

CELEBRATION OF CATHOLIC MARRIAGES IN INDIA

by

John Maliekal.

A dissertation submitted to the Faculty
of Canon Law, Saint Paul University,
Ottawa, Canada, in partial fulfillment
of the requirements for the Degree of
Doctor of Canon Law



Ottawa, Canada, 1983

UMI Number: DC53470

INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

UMI[®]

UMI Microform DC53470
Copyright 2011 by ProQuest LLC
All rights reserved. This microform edition is protected against
unauthorized copying under Title 17, United States Code.

ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

ACKNOWLEDGEMENTS

I wish to express my deepest gratitude to all those who made it possible for me to undertake and complete this research, especially the Right Reverend Joseph Albert Rosario, M.S.F.S., Bishop of Amravati, India.

My final year of study was made possible through a scholarship offered by the Missionswissenschaftliches Institut, Germany. I express a special word of gratitude to P. Wissinger, the director of the Institute.

Reverend F.G. Morrissey, O.M.I., whose co-operation, guidance and concern were indispensable in this study, has spent considerable time and energy in directing this research. I remain immensely grateful and indebted to him for his suggestions, generosity and kindness.

I express my sincere thanks to my parents and extend my heartfelt gratitude to all my friends who have helped me in many and various ways in bringing this project to fulfillment.

CURRICULUM VITAE

John, son of Varghese Maliekal and Maria Pilappilly, was born on June 1, 1947, in Anjukunnu, Kerala, India, in a family of four children, and completed his studies to the Priesthood at Saint Charles Seminary, Nagpur, India. He was ordained priest on October 26, 1974 for the diocese of Amravati, India.

He obtained LL.B. (special) in 1978 from Shivaji University, Kolhapur, India. From 1979 to 1983 he studied Canon Law at Saint Paul University, Ottawa, obtaining his Licentiate in Canon Law in 1981. He is currently a member of the Bar Council of Bombay.

ABBREVIATIONS

- A.A.S., Acta Apostolicae Sedis
- A.I.R., All. All India Reporter, Allahabad Series
- A.I.R., AP., All India Reporter, Andhra Pradesh Series
- A.I.R., Ass., All India Reporter, Assam Series
- A.I.R., Bhop. All India Reporter, Bhopal Series
- A.I.R., Bom., All India Reporter, Bombay Series
- A.I.R., Cal., All India Reporter, Calcutta Series
- A.I.R., Del., All India Reporter, Delhi Series
- A.I.R., Goa, All India Reporter, Goa Series
- A.I.R., HP., All India Reporter, Himachal Pradesh Series
- A.I.R., J&K., All India Reporter, Jammu and Kashmir Series
- A.I.R., Karn., All India Reporter, Karnataka Series
- A.I.R., Ker., All India Reporter, Kerala Series
- A.I.R., Mad., All India Reporter, Madras Series
- A.I.R., MP., All India Reporter, Madhya Pradesh Series
- A.I.R., Mys., All India Reporter, Mysore Series
- A.I.R., Nag., All India Reporter, Nagpur Series
- A.I.R., Ori., All India Reporter, Orissa Series
- A.I.R., Raj., All India Reporter, Rajasthan Series
- A.I.R., SC., All India Reporter, Supreme Court Series
- A.I.R., Trip., All India Reporter, Tripura Series
- A.K.K., Archiv für Katholisches Kirchenrecht
- And PLR., Andhra Pradesh Law Reporter
- A.S.S., Acta Sanctae Sedis
- A.W.C., Andhra Weekly Cases

ABBREVIATIONS

v

AWN	Andra Weekly Notes
B.L.R.,	Bombay Law Reporter
C.I.C.,	Codex Iuris Canonici
C.L.D.,	Canon Law Digest
C.L.S.A.,	Proceedings, Canon Law Society of America, Proceedings
CWN	Calcutta Weekly Notes
CRLJ	Criminal Law Journal
HMA,	Hindu Marriage Act
H.P.R.,	Homiletic and Pastoral Review
I.A.,	Indian Appeals and Cases in the Privy Council on Appeal from the East Indies
ICMA,	Indian Christian Marriage Act
IDA,	Indian Divorce Act
I.E.R.,	Irish Ecclesiastical Review
I.L.R.,	Indian Law Reports
K.L.T.,	Kerala Law Times
Mad.,	Madras Law Reports
M.E.,	Monitor Ecclesiasticus
MG.,	Minge, Patrologia cursus completus, (Greek)
MHCR,	Madras High Court Reports
ML.,	Minge, Patrologia cursus completus, (Latin)
M.L.J.,	Madras Law Journal
N.C.E.,	New Catholic Encyclopedia
Periodica,	Periodica de re morali canonica liturgica
Punj LR,	Punjab Law Journal
S.C.C.,	Sacred Congregation for the Council

