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SOURCES OF THE NORM ABOUT DOUBT OF LAW AND LACK OF OBLIGATION—CAN. 14

Abstract. In canon law, doubt is one of the conditions under which an ecclesiastical law may lack an obligation. The concepts contained in the text of the law in both canon 14 and CCEO canon 1496 pose a single reality of doubt with two facets of law or of fact. In doubt of law, laws even if they are disqualifying or invalidating, do not oblige. If the doubt is about a fact, the law obliges but the competent authority can dispense it.

The research focuses majorly on the historical origin of the rule about doubt of law and lack of obligation. The origin of this rule may help to understand whether it is a juridical law capable of producing a juridical obligation with respective juridical effects, or if its positivistic application may have some juridical and moral consequences in relation to individual's rights or the rights of the third parties.

Key words: Canon Law; ecclesiastical law; lack of obligation; doubt of law.

PRAELIMINARIA

In canon law, doubt is one of the conditions under which an ecclesiastical law may lack an obligation. The concepts contained in the text of the law in both canon 14¹ and CCEO canon 1496² pose a single reality of doubt with two facets of law or of fact. In doubt of law, laws even if they are disqualifying or invalidating, do not oblige. If the doubt is about a fact, the law obliges but the competent authority can dispense it.

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¹ Cf. IOANNES PAULUS II, *Constitutio Apostolica Sacrae disciplinae leges*, 25 Ianuarii 1983, in *AAS* 75/II (1983) can. 14, 3: “Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti in eis dispensare possunt Ordinarii, dummodo, si agatur de dispensatione reservata, concedere solet ab auctoritate cui reservatur.”

² Cf. IOANNES PAULUS II, *Constitutio Apostolica Sacri Canonis*, 18 Octobris 1990, in *AAS* 82 (1990) can. 1496, 1344: “Leges, etiam irritantes aut inhabilitantes, in dubio iuris non urgent; in dubio facti autem ab eis dispensare possunt Hierarchae, dummodo dispensatio, si est reservata, concedi soleat ab auctoritate, cui reservatur.”

The research focuses majorly on the historical origin of the rule about doubt of law and lack of obligation. The origin of this rule may help to understand whether it is a juridical law capable of producing a juridical obligation with respective juridical effects, or if its positivistic application may have some juridical and moral consequences in relation to individual's rights or the rights of the third parties.

Apart from the introduction and some conclusive notes, the study presents some historical notes based on: 1. Some canonical norms and collections prior to the codification; 2. the codification of the 1917 code, canon 15; 3. the codification of canon 14; 4. the codification of *CCEO* canon 1496; 5. some uncodified sources of doubt of law and lack of obligation.

INTRODUCTION

Doubt is a fact of existence for the human mind that enjoys the sufficiency of reason. The mind inevitably copes with doubt through the pursuit of understanding. While trying to move from doubt to understanding, the individual is ordinarily unsettled until he arrives at a reliable truth. The path leading to the truth, when strewn with rubble, may distract the mind from considering the realities of some facts to an extent that the knowledge seeker may become stuck along the way.

The one seeking knowledge is stuck, not because he lacks the desire to proceed searching for truth, but because the doubting mind cannot follow a clear path to acquire the reliable truth necessary for its security. Until a person arrives at the reliable truth with moral certainty, there is no obligation to abide by what is unclear in meaning or what is contradictory and ambiguously comprehensible.

When in doubt, the mind finds itself in a state of *aporia* or *dubitalia*. It faces a vexing problem or difficulty that causes anxiety while in search of truth. The perplexed mind faces contradictory propositions. The affirmation of one would imply the negation of the other, and vice versa. At no one point can both propositions be simultaneously true and false. The mind, at this moment, is in a state of wonder and investigation with a certain form of involuntary ignorance because it acknowledges the imperfection in arriving at objective knowledge of things as they are in reality. However, it continues to interrogate itself about the true proposition in order to eliminate doubt and attain moral certitude.

When the mind is in a state of awareness of doubt, it can prefer multiple choices. It can decide to suspend the judgement, choose the part that appears probable, or the so-called “close to the truth or to the reality,” or choose the falsified proposition with the conviction that it might give birth to a maximum utility. To whichever choice the mind is inclined, there is a tendency to construct an opinion. Since doubtful laws contain incompatibilities, such opinions are ordinarily complicated with fear of error because the choice of any one opinion contains moral-juridical implications.

In order to escape from the yoke of opinions generated by doubt, the general codified norm establishes that a law does not bind when it is doubtful. An example can be given whereby a debtor owes a creditor five euros. Justice demands that the debtor has the obligation to refund the same value, whereas the creditor has the right to receive the value owed. Because a doubtful law does not bind or lacks obligation, a debtor cannot claim that the transaction laws were doubtful and so there is no obligation whatsoever to refund the value owed. Without prejudice to this example, the rule about doubt of law and lack of obligation, if applied without a proper evaluation, may likely jeopardize justice.

It is, therefore, important to consider the development of this legislation because canonical science requires a well-grounded survey of the evolution of the relevant principles and their contextualization. The historical analysis intends to respond to potential *status quaestionis*. For example, which laws or doctrines influenced the sources of canon 14 regarding doubt of law? How and when did the inclusion find entrance into the code? Which drafts (*schema*) contained the future law? Whose proposal was it? Were there differences, variations or substantial changes in the “texts” of the future canon during its development?

1. SOME CANONICAL SOURCES BEFORE THE CODIFICATION

Some of the prefaces or some of the texts of the law, as found in various legislative texts and collections prior to the codification of 1917 code, while confirming the reality of doubt in any positive law, give some general and specific orientations towards their resolution. The general rule found in most of these texts ascertains that a doubt of law, or of fact, should be interpreted by competent authority, and if need be, a new law should be promulgated as a means of resolving doubt.³

³ Cf. Franciscus FORAMITI, *Corpus iuris civilis*, vol. I (Venetiis: G. Antonelli, 1836), 10–64.

The Justinian code is an example whereby the promulgation of a new law aims at resolving questions of doubt that emanates from various magistrates and courts of law. Justinian's literary codification style presents the doubt first, and then establishes the rule.⁴ He insists that in order that no doubt should arise thereafter because of the incomprehensible writing, the text of the law should be free from any abbreviations. Similarly, he discourages unclear, obscure and compendious expressions, because they are likely to create contradictions.⁵ Therefore, laws are to be clear and certain to everyone. In case of doubt or uncertainty, the power of authentic interpretation belongs to the office of the legitimate authority.⁶

In the preface to the *Digesta*, Justinian asserts that whatever is ambiguous or doubtful has been corrected and reduced into proper order, whatever is proper and necessary for the meaning of the laws are included, and where

Some of these laws were composed, for example, in the twelve tables (754–449 BC), in *Lex Canuleia* (445 BC)—on marriage between patricians and plebeians, in *Leges Licinae Sextiae* (367 BC)—restrictions on possession of public lands, in *Lex Ogulnia*, (300 BC)—on priestly posts, and in *Lex Hortensia*, (287BC)—on verdicts of plebeian assemblies. There were also the institutes formulated during the classical period by jurists such as Gaius (110–180 AD), Ulpian (170–228 AD), Julian (110–170 AD), and many other decrees established by various authorities. In as much as they tried to eradicate various doubts, there were still occurrences of further doubts. For example, the jurists sought to clear the doubts regarding the opinion of the judge on new laws lacking long standing traditional force. The guiding rule was that when doubt arose in reference to some new law not confirmed by long standing tradition, the opinion of the judge was as significant as the authority of the Emperor. In *Cod.* 1.14.11 [LEO, ZENO]: “cum de novo jure, quod inveterate usu non adhuc stabilitum est, dubitatio emergat: necessaria est tam suggestioni judicantis, quam sententiae principalis auctoritas.”

⁴ While answering Demosthenes, Praetorian Prefect, Justinian acknowledges the degree of doubt among Roman jurists whether a decision or an interpretation of the Emperor has the force of law. He responds that every interpretation of the law by the Emperor, whether in answer to requests made to him or whether given in judgment, or in any other way whatsoever, is valid and free from all doubt. *Cod.* 1.14.12.2 [JUSTINIANUS]: “cum igitur et hoc in veteribus legibus invenimus dubitatum, si imperialis sensus legem interpretatus est, oporteat hujusmodi regiam interpretationem obtinere: eorum quidem vanam subtilitatem tam risimus, quam corrigendam esse censuimus. Definimus autem omnem imperatorum legum interpretationem, sive in precibus, sive in iudiciis, sive alio quocumque modo factam, ratam et indubitatum haberi.”

⁵ Cf. *Cod.* 1.17.1.13 [JUSTINIANUS]: “ne autem per scripturam aliqua fiat in posterum dubitatio: jubemus non per siglorum captiones, et compendiosa aenigmata, quae multas per se et per suum vitium antinomias induxerunt, ejusdem Codicis textum conscribi, etiam numerus librorum significatur, aut aliud quidquam: nec enim per specialia sigla numerorum manifestari, sed per litterarum consequentiam explanari concedimus.”

