

OIKONOMIA AND CUSTOM IN THE CANONICAL COMMENTARIES OF
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Oikonomía in Orthodox Canon Law shares a family of meanings and represents an overlap of philosophical and theological terms, rhetorical techniques and multiple canonical appropriations. Attempts to study and define the meaning of *oikonomía* have so far focused on *oikonomía* as a technical legal tool seen through the lens of similar legal tools existing within and outside of Eastern Canon Law. Both external and internal perspectives have been influenced, and to some extent contaminated, by such a comparativist approach. The present text draws on existing scholarship which examines the multiplicity of meanings of *oikonomía* and argues that it is critical to understand the interdependence of this plurality of usages in order to understand and define the meaning, the role and the place of *oikonomía* in Eastern Canon Law. The text proposes that an examination of the multiplicity of usages of the term of *oikonomía* may have produced a particular category mistake in modern Canon Law by using *oikonomía* as a substitute for custom and argues that a recalibration of a robust understanding of the interplay of law and custom and the place of *oikonomia* within the context of this interplay is a critical element in any recalibration of modern Orthodox Canon Law. The text examines how this dichotomy has operated in the Canon Law of the twelfth century and proposes that, despite overlaps, without a clear understanding of the difference between the strictness of law and custom as sources of positive law on the one hand, and strictness and *oikonomía* within an act of judgment on the other, the use of *oikonomía* risks losing its relevance in a contemporary Orthodox context and beyond the Orthodox context.

The process of appropriation of *oikonomía* as a technique of legal and theological reasoning begins with the patristic authors from the fourth century onwards who appropriate the intellectual strategies of late antiquity and widely interpret *oikonomía* as a key to obscure scriptural passages – those refer to morally dubious acts ratified by divine or apostolic authority, an ordering which compromises with the needs of the concrete reality, departure justified or justifiable by utility or by the compassion for the deviations and human limitations¹.

Oikonomía is seen in a relationship with another principle, similar but not identical – *συνκατάβασις* the divine condescending over the individual imperfections, it is compared to offloading the ship's cargo sailing into the storm in order to save the ship², as a penitential healing which has the capacity to transcend beyond the prescribed penitential rules³.

¹ Cf. C. CUPANE, Appunti per uno studio dell'*oikonomia* ecclesiastica a Bisanzio, in: *Jahrbuch der Österreichischen Byzantinistik* 38 (1988) 53-73.

² Cf. *ibid.*, 55.

³ Cf. *ibid.*, 55.

One way or another in the period between the fourth and the fourteenth century *οικονομία* emerges in a variety of Byzantine theological and canonical texts where the application of *οικονομία* constantly in penitential terms, imperial privileges and in the sense *συνκατάβασις* which transmits the imitation of the divine philanthropy which is reproduced at a human level through the salvific act of Redemption constantly overlaps. The terminology in those cases remains constant and relates *οικονομία* to terms such as *φιλανθρωπία*, *συμπάθεια*, *συμπεριφορά*, and *συνκατάβασις* usually in combination with medical metaphors referring to the healing dimension of penitence⁴. And this is the intellectual context which is embedded in the canonical commentaries of the twelfth century.

By the fourteenth century the discourses relating to *οικονομία* change. The Byzantine church in thirteenth-fourteenth century faces new situations and responds to new realities on levels of ideology, administration and administration of justice. In such a context it becomes critical to heal conflicts with the necessary flexibility without compromising an already precarious situation.

Dealing with a collapsing imperial legal system due to Latin or Ottoman invasions and constant disappearances or transfers of episcopal sees and with other aspects of changing ecclesiastical geography required a greater deal of flexibility and new “un-orthodox” approaches. This is the period of gradual departure from the already discussed multi-layered approach, which was able to marry theology, Canon Law and civil law. The new realities made the exercise of *οικονομία* a central technical feature of administration of justice and this is evident from rich material contained in the Acts in the Register of the Ecumenical Patriarch of Constantinople.

The Acts of the Patriarchate of Constantinople in the thirteenth century represent the use of the term *οικονομία* to designate a measure in the absence of any substitute so to speak of a “technical” metaphor used by the Church as a way of prudent administration driven by objective necessity. In the works of Philotheos Kokkinos for example *metathesis* becomes an authentic method of ecclesiastical administration which refers not simply to utilitarian or opportune, but to just or legitimate judgment (*κατὰ τὸν δίκαιον λόγον*)⁵.

This evolution of the canonical and theological concept is substantively determined by the progressive deterioration of the situation on the ground. In the face of the disappearance of central institutions and crumbling of the entire integrity of the Empire *οικονομία* is understood primarily and almost entirely as dispensation, a means to get by in difficult moments. In such cases one could always abandon the opposition *οικονομία-ἀκρίβεια* in favour of *οικονομία*. At this stage *οικονομία* perhaps does become the technical term to define the operation of ecclesiastical politics evident in some of the above mentioned modern ecclesiastical ordinances dealing with *communicatio in sacris*. And in this context with a collapsed imperial legal system the demarcation of *οικονομία* within the

⁴ *Ibid.*, 59-61.