ABBREVIATIONS

vi

S.C.S., Sacred Congregation for Sacraments

S.C.O.C., Sacred Congregation for Oriental Churches

S.R.R.Dec., Sacrae Romanae Rotae Decisiones seu sententiae

T.L.R., Travancore Law Reports

TABLE OF CONTENTS

Chapter	Page
INTRODUCTION	xi
I. MARRIAGE IN INDIA UNTIL 1872.....	1
1. General Background.....	1
a) General Concept of Marriage in India	6
b) Requisites of Marriage	10
i) Betrothal	12
ii) <u>Kanyadana</u>	14
iii) Solemnization: the Eight Forms of Marriage	15
2. Marriage among the Early Indian Christians.....	22
a) The Early Indian Christians	22
b) Marriage among the Early Indian Christians	26
i) Child Marriages	27
ii) Arranged Marriages	28
iii) The Form of Marriage	29
iv) The Two Forms of Marriage	32
3. Marriage under the Portuguese until 1872.....	33
a) The Advent of the Portuguese	33
i) The Portuguese Intervention	36
ii) The Synod of Diamper and the Form of Marriage	37
b) The Celebration of Marriage during the XVII and XVIII Centuries	39
i) The Form of Marriage among the Anglo-Indians	41
ii) The Form of Marriage among the Tamil	43
Conclusion	45
II. THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.....	46
1. The Preparation of the Indian Christian Marriage Act, 1872.....	46
a) The Political Context	46
b) The Religious Context	49
c) The Preparation of the ICMA	51
d) Personal Law and its Application in the Courts of Law	53

TABLE OF CONTENTS

viii

Chapter	Page
2. The Extension of the ICMA.....	55
a) The Territorial and Personal Extent of the Act	55
b) Implicit Recognition of Ecclesiastical Law	57
3. Major Provisions of the Act.....	62
a) General Outline	62
b) The Subjects of the Act	63
i) Capacity to Contract Marriage	64
ii) The Qualities of the Subject	66
iii) Ability to Contract	66
iv) Willingness to Contract	68
v) Minors and Capacity	69
c) The Officiating Minister	72
i) An Episcopally Ordained Minister	74
ii) The Duties of the Minister	78
d) Banns, Time, Place and Witnesses	81
e) Exemptions for Catholics	81
f) Forms of Solemnization of Marriages	83
i) The Nature of Solemnization	84
ii) Rituals and Sacraments	90
Conclusion	92
III. THE ICMA AND THE CIC WITH REFERENCE TO THE FORM OF MARRIAGE.....	93
1. The Form of Marriage.....	95
a) Historical Overview	95
b) The Ordinary Form of Marriage	100
i) The Parties	104
ii) The Witnesses: Ordinary and Qualified	110
c) The Extraordinary Form of Marriage	122
2. The Rites and Ceremonies of Marriage.....	128
3. Validation of Marriage.....	131
a) Simple Validation	133
b) Radical Sanation	134
4. Marriages of Conscience.....	139

TABLE OF CONTENTS

ix

Chapter	Page
5.	Effect of Conversion on Marriage.... 143
a)	Privilege of the Faith 144
b)	Petrine Privilege, Indissolubility and Civil Law 146
c)	Conversion and the ICMA 149
	Conclusion 153
IV.	DEVELOPMENTS REGARDING THE FORM OF MARRIAGE SUBSEQUENT TO THE PROMULGATION OF THE LAWS..... 155
1.	Changes in Canon Law since the Promulgation of the 1917 Code..... 155
a)	The Assisting Priest 155
b)	Development of Law on Those Subject to the Form 157
c)	Towards the Recognition of the Orthodox Form of Marriage 161
i)	The Vatican Council 161
ii)	Report of the Votum 163
iii)	The Decree on the Oriental Churches 164
iv)	<u>Crescens Matrimoniorum</u> 165
v)	Response of the Orthodox Church 167
d)	Assistance at Marriage 168
i)	Juridical Role of the Pastor 172
ii)	Deacons and Lay Persons as Witnesses 173
e)	The Extraordinary Form 175
2.	Civil Legislation Since the ICMA.... 178
a)	Conflicting Decisions 178
b)	Who is Subject to the Act? 185
c)	Validity of Marriage and Section 88 189
i)	Delegated Lay Person and the ICMA 193
Conclusion	196
V.	EVALUATION AND PROPOSALS..... 198
1.	An Evaluation of Existing Civil and Religious Legislation..... 199
a)	Civil Law 199
i)	The Context: India is a Secular State 199
ii)	Defects in the Civil Legislation 204