⁶ Cf. *Cod.* 1.14.9 [VALENTINIANUS, MARCIANUS]: “leges sacratissimae, quae constringunt omnium vitas, intellegi ab omnibus debent, ut universi praescripto earum manifestus cognito vel inhabita declinent vel permissa sectentur. Si quid vero in isdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri duritiamque legum nostrae humanitati incongruam emendari.”

formerly any doubt arose, the point has become entirely safe and indisputable, with all grounds for perplexity having been removed.⁷

The insistence by Justinian in the prefaces that laws are to be certain, clear and free from any ambiguity can be interpreted to mean that the establishment of new laws in the resolution of doubts is a step forward to the eradication of any emerging doubts. However, the promulgation of new laws as interpretations or responses to doubtful laws or facts may only be useful in reference to the resolution of already existing doubts, but it does not imply that further doubts of law or fact cannot arise. Consequently, it cannot be presumed that laws are too certain to an extent that no doubt about them can arise. Clarity may be a characteristic or a requirement for the promulgation of a law, but it does not mean that a promulgated law is automatically clear and certain to an extent that it cannot cause any doubt.

Without prejudice to the general rule about promulgation, there are also some specific rules taught by various pontiffs about the resolution of doubt. In matters that are doubtful, Pope Leo (440–61) is of the opinion that doubt should not lead or compel an individual to act contrary to the Gospel or the decrees of the pontiff. The Gospel and the decrees of the pontiffs should maintain their obligation when a clear solution to doubt cannot be determined.⁸ He also teaches that a judge should not rely on dubious evidence while establishing a sentence. However, if the person is aware that the dubious accusations are certain even, to the point of the internal forum, then the person is supposed to act out of conscience, irrespective of the sentence passed by the judge.⁹

⁷ Justinian proclaims that after constantly exercising supervision over the matters and carefully scrutinizing whatever is doubtful, they have imparted to all said matters a suitable form according to the vigour of their intellect and the ability conferred upon them by God and their Saviour Jesus Christ. Therefore, they compose a code dignified by their Imperial Name, accepting everything that is useful, rejecting all ambiguities and doubts, and retaining nothing contradictory. *Cf. Dig. Prooemium*, II: “omnia igitur confecta sunt, Domino et Deo nostro Jesu Christo possibilitatem tam nobis quam nostris in hoc satellitibus praestante. Et principales quidem Constitutiones duodecim libris digestas, jam ante in Codicem nostro nomine praefulgentem contulimus. Postea vero maximum opus adgredientes, ipsa vetustatis studiosissima opera, jam pene confusa et dissoluta, eidem viro excelso permisimus tam colligere quam certo moderamine tradere. Sed cum omnia percontabamur, a praefato viro excelso suggestum est duo pene millia librorum esse conscripta, et plus quam trecentiens decem millia versuum a veteribus effusa, quae necesse esset omnia et legere et perscrutari, et ex his si quid optimum fuisset, eligere . . . et in quinquaginta libros omne quod utilissimum erat, collectum est, et omnes ambiguitates decisae, nullo seditioso relicto . . .”

⁸ *Cf. D.14 c.2*: “illa semper conditioni servata, ut in his, quae vel dubia fuerint aut obscura, id noverimus sequendum, quod nec preceptis evangelicis contrarium, nec decretis sanctorum Patrum inveniatur adversum.”

⁹ *Cf. C.11 q.3 c.75*: “quamvis vera sint quaedam, tamen iudici non sunt credenda, nisi certis

Similarly, Pope Gregory the Great (590–604) writes, that without proper and authentic evidence of the facts, and especially when doubt is about penal matters, it is impossible to mete out a definite sentence until there is a moral certainty of proper evidence.¹⁰ However, in some doubtful matters a judge can, or may, rely on an opinion that is certain when pronouncing a judgement.¹¹

In the doctrine of Pope Eugene III (1145–53), when there is an objective doubt, a person should maintain or follow the part that is more certain.¹² Popes Lucius III (1181–85),¹³ Clement III (1187–91)¹⁴, Innocent III (1198–1216),¹⁵ among others, also share the principle especially, in matters regarding doubts about second marriages. They hold that when in doubt, it is plausible to follow the safer part or the more secure line of action.¹⁶

Consequently, both Popes Honorius III (1216–27)¹⁷ and Gregory IX (1227–41)¹⁸ teach that for laws to have a binding force they must not contain

indicii demonstrantur”; D.33 c.7: “sed quia in rebus ambiguis absolutum non debet esse iudicium, hoc tuae conscientiae committendum eligimus...”

¹⁰ Cf. D.86 c.23 (printed as c. 33 in FRIEDBERG edition): “si quod vero de quocumque clerico ad aures tuas pervenerit, quod te iuste posit offendere, facile con credas, nec ad vindictam te res accendat incognita; sed praesentibus ecclesiae tuae senioribus diligenter veritas est perscrutanda, et tunc, si qualitas rei poposcerit, canonica districtio culpam feriat delinquentis.”

¹¹ Cf. C.11 q.3 c.74: “in re dubia certa potest ferri sententia.”

¹² Cf. X. 4.1.3: “quia igitur in his quae dubia sunt, quod certius existimamus, tenere debemus.” Pope Eugene III was responding to doubt about the validity of a certain marriage between a young man and a girl (hardly seven years of age), whereby the man attempted another marriage with the girl’s aunt.

¹³ Cf. X. 4.21.2: “sed in re dubia certius et modestius est huiusmodi nuptiis abstinere.” For example, Pope Lucius III taught when the death of a spouse is dubious, the most certain and modest thing is to abstain from the second marriage especially in cases where there is no certainty or proof about the death of the spouse.

¹⁴ Cf. X. 4.1.19: “non possunt ad aliorum consortium canonicè convolare.. donec certium nuntium recipient de morte virorum.”

¹⁵ Cf. INNOCENTIUS III, decr. *Devotioni vestrae*, in Aemilius FRIEDBERG, *Quinque compilationes* (Lipsiae: Ex Officina Bernhardi Tauchnitz, 1882), 105: “ut eisdem, absque quolibet dubitationis scrupolo, ut possunt, cum opus fuerint, tam in iudiciis, quam in scholis”; X. 5.27.5. Basing his doctrine on the *regulae iuris* “in dubiis via est tutior eligenda” Pope Innocent III maintains that if a priest is in doubt about his excommunication, the best approach to the doubt is to refrain from the administration of the sacraments. This is due to the security of action, in order not to harm the majority of souls. In another case, of an unbaptised priest ordained before baptism or from doubtful baptism, the pontiff states that “in hoc dubitabili casu, quod tutius est sequentes.” See X. 3.43.3.

¹⁶ Cf. X. 5.12.12: “in dubiis semitam debemus eligere tutiorem.”

¹⁷ Cf. HONORIUS III, decr., *Novae*, in Aemilius FRIEDBERG, *Quinque compilationes* (Graz: Akademische Druck, 1955) 151: “quocirca discretioni tuae per apostolica scripta mandamus, quatenus eis solemniter publicatis absque ullo scrupolo dubitationis utaris et ab aliis recipe facias tum in iudiciis, quam in scholis.”

anything uncertain or ambiguous. Pope Clement V (1305–14) in his *regulae iuris*, while relying on the teachings of St. Bede, holds that “*dubia in meliorem partem interpretari debent.*”¹⁹

Pope Boniface VIII (1294–1303),²⁰ in his collection of eighty-eight *regulae iuris* which, in a strict sense, are not laws, but can be referred to as “legislative idioms” or as rules of law, lays down the principle “in obscuris minimum est sequendum.”²¹ This rule of law can have a direct connection with another rule, “*utile non debet per inutile vitiari.*”²² In other words, that which is useless or ambiguous should not vitiate the useful. In his teachings, he maintains that it is fitting that the odious thing be restricted and the favourable one extended. While doubt persists, that which is most probable or which happens most often, or is customary, should take priority. A choice made amidst doubt should be that which is possible²³ since no one can be obliged to the impossible.²⁴

The above interlinear thoughts incline toward a deduction that the common specific principle applied in the resolution of doubt about law or fact is to uphold to the best interpretation by choosing the most intelligible or the most reasonable (secure) part of the proposition. From the analysis of these canonical sources, a possible deduction is that even though there is no rule that explicitly spells out a canonical norm about *dubium legis* and lack of obligation, some of the *regulae iuris* might have influenced the codification of the canonical norm about *dubium legis* and lack of obligation in the 1917 code, canon 15.

¹⁸ Cf. GREGORIUS IX, *Rex Pacificus*, in Aemilius FRIEDBERG, *Corpus Iuris Canonici* (Graz: Akademische Druck, 1955), X. 1.13.2: “*quoniam constitutio apostolicae sedis omnes adstringit et nihil debet obscurum vel ambiguum continere.*”

¹⁹ X. 5.41.2.