⁵ F. MIKLOSICH – I. MÜLLER, *Acta et diplomata Graeca medii aevi sacra et profana collecta I* Wien, 1860, 465, 4.6 (Nr. 208).

context of balancing between law and custom is gradually fused and *oikovoμία* becomes a “custom”, a form of a “transitional justice” grammar in the face of failing legal structures.

In this context it will be perhaps fair to say that towards the end of fourteenth century *oikovoμία* has evolved and has acquired a very technical and pragmatic legal canonical usage and has gradually evolved from a highly sophisticated and multilayered theological concept to an obscure technical canonical device.

I. Law, Custom and Oikonomia – Balsamon’s Consolidation of Theology and Canon Law of the First Millenium

The above overview of different conceptions of the concept of *oikovoμία* in a Byzantine context makes the commentaries of the twelfth century canonists particularly relevant. Without a clear idea of how *oikovoμία* played a part in the legal reasoning of Orthodox Canon Law and its interplay with fully functioning system of civil law it will be virtually impossible to assess the evolution of *oikovoμία* as a canonical concept. In this respect Balsamon’s commentaries are particularly significant because of the way they are shaped by a continuous cross-referencing between the civilian systematic legal approaches proposed by the Nomocanon of 14 Titles and the more chronological approaches of the Syntagma which he has commented alongside Aristenos and Zonaras. This remains the only context in which the usage of *oikovoμία* reflects the complex interplay between canon law and fully operational system of imperial civil law. It is the only comprehensive attempt to chart the interplay the relationship between *nomos* and canon and the use of *oikovoμία* is central to the negotiation of this interplay.

Balsamon’s commentaries of the Nomocanon of 14 Titles and the Syntagma remind us that *oikovoμία* did not preoccupy the concerns of the twelfth century canonists who certainly referred constantly to the exercise of discretion but were very reluctant to articulate in a more didactic way how this discretion is to be exercised. Balsamon has grounded the usage of *oikovoμία* in his commentaries with a specific qualification that balancing between judgment and mercy is not something commentators do and it is only the judges who have the gift to do so.

Balsamon does not discuss in great detail the application of *oikovoμία*. After all the purpose of his commentaries is to illuminate substantive law and not to present a primer on how to judge, particularly how to exercise penitential justice. In fact in the Preface to the Council of Gangra Balsamon raises a striking caveat about lighthearted attitude to executing severe ecclesiastical judgments. Referring to cc. 2 and 7 of the Council of Chalcedon which outline various grounds for pronouncing anathemas Balsamon launches out of the blue into an extensive quote from St. John Chrysostom. The passage is a primer for every canonists tasked with the responsibility to balance between applying harsh canonical provisions and to balance between rigour and mercy:

“The Golden Mouth and a Doctor of the Universe alas saying that a believer must not be condemned to *anathema* teaches literally thus: What does this word *anathema* pronounced by you mean but that one must be offered to the Devil, that there is no longer place for salvation and that he is alien to Christ? And who are you? This is a task of power and of a great authority. It is the King who will one day sit and set the sheep to the right and the goats to the left. So why did you then decide to receive upon yourself such an honour? [...] What then? You dare to do this despite the divine ordinances and accept upon yourself to judge like the King, something no one amongst the realm of powers has done, apart from the One Who has? Because the *anathema* completely severs from Christ – teaches of obedience etc. [...] So should that written by the great Father and our Doctor Chrysostom have greater authority than the canons of the Councils of Chalcedon and Gangra? This of course will decide those who have power and have to resolve such questions”⁶.

This passage puts in a particular context Balsamon’s numerous references to *οικονομία* linked either with the metaphor of healing or with the idea of custom and provincial practices⁷. However *οικονομία* is not to be applied leniently and with the full awareness of the challenges of balancing between law and its relaxation.

The reason Balsamon is central for the understanding of the evolution of *οικονομία* is to do with the fact that by the 12th century the interchanging usage of *οικονομία* – *συγκατάβασις* – *συμπεριφορά* is complete and solidified and represents a complex evolution of theological conventions and their incorporation in the revised canon and civil law of the twelfth century. Both Theodore Balsamon and Johannes Zonaras in their commentary of c. 4 of St Gregory of Nyssa use the obsolete term *συμπεριφορά* = indulgence as a synonym to *συγκατάβασις* and *οικονομία*⁸. This penitential dimension of *οικονομία* encapsulates as we have seen in the middle Byzantine period does not abolish but rather incorporates and reaffirms the original accession of *οικονομία* as derogation. While commenting on the special disposition of the council of Ephesus from the point of view of terminology *οικονομία* is used alongside with *συμπάθεια* with identical nuance of significance⁹. The utility (τὸ χρήσιμον), however, that alone justifies in the eyes of the canonist the dispensation, and slipped decidedly from the general plan to that

⁶ G. RHALLES – M. POTLES, *Σύνταγμα τῶν θεῶν καὶ ἱερῶν κανόνων* II, Athens 1852, 3;100.