TABLE OF CONTENTS

x

Chapter	Page
iii) Matrimonial Relief	204
iv) Personal Law	218
b) Church Law: Effective Legislation	221
2. Proposals for Revision.....	224
a) Civil Law: A Uniform Civil Law?	224
b) Church Law: Changes in the Law on the Form of Marriage	227
c) Church Legislation and the Indian Church	234
Conclusion	242
CONCLUSION.....	247
BIBLIOGRAPHY.....	255

INTRODUCTION

India is a secular democratic State which provides for personal laws such as those of the Catholic Church. The expression "personal law" applies to the system of rules considered by the courts of law when dealing, among other things, with the religious affiliation of a person. This application inevitably occurs more often in India in the area of marriage than in other sectors of life. It can be asked, therefore, to what extent there can be a healthy relationship between personal laws (e.g., Canon Law) and civil law? To answer this question satisfactorily, it is necessary to make a comparative examination of the pertinent legislations. This study is limited to the celebration of marriage itself, and is further restricted to the celebration of marriage between Catholics of the Latin rite (i.e., the canonical form).

The importance of this study lies in the fact that numerous difficulties have been encountered in the past and in recent times either due to inadvertence to or ignorance of the laws. In the light of recent civil and canonical legislation and in view of other trends now facing Indian society (such as urbanization, migration, etc.) it is probable that these and newer problems will arise in the years to come. Hence, this study attempts to respond to some of the practical needs of the Church in its evangelization process.

Marriage in the Indian context is a personal relationship arising from an exclusive sacramento-contractual union

of man and woman preferably actualized in a ritual context. This union which the courts hold as sacred and the people rightly consider as such, is to be formally brought about by a process called solemnization. Marriages of Christians in this regard are governed by the Indian Christian Marriage Act, 1872. This inquiry studies the norms concerning the celebration of marriages of Catholics under this Act and compares them with the relevant provisions of Canon Law.

In this study, the concept of marriage in Indian tradition will be first examined and then the immediate factors that lead to the enacting of the Indian Christian Marriage Act. Considering the missionary nature of the Church in India, an attempt will be made to provide practical answers to some questions regarding the status of a person who converts to Christianity. This will be particularly important in the context of the Anti-Conversion Acts.

The majority of the people in India attach great importance to rituals, so much so that almost all stages of life, almost every undertaking is either preceded by some form of ritual or marked by it. This faith-penetrated vision of mankind makes marriage more sacred than a mere secular institution which involves just three elements: the man, the woman and the State. Apart from these three who actually bring about marriage, many other elements, such as betrothal, gifting of the bride, ceremonies like veiling, tali, the seven

steps (saptapadi) are important.

It is interesting to note that the faith-centered and ritual-oriented life of the common people of India has not changed much in spite of the early missionary endeavours to "romanize" in the field of marriage legislation. Marriage was preserved in the Indian tradition as a holy institution, one that is stable and durable, thanks to the overall structure of society. In other words, it is not an isolated happening in the life of two persons, but more a communitarian event than a mere private one. In a typical Indian context, marriage means and implies entering into a prefabricated social life and a pre-arranged family life which are often brought about by an arrangement between two families. In such a context, the ritual solemnization of marriage is more important than a mere exchange of consent in private, hence the insistence on solemnization even under the civil law. Should there be any doubt about the validity of marriage, under normal circumstances, the fact of having gone through a valid marriage ceremony is presumed to be the conclusive proof of marriage; this, however, is a rebuttable presumption.

The institution of marriage has evolved over the centuries. It has passed from promiscuity to polyandry and polygamy and reached monogamy. In earlier days, it was a matter of free choice of the man and the woman. With the passage of time, it came to be accepted and seen as an institution by

which alliances between families and groups (such as tribes, clans, royal houses, etc.) could be created and strengthened. It is in this context that the system of "arranged marriages" has its relevance and meaning. In early times, in India, for example, the samana festival was an occasion for girls to choose their life partners. Later on, this came to be done through an intermediary, and at present it is the parents of the parties who usually make the arrangements. To sanctify this "alliance" between the families and the couple, it is only natural for ceremonies and ritual formalities to be prescribed. This heritage has been preserved by the majority of Indians up to now. Such customs are not considered by the Church in its marriage legislation, and so this study proposes means to meet this lacuna; we feel that indigeneous customs should be considered when speaking of marriages of Christians in India.