²⁰ Cf. BONIFACIUS VIII, *decr. Sacrosanctae Romanae Ecclesiae*, in Aemilius FRIEDBERG, *Codex Iuris Canonici* (Graz: Akademische Druck, 1955), col. 933-934 (*Prooemium* in VI^o): “*Sane cum post Volumen Decretalium a felicis recordationis Gregorio Papa IX praedecessore nostro, tam provide, quam utiliter compilatum, nonnullae ab eo, et ab aliis Romanis Pontificibus successive super diversis dicerentur articulis editae Decretales; de quarum aliquibus, an Decretales existerent, earumque auctoribus dubitabatur solícite in iudicijs, et in scholis. Nos ad apicem Summi Pontificatus superna dispositione vocati, super hoc cum instantia requisiti a multis, ambiguitatem, et incertitudinem huiusmodi dispendium pluribus afferentem, omnino tollere, ac elucidare, quae de Decretalibus ipsis teneri, quaeve imposterum refutari, gratia suffragante Divina, pro utilitate publica desiderabiliter affectantes.*”

²¹ *Reg. 30*, in VI^o.

²² *Reg. 37*, in VI^o.

²³ Cf. *Reg. 45*, in VI^o: “*inspicimus in obscuris quod est verisimilius, vel quod plerumque fieri consuevit.*”

²⁴ Cf. *Reg. 6*, in VI^o: “*nemo potest ad impossibile obligari.*”

2. THE CODIFICATION OF DOUBT OF LAW AND LACK OF OBLIGATION IN THE 1917 CODE, CANON 15

Peter Gasparri (1852–1934), with the assistance of others acting under the mandate of Pope Pius X (1903–14)²⁵ and Benedict XV (1914–22), worked to codify the laws promulgated in 1917 code. One of the guiding principles of the codification was that they were supposed to conserve the words of the document with proper citation, indicating the page, volume, and edition of their sources, indicate with brief reasons modifications made to *Corpus Iuris Canonici* and, if they believed necessary, to give new disposition.²⁶

The historical notes reserved at the Vatican Secret Archives show that the elaboration of book one on *normae generales* was assigned to a group of consultants that included Lombardi, Sili, Wernz, Palmieri, Pompili, and Giorgi who worked together with others.²⁷ Lombardi and Sili (with the contribution of other consultants and experts) elaborated the texts of the canons that later made the *corpus* of the seventeen canons denominated as “ecclesiastical laws,” as found in book one of 1917 code.

Lombardi’s *votum* is composed of 12 canons or themes. The norm about doubt of law and lack of obligation is not part of this *votum*. The only comment he gives about doubt is in relation to its interpretation and promulgation in *modum legis*.²⁸ He further comments that the principle of *lex dubia lex nulla* acts as the foundational reason under which a doubtful law demands the promulgation of a new law.²⁹ Sili’s *votum* is composed of

²⁵ Cf. PIUS X, *Motu Proprio Arduum Sane Munus*, in *ASS* 36 (1903-04), 549-551. The pontiff observes that just as imperial Rome redacted their laws into one body, so the sacred canons could likewise undergo elaboration and codification into one body in order that knowledge of them, their application and observance, would become easier for all.

²⁶ Cf. COMMISSIONE PONTIFICIA PER LA CODIFICAZIONE DEL DIRITTO CANONICO, *Regolamento* 11 Aprile 1904, in ARCHIVIO SEGRETO VATICANO (=ASV), *Commissione Codice di Diritto Canonico* (=CCDC) 3, An. 1917.

²⁷ Cf. IDEM, *Divisione delle materie nel futuro lavoro di Codificazione*, Giugno 1904, in ASV, CCDC 3, An. 1917.

²⁸ Cf. CAROLUS LOMBARDI, *Votum 1904: Titulus I, De Constitutionibus*, in ASV, CCDC 10, An. 1917, canon 7, 13-14: § 1 “authentica canonicarum legum interpretatio ad ipsum legislatorem in genere spectabit. Ea autem nova promulgatione haud indigebit, nisi forsam legem ad novum prorsus casum protulerit. Ipsius autem vis, nisi aliter fuerit decretum, usque a die quo lex vigere coepit vim exerere erit censenda et hinc iuxta hunc sensuum erit aestimandus actorem valor”; § 2 “in interpretandis legibus, quae vel inhabilitantes vel irritantes vel poenales sunt benignius erit agendum: in interpretandis vero, quae leges priores immutant aut quae magis ex utilitate vel aequitate quam ex iuris rigore fuerunt constitutae, strictius.”

²⁹ Cf. IDEM, *Adnotationes in canon 8: De legibus ecclesiasticis*, in ASV, CCDC 13, An. 1917, file V, n. 251, 1-2: “cum lex dubia sit lex nulla etiam interpretatio declarativa alicuius legis dubia

22 canons with the term “doubt” mentioned twice in his *votum*. Both are in relation to the interpretation of doubtful laws³⁰ and the presumption of their abrogation.³¹ The *consulta* of 13 November 1904, and the partial plenary dated 27 November 1904, voted for or against each of the proposed canons, and combined similar ones. The plenary approved sixteen proposed canons that were later drafted as *schema* 1904.³² There is no written report by the plenary about the norm on doubt of law and lack of obligation.

A study research on the numerous contributions made by other consultants and officials show that none of them made an observation or contribution regarding the norm on doubt of law and lack of obligation.³³ The same is applicable to the partial plenary of 26 March 1905,³⁴ and the subsequent plenaries held to year-end.³⁵ However, in one of the printed copies of the *schema* 1906, there is on the back, hand written notes of four texts of proposed canons. Possibly, they were to be added to the *corpus* of book one.³⁶

promulgatione eget, nec valet retrosum.” Lombardi maintains that a doubtful law is not a law and its interpretation demands for a promulgation of a new law without retroactive effect.

³⁰ Cf. Augustus SILLI, *Votum 1904: Titulus I, De Constitutionibus*, in ASV, CCDC 10, An. 1917, canon 15, 13. The canon contains a preamble followed by two paragraphs. The preamble states “voluntas legislatoris ex verbis legis proprio sensu acceptis, ac tota lege perspecta, petenda est; in re, autem, obscura vel dubia, interpretatione fit locus ex generalibus iuris principiis aliisque probatis regulis hermeneutici iuridicae.” Canon 15 § 1 “si lex strictam simul et latam interpretationem admittat, in odiosis illa, haec tenenda in favorabilibus, quippe odia restringi et favores convenit ampliari.” Canon 15 § 2 “verum, interpretatio authentica, quae fit ab ipso legislatore, eiusve successore aut superior, per se, nulli subest certae normae, ab eo, namque, procedit in cuius prudenti arbitrio lex posita est.” See also C.22 q.5 c. 11; *Reg.* 15, in VI^o; FRANCISCUS SUÁREZ, *Tractatus de legibus ac Deo legislatore in decem libros distributus*, (=FRANCISCUS SUÁREZ, *De legibus*) (Neapolis: Ex Typis Fibrenianis, 1872), VI.1.1-3.

³¹ Cf. Augustus SILLI, *Votum 1904: Titulus I, De Constitutionibus*, in ASV, CCDC 10, An. 1917, canon 20 § 2, 17: “in dubio, nec abrogatione nec derogatione praesumitur sed leges posteriores ad priores trahendae sunt.”

³² Cf. *Verbali delle consulte generali ed osservazioni dei Consultori, consulte del 27 Novembre 1904*, in ASV, CCDC 13, An. 1917, File IV, n. 7.

³³ Cf. *Verbali delle consulte generali ed osservazioni dei Consultori*, in ASV, CCDC 13, An. 1917, file IV, 235. They include the contributions of Rego, Lipidi, Lugari, De Montel, Sebastianelli, Pompili, Pezzoani, Binzecher, Costa, Latini, Fernandez, Lepicier, Lucidi, Wernz, Moral, Pillet, Kaiser, Mannaioli, Giorgi, Melata, Benedetti, Janssens, Valenzuela, Van Rossum, Lega, Esser, Vecchia, and Pacelli among others.

³⁴ Cf. *Pars generalis: De legibus ecclesiasticis*, [Approved in the Partial Plenary of 26 March 1905], in ASV, CCDC 13.

³⁵ Cf. *Studi preparatori alla codificazione del diritto canonico, Liber I-II*, in ASV, CCDC 7; cf. *Normae generales*, in ASV, CCDC 10; cf. *Schemi del Liber I*, in ASV, CCDC 12; cf. *Verbali delle consulte parziali e generali per Liber I del Codice di Diritto Canonico: Normae generales*, in ASV, CCDC 13.