⁷ Some of those included commentaries on c. 30 Trullanum: cf. *ibid.*, 370-371; c. 61 Trullanum: *ibid.*, 444-447; c. 14 Nicea II: *ibid.*, 616-619; c. 19 Nicea II: *ibid.*, 632-636; cc. 2, 4 and 7 Ancyra: *ibid.* III, 36; c. 15 Ancyra: *ibid.*, 51-52; c. 16 Ancyra: *ibid.*, 54-56; c. 3 Neocesarea: *ibid.*, 74-75; c. 21 Gangra: *ibid.*, 418-419; c. 3 Laodicea: *ibid.*, 174; c. 5 Sardica: *ibid.*, 241-242; c. 12 Nicea I: *ibid.* II, 142-143; c. 18 Nicea I: *ibid.*, 155-158 etc.

⁸ Cf. RHALLES – POTLES, *Σύνταγμα τῶν θεῶν καὶ ἱερῶν κανόνων* IV, Athens 1854, 311, 10-12 (Zonaras); 312, 24-26 (Balsamon): „τοῖς ἀσθενεστέροις τῶν ἁμαρτανόντων γενέσθαι τινὰ παρὰ τῶν Πατέρων συμπεριφορὰν, ἧγουν οἰκονομίαν, συγκατάβασιν”.

⁹ Cf. RHALLES – POTLES, II (= fn. 6), 214, 4-6.

of the particular which has something to do according to Cupane as a result of the penitential coloring of the concept of *oikovoμία* in this period¹⁰.

There is however another aspect of the development of the concept of *oikovoμία* in the twelfth century which is very important for the present discussion. Balsamon's commentaries are a key to understand the inherent interdependence between law and custom and the way contemporary Eastern Orthodox Canon Law may have slipped into a category mistake by blending or merging custom and *oikovoμία*.

Whether one likes Balsamon or not the fact remains that of the three great canonists of the twelfth century Balsamon is the commentator who is more interested in law than any of his great contemporaries Zonaras and Aristenos (both having served a distinguished career as senior lawyers). Balsamon's interest includes a very thorough interest in substantive law as well as case law and his commentaries are the first and perhaps the last comprehensive project which attempts to show the interplay between Roman law and civil law in Byzantium. In my text I use Balsamon as a measure, a yardstick to enable me to see how the diverse accounts of *oikovoμία* in the first millenium have featured in twelfth century canonical commentaries and how these commentaries provide a level of comparison with the ways *oikovoμία* has evolved and has been appropriated in a modern canonical usage.

The first thing which is striking about Balsamon's methodology is the level of fluency of the appropriation of Roman law. Privileges, law and custom of Rome and the provinces and even the rules applying for barbarian lands are themes and approaches with which Roman lawyers are at home. This should not be surprising. After all Balsamon's task to provide a commentary of the Nomocanon of XIV Titles was primarily a Justinianic project. What is relevant to this paper is the way a dichotomy between law and custom which is fairly prominent in Roman law may have played a part in the way the concept of *oikovoμία* and *ἀκρίβεια* is discussed in twelfth century Byzantine Canon Law and the extent to which *oikovoμία* plays a central part in the negotiation of law with custom in Balsamon's commentaries. Like in classical Roman Law Balsamon's concept of custom is largely contingent on a Roman reference to custom not as a source of law but as contextualised local practices. This equitable use of local practices, a civilian-canonical take on what we call today subsidiarity is a central element in Balsamon's reconciliation between the civil law and the Canon Law in the Nomocanon of XIV Titles and also plays a central part in articulating the modes of operation of civil and Canon Law along the lines of punishment and healing. The dichotomy of strictness of law and custom plays a central part in justifying differences between the application of civil and Canon Law in Rome and in the provinces, between the rules of episcopal elections in Rome and the "barbarian lands" and between local ecclesiastical practices regarding sacraments and reception of repentant heretics. As a broader methodological strategy custom in Balsamon's commentaries is an evolving contextualised normative application.

¹⁰ Cf. CUPANE, Appunti (= fn. 1), passim.

The Trullan dichotomy of ἀκριβεία and οἰκονομία¹¹ in Balsamon's commentaries is moved across and grounded in the civilian technical language of Roman Law. Strictness of substantive law and its relaxation operate in his legal commentaries and indeed could operate in any other commentaries of substantive rules within the dichotomy of law and custom, within the margins of universality and subsidiarity of substantive legal norms. And the role and the place of οἰκονομία as an act of judgement appears to be the sacramental hermeneutic approach which adjudicates between the strictness of substantive law and custom on the one hand and between just and unjust customs on the other. Interestingly enough the multiple references to οἰκονομία or discretion, healing and compassion in Balsamon's commentaries do not tell us what οἰκονομία is. Balsamon leaves οἰκονομία to the judge and only offers the margins which have to be considered in any act of judgement – the tension between law and custom and the context as factors to be considered in any judgment.

In this methodological framework οἰκονομία is not simply a local custom but a unique sacramental way central to delivering a judgment which has to take into account the tensions between written law and local practices.

With the collapse of imperial structures and the legal framework based on Roman law custom and οἰκονομία appear rather concocted and οἰκονομία increasingly resembles a customised application of canonical rules. This is certainly the way ἀκριβεία and οἰκονομία are articulated in the Pedalion and in contemporary Orthodox practices. For example the notion that a second and third marriage are allowed by virtue of οἰκονομία may suggest that οἰκονομία is applied in every case and thus has acquired the status of a precedent. In fact describing this as an established practice which has evolved to allow second and third marriages *but* that οἰκονομία plays an important part, as an act of judgment, to allow second or third marriages in every case without creating precedents makes a lot more sense from canonical and theological perspectives.