A comparative study of Church law and civil legislation will be made to enable us to see to what extent both are in agreement. As the study progresses, points will be raised for finding solutions where both laws are not in conformity, and where improvements could be recommended. To the best of my knowledge, there has not been such a detailed study in the field of comparative law on this topic. There have been, however, a certain number of studies on the canonical form of marriage but not in relation to the existing civil law. As far as the Indian Christian Marriage Act is concerned, some

discussions of general nature have been prepared but nothing related directly to our topic. It appears, then, that a comparative study of this kind is altogether new.

The subject will be first studied from the historical point of view, after which the pertinent provisions of the laws will be briefly explained. Where lacunae exist in either legislation, or where the laws are divergent, an analogical application of the law or a working compromise will be proposed, where possible. In this regard, the various decisions of the Indian High Courts and of the Sacred Roman Rota will be studied in detail.

Since in recent years, there have been new approaches in the area of effective legislation in India, especially in the field of marriage, and more so for indigeneous legislation incorporating local customs, it is hoped that this study will open up new areas of interest for further inquiries.

CHAPTER I

MARRIAGE IN INDIA UNTIL 1872

1. General Background

The Indian subcontinent is inhabited by a number of races. Each race has been, in the course of time, subject to invasions or intrusions which eventually destroyed all or most of the previous culture. Since it is from the culture that we learn about the people of antiquity, it is not surprising, then, that we know rather little about the earliest inhabitants of India. The original people (Adivasis) are known as the Proto-Australoid race.¹ The Dravidians (of Mediterranean stock) were the first known group to invade India. They had developed a high form of civilization by the third millennium, B.C.²

During the second millennium, B.C., the Dravidians were driven away from the north by the Aryans³ who were able

1 A.N. Saha, Marriage and Divorce, 2nd ed., p. 3. Proto-Australoids are dark skinned, broad nosed, long-headed people speaking the Austric language, a predecessor of the Munda language.

2 B. Griffiths, "Hinduism", in New Catholic Encyclopedia, Vol. 6, p. 1123: "It is called the Harappa-Mohanjadaro civilization." Also see P. Younger, The Indian Religious Tradition, pp. 5-13; E.W. Hopkins, The Religions of India, pp. 26-36.

3 Aryans are of Alpine-stock, speaking the Indo-Aryan language. S. Johnson, Oriental Religions and Their Relation to Universal Religion, pp. 39-53; A.N. Saha, op. cit., p. 3.

to establish, in turn, an empire in India. During the period of the Aryans, there grew up a religious tradition with its sacred writings which eventually spread to the entire sub-continent. As a consequence of the various invasions and movements of the peoples, and because of a prevailing spirit of "tolerance", there resulted an agglomeration of culture and religion which came to be known as Hinduism, a way of life aiding the individual to attain his goal (salvation).⁴ This continued throughout the Vedic Age, that is, from about 1500-600, B.C.⁵

For a person to achieve the goal of life, Hinduism emphasizes the performance of certain social duties and the fulfillment of obligations according to a fixed code of conduct. These codes find their extension and expression in three ideal structures: the four classes,⁶ the four

4 S. Radhakrishnan, The Principal Upanisads, p. 162: "From the unreal lead me to the real, from darkness lead me to light, from death lead me to immortality" (Brahadaranyaka Upanishad, 1.3.28). Also see A. Aiyappan, "Thinking about the Hindu Way of Life", in P. Vidyarthi, ed., Aspects of Religion in Indian Society, pp. 38-45.

5 A.T. Embree, The Hindu Tradition, p. 3. The Vedic Age is the period of Indian history extending from about 1500 B.C. to 600 B.C.

6 H.W. Griswold, The Religion of Rigveda, p. 52: "Classes that ordinarily remain fluid, such as nobility, priesthood and commons, became in India crystallized into castes, because of the addition of the fourth or Sudra class." The four classes are: brahma (priestly class), kshatriya (warriors), vaisya (merchants) and sudra (servants).

stages of life,⁷ and the four ends of man.⁸ We receive insight into these structures from the sacred writings and the law books (Dharmasastras)⁹ which lay down principles of living and good conduct.