³⁶ Cf. *Pars generalis: De legibus ecclesiasticis* [Approved in the Partial Plenary of 27 November

At the end of these texts there is a note referring to article 4 of an unmentioned civil code. The research done shows no relationship of these proposed norms with any civil code.³⁷ There is also an abbreviation “GP” at the bottom of the page. There is no doubt that the abbreviation written in the form of a signature represented Gasparri Petrus. The exact date or year when these canons were proposed is unknown because the notes (manual) do not contain any date. The first canon indicates parts of the content of *dubium legis* and non-obligation. The study shows that there are no written reports about the discussion of this proposed norm by any commission or plenary held between 1906 and 1911.³⁸ The first published copy of this norm is

1904], in ASV, *CCDC* 12. Canon 1 “leges ecclesiasticae (etiam irritantes), si dubiae sunt dubio iuris non urgent; si dubiae sunt dubio factae, potest ordinarius in eidem dispensare, dummodo agatur de legibus in quibus Romanum Pontifex solet dispensare.” Canon 2 “quoties . . . Ordinarius potest subdito a lege ecclesiastica dispensare, potest quoque dispensare seipsum.” Canon 3 “quando nam Ordinarii locorum aut superiores religiosi possunt dispensare in iure communi.” Canon 4 “leges quae latae . . . ad praeservendum periculum generales, urgent, et in casu particulari periculum non adsit.” The dotted lines refer to invisible letters thus rendering the intended words difficult to read.

³⁷ A possible question may regard which civil code Gasparri referred to in his notes at the back of the draft. Various hypotheses are possible. It may be that Gasparri referred to the text of the law Napoleonic code (also called French civil code) as established in Book III, article 1162. The text of the law states that in case of doubt, the interpretation of the agreement is against the person who had stipulated it, and in favour of the person who had contracted the obligation.³⁷ However, this code was no longer in force by the time of the elaboration of the 1917 code. Even if it was in force, there is not enough evidence or sufficient indications to believe that it could have been a likely source of what would later become canon 15, in 1917 code. See for example, Julien-Michel DUFOUR, *Code civil des Français* (Paris: Lenormant, 1806) tom. II, art. 1162, 295. It is most likely that Gasparri relied on the Italian civil code promulgated in 1865. This code replaced the Napoleonic code of 1804 and was in use by the time of and after the promulgation of 1917 code until its revision in 1945. If article 4 referred to was from the Italian civil code promulgated in 1865, then it was under the title about the disposition on the publication, interpretation and application of laws in general. A glance at this article indicates that neither did it speak expressly about doubtful laws and their lack of obligation nor did it mention any rule regarding the power of the Ordinary to dispense subjects from the laws. It expressly stated that penal laws and those laws which restrict the free exercise of rights or form exceptions to the general regulations or their laws were not to be extended other than the cases or times in which they were expressed. See ITALIA, *Codice civile del Regno d'Italia* (Torino: Gazzetta del Popolo, 1865), art. 4: “le leggi penali e quelle che restringono il libero esercizio dei diritti o formano eccezione alle regole generali o ad altre leggi, non si estendono oltre i casi e tempi in esse espressi.”

³⁸ Cf. *Verbali delle consulte generali ed osservazioni dei Consultori, consulte del 26 Giugno 1911*, in ASV, *CCDC* 13, file IV, n. 7. Just before the publication of the 1912 draft, there was, a *consulta* plenary held on 26 June 1911. Those present included Lega, Melata, Vidal and few others. They commented on some canons of book one such as canons 32-38 but the future canon 15 regarding *dubium legis* and lack of obligation was not discussed.

found in *schema* 1912 under *Liber I “Parte generalibus,” Titulus I “Leges ecclesiasticae,”* canon 15.³⁹

In comparison to Gasparri’s original hand written text, apart from grammatical corrections, there is an addition of the term *inhabilitantes*.⁴⁰ The second published draft is the *schema* 1914, canon 16.⁴¹ There is no substantial correction to this *schema* apart from Gasparri’s manual insertion and proposal that the proposed norm becomes canon 15 in the chronological order. In *schema* 1916, the proposed canon appears in its third and final published draft as canon 15.⁴² There are no corrections made in the draft. However, the promulgated text contains a minor change.⁴³ It is one of the few canons promulgated in the 1917 code without a source (*fontibus carentes*).⁴⁴ The manuscripts reserved in the Vatican Secret Archives show that the initial proposal and the subsequent grammatical and textual corrections (until the promulgation of this norm) are majorly from Peter Gasparri. To this extent, this norm is the “brainchild” of Peter Gasparri who opted to move from traditional ways of resolving legislative doubts, to codifying the text of the law about doubt and lack of obligation.⁴⁵

³⁹ Cf. PIUS X, *Codex Iuris Canonici, cum notis Petrus Gasparri*, Romae 1912, in ASV, CCDC 86, canon 15, 6: “leges ecclesiasticae etiam irritantes si dubio sint dubio iuris, non urgent; si dubio facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.”

⁴⁰ Cf. *ibid.*: “Leges ecclesiasticae irritantes et inhabilitantes, in dubio iuris, non urgent; In dubio facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.”

⁴¹ Cf. *ibid.*: “Leges ecclesiasticae irritantes et inhabilitantes in dubium iuris non urgent; in dubio autem facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.”

⁴² Cf. Petrus GASPARRI, *Schema Completa, cum Notis*, Romae 1916, in ASV, CCDC 88, canon 15, 6: “Leges, ecclesiasticae irritantes et inhabilitantes in dubium iuris non urgent; in dubio autem facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.”

⁴³ Cf. BENEDICTUS XV, *Constitutio Apostolica, Providentissima Mater Ecclesia*, 27 Maii 1917, in AAS 9, II (1917), canon 15, 13: “Leges, etiam irritantes et inhabilitantes in dubium iuris non urgent; in dubio autem facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.” The word *ecclesiasticae* which had consistently appeared from the beginning (Gasparri’s manual draft) until 1916 draft was eliminated. The reason could be that the title was addressing general ecclesiastical laws. The word *etiam*, eliminated from the 1914 scheme, was again included in the promulgated text.

⁴⁴ Cf. Petrus GASPARRI (cura), *Codicis Iuris Canonici fontes*, vol. IX, (Romae: Typis Polyglottis Vaticanis, 1939), 1.

⁴⁵ The historical analysis of the insertion of this norm in the 1917 code cannot deny the fact that Gasparri inserted the text of this norm in the working scheme because of his powerful influences. See for example, Eduardo BAURA, “Pietro Gasparri (1852-1934),” *Juristas universales* III (2004)

The subject of doubt of law was not completely alien to Gasparri. He applied the notion of doubt of law and doubt of fact in his publications, especially in relation to marriage,⁴⁶ but he did not specifically mention (in his previous works prior to the 1917 code) that laws do not oblige when there is doubt of law. It is most likely that Gasparri's idea of codifying this norm had some influence, to some extent, from moral doctrines and related schools of thoughts. He was aware of this moral rule and its consequences, and might have wanted a similar law codified in order to have a juridical force with an intention of resolving all the juridical doubts. The rising challenge is that even in the moral fields the rule about doubt of law and lack of obligation does not solve all the moral doubts. It seems that even those who elaborated this norm in the present code did not take into consideration this challenge.

3. CODIFICATION OF DOUBT OF LAW AND LACK OF OBLIGATION IN CANON 14

The first commission for the revision and elaboration of the present code was constituted on 28 March 1963.⁴⁷ The first plenary congregation, held on 12 November 1963, discussed the methodology for the revision of the work as they awaited the conclusion of the Vatican Council II.⁴⁸ Prior to the publi-

623-626: "en cuanto a la codificación canónica, Gasparri tuvo un papel de primer orden, pues fue uno de los principales defensores de la idea, dirigió los trabajos de su elaboración y tomó personalmente muchas decisiones relativas a la redacción definitiva del texto. Como es sabido, la codificación piobenedictina no quería innovar la disciplina jurídica eclesiástica sino, al contrario, "codificar," según la técnica propia de los Códigos estatales contemporáneos, la tradición canónica. Sin embargo, el hecho fue que no sólo se introdujeron modificaciones normativas concretas, sino que cambió notablemente el modo de estudiar y de aplicar el Derecho de la Iglesia, pasando de ser un Derecho de tipo jurisprudencial a otro de corte legislativo. [...] Con todo, hay que reconocer en el Código de 1917 una obra monumental de sabiduría jurídica y una norma que ha contribuido a clarificar la disciplina eclesiástica y a reforzar la unidad de la Iglesia Católica, cuya elaboración fue posible gracias al vasto conocimiento que del Derecho canónico tenía Gasparri, así como a su capacidad de trabajo y de decisión." Cf. Giorgio FELICIANI, "Gasparri et le droit de la codification," *L'Année Canonique* 38 (1996): 25-37.

⁴⁶ Cf. Petrus GASPARRI, *Tractatus canonicus de matrimonio*, Lib. I (Parisiis: Secrétariat de l'Institut catholique, 1892), 71: "si sponsalia sunt dubia dubio vel facti vel juris, ita ut sententia probabilis est eadem non valere, licet sententia probabilior sit pro eorum validitate, omnes admittunt obligationem sponsalitiā non urgere."

⁴⁷ Cf. IOANNES XXIII, *Commissione per la revisione del Codice di Diritto Canonico*, 2 Maii 1963, in *AAS* 55 (1963) 363-364.

