progressively abstract within the framework of Latin doctrinal thought,[134] fragmenting into a form of casuistry that was, all in all, alien to Eastern sensitivities. This is clearly shown by the fact that, at first, its elimination was proposed with no great hesitation, and that, afterwards, it was kept, but without much concern for its traditional contents.

On the other hand, from the perspective of the *Coetus*, the choice to make the substantial scope of the word "cause" explicit with the formula "bonum spirituale fidelium" could have equally applied to "causa legitima" and to the expression that was used in the end, "causa iusta et rationabilis". An obvious sign, in the consultors' minds, of the fungibility of attributes, and of their overall irrelevance with regards to the comprehension of the question's nature.

This merits attention. If we consider the semantic richness of *rationabilitas*, that is, the fact that it was used to communicate both the evidence of *bonum spirituale fidelium* and the need for any legally relevant action to be proportional to the latter, the pressure the *Coetus* felt to explain the expression "iusta et rationabilis causa" appears to be the clearest sign of the obfuscation, in the collective imagination, of the fullness of meaning that this word carries.

133 "Coetus studii 'de normis generalibus', Sessio V", *op. cit.*, "Riunione antimeridiana del 26 gennaio 1978", in *Communicationes* 42 (2010) 1, 163.

134 See Minelli, *Rationabilitas* (ftn. 9), 133–143.

So it is that, in the Eastern context, which is dominated by the need to recover the original dynamism of the law and serve it in its entirety, the product of the culmination of twentieth-century legal history must deal with the gaping chasm that opened between *rationabilitas* as a vital criterion in the decisive passages of canon law – one need only think of the choices that led to the positive result of the long navigation towards the CCEO – and its gradual loss of meaning within the structure of canonical norms and within its irrenounceable correctives – one need only think of the aforementioned integration of meaning, which might have come across as a tautology pure and simple before the codification process began.

6. "Easdem res iisdem vocibus": the subtle echo of *rationabilitas*

It is difficult not to ask ourselves whether it is possible to retrieve the true capacity of the attribute of *rationabilis* in a way that does not come across as exstrinsic or juxtaposed. In other words, it is difficult not to ask ourselves whether this word, which describes those choices that oriented legislators towards an original interpretation of the codification model, and which is evocative of the essential aspects of the normative phenomenon regarding the "system of sources" that John Paul II advocated "through the retrieval of the idea of *Corpus iuris canonici*",[135] still includes (even in the midst of so many contradictions) a communicative and dynamic force that renders it interest-

135 As has been observed, it was precisely "with the constitution of the new *Corpus iuris canonici* of the Universal Church that new horizons opened up in the interpretation of and the interrelationship between its single parts; what is restored, in synergy, with the extension of the particular law, is the dynamicity that is inherent to the ecclesiastical legislation with respect to the Code of 1917 and to the stability and the territoriality of the state codes; but above all, thanks to the idea of the *Novum Corpus*, which is in itself open, it becomes possible for the other Churches *sui iuris* to formulate a particular law that better corresponds to the ecumenical instance and to the needs of the intercul-

ing even in the current context of application, as well as within the framework of that "normative harmonisation" recently called for by Pope Francis *Motu Proprio De concordia inter Codices*, according to which even "in the particular norms" the two Codes should "demonstrate sufficient concordance".[136]

This in turn compels us to dwell on the semantic capacity of *rationabilis* as a key term that has passed through the sieve of codification, perhaps without an adequate verification of its true richness of meaning.

From the linguistic point of view, *rationabilis* doubtless constitutes an example of a complementative-relational adjective: while most adjectives indicate a property that may be attributed to entities denoted by nouns, adjectives belonging to this category point to the existence of relationships between entities, and tie themselves to one of these, without making the meaning of the relationships explicit.[137] Making it explicit would require formulating the hypotheses suggested by the context itself. A reading that takes tradition under consideration, something that the codification process never lost sight of, might al-

turation of the Christian faith", Carlo Fantappiè, *Storia del diritto canonico e delle istituzioni della Chiesa*, Bologna 2011, 308–309.

136 M.P. *De Concordia inter Codices*, May 31, 2016, in AAS 108 (2016) 602.

137 "As a rule, these adjectives semantically represent a relationship that they do not make explicit, however, and they instead explicitly indicate the second argument of the relationship. An adjective such as *comunale* indeed signifies "having to do with the *comune* (town or city administration), where the rather poor notion of 'relative to' is specified each time in a different value: *asilo comunale* 'an *asilo* (nursery) *run by the comune*'; *imposta comunale 'a tax that must be paid to the comune*'; *impiegato comunale* 'a worker *hired by the comune*'; *archivio comunale* 'an archive *containing documents belonging to the comune*'; *palazzo comunale* '*a building where the comune is headquartered*' (city or town hall); *consiglio comunale* 'board *governing the comune*'; *consigliere comunale* '*counsultor who is a member of the government assembly of the comune*'…", Eddo Rigotti – Sara Cigada, *La comunicazione verbale*, Milano 2004, 231.

low for the retrieval of the relation of conformity between things and the state of being, as is clearly shown in customary law.