The law of any country is the product of its morality and culture; these evolve from the life of a given people at a given time.¹⁰ Hindu law is the oldest of any

7 M. Müller, Lectures on the Origin and Growth of Religion as Illustrated by the Religions of India, 2nd ed., p. 343: "A much more important feature, however, of the ancient Vedic society than the four castes, consists in four Asramas or stages"; S. Radhakrishnan, op. cit., p. 113: "The four asramas or stages of life are recognized. While the rule is that one has to pass through successive stages of life, exemptions are permitted." The four stages of life are called asramas, they are brahmacharya (student), grahasta (house-holder), vanaprasta (forest-dweller) and sanyasa (hermit). Also see M. Williams, Religious Thought and Life in India, p. 362.

8 V. Raghavan, "The Four Ends of Man", in T. De Bary, ed., Sources of Indian Tradition, p. 211. The four ends are dharma (duty), artha (wealth), kama (pleasure) and moksa (salvation). Also see A.T. Embree, op. cit., p. 77: "The four legitimate ends to be pursued were dharma or duty; material gain (artha); the pleasures of physical sense (kama) and salvation (moksha)."

9 G.F. Macmunn, The Religions and Hidden Cults of India, pp. 31-39. The sacred writings are: a) Vedas: the first book Rigveda was completed by 900 B.C.; the other, Samaveda, Yajurveda and Atharvaveda were later added; b) Brhmanas, Aranyakas and Upanishads come from the period between 900-500 B.C.; c) Dharmasastras; d) The great Epics, Mahabharata and Ramayana (400 B.C.-400 A.D.) and Bhagavatgita (200 B.C.). Also see B. Griffiths, loc. cit., pp. 1123-1136.

10 P.K. Menon, "The Role of Customs in Hindu Jurisprudence", in The Jurist, 26(1966), pp. 69-94.

known legal system.¹¹ To a Hindu jurist, law is a collection of practices and customs based on principles of morality and justice with wide acceptance. To violate a custom, for a Hindu, is nothing short of a sacrilege.¹² Indeed, all the precepts of law must be followed; this is why they are called Dharmasastras (the science of duties). The Dharmasastras lay down the principles of living, as P.V. Kane writes:

The writers on Dharmasastra meant by Dharma not a creed, or a religion but a mode of life or a code of conduct, which regulated a man's work and activities as a member of the society and as an individual and was intended to bring about the gradual development of a man and to enable him to reach what was the goal of human existence.¹³

Among the writers on Dharmasastra, Manu is considered to be the greatest and is called "The Law-giver". He treats of man as a part of the universe in its bio-physical-mental aspects. Manu frames his treatises into a trilogy, each

11 Ibid., p. 64.

12 Ibid., p. 65.

13 P.V. Kane, History of Dharmasastra, Vol. 1., p. 24; Rigveda, 1.187.1. Dharma determines the code of conduct, it is not a law from outside, but is determined according to one's own dharma, asrama and moksa. Dharma is a proper course of conduct; Bagavatgita, 3.8 One's own dharma is best for that person.

section having four parts: the four classes, the four stages of life and the four ends of man.¹⁴

Dharma is considered to be every person's duty which is fulfilled by actions (karma).¹⁵ What makes karma exclusively Hindu is the course of action to which every phenomenon is subjected. This course of action is called samsara.¹⁶ In this connection, we can say that confronted with karma and samsara, the sages and the learned sought to find a way out, to find salvation and liberation, thus they brought into life the system of four asramas.¹⁷

14 G. Bühler (translator), The Laws of Manu (hereafter mentioned as Manu, with chapter and verse reference), Manu, 4.1; 5.169; 6.1; 6.33. Manu, called "The Lawgiver", is the supposed author of the famous code of Hindu law and jurisprudence. Nothing or very little is known about him; he must have lived between 1200 B.C.-500 B.C. (see A.N. Saha, op. cit., p. 5). He probably was a compiler of legal doctrines that were long antecedent to him. His collection is known as the Law of Manu, or at least it is the name affixed to the code. Today it consists of 12 books. The code of Manu is the handbook of Hindu jurisprudence, the first treatment of Hindu law and precursor of all Dharmasastras and other Brahminical legal manuals.

15 R. Zaehner, Hinduism, p. 5: "Karma is the law according to which any action whatsoever is the effect of a cause, and is in its turn the cause of an effect." Karma is defined as the sum-total of all subtle impressions (samskara) left on atman (soul) by the actions, good or bad, done in this life, which make it necessary for atman to reincarnate for the purpose of enjoyment and expiation.

16 C. Bernard, Hinduism in Spotlight, p. 163. Samsara is defined as a "chain of reincarnations or the passage from life to life."