⁴⁸ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Prima sessio Em.morum*

cation of the *schema* 1974, the special commission constituted for the review of the *corpus* of *Liber I* “De normis generalibus” held various sessions of discussion. Although the norm about doubt of law and lack of obligation does not seem to have undergone discussion in any of the sessions,⁴⁹ it appeared in the *schema* 1974 with the exact text (save the second part on doubt of fact) and numbering as in the 1917 code, canon 15.⁵⁰

The subsequent sessions received the *schema* 1974 for further elaboration. The commission met on 12–16 June 1976 during the fourteenth session. It discussed and approved some canons, but did not recommend any change to the rule about doubt of law and lack of obligation.⁵¹ Consequently, the text of this norm in the *schema* 1977⁵² is textually similar to the one in *schema* 1974. The commission met again on 7–11 May 1979 to consider the observations presented by the Roman Curia, Dioceses, Universities and individuals. This session discussed 23 canons. There was a discussion about *dubium facti*,⁵³ but not about *dubium legis*. The approved version appeared in the *schema* 1980.⁵⁴

Cardinalium, in *Communicationes* I (1969): 36. The elaboration of the code took place in various sessions and plenaries, and the work was devolved to different persons, experts, Universities, Episcopal Conferences, Bishops and many others. In fact, on 17 April 1964, Pope Paul VI internationalized the commission adding more cardinals and consultants to the commission.

⁴⁹ Cf. IDEM, *Coetus Studii*: “De normis generalibus deque personis physicis et iuridicis,” (Sessio XIII, 13-17 Maii 1974), in *Communicationes* 23 (1991): 22–71.

⁵⁰ Cf. *ibid.*, canon 15, 74: “leges, etiam irritantes et inhabilitantes, in dubium iuris non urgent; in dubio autem facti in eis dispensare possunt Ordinarii, nisi agatur de dispensatione quam Suprema Ecclesiae auctoritas sibi aut alii auctoritati reservaverit.” There were no changes in the first part (*dubium iuris*). However, the second part, on *dubium facti*, contained some changes. For example, the sentence from the original text, which read as “potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet,” was changed, and the version of the *schema* 1974 contained the sentence with the words “in eis dispensare possunt Ordinarii, nisi agatur de dispensatione quam Suprema Ecclesiae auctoritas sibi aut alii auctoritati reservaverit.”

⁵¹ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Coetus Studii*: “De normis generalibus deque personis physicis et iuridicis,” (Sessio XIV, 12-16 Ianuarii 1976), in *Communicationes* 23 (1991): 108-27.

⁵² Cf. IDEM, *Schema canonum libri I: De normis generalibus* (reservatum) (Typis Polyglottis Vaticanis, 1977), canon 15, 15: “Leges, etiam irritantes et inhabilitantes, in dubium iuris non urgent; in dubio autem facti in eis dispensare possunt Ordinarii, nisi agatur de dispensatione quam Suprema Ecclesiae auctoritas sibi aut alii auctoritati reservaverit.”

⁵³ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Coetus Studii*: “De normis generalibus,” (Series altera – Sessio I, 07-11 Maii 1979), in *Communicationes* 23 (1991) canon 15, 155. Four consultants argued that the second part of canon 15 on *dubium facti* was not necessary because canon 87 already spelt out the power of dispensation by the Ordinary. On the other hand, the Ordinary could only dispense from the laws that were reserved proper to the office. The proposed text awaiting approval was “leges.. Ordinarii, dummodo, si de dispensatione reservata

There were further discussions at the sixth plenary session held on 20-28 October 1981.⁵⁵ A number of canons underwent modifications by way of textual addition, subtraction, or rearrangement before their publication in the *schema* 1982.⁵⁶ The *schema* 1982 does not show any recorded observation regarding the rule on doubt of law and lack obligation.⁵⁷ Before the promulgation of the final document, a special commission of seven experts took the responsibility to assist with corrections, adjustments and insertion of missing words, the grammatical structure and the synthesis of the canons. After presenting their observations, a smaller commission of four experts, under the guidance of pro-president of the commission, Rosalius Castillo Lara, made the final synthesis. Neither the first nor the second commission proposed any adjustments or new thoughts in relation to the rule about doubt of law and lack of obligation. The pro-president presented the document to the Roman pontiff on 23 December 1982.

On 25 January 1983, Pope John Paul II promulgated the norm about doubt of law and lack of obligation without any grammatical or textual change. It was placed under *Liber I* “De normis generalibus,” *Titulus I* “De legibus ecclesiasticis,” canon 14.⁵⁸ In 1989, the *Pontificia Commissio Codici Iuris*

agatur, concede solet ab auctoritate cui reservatur.” The approved text read “leges... Ordinarii, dummodo, si agatur de dispensatione reservata, concedi solet ab auctoritate cui reservatur.”

⁵⁴ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Codex Iuris Canonici: Schema Patribus Commissionis Reservatur*, (= *Schema Codicis Iuris Canonici*, 1980), 29 Iunii 1980, Libreria Editrice Vaticana 1980, canon 14, 5: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti in eis dispensare possunt Ordinarii, dummodo, si agatur de dispensatione reservata, concedi solet ab auctoritate cui reservatur.”

⁵⁵ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Liber I: De normis generalibus (cann. 1-192)*, in *Communicationes* 13-14 (1981-82): 133.

⁵⁶ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Codex Iuris Canonici, schema novissimum*, (= *Schema Novissimum*, 1982) 25 Martii 1982, Typis Polyglottis Vaticanis 1982, canon 14, 3: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti Ordinarii in eis dispensare possunt, dummodo, si agatur de dispensatione reservata, concedi solet ab auctoritate cui reservatur.” The text was identical to the *schema* 1980 with hardly any substantial change. The noted modifications included the reversal of the order of words from “in eis dispensare possunt Ordinarii” to “Ordinarii in eis dispensare possunt” and from “solet” to “soleat.”

⁵⁷ Cf. RELATIO COMPLECTENS SYNTHESIM ANIMADVERSIONUM AB EM.MIS ATQUE EXC.MIS PATRIBUS COMMISSIONIS AD NOVISSIMUM SCHEMA CODICIS IURIS CANONICI EXHIBITARUM, CUM RESPONSIONIBUS A SECRETARIA ET CONSULTORIBUS DATIS, *De normis generalibus*, in *Communicationes* 14 (1982), canon 14, 133. One of the members commented on the power of jurisdiction and reservation of dispensation. The proposed formulation was that the second part of the canon on doubt of fact read as “nisi agatur de dispensatione quam Suprema Ecclesiae auctoritas sibi aut aliis reservaverit.” The suggestion was not accepted. The canon was published in the *schema* 1982 textually similar to the previous *schema*.

⁵⁸ Cf. canon 14: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti in eis dispensare possunt Ordinarii, dummodo, si agatur de dispensatione reservata, con-

Canonici Authentice Interpretando published the sources of the canons. Canon 14 has two sources:⁵⁹ the 1917 code canon 15; and the Pontifical rescript addressed to the Superiors of Clerical Institutes of Pontifical Right and the Abbots of the monasteries regarding the laws from which they could dispense their subjects.⁶⁰ A text of the law parallel to canon 14 is codified in the Code of Canons of the Eastern Churches, canon 1496.

4. CODIFICATION OF DOUBT OF LAW AND LACK OF OBLIGATION IN THE CCEO, CANON 1496

Prior to the promulgation of the Code of Canons of the Eastern Churches in 1990, some of the laws appeared in *Crebrae Allatae Sunt*,⁶¹ *Sollicitudinem Nostram*,⁶² *Postquam Apostolicis Litteris*,⁶³ and *Cleri Sanctitati*.⁶⁴ Some of the canons contained texts of norms regarding doubt of fact.⁶⁵ None of them explicitly contained a norm about *dubium legis* and lack of obligation.

The schemes published in *Nuntia* by the preparatory commissions contain one canon about doubt of law and its lack of obligation. It first appeared without comment or source in the *schema* 1958.⁶⁶ A special commission met

cede solet ab auctoritate cui reservatur.” The wording is almost identical to that in the *schema* 1982 except for the change of one preposition from “in” to “ab.”

⁵⁹ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO, *Codex Iuris Canonici: Fontium annotatione et indice analytico-alphabetico auctus*, Auctoritate IOANNES PAULUS II promulgatus, Libreria Editrice Vaticana 1989, canon 14, 8.

⁶⁰ Cf. SECRETARIA STATUS, *Cum Admotae*, 06 Novembris 1964, in *AAS* 59 (1967): 374-378.

⁶¹ Cf. PIUS XII, Litterae Apostolicae Motu Proprio datae *Crebrae Allatae Sunt* (=CAS) [De disciplina sacramenti matrimonii pro Ecclesia Orientali], 22 Februarii 1949, in *AAS* 41 (1949): 89-117.