In this sense –though we note the gradual diminishment of references to this relationship– it is worth evaluating the persistence of the adjective *rationabilis*.

As an attribute that operates in relation to other elements (which themselves denote entities or actions) *rationabilis* is characterised by an inherently-broad semantic scope. That is, it presupposes dynamisms that in turn require the participation of subjectivities that are both aware and trusting in the positive attitude of their recipients.[138]

Certainly, the vagueness[139] that this key term has taken on has led

138 The semantic-pragmatic connections between the factors inherent to the verbal communicative event lie at the core of a plurality of research studies. For all of them see Eddo Rigotti – Andrea Rocci, *Tema-rema e connettivo: la congruità semantico-pragmatica del testo*, in *Sýndesmoi. Connettivi nella realtà dei testi*, Giovanni Gobber – Maria C. Gatti – Sara Cigada (ed.), Milano 2006, 3–44.

139 The notion of vagueness (close to that of *indeterminate*) is currently of essential importance in the pragmalinguistic studies and have made it possible to reinterpret in a fruitful manner a series of phenomena that were traditionally explained in light of the concept (now in part obsolete) of polysemy. To this regard, see above all the contribution by James Pustejovsky (Id., *The Generative Lexicon*, Cambridge [MA.] 1995). A clear and exhaustive view of vagueness in pragmatics is offered in Cecilia Andorno, *Che cos'è la pragmatica linguistica*, Roma 2006. See also Carla Bazzanella, *Linguistica e pragmatica del linguaggio. Un'introduzione*, Roma–Bari 2008. At the level of the problems inherent to interpretation, it is worth recalling that "the vagueness of the expressions used in the language of the sources makes it so that the interpreter, when faced with a marginal case, that is, a case that falls within the margins of the plot, can discretionally determine whether the matter in hand must or must not be included in the field of application of the norme in question". Lastly, it is important to "underscore that in natural languages – and the normative documents are indeed formulated in natural language (that is, in language) – vagueness is a characteristic of all the predicates, that is to say, of all the terms that denote classes", Ricardo Guastini, *Il diritto come linguaggio. Lezioni*, Torino 2006, 144.

to its generic and ultimately clichéed usage, even in contexts characterised by high semantic specialisation, such as those we discussed in this paper. However, even the word's clichéed usage invites us to reconsider the pertinence of that which it never ceases to presuppose; that is, the extremely subtle, but never abandoned link to a tradition that has been marginalised in the contemporary juridic debate, but that is also nevertheless still present.

From this perspective, the process of Eastern codification becomes very instructive.

It is enough to reflect on the critical examination of common words that qualifies the elaboration of the normative section that is here considered. By drawing from the encounter with the multiplicity of law in the Catholic East, this examination uncovers, on the very same field as *rationabilitas*, that need for concordance with Latin law, which is much deeper than the hoped-for terminological uniformity. It is no coincidence that, once the latter is achieved, its powers of persuasion will be weak, and (in light of the process's development) any merely verbal substitution will be revealed as insufficient.

This need, which has never been entirely resolved, claims a language that is truly shared and that, by emphasising the pre-eminence of *res* over *voces*, retrieves the semantic richness of common words. In other words, it is necessary to restore *rationabilitas*'s inherent capacity to offer a solution that is measured to result in good in all concrete cases, and therefore also reactivate circulation in the system's vital ganglia, including the principle of economy, which is "almost 'the heart', the fundamental structure – and indeed the identifying characteristic – of the dynamics of Eastern canon law".[140]

It is an incontrovertible fact that the CCEO stays silent on these matters. However, digging into the origins of this "conspicuous si-

140 Szabó, "Tradizioni" (ftn. 1), 649.

lence"[141] (a process that we wished to briefly illuminate in this paper) suggests we should reconsider the link between *oeconomia* and *dispensatio* in light of a frank retrieval of *rationabilitas* that might guarantee, from within the codified system, that "freshness" and "openness" that qualifies economy "in its task to *inspire*, to invite one to always return the application of the canonical norm to its original sense and meaning".[142]

It would appear, then, that the task of the canonist cannot be replaced, be they a legislator, judge, or scholar: being compelled, like all jurists, "to produce reasonings and […] make them public",[143] the canonist "shall never be guilty of that rigidity and immobility that often characterises purely secular institutions, caused by a fear of responsibility, or indolence, or even a misguided attempt to preserve the good and safety of the law".[144] The canonist must demonstrate the courage necessary to overcome the risk, always present in codification processes, of relegating the meaning of words within the system's predermined boundaries;[145] he must tend towards that "concordance" that grows ever more urgent at all levels of juridic experience.