17 P. Deussen, "Asrama", in Encyclopedia of Religion and Ethics, Vol. 2, pp. 128-131.

We are particularly concerned with the second of the four asramas, "grahastarama" (house-holder), for marriage takes place at this stage. As Manu says, one who returns home from the teacher's home enters the second stage of life (grahasta). In other words, a person is expected to marry as soon as he has completed student life.¹⁸ The Hindu male must marry and beget children, and for women, marriage is "inevitable like adolescence."¹⁹

According to Manu, grahasta is as necessary for society as breath is for the body. While grahasta was desirable for all from ancient times, it became obligatory for girls by the year 300 B.C.²⁰ To see how these notions were applied in practice, we shall examine the general concept of marriage, the requisites for matrimony, and the forms of solemnization.

a) General Concept of Marriage in India

Hinduism as a way of life is influenced by the concept of dharma embracing all four asramas. Marriage constitutes an important event in grahastarama and, therefore, the law makers paid more attention to it; it has been

18 Manu, 3.4.

19 D. Mace and V. Mace, Marriage East and West, p. 165.

20 A.S. Altekar, Position of Women in Hindu Civilization, p. 32.

the object of lively discussion throughout history. Indeed, marriage has passed through many stages (such as promiscuity, polygamy, etc.)²¹ to reach the accepted monogamous stage. Initially, it was a secular reality.²² However, since according to Hindu thought it was situated within the history of salvation, it soon came to be regarded as sacred, for, as J. Strange states, "By no people is greater importance attached to marriage than by the Hindus."²³ And, according to K. Bahadur, "in no other religion marriage has been so strongly associated with religion."²⁴ To a Hindu, it is an indispensable union of flesh with flesh and bone with bone, to be continued even in the next world.²⁵ This sacredness of marriage has been recognized from the Vedic Age.²⁶

Later on, marriage became an obligatory reality. So much so that an unmarried man was looked upon as having no

21 A.N. Saha, op. cit., pp. 1-6. Also see C.H. Ratschow, "Ehe und Hochzeit, religionsgeschichtlich", in Die Religion in Geschichte und Gegenwart, 3rd ed., Vol. 2, p. 315.

22 A.N. Saha, op. cit.; p. 1.

23 J.J. Strange, Elements of Hindu Law, Vol. 1, p. 35.

24 K. Bahadur, "The Hindu Law of Marriage and Divorce", in Jaipur Law Journal, 5(1965), p. 113.

25 U.C. Sarkar, "Hindu Law of Marriage; Its Nature and Development", in Jaipur Law Journal, 5(1965), p. 61.

26 R.B. Pandey, Hindu Samskaras, pp. 107-152.

social status, except in the case of those taking celibacy as a way of life.²⁷ Marriage was considered, then, the most important of all samskaras which help to render the scheme of four stages of an individual's life more tangible and definite.²⁸ Indeed, for women, it is the only samskara.²⁹

In his law treatises, Manu treats of both criminal and of civil law. Under civil law, he speaks among other things of property, of contracts, and of marriage. The laws are interspersed with rubrics and rituals. While Manu does not define marriage, he prescribes it as a necessity and treats it in a sacred-contractual perspective: "A student on completion of his studies shall enter the order of house-holder [..] shall marry a wife of equal caste."³⁰ And Narade, another ancient writer states:

That title of law in which the legal rules for women and men regarding marriage [..] are laid down is called The Mutual Duties of Husband and Wife. When a woman and man are to unite as wife and husband, the choice of the bride must

27. A.J. Dubois, Hindu Manners, Customs and Ceremonies, p. 205; A.S. Altekar, op. cit., p. 32.

28 P.D. Mehta, Early Indian Religious Thought, pp. 485-488.

29 A.S. Altekar, op. cit., p. 33.

30 Manu, 3.2, emphasis added; also see T.A. Organ, The Hindu Quest for the Perfection of Man, p. 234.

take place first of all. The choice of the bride is succeeded by the (ceremony of) joining the bride and bridegroom's hands.³¹

The law makers insist on two aspects: marriage is sacred and it is a sacrament with permanency. Moreover, it is considered as a sacrifice performed according to social customs. For example, Gupta writes: "The rites and ceremonies portray the sacred unity of the couple, the status of the kinsmen and members of the caste and friends."³²

The Vedic concept of marriage established a basic duty for each person. According to Manu,

Women must be honoured and adorned by their fathers, brothers, husbands and brothers-in-law, who desire their own welfare. Where women are honoured there the gods are pleased, but where they are not honoured no sacred rite yields rewards. [..] The husband receives his wife from the gods [..] he must always support her while she is faithful. [..] Let mutual fidelity continue until death. This may be considered as the summary of the highest law for husband and wife.³³

31 J. Jolly (translator), The Minor Law Books, Narada and Brihaspati, (hereafter referred to as Narada with chapter and verse), Narada, 12.3.