⁶² Cf. IDEM, Litterae Apostolicae Motu Proprio datae *Sollicitudinem Nostram* (=SN) [De iudiciis pro Ecclesia Orientali], 6 Ianuarii 1950, in *AAS* 42 (1950): 5-120.

⁶³ Cf. IDEM, Litterae Apostolicae Motu Proprio datae *Postquam Apostolicis Litteris* [De religiosis, De boni Ecclesiae temporalibus et de verborum significatione pro Ecclesiis Orientalibus], 9 Februarii 1952, in *AAS* 44 (1952): 62-152.

⁶⁴ Cf. IDEM, Litterae Apostolicae Motu Proprio datae *Cleri Sanctitati* (=CS) [Ad Venerabiles Fratres Patriarchas, Archiepiscopos, Episcopos, ceterosque locorum Hierarchas Ecclesiarum Orientalium, pacem et communionem cum apostolica Sede habentes: De ritibus orientalibus, De personis pro Ecclesiis Orientalibus], 2 Iunii 1957, in *AAS* 49 (1957): 433-608.

⁶⁵ Cf. canon 4 and canon 21 in *CAS*; cf. canon 217 § 2, in *SN*; cf. canon 522, in *CS*.

⁶⁶ Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENTO, *Coetus II: “Munera coetus II – textus initiales”*: *Testi dalle bozze 1958 – leges ecclesiasticae*, in *Nuntia* 2 (1976): 67, canon 10: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti potest Hierarcha ab iis dispensare, dummodo agatur de legibus Romanus Pontifex dispensare solet.”

between 23 January and 4 February 1978 to review the future laws.⁶⁷ Another session of the consultants took place from 10–15 March 1980.⁶⁸ The norm about doubt of law and lack of obligation was among the canons in the draft for discussion.⁶⁹ The session held between 24 November and 6 December 1980 studied some of the proposals. The commission approved the rule about doubt of law and lack of obligation without any textual or structural corrections in its composition, save the chronological order.⁷⁰

Apart from the commission, various Churches, Dioceses, Universities and concerned individuals received the *schema* 1980 for study and the submission of their opinions. The observations made were fewer in comparison to the previous schemes.⁷¹ A special commission group studied these observations on 20–25 September 1982.⁷² There are no observations regarding doubt of law, save the doubt of fact.⁷³ The same is applicable to the various commissions held from the beginning of December 1985 to 15 December 1986.⁷⁴ The

⁶⁷ Cf. IDEM, *Révision des canons de normis generalibus* (Archm. Elias Jarawan – Relator), in *Nuntia* 10 (1980): 87.

⁶⁸ Cf. *ibid.*

⁶⁹ Cf. *ibid.*, 99: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti in eis dispensare possunt Hierarchae, nisi agatur de dispensatione quam Suprema Ecclesiae Auctoritas sibi aut alii auctoritati reservaverit.” In comparison to the previous scheme the last part of the canon was changed from “. . . potest Hierarcha ab iis dispensare, dummodo agatur de legibus Romanus Pontifex dispensare solet” to “. . . in eis dispensare possunt Hierarchae, nisi agatur de dispensatione quam Suprema Ecclesiae Auctoritas sibi aut alii auctoritati reservaverit.” It also appeared as canon 8, numerically different from the previous scheme.

⁷⁰ Cf. IDEM, *Schema canonum de normis generalibus et de bonis Ecclesiae temporalibus*, in *Nuntia* 13 (1981): 46. The approval and publication of the future CCEO, canon 1496 had only numerical modification from canon 8 to canon 132. It appeared under *Titulus XXIX*, “De lege, consuetudine, actibus administrativis praescriptione atque temporis supputatione,” *Caput I*, “De legibus ecclesiasticis,” canon 132 and stated that “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti in eis dispensare possunt Hierarchae, nisi agatur de dispensatione quam Suprema Ecclesiae Auctoritas sibi aut alii auctoritati reservaverit.”

⁷¹ Cf. IDEM, *Nuova revisione dello Schema canonum de normis generalibus et de bonis Ecclesiae temporalibus*, in *Nuntia* 18 (1984): 3.

⁷² Cf. *ibid.*

⁷³ Cf. *ibid.*, 78. There was an observation regarding the absolute power of the Ordinary to dispense even in cases where there are no doubts. There was unanimous acceptance of the observation and the canon formulated *ad verbum* as in 1983 code, canon 14. The visible change from the previous scheme was the change of the words from “in eis dispensare possunt Hierarchae” to “Hierarchae in eis dispensare possunt.” The word “nisi, agatur” also changed to “dummodo, si agatur.” The number of the canon remained as canon 132 in the new version: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti Hierarchae in eis dispensare possunt, dummodo, si agatur de dispensatione reservata, concede soleat ab auctoritate cui reservatur.”

⁷⁴ Cf. IDEM, *Breve relazione sull’attività della Commissione dall’inizio di Dicembre 1985 al 15 Dicembre 1986*, in *Nuntia* 23 (1986): 105; IDEM, *Schema Codicis Iuris Canonici Orientalis*, in

Coetus de coordinatione received the *schema* 1986 for further observations and possible revisions.⁷⁵

The plenary assembly held in November 1988 approved the entire *Titulus XXIX*, which contained canons 1503–1554, with an absolute majority: *placet* 27; *non placet* 1; and *astensioni* 1.⁷⁶ As it was in the previous scheme, the commission retained the original text of the rule about doubt of law and lack of obligation.⁷⁷ A new publication of all the proposed canons appeared in “*Schema Novissimum*,” which was later submitted to the pontiff on 28 January 1990.⁷⁸ John Paul II promulgated the norm on doubt of law and lack of obligation on 18 October 1990. The publication *de accessus ad fontes* does not indicate a specific source, even if the text of the law is parallel to the text of canon 14.⁷⁹

Nuntia 24–25 (1987), canon 1511; IDEM, *Invio dello Schema Codicis Iuris Canonici Orientalis all’esame dei Membri della Commissione*, in *Nuntia* 23 (1986) 109; IDEM, *Schema Codicis Iuris Canonici Orientalis*, in *Nuntia* 24–25 (1987), canon 1511, 260. In *schema* 1986, the future CCEO canon 1496 was published under *Titulus XXIX* “De Lege, De consuetudine et De Actibus Administrativis,” *Caput I* “De Legibus Ecclesiasticis,” canon 1511. The only change made in the canon was the numbering. It moved from canon 132 to 1511: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti Hierarchae in eis dispensare possunt, dummodo, si agatur de dispensatione reservata, concede soleat ab auctoritate cui reservatur.”

⁷⁵ Cf. IDEM, *L’operato del Coetus de Coordinatione, seconda fase dei lavori Coetus de Coordinatione (Novembre 1986 – Dicembre 1988), emendamenti redazionali proposti all’approvazione dell’assemblea plenaria dei membri della Commissione*, in *Nuntia* 27 (1988) 75. The commission made small changes like “et = aut; t. facti a. autem; dummodo, si agatur de dispensatione reservata, concede = dummodo dispensatio, si est reservata, concedi.”

⁷⁶ Cf. IDEM, *Resoconto dei lavori dell’assemblea plenaria dei membri della Commissione del 3–14 Novembre 1988*, in *Nuntia* 29 (1989) 73.

⁷⁷ Cf. IDEM, *Le osservazioni dei Membri della Commissione allo Schema Codicis Iuris Canonici Orientalis e le risposte del Coetus de expansione observationum*, in *Nuntia* 28 (1989): 3–138.

⁷⁸ Cf. IDEM, *Schema Codex Canonum Ecclesiarum Orientalium, schema novissimum, iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum*, 28 Ianuarii 1989, canon 1496, 73: “leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti Hierarchae in eis dispensare possunt, dummodo, si agatur de dispensatione reservata, concede soleat ab auctoritate cui reservatur.”

⁷⁹ Cf. PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Codex Canonum Ecclesiarum Orientalium* [Auctoritate IOANNES PAULUS II promulgatus, Fontium annotatione auctus], Libreria Editrice Vaticana 1995, 493.

5. SOME UN-CODIFIED SOURCES OF THE RULE
ABOUT DOUBT OF LAW AND LACK OF OBLIGATION

Irrespective of its canonical *fontibus carentes*, there is a greater plausibility to believe that this norm originated from particular teachings or doctrines, given the fact that the doctrines of some authors guided the codification of some norms.⁸⁰

In the doctrine of Cicero, the purpose of law is to serve the common good so that society can live a happy and serene life. Those who institute unjust (*inique*) laws have only satisfied their needs and have given what they wanted instead of proposing just laws.⁸¹ Ulpianus holds that any precept that does not meet the logic of *boni et aequi* is not a law, but an unjust or inefficient law.⁸² St. Augustine of Hippo (354–430) affirms that an unjust precept is not a law and, as such, does not oblige.⁸³ In one of his homilies on reconciliation and penance, he teaches that to eliminate or to liberate oneself from doubt, a person should hold to the certain, and dispel the uncertain.⁸⁴ In another account, Isidore of Seville (560–636) teaches that laws ought to be honest (moral), just, possible, according to nature, custom of the place, and convenient in time and place.⁸⁵

⁸⁰ Cf. Eduardo BAURA, *La dispensa canonica dalla legge* (Milano : Giuffrè, 1997), 70 : “sta di fatto che hanno avuto influsso decisivo sulla dottrina posteriore, che si è manifestato da ultimo nelle scelte redazionali del Codice piano-benedittino.” The author refers specifically to the contributions of Thomas SÁNCHEZ and Francis SUÁREZ, whose doctrines influenced the codification of some canons in the 1917 code.