Similarly and more so the practice of the recognition of heretical sacraments by virtue of οἰκονομία is even more baffling. If applied as a legal tool οἰκονομία appears to be able to do a lot more than theologians have long agreed οἰκονομία can and cannot do. On the other hand if local practices represent a law of custom applied in a very specific context οἰκονομία in some way plays an important part in validating such custom rather than creating a precedent to treat the validation of all heretical sacraments in a particular way.

In this respect the commentary of c. 102 of the Council in Trullo is crucial. Here the act of judgment administered by a bishop is part of a discussion about strictness of law and custom.

¹¹ C. 37 Trullanum: “Ὅτι γάρ, ὑπὸ τοῦ τῆς ἀνάγκης καιροῦ τῆς ἀνάγκης καιροῦ τῆς ἀκριβείας περιγραφείσης, ὁ τῆς ἀκριβείας περιγραφείσης, ὁ τῆς οἰκονομίας ὄρος περιοπισθήσεται (For, even if strict observance [of the law] is circumscribed by the necessity of the times, the boundaries of economy shall not be restricted)”. The conciliar canons are quoted from the edition of G. NEDUNGATT and M. FEATHERSTONE (ed.), *The Council of Trullo Revisited* (Kanonika 6), Rome 1995, 115-116 (English transl. by M. Featherstone, G. Nedungatt and J. Munitiz).

“Those who have received from God the power to loose and to bind (cf. Mathew 16:19) must consider the peculiar nature of the sin and the readiness of the sinner for a change, and thus apply a suitable remedy to the illness. lest, Exceeding the mark in one or the other sense, he should fail in obtaining the salvation of the one afflicted. For the illness of sin is not simple in nature, but diverse and complex, abounding in many mischievous ramifications, from which the evil spreads further and progresses, until it is slayed by the power of the one treating it. Therefore, he who professes the science of spiritual healing must first examine the disposition of the one who has sinned, and whether he is inclined toward health or, on the contrary, has brought the illness upon himself through his own habits; He must observe how the other conducts his life in the meantime: whether he is not resisting the healer and the ulcer of his soul is not growing worse through the application of the medicines employed; And thus he must measure his mercy accordingly. For the entire concern of God and of the entrusted with pastoral authority is to bring back the lost sheep and heal the serpent’s bite: neither pushing the sufferer to the precipice of despair, nor giving him rein to lead a dissolute or contemptuous life, but by one or another means, be it more severe and astringent medicines, or milder and more soothing ones, to stay the suffering and strive for the cicatrization of the ulcer, examining the fruits of repentance and wisely guiding the man who is called to the splendour on high. As St. Basil teaches us: ‘We must, then, know both ways, that of strict observance and that of customary usage; And in the case of those who are not amenable to strictness, we must follow the traditional model’”¹².

Balsamon links the Roman Law dichotomy of strictness of the law and custom with a quote from St. Basil. Balsamon extracts from this passage an emphasis on the importance of a good grasp of the strict rules as well a good grasp of the rules of custom. Here Balsamon also links custom with mercy and compassion and relates it to tradition and habit witnessed and sealed with the passage of time. The key to this canon is the tension between law and custom and universality and subsidiarity by emphasising the centrality of the role of the local bishop to bind and loose in a particular contextual fashion. The canon is summed up in the following fashion:

“We are obliged to know the strict rules of the canonical penitence and the provisions of the more merciful custom. Sometimes disease is healed with the strict rules when the sick readily receive the penitence and sometimes with the ailments of customary (customised) and more lenient remedies in those cases when the sick are resistant to the acceptance of the penitence. Because it is unlikely that one would resist the measures of custom”¹³.

¹² Cf. RHALLES – POTLES, II (= fn. 6), 549: “Ἀμφοτέρα τοίνυν εἰδέναι ἡμᾶς χρή, καὶ τὰ τῆς συνηθείας ἔπεσθαι δὲ ἀκρότητα τῷ παραδοθέντι τύπῳ”.

¹³ Cf. *ibid.*

It is striking that in this passage Balsamon carefully avoids to use the dichotomy of *οικονομία* and *ἀκρίβεια* which is central to c. 37 of the Council in Trullo. Interestingly enough neither Balsamon nor the other two twelfth century canonists make much of the text of c. 37.

It is also very indicative how central the interdependence between law, custom and *οικονομία* is for the twelfth century canonists. This interdependence is often shaped by what I call the interdependence between universality and subsidiarity in the application of general norms and particular norms applying in the provinces or in situations where Canon Law or imperial civil law cannot be applied due to the presence of a heteronomous legal order. In this context *οικονομία* in its full range (legal, therapeutic, philanthropic) is applied as a way of resolving the tensions between law and custom.