32 G.R. Gupta, Marriage, Religion and Society, p. 78.

33 Manu, 3.55-56; 9.96,101; reference to this was made in Kamani Devi vs Kameshwar Sing, 25 Patna 58.

b) Requisites of Marriage

From Vedic times, as a duty all persons were to marry, but only according to law.³⁴ In marriage, considered as a contract, consent was essential for validity; as a sacrament (samskara) the religious ceremonies were also essential for validity. A series of ceremonies were to be performed in every marriage: sagai (betrothal), kanyadana (giving away of the virgin) and sadi (wedding itself). At the first stage (sagai), consent was usually given only on the part of the parents; at the second (kanyadana), it resides in the parties; at the third (sadi), there is a specific manifestation of consent by the entire community present. While these three stages are essential, they must be solemnized by rituals which encompass the elements of marriage.

The term vivaha (marriage) means to obtain, to lift up. Literally, it is some kind of acceptance with accompanying rituals.³⁵ The wedding ceremonies themselves consist of

34 Even today this principle holds good, see for example, Tara vs Narain, AIR 1976 P&M 300; the law insists that the essentials of marriage: kanyadana, vivaha and saptapadi, should be performed: Keshab Chand vs Sankar Pandey, AIR 1963 MP 126.

35 H.C. Sastri, Forms of Marriage in Ancient India, Vol. I, pp. 15-16: "The term 'vivaha' is wide vogue and is derived from the root 'vah' denoting 'carrying'. This perhaps conveys a notion of the ceremony, where the maiden is carried away from the house of her parents for induction

eight different forms of marriage, and the solemnization of marriage can take place according to any one of these forms.³⁶

In its literal sense, therefore, marriage means a gift.³⁷ It is the gift of the bride, her acceptance by the groom and the knowledge that she is now his wife. Marriage cannot consist solely in the awareness of being a wife, for it would not be present in the marriages of children. Nor is it in the gifting alone, for this too implies acceptance. However, when all these elements co-exist, we have marriage.

35 (cont'd) into the house of her husband. [∴] But in the technical sense of the term, all are in agreement to signify the totality of the act of marriage." Other words, such as, udvaha (to get), parinaya (to take), upayama (to accept), parigrahana (to be taken) are used to mean marriage. These words denote a special kind of acceptance. A similar concept can be found among the ancient Romans, where one could obtain a wife by usus, emptio, or confarreatio, the last one is the same as the gifting of the girl; see P. Palmer, "Christian Marriage: Contract or Covenant?", in Theological Studies, 33(1972), pp. 627-628.

36 R.B. Pandey, op. cit., pp. 158-159.

37 The idea of gift becomes clear in the context of the arranged marriages. This is clear from the following statement: "I give away to you this my daughter decked with clothes and ornaments and devoted to Prajapati. The bridegroom accepts with the word Svasti", R. Antoine, "The Hindu Samskaras", in J. Neuner, ed., Religious Hinduism, p. 163.

Thus, J.D. Derrett says, "Vivaha consists essentially in an acceptance which produces the mental impression that this girl is this man's wife, and wifeness arises from her having undergone the Samskara [sacrament]." ³⁸

i) Betrothal

Both betrothal and kanyadana are the two essential steps leading to the establishment of marriage. While betrothal is the first formal step to marriage, it is preceded by the choice of a partner, which usually takes place without courting. ³⁹ The choice of a partner is not determined only by emotions and sympathy, but many other important factors are also considered; lack of impediments, ⁴⁰ family background, personality, ⁴¹ caste, and so forth. ⁴²

³⁸ J.D. Derrett, Essays in Classical and Modern Hindu Law, pp. 325-327, as cited in C. Bennett, The Problem of Consent in the Arranged Marriage of Tamils of Jaffna, p. 65.

³⁹ Narada, 12.3; D. Shrirama, Social Structure and Values in Later Smrtis: Social Philosophy in Some Later Smrtis, p. 51; D. Mace and V. Mace, op. cit., p. 174; A.C. Mayer, Caste and Kinship in Central India, pp. 202-208.