⁸¹ Cf. Marcus Tullius CICERO, *De legibus*, Lib. II (Milano: C. Signorelli, 1935), 183.

⁸² Cf. *Dig.* I.1.1.1 [ULPIANUS]: “iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi”; “cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernente, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.”

⁸³ Cf. Aurelius AUGUSTINUS, *De libero arbitrio*, Lib. I, cap. 5, n. 11-13, in Jacques Paulus Migne (accurante), *Patrologiae cursus completus, series Latina*, (= *PL*), 32 (Parisiis: Apud Garnier, 1844), 1227–1228.

⁸⁴ Cf. Aurelius AUGUSTINUS, *Sermo* 393, in *PL* 39, 1715: “ergo tene certum, et dimitte incertum”; cf. C.33 q.3 c.4; cf. D.7 c. 2, 4.

⁸⁵ Cf. ISIDORI Hispalensis, *Etymologirum*, Lib. II, cap. 10, n. 6, in *PL* 82, 131: “erit autem lex honesta, justa, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporique conveniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem in captionem contineat, nullo private commodo, sed pro communi civium utilitate conscripta; cf. *ibid.*, Lib. V, cap. 21, in *PL* 82, 203.

St. Thomas Aquinas interprets the Isidorian notion in reference to positive law, and states that a positive law that does not have an advantage to the common good, or is not proportionate to the human utility, is unjust and not worth the name “law.”⁸⁶ It follows that an unreasonable, unjust and objectively doubtful precept is an iniquity, or *corruptio legis*.⁸⁷ Therefore, an objectively doubtful law corrupts the mind and diminishes access to the truth. As a form of a corrupt law, it loses its content and meaning in the practical order of things, and distorts its relation to social reality. It brings into play a plurality of interpretations and misinterpretations, leading to ineffectiveness and inapplicability. A doubtful law distorts the communication between the signifier and the signified to an extent that it sterilizes the intended order. It diminishes the intellectual operation of understanding its genuine meaning and its subsequent application, especially when it is a question of granting justice to the rightful person.

An objective doubtful law is a kind of unjust law, and should not oblige in conscience⁸⁸ because it may not produce the proper juridical effects. It may directly or indirectly, harm the rights of the community or persons who ought to benefit from its positive effects. It may disorder and harm the community as far as laws are supposed to order the social rapport of the members of the community for the sake of their common good. It may throw one’s meagre power of just judgement off balance and hinder the noble process towards rendering justice. Because a law is as a measure, it has to be certain.⁸⁹ The certainty is an existential nature of the law in relation to reality and the social order, without undermining the aspect of promulgation. There must be perfect conviction and great moral certainty that laws are unjust before affirming that they do not oblige.⁹⁰

Other doctrines hold that when an unjust law is doubtful, there is need to maintain the presumption in favour of the legislator because the possession of a higher right to establish laws is due to the authority of the office. The legislator may have a higher or different point of view (general view) other than what the subjects may have; and the subjects may take greater advantage of not obeying the laws.⁹¹ In any case, the legislator

⁸⁶ Cf. S. Thomas Aquinas, *Summa Theologie* (= S. Th.) (Venetiis: ex officina Gasparis Bindoni, 1585), I-II, q. 95, a.3.

⁸⁷ Cf. S. Th., I-II, q. 90, a.1.

⁸⁸ Cf. S. Th., I-II, q. 96, a.4.

⁸⁹ Cf. S. Th., I-II, q. 19, a.4: “mensura (seu lex) debet esse certissima.”

⁹⁰ Cf. S. Th., I-II, q. 96, a.4.

⁹¹ Cf. Nicolaus TUDESCHI [PARNOMITANUS], *Abbatis Panormitani Commentaria*, Vol. VI, *Commentaria in tertium decretalium librum* (Venetiis: Iuntas, 1582), cap. *Cum in Ecclesiarum*, n. 14;

should uphold the moral and juridical responsibility by promulgating manifest and just laws.

In fact, in the doctrine of Francis Suárez the value of a law does not only depend on the *actus voluntatis* of the legislator (voluntarism),⁹² but on *iustae et rectae* in an axiological objective order. If this value is *vacante*, then law does not oblige because injustice is a sufficient reason for the nullity of laws.⁹³ For a law to demand an obligation, it should be just and instituted justly.⁹⁴ A law needs to conform to reason, and it cannot conform to reason unless it is just from all points of view.⁹⁵ He gives two reasons why laws should conform to reason: for respect to the subjects or the community to whom the laws are destined, and for the respect to the law itself.⁹⁶ He maintains that unjust laws even if commanded by the legislator are not laws because a law that does not possess justice or honesty is not a law, and therefore, does not oblige.⁹⁷ Suárez further teaches that doubtful laws “quia onus inutile nec aequum, nec justum est.”⁹⁸

In defence that a doubtful law cannot produce a certain and clear obligation, St. Alphonsus Maria de Liguori argues that a law is a measure. A doubtful law is not a law, and is not a measure, because every measure needs to be certain, precise and clear. A doubtful law does not oblige

Felinus Maria SANDEO, *In decretalium libros V* (Venetiis: Iacobum Picaiam, 1570), cap. *De Constitutionibus*, nn. 60ff; Franciscus de VITORIA, *Relectiones theologicae* (Lugduni: Expensis Petri Landry, 1586), cap. *De Potestate Papae et Concilii*, n. 18; Ferdinandus de CASTRO PALAO, *Operis moralis*, vol. I (Lugduni: Sumptibus Guilielmi Barbier, 1656), cap. 5; Ioaness de TORQUEMADA, *Gratiani decretorum libri quinque secundum Gregorianos decretalium libros*, vol. I (Romae: Typis Polyglottis Vaticanis, 1726), cap. *Sententia*, 11, q. 3, concl. 6-9; Franciscus SUÁREZ, *De legibus*, I.9.11.

⁹² Suárez concept of *voluntarism* can also be found in many publications or articles such as in Jacques DE BLIC, “Le Volontarisme Juridique chez Suárez,” *Revue de Philosophie*, XXX (1930): 213-230; Émile JOMBART, “Le Volontarisme de la Loi d’après Suárez,” *Nouvelle Revue Théologique*, LIX (1932): 34-44.

⁹³ Cf. Franciscus SUÁREZ, *De legibus*, I.9.10: “quod vero haec iniustitia sufficiat ad nullitatem legis, affirmat expresse d. Thomas, dicens tales potius esse violentias, quam leges, et ideo non obligare in conscientia.”

⁹⁴ Cf. *ibid.*, I.9.1.

⁹⁵ Cf. *ibid.*, I.9.7.

⁹⁶ Cf. *ibid.*, I.9.2.

⁹⁷ Cf. *ibid.*, I.9.4. The thoughts of Suárez need an attentive analysis. He talks of the non-obligation of unjust laws. Unjust laws do not oblige, not because they are doubtful, but because they cannot grant a required necessary justice. It seems that Suárez implicitly states that doubtful laws, if they are just, then they ought to bind. He brings to light the notion that a doubtful law does not necessarily mean an unjust law.

⁹⁸ *Ibid.*, VIII.30.22.

because one of the principles of a manifest law is *legare*. If the law has to bind, then it follows that it plays a very important role in human liberty and freedom. In order that law should bind liberty, it should be objectively certain and just. Therefore, uncertain, doubtful, obscure and unjust laws do not bind.⁹⁹

Alphonsus, therefore, develops a thesis relating to law and liberty under the principle that “in dubio legis, possidet libertas,” which leads to the affirmation that “lex dubia non obligat quia in dubio legis possidet libertas,” which implies that “lex ut obliget debet esse sufficienter intimata.” He uses the term “intimata” to refer to the promulgation of a law and teaches that a law cannot oblige unless it is promulgated, certain, applied, and manifest.¹⁰⁰ He explains that “lex vero, ut obliget, non tantum promulganda est, sed etiam promulganda ut certa” because “si promulgatur lex dubia, promulgabitur dumtaxat dubium, opinione, sive quaestio an adsit lex prohibens actionem, sed non promulgabitur lex.”¹⁰¹ A law that lacks sufficient promulgation cannot demand an obligation. He further states that “lex incerta non potest certam obligationem imponere,”¹⁰² and defends this thesis that “in dubio, nullus praesumitur obligatus,”¹⁰³ recalling the *regulae iuris* “cum sunt partium jura obscura, reo favendum est potius quam actori.”¹⁰⁴

In the doctrine of Joseph D’Annibale, for a law to be sufficiently promulgated it must be certain and manifest because uncertain or doubtful laws do not command obligation.¹⁰⁵ D’Annibale, influenced by the doctrine

⁹⁹ Cf. Alphonsus Maria de Liguori, *Confessore diretto per le confessioni della gente di campagna* (Venezia: Remondini, 1764), 506; IDEM, *Dell’uso moderato dell’opinione probabile* (Torino: G. Marietti, 1765), 63-64. St. Alphonsus Maria de Liguori teaches that “in dubio legis, possidet libertas” which leads to the logical affirmation of “lex dubia non obligat quia in dubio legis possidet libertas” and maintains, “lex ut obliget debet esse sufficienter intimata.” He uses the term “intimata” to refer to the sufficient promulgation of law, and teaches that a law cannot demand obligation unless it enjoys sufficient promulgation and just application to concrete realities.