These tensions have entered Byzantine civil and Canon Law from classical Roman Law. To those unfamiliar with the discourses and discussions between Roman and civil law I will flag some of the main premises. Roman jurists do not seem to be concerned with defining a concept of customary law; rather their attention is drawn to particular contexts in which custom comes into play. The ways in which Roman advocates argued from custom were comparable to the ways in which they argued from equity (*aequitas*)¹⁴. Roman treatises on rhetoric regularly list both *consuetudo* and *aequitas* amongst the sources of the *ius civile* available to advocates when seeking to construct (“find”) persuasive proofs for any given case¹⁵. Classical Roman jurists were interested in how to do things with legal customs from within particular given legal contexts and – like Greek and Roman philosophers and rhetoricians – knew of a general distinction between *ius scriptum* and *ius non scriptum*; the latter might refer, for example, to “unwritten law” which was said to derive from the *ius naturale* or the *ius gentium*, but nonetheless operated “within” the Roman *ius civile*¹⁶.

Book 1, title 2.9 of Justinian’s *Institutes* (promulgated 533 AD) seems to provide just such a general “postclassical” definition:

¹⁴ QUINTILIAN, *Inst. Orat.* 4.3.11 and 7.1.63 stresses that advocates need to know when to argue from *aequum* rather than *ius* (Loeb Classical Library, 1920, vol. 2, 127 and vol. 3, 45).

¹⁵ CICERO, *Topica* 5.28: The *ius civile* “is to be found in statutes (*leges*), resolutions of the senate, previous judgments, the authority of those learned in law (the *iusperiti*), edicts of the magistrates, custom (*mos*) and equity (*aequitas*)” (Loeb Classical Library 1949, 400); also: CICERO, *Rhetorica ad Herennium* 2.13.19; (listing nature, statute, custom, previous judgements, bona fides and agreement) (Loeb Classical Library, 1954, 92-92); cf. also C. HUMFRESS, *Law and custom under Rome*, in: A. RIO (ed.), *Law, Custom and Justice in Late Antiquity and the Early Middle Ages* (Centre for Hellenic Studies Occasional Publications 2), London 2011, 23-47; P. STEIN, *Custom in Roman and medieval civil law*, in: *Continuity and Change* 10 (1995, nr. 3) 337-344 (337) notes that Roman treatises on rhetoric “routinely list custom, *consuetudo*, as one of the factors from which law, *ius*, derives”.

¹⁶ Cf., e.g., *Digest* 1.1.1,2 and D. 1.1.6.1 (both excerpted from ULPIAN, *Institutes* book 1): *Corpus Iuris Civilis*, Editio Stereotypa Quinta Decima, vol. I, 1928, 30; and *Just. Inst.* 1.2.10. *Corpus Iuris Civilis*, Editio Stereotypa Quinta Decima, vol. I, 1928, 2.

“Law (*ius*) comes into being without writing when a rule is approved by use. Longstanding custom founded on the consent of those who follow it is just like statute law (*leges*)”¹⁷.

Digest. 1.3.32pr outlines what appears to be a technical set of interpretational guidelines relating to the application of Roman law, in a context beyond the city of Rome. *Digest* 1.3.38 where custom can be used to interpret written statutes where the latter are ambiguous¹⁸. According to Ulpian’s *Commentary on the Praetorian Edict*, taking local custom (*mos*) into account was one way in which equity could be developed with respect to the Praetorian Edict itself. This constant interplay between positive law and custom is shaped by the inherent paradox that on the one hand Roman jurisprudence, as Byzantine jurisprudence, was a technical, specialist discipline that was developed by legal experts and on the other.

“The law is perpetually in a state of flux: not simply in that its rules are repeatedly being changed but that the intellectual structures linking together those rules are always themselves provisional”¹⁹.

In this context custom itself is not static, fixed and bound by “long-standing tradition”, but also fluid, dynamic and pragmatic. We should also note that a reference to “longstanding custom” in the Roman legal sources might not indicate a survival from a “traditional (non-Roman) past” at all, but might rather function as “an integral part of an ongoing asymmetrical order”²⁰.

The second element which articulates the interplay of law and custom and the centrality of *oikonomia* in the articulation of this interplay is the role of rhetorical strategies deployed to do so. In that sense *oikonomia* is as much normative as it is rhetorical and rhetorics in turn become normative through the negotiation of law and custom. In this respect Balsamon’s contextual strategies in his commentaries represent emerging new role of an advocate which is perhaps different from that of a textual commentator of substantive law.

Similar references to *oikovoμία* and its linking with law and custom emerge through the Greek rhetorical and philosophical texts of the Late Antiquity. This

¹⁷ Just. Inst. 1.2.9: “Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur”: *Corpus Iuris Civilis*, Editio Stereotypa Quinta Decima, vol. I, 1928, 2.

¹⁸ D. 1.3.38 (CALLISTRATUS, Questions book 1): “Nam imperator noster Severus rescripsit in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis optinere debere”: *Corpus Iuris Civilis*, Editio Stereotypa Quinta Decima, vol. I, 1928, 34-35. Cf. D. 1.3.33 (ULPIAN, De officio proconsulis book 1) and D. 1.3.37 (PAUL, Questions book 1), which seems to refer to a specific municipal context: *Corpus Iuris Civilis*, Editio Stereotypa Quinta Decima, Vol I, 1928, 34.

¹⁹ D. IBBETSON, What is legal history a history of?, in: A. LEWIS – M. LOBBAN (ed.), *Law and History*, Current Legal Issues VI, Oxford 2003, 33-40 (40).