⁴⁰ Narada, 12.8 stipulates that man must undergo an examination of his virility and when his virility is proved beyond doubt, he shall obtain a maiden; also see B. Walker, Hindu World, Vol. 2, p. 39.

⁴¹ S. Radhakrishnan, Religion and Society, p. 173: "The bride yearns for beauty, her mother for wealth, her father for learning [...]."

⁴² Manu, 3.2-11; Narada, 12.4; A.S. Altekar, op. cit., p. 72.

Mate selection is usually carried out by the parents.⁴³ Since marriage as an institution depended on the family, betrothal was mainly a family contract between the parents of both parties. This has been expressed by G.E. Howard as follows:

Among very low races [..] betrothal is a compact between the bride and bridegroom. As soon as the genealogical organization is further developed, marriage is changed from an individual relation to a relation between families, and betrothal is a compact between the kindred groups.⁴⁴

On finding a suitable match free from any impediment, betrothal takes place, and the parents of the parties exchange promises.⁴⁵ However, these days, prior to the exchange of consent the parties are consulted, are introduced to each other and to their respective relatives.⁴⁶ Betrothal is binding and irrevocable, except in case of fraud.⁴⁷

43 D.N. Mujumdar, Races and Cultures of India, 4th ed., p. 185. Also see C.A. Bhat, "Marriage Among the Waddars", in Bulletin of the Anthropological Survey of India, 17(1968), pp. 257-272.

44 G.E. Howard, A History of Matrimonial Institutions, Vol. 1, p. 202; also see E.A. Westermarck, The History of Human Marriage, chapter 6; G.H. Joyce, Christian Marriage: A Historical and Doctrinal Study, p. 118.

45 S. Stevenson, The Rites of the Twice-Born, p. 48.

46 Ibid., p. 48; D.N. Mujumdar, op. cit., p. 188.

47 D.N. Mujumdar, op. cit., p. 188.

ii) Kanyadana

In a context where marriages are arranged by the parents, consent of the parties apparently has little or no role to play. This does not, however, rule out the need for their consent.⁴⁸ Usually at or before betrothal (depending on the local custom), the consent of the girl is received; the boy himself asks the girl's father for his daughter in marriage. It is only then that kanyadana takes place. Consent is at least presumed as was the case with confarreatio in Roman law.

While consent of the parties played an important role in Vedic marriages, love and consent did not play as important a role as they do today.⁴⁹ The present practice is the result of centuries of evolution. Yet, both the ancient and the modern law insist that marriages be made public by means of ritual solemnization. A brief overview of the marriage ceremony clearly explains the need of consent:

48 Narada, 12.4; Manu, 9.47: "Once is the partition of inheritance made, (once is) a maiden given in marriage, (and) once does a man say 'I will give', each of these three (acts is done) once only."

49 R. Antoine, loc. cit., p. 163; in the offering and acceptance of the bride, consent can be presumed to exist. For a similar notion of consent in Roman law, see P. Palmer, loc. cit., p. 627.

When the hands of the parties were being united in wedlock, they were informed that the union was being brought about at the behest of the god Sun. In the marriage sacrifice oblations were made unto Pusan, Bhaga and Aryaman, because they were the presiding deities over prosperity, good luck and conjugal fidelity respectively. These were sought to be ensured for the new couple by the nuptial sacrifice. The parties then touched each other's heart; they may be two in person, but henceforward they ought to be one in heart. Then they ascended a stone, and the prayer was offered that their mutual love should be as firm and steadfast as the stone they were treading upon. /.../ In the important ritual of saptapadi, the bride and the bridegroom took seven steps together, and it was hoped and prayed that their future life should be full of love, brilliance, opportunities, prosperity, bliss, progeny and holiness. Finally the husband and the wife took mutual vows that each would further and fulfil the hopes, desires and ambitions of the other in the spheres of religion, love and worldly prosperity. A prayer was offered at the end that the affectionate union of the couple should never be dissolved.⁵⁰

iii) Solemnization: the Eight Forms of Marriage

According to law, marriages must be solemnized. At solemnization, the transition from betrothal to marriage is brought about.⁵¹ At one time only a simple form of

⁵⁰ A.S. Altekar, op. cit., p. 80; M. Williams, op. cit., p. 363.

⁵¹ Civil laws also prescribe ceremonies: The Indian Christian Marriage Act, s.5; Special Marriage Act, s. 12; Ceremonies are essential for the validity of marriage; see Shakuntala vs Nilkanth, AIR 1973 All 203.

solemnization existed. Marriage was complete with the taking of an