¹⁰⁰ Cf. IDEM, *Delle cerimonie della Messa: Apologia della teologia morale* (Bassano: Remondini, 1769), n. 18, 221: “la legge per obbligare deve essere *conosciuta*; che niuno vien legato dal precetto, se non per la *scienza* del precetto; che la legge per obbligare deve esser *certissima*; che non siam tenuti di conformarci alla divina volontà se non quando ci è *manifestata* per mezzo dei precetti, non possono altro significare che la legge non obbliga se non quando è *conosciuta*, se non quando è *certissima*, se non quando se ne ha la *scienza*, se non quando è *palesata*.”

¹⁰¹ IDEM, *Theologia moralis*, Lib. I (Mechliniae: P. J. Hanicq, 1803), tract I, cap. III, n. 58.

¹⁰² *Ibid.*; cf. IDEM, *Confessore diretto per le confessioni della gente di campagna*, 506.

¹⁰³ IDEM, *Theologia moralis*, Lib. I, tract I, cap. III, n. 58.

¹⁰⁴ *Reg.* 11 in VI^o.

¹⁰⁵ Cf. Iosephus D’ANNIBALE, *Summula Theologiae Moralise (=Summula)*, vol. I (Romae: De Propaganda Fide, 1891), n. 162, 151: “ut lex sufficienter promulgate, debet esse certa et manifesta:

of Alphonsus, teaches that “lex incerta non potest certam obligationem inducere.”¹⁰⁶ He expressly states that a doubtful law does not produce an obligation because “lex dubia non obligat.”¹⁰⁷ However, in the doctrine of Alphonsus the application of the adage “lex dubia non obligat” is not a law, but only acts as a reflex or as a response to a particular situation of doubt of law.¹⁰⁸ Without prejudice to the defects that may exist in some of these doctrines, they give light towards the authentic source of the canonical norm about *dubium legis* and lack of obligation, even if none of them is enjoys an explicit mention as a possible source.¹⁰⁹

CONCLUSIONS

a) The codification of the canonical rule about *dubium legis* and lack of obligation appeared for the first time in the 1917 code, canon 15. Peter Gasparri expressly inserted the text of this law in the working document around 1912. The reserved manuscripts in the Vatican Secret Archive reveal that the text, apart from its insertion much later in the working document, also lacked concrete contributions from plenary sessions, experts or individual contributors. It gives an impression that Peter Gasparri used his authority, and influenced the codification of the rule about *dubium legis*.

quamobrem, si non constat de existentia legis (lex incerta), vel legis sententia obscura est (lex dubia), et re diligenter explorata, in priori casu non appareat legem extare, in posteriori quatenus sit legis sententia, cessat legis obligatione: inde axiomata lex incerta non potest certam obligationem inducere; lex dubia non obligat.”

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Cf. Robertus PHILIPPOT, *De dubio in jure praesertim canonico seu in canonem decimum quintum codicis juris canonici: notae historicae, doctrinales et exegeticae* (Brugis: C. Beyaert 1947), 24: “in tractatibus de Legibus et praesertim de Conscientia, principium seu potius adagium: *lex dubia non obligat*, non apparet ut *primum principium* sed *reflexum*.”

¹⁰⁹ Cf. Roger VIAU, *Doubt in canon law* (Washington, D.C.: The Catholic University of America Press, 1954), 40: “his position [Suárez] became the one that was later to be adopted in the Code of Canon Law.” Cf. *Ibid.*, 49: “that he [Alphonsus Maria DE LIGUORI] achieved a large measure of success is clearly borne out by the Code of Canon Law.” Cf. Eduardo BAURA, *La dispensa canonica dalla legge*, 70: “sta di fatto che hanno avuto influsso decisivo sulla dottrina posteriore, che si è manifestato da ultimo nelle scelte redazionali del Codice piano-benedittino.” See the works of Alphonsus Maria, Franciscus SUÁREZ, Bartholomeo MEDINA, Thomás SÁNCHEZ and even *post codicem* publication of Adolphe Alfredus TANQUERAY, *Synopsis theologiae dogmaticae ad mentem s. Thomae Aquinatis hodiernis moribus accommodata*, vol. II, *Theologia moralis fundamentalis* (Parisiis: Desclée, 1931), 413.

b) To some extent, the codification of this law, without associating it to any source (*fontibus carentes*), seems to have gone against the objective of the codification, which was to conserve, in general, the existing discipline and doctrine, unless it introduced appropriate changes. Strictly, the objective of the codification of the 1917 code was not a question of creating new laws, but rather of presenting the existing legislation in a new fashion, taking into consideration the canonical tradition.

c) Irrespective of its *fontibus carentes*, the rule about *dubium legis* seems to have gained a great influence from moral principles or maxims such as “lex dubia lex nulla,” “lex dubia non obligat,” and “in dubio libertas.” Consequently, these maxims might have been influenced by some *regulate iuris* such as “odia restringi et favores convenit ampliari,” and “in dubio melior est conditio possidentis.” Taking into account the significance of these *regulae iuris*, the main rule of law, which can be considered as the engine that drives the principle of *dubium legis* and its implications in the canonical context, is: “in obscuris minimum est sequendum” because “utile non debet per inutile vitari.”

d) In fact, even prior to the promulgation of the norm about *dubium legis* in the 1917 code, there existed some rules of law about resolving doubts. An example of un-codified rule of law was *in obscuris minimum est sequendum*. Aware of the doubts that may exist in any human legislation, there was an inclination towards this moral principle. However, it did not hinder the traditional recourse to the legitimate authority for an authentic interpretation of doubtful laws.

e) Without prejudice to the authority of the legislator, whereby under some conditions he can promulgate a moral law and demand its juridical obligation, the nature of the code is not to respond, by all means, to some questions that are purely of moral nature and can be morally justified without necessarily codifying them in a legislative text. To this extent, the codification of the rule about doubt of law and lack of obligation was, in a way, influenced by some positivistic inclination which intended to respond to all possible canonical questions to an such extent that *quod non est in codicis non est in mundo*.

f) The codification of the rule on *dubium legis* and lack of obligation poses one of the major challenges in determining the limits and extents of the moral obligation and the juridical obligation when a subject faces juridical doubt. Each case of doubt calls for prudence, *sub ratione iustitiae*. The objectivity and rationality of doubt should first be determined case by case

before arriving at the conclusion that a doubtful law do not bind. Aware of the implications of the application of this norm, Peter Gasparri fell in the trap of juridical generalization by codifying this rule, especially when it comes to its moral and juridical obligation of the rights of third parties.

In fact, the kind or nature of doubt intended in the text of the law, as found in the code, is strictly a doubt about law in terms of *lex*. This does not deny that in some cases there could also be a doubt about rights. Therefore, it is plausible to apply the term *dubium legis*, rather than *dubium iuris*, and to specify that *dubium legis non obligat in casu* because it calls for a diligent study of the doctrine about *dubium legis* and its application, case by case. Nevertheless, in the application of this law, it is necessary to determine, with moral certainty, the elements or effects that call for juridical obligations, and those that call for moral obligations without necessarily being juridical.

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ŹRÓDŁA NORMY DOTYCZĄCEJ WĄTPLIWOŚCI PRAWNEJ
ORAZ BRAKU OBOWIĄZKU – KAN. 14

Streszczenie

W prawie kanonicznym wątpliwość prawna jest jednym z warunków, w jakich prawo kościelne nie obowiązuje. Pojęcia zawarte w tekście ustawy zarówno w kanonie 14 KPK, jak i kanonie 1496 KKKW stanowią jedną rzeczywistość wątpliwości z dwóch aspektów prawnych lub faktycznych. Wątpliwości prawnej kodeksu nie obowiązuje, nawet unieważniające i uniezdalniające. Jeśli wątpliwości są natury faktycznej, prawo obowiązuje, ale właściwe władze mogą od niego dyspensować. Autor w swoim artykule koncentruje się na historycznym kontekście powyższej reguły.

Słowa kluczowe: prawo kanoniczne; prawo kościelne; wątpliwości prawne.