²⁰ J. STARR – J. F. COLLIER, Historical studies of legal change, *Current Anthropology* 28 (1987, nr. 3) 367-372 (371); cf. also C. HUMFRESS, Law and custom under Rome, in: A. RIO (ed.), *Law, Custom and Justice in Late Antiquity and the Early Middle Ages* (Centre for Hellenic Studies Occasional Publications 2), London 2011, 23-47.

connection between the practice of οἰκονομία as an equitable remedy and language is already apparent in the way οἰκονομία has been used by the rhetorics of 100 BC and would help to make a link between the way οἰκονομία is understood today and the way Balsamon applied οἰκονομία as a hermeneutic tool in his commentaries. The Stoic ethical sense of οἰκονομία as an arrangement of actions or direction of them in accordance with inner purposes which are really often different from what appears to be on the surface becomes clear in authors such as Marcus Aurelius, Hermagoras, Quintilian and Dyonisius of Halicarnassus²¹. Used often in connection with τάξις or disposition οἰκονομία was often referred to as the manner of arrangement of rhetoric following the notion that an oration must be case-specific:

“The most powerful, and what is properly called the most economical arrangement (*oeconomico ... dispositio*) of a case as a whole, is that which cannot be determined except when we have the specific facts before us”²².

The gift of arrangement (*haec oeconomica ... dispositio*) is to the oratory what generalship is to war, i. e. the ability to arrange resources well as a good manager which appears throughout οἰκονομία now applied to rhetoric not just generally, but in regard to the individual parts of oration, too.

“It is not enough merely to arrange the various parts, each several part has its own internal economy (*dispositio*)”²³.

Οἰκονομία is also central for the arrangement or usage of material brought together in preparatory investigation and in some way is even more important than the discovery of the material itself²⁴. It implies a deliberate deviation from the accustomed, natural order in an oration, and seeks to strengthen its case by these very deviations which cover up weak points with strong arguments. *Taxis* differs from οἰκονομία because *taxis* on the one hand is characterised by following of the chief points and by knowing how to use them in accordance with their natural order which one first, or which second; but οἰκονομία on the other hand is characterised by expediency – often the natural order is altered on account of expediency and elements may be rearranged or omitted altogether²⁵.

“Arrangement (διάθεσις) is divided into two parts: τάξις and οἰκονομία. Τάξις on the one hand occurs as I have said, in the area of subject matter, that which is right (τὸ δίκαιον) comes first, then that which is expedient (τὸ συμφέρον) and this is τάξις. But οἰκονομία on the one hand is the changing

²¹ Cf. J. H. P. REUMANN, The Use of Οἰκονομία and related Terms in Greek Sources to About AD 100, in: Ἐκκλησία καὶ Θεολογία 3 (1983) 115-140.

²² QUINTILIAN, The Institutio Oratoria, Book VII: transl. H. E. BUTLER, vol. III, London 1921, 169.

²³ Ibid., 171.

²⁴ W. RHYS ROBERTS, Dionysius of Halicarnassus: The Three Literary Letters, Cambridge 2011, 8 f.

²⁵ Ἀνονήμου προλεγόμενα τῆς ῥητορικῆς, in: Chr. WALZ, Rhetores Graeci vol. 6, Stuttgart 1832, 35.

of the chief elements of expediency (ἡ πρὸς τὸ συμφέρον τῶν κεφαλαίων ἐναλλαγή), as Demosthenes in the oration on the crown, when he was weak as regards legality, but strong with respect to justice; for he arranged first the just part (τὸ δίκαιον), dividing it in two; then the legal part, and after it again, the emphasis on justice (τὸ δίκαιον). And by the aid of the just part on each side he concealed the weakness of the legality of it”²⁶.

Balsamon’s commentaries are profoundly shaped by the dichotomy of law and custom on the one hand and by the above mentioned rhetorical references to οἰκονομία appropriated, fused and transformed by patristic and canonical sources. In some way Balsamon’s commentaries represent the last comprehensive overview of the synthesis of Roman jurisprudence, stoic rhetorics and patristic theology which represent a multilayered approach within which οἰκονομία on the one hand represents a pastoral approach which reconciles the perpetual tension between ἀκρίβεια and custom and on the other relates scriptural and patristic references to οἰκονομία as a Divine stewardship to its canonical application. The commentaries of the twelfth century because of their scope are perhaps the last attempt to relate in such scope canonical and theological perspectives on οἰκονομία. They also mark the beginning of the end of a process which starts in fourth century and comes to a slow closure from the 15th century onwards, a process finally concluded with the Pedalion and St. Nikodemos of the Holy Mountain. In this process οἰκονομία from a mystagogical concept which brings closer together Canon Law, sacramental theology and mystical theology on the one hand and civil law and Canon Law on the other gradually erodes to a technical device to resolve practical problems in the presence of legal, procedural or institutional loopholes. In this process the interplay between law and custom has gradually disappeared and οἰκονομία has taken the place of custom and is articulated along those lines in some of the early modern ecclesiastical statutes referring to the practice of οἰκονομία.

II. Oikonomia and Ecclesiastical and Imperial Privileges

One of the most confusing aspects of the use of the idea of a privilege as a way of alternating the existing legal order in Balsamon’s commentaries has been the use of shared privileges by Emperor and clergy and has been often used as an evidence to pigeonhole Balsamon as the “emperor’s man”. Balsamon regards οἰκονομία Βασιλική to be a faculty of dispensation in ecclesiastical affairs which the Emperor considers to be one of his privileges and presents a complex position of the sovereign against the law and the canons²⁷. A detailed examination of his

²⁶ Ἀνωνόμου προλεγόμενα τῶν στάσεων, *ibid.*, vol. 7.1, 16-17.

²⁷ On complex interdependence between imperial and ecclesiastical privileges within the dichotomy of *nomos* and *kanon* see the brilliant interpretations of D. SIMON, *Princeps legibus solutus*, in: D. NÖRR – D. SIMON (ed.), *Gedächtnisschrift für Wolfgang Kunkel*, Frankfurt 1984, 449-492; H.-G. BECK, *Nomos, Kanon und Staatsraison in Byzanz*, in: *Österreichische Akademie der*

commentaries presents a more complex picture but this is not the time and place to examine Balsamon's take on the Byzantine state. For the purposes of the present examination it could be said that the extension of the exercise of ecclesiastical discretion to the emperor is part of a complex project which lies at the heart of Balsamon's commentaries – how to reconcile civil and ecclesiastical laws and what part privileges to alternate the rule of law play in negotiating such reconciliation. In addressing this aspect the twelfth century canonist has no doubt that these privileges are shared and that the normative order of the Universe is shaped by the Pentarchy of the five ancient patriarchates and the Emperor who project in a “liturgical” act the law of the universe:

“The service of the emperors (αὐτοκρατόρες) includes the enlightening and strengthening both of soul and body: the dignity of the patriarchs is limited to the benefits of the souls, and to that only (for they have little concern with bodily well-being). [...] The most pious emperors and the pentarchy of the most holy patriarchs can be compared to husbandmen standing in the middle of a threshing floor at a harvest time, winnowing away sin like chaff with the winnowing fan of baptism, and gathering goodness like grain; or again they may be compared to compasses which trace accurately the circumference of a circle and illuminate, as it were, the centre with spreading rays of justice; or yet again they may be compared with the masts and sails of a sea-going vessel, guarding and guiding the ship of this world on its way in the strength of imperial prudence and spiritual instruction. Wherefore, if we may compare great things with small, the most God-fearing of the emperors and the more eminent of the Holy Fathers have laid it down as necessary that the heads of the hierarchy should be attended with such circumstance, and that rich and poor alike should be placed on the same footing: to the end that the faithful, when they see this great and reverend solemnity observed for emperors and patriarchs, and for them only, may offer thanksgiving accordingly, as a sacrifice acceptable to the Lord, Who from the middle of the circle of the world's beauty glorifies the defenders thereof; and on bended knees they may pray to the Lord that all the earth on which the sun shines shall rejoice in the light of imperial victories, and all the goings of this world shall be made to shine by the prayers of the patriarchs”²⁸.

The first thing that strikes in this passage is the liturgical imagery and language in this passage. In a way this text is more central for the understanding of the place the concept of pentarchy plays in Balsamon's overall concept of juristic theology than for example his interpretation of conciliar canons referring to pentarchy. It highlights a very important aspect of Balsamon's interpretation namely the fact that he views pentarchy not so much as a historical reality but rather as a permanent feature of the life of the church which integrates the

Wissenschaften, Philosophisch-Historische Klasse 384, Wien 1981, 1-60; G. DAGRON, *Emperor and priest: the imperial office in Byzantium*, Cambridge 2003.

²⁸ THEODOROS BALSAMON, *Τοῦ ἀγιωτάτου πατριάρχου Αντιοχείας Θεοδώρου μελέτη ἡγουν ἀποκρισις, χάριν τῶν πατριαρχικῶν προνομίων*: PG 138, 1017; 1020.

mystical as well as physical aspect of the ecclesial gathering as the centre of both life and governance of the Christian community. Being together in Christ is for Balsamon not different from being together as ecclesiastical government. The liturgical as well as the historical aspect of pentarchy thus blend together in a way that the only relevant historical perspective of pentarchy becomes its eschatological perspective which emanates through its liturgical character. And more importantly the normative privileges deployed to sustain such a normative order are shared privileges.

The above sketch served the purpose of highlighting the usage of οἰκονομία in a specific canonical context which reflects the interdependence of canonical and other usages of οἰκονομία – theological, rhetorical, exegetical. Approached through the lens of fully functioning and integrated canonical tradition in the twelfth century the use of οἰκονομία in a canonical context not as an antithesis of ἀκρίβεια but as a sacramental hermeneutic tool which is deployed to link and in some way fuse and overlap οἰκονομία as a sacramental canonical exegesis with its theological content by negotiating the margins between strict law and emerging local practices which have acquired a normative standing. Revisiting this authentic approach to οἰκονομία is not simply an exercise of canon law history. It flashpoints not simply a stage of the evolution of a particular canonical concept. It demarcates the margins of a distinct canonical culture emerging as an exegesis of c. 37 of the Council in Trullo through a complex synthesis between the conventions of Canon Law, civil law and theology – a canon law culture which largely disappears with the collapse of the Byzantine Empire. Today this synthesis sheds a new light to the established practices of οἰκονομία of local Orthodox churches. Seen through the lens of the post-fourteenth century application of οἰκονομία these practices outlined in ecclesiastical ordinances are confusing. They refer to οἰκονομία but in their references οἰκονομία sounds like a form of positive law which is an alternative to ἀκρίβεια. This is clearly problematic since all modern Orthodox canonists writing on *oikonomia* state that οἰκονομία cannot create a precedent. In addition the application of οἰκονομία to *communicatio in sacris* is deeply confusing and begs some serious examination. In the light of all this the revisiting of the Byzantine law of the twelfth century does not present easy answers, but it certainly offers hermeneutic perspectives which offers different understanding of the modern application of οἰκονομία. If we approach the modern applications of οἰκονομία through the lens of the law – custom dichotomy will then have a picture which is perhaps less confusing. Addressing the current approaches to *communicatio in sacris* presents a dichotomy between ἀκρίβεια and local ecclesiastical custom and οἰκονομία seen through the lens of the twelfth century canonists is the sacramental exegesis which deals with the “vagueness of law” in each particular case and does not establish the custom that all similar cases should be resolved in the similar fashion (which the existing ecclesiastical ordinances suggest). This means that second and third marriage or validation of heretical sacraments is not done by virtue of οἰκονομία but by virtue of local ecclesiastical custom (which may even be confirmed by local ecclesiastical laws) and οἰκονομία is the means of resolving the tensions between the law of the

Orthodox Church and the local practices. This is a terribly important source of reclaiming an authentic scope of the application of οἰκονομία rather than arguing that οἰκονομία has simply become something else (and lesser) through its historical evolution. Reconnecting to this multilayered and complex understanding of οἰκονομία which captures the synthesis of canonical and theological perspectives of the First Millennium is a crucial step to reclaim the true scope of οἰκονομία and make it equally relevant for the two lungs of the Church. Now that we are approaching another great council of the church revisiting the scope of this exercise has never been more urgent. For οἰκονομία will not become more effective through committees and agreed definitions, but through a revival of a genuine and vibrant canonical legal culture.

Reflecting on the theological significance of Gallagher's comparative study of Canon Law in Rome and Byzantium one of the greatest canonists and periti of the Vatican II generation Ladislav Orsy who also contributed some most insightful reflections in οἰκονομία in his career highlights the failure of Vatican II to marry its theology and law:

“In the thirties and forties of the last century numerous continental theologians, sensing the need for church renewal, turned to the past and sought inspiration for a ‘true reform’ in the early understanding of revelation. Their efforts bore fruit, and the tradition once again revealed its riches. The searchers’ new insights into old truths sent a fresh wind through the Church, and the movement they instigated became known – paradoxically-as *la nouvelle theologie*. The seemingly new ideas provoked resistance, however, and many scholars suffered sanctions, but the hard times did not last long: through the initiative of the humble Pope John XXIII, the ‘new theology’ became a wellspring for Vatican II.

There was, however, no such parallel movement in the field of canon law. Not that there were no historians: there were, and they did excellent work in reporting about past laws and rules. But hardly any did it with the intention of seeking inspiration in old structures and norms for the purpose of renewing the present ones. Consequently, little effort was made by Vatican II to assure that its *aggiornamento* in doctrinal insights would be followed by appropriate legislation. The result is an imbalance in our contemporary Church. We have progressed in our understanding of the mystery of the Church, but our structures and norms have not kept pace. We profess that the Church is a *communio*, but we tend to give the laity a lesser role in decision-making than ever before. We proclaim that the Apostles were called to form a college, but there is little room for the exercise of episcopal synodality. We extol the dignity of the local churches but we see them reduced to a uniformity through expanding centralization. In all such practical matters that demand new structures and laws we tend to ignore or reject venerable traditions honored in the early centuries by ‘the saints’ – popes, patriarchs, bishops, and laity. The community is torn by tensions: we suffer for a lack of harmony between our vision and our legislation. We long for ‘tranquility of

order,' but we shall find it only when, in an orderly way, our practices follow our insights"²⁹.

An overview of οἰκονομία in Balsamon's commentaries compared with its contemporary appropriations reminds us of the possible danger of oversimplifying a complex intellectual legacy and of an opportunity to rediscover authentic hermeneutic approaches through οἰκονομία which might be shared by the canonical traditions of the Christian East and West. Perhaps both traditions can learn from οἰκονομία as the means of achieving the tranquility of order of which Father Örsy speaks and treat οἰκονομία as a gift of the Holy Spirit rather than as a problem which has to be resolved. And this would no doubt have different forms or ways for the "two worlds of vision, two radically differing methods of approach"³⁰ to reclaim our shared canonical tradition of the Council in Trullo.

²⁹ L. ÖRSY, Review of Church Law and Church Order in Rome and Byzantium: A Comparative Study by Clarence Gallagher, in: *Theological Studies* 64 (2003) 185.

³⁰ IDEM, In search of the meaning of oikonomia: report on a convention, in: *Theological Studies* 43 (1982, nr. 2) 319.