141 *Ibid*.

142 Montini, "Il diritto" (ftn. 93), 482–483.

143 Guastini, *Il diritto* (ftn. 139), 195.

144 Pius XII, Discorso alla Rota Romana [29. X. 1947], in AAS 39 (1947) 495.

145 Cf. Stefano Solimano, *«La codification est plus qu'un multiple de la loi». Spigolature sulla 'forma codice'*, in Chiara Minelli (a cura di), *Certezza del diritto e ordinamento canonico. Percorsi di ricerca nel centenario del Codice piobenedettino, in memoria di Maria Vismara Missiroli*, Torino 2017, 68 f.

abstract

A quasi trent'anni dalla promulgazione del CCEO la dottrina non cessa di interrogarsi riguardo alla compatibilità o meno del fenomeno "Codice moderno" con il patrimonio giuridico di matrice orientale; e, più specificamente, pone particolare attenzione alla verifica di quale possa essere il grado di flessibilità ancora praticabile in un sistema codificato a livello ermeneutico-applicativo ed a livello nomopoietico-locale: ci si chiede insomma se sia davvero possibile un funzionamento del Codice in senso autenticamente orientale.

Non vi è dubbio che si tratti di interrogativi circoscrivibili alla esperienza giuridica dell'Oriente cattolico; tuttavia sarebbe quanto meno riduttivo isolarli dal più vasto contesto dell'esperienza giuridica contemporanea. Quest'ultima, infatti, proprio per la fluidità che la caratterizza, si offre al canonista quale opportunità decisiva per rivisitare i dinamismi originali in cui si è giocata e continua giocarsi, dinanzi alle sfide attuali, la vitalità dell'ordinamento canonico nella sua interezza, fin nelle flessioni che ne connotano il carattere essenzialmente plurale. Si ritiene pertanto che un apprezzamento equilibrato della distinzione tra disciplina latina e discipline orientali possa consentire di mettere a fuoco quei margini di elasticità ancora presenti a soddisfacimento delle esigenze tipiche della prassi orientale ma nient'affatto estranee a quella latina, senza deprimere l'irriducibile specificità di ciascuna tradizione e, al tempo stesso, senza sottovalutarne la profonda comunanza sostanziale.

In tale prospettiva, forse non vi è categoria più suggestiva da ripensare che la *rationabilitas*.

Non vi è dubbio che la scelta di non codificare la definizione sostanziale di legge – si pensi a quella divenuta classica di San Tommaso: «lex nihil est aliud quam quaedam ordinatio rationis ad bonum commune, ab eo qui curam communitatis habet promulgata» - pur obbedendo a valutazioni contingenti di natura pratica, segni una linea di demarcazione netta rispetto al diritto precodiciale. E' del pari

innegabile che la canonistica latina contemporanea abbia ricevuto integra l'eredità sulla *rationabilitas*, come dimostrano gli studi anche recenti dedicati alle norme generali o a temi ad esse correlati, e come documentano i manuali che offrono la trattazione organica e sistematica del diritto vigente evidenziando le linee di forza e le peculiarità dell'ordinamento canonico.

Ora proprio questo squilibrio – povertà del dato codiciale e solidità dell'impianto dottrinale – merita adeguata ponderazione, in quanto documenta quell'urgenza di senso che attraversa l'intero itinerario della codificazione postconciliare e che culmina nella domanda radicale dei vescovi olandesi emersa durante le ultime battute della revisione del Codice piobenedettino: «quid sibi vult verbum rationabilis?».

Un interrogativo di questo calibro rende ancor più vivo l'interesse ad una verifica della effettiva portata di una categoria, profondamente innervata nei gangli vitali dell'ordinamento, qual è la *rationabilitas*, sul versante orientale di quel *Corpus Iuris Canonici* in cui trova compimento il disegno del legislatore affinché la Chiesa «unico Spiritu congregata quasi duobus pulmonibus Orientis et Occidentis respiret atque uno corde quasi duos ventriculos habente in caritate Christi ardeat».

Tale verifica che interessa inevitabilmente tutti i livelli dell'esperienza giuridica, trattando del dinamismo pervasivo di un criterio fondamentale, di per sé refrattario ad essere rinchiuso in pochi o molti canoni di un codice, non può eludere, almeno in prima battuta, quello normativo che disciplina la produzione stessa del diritto. A questo livello basilare si svolgono dunque le considerazioni del presente saggio, che percorrono la genesi del titolo *De lege, de consuetudine et de actibus administrativis*, ove si evidenzia tra l'altro la marcata diversità strutturale del CCEO rispetto ai codici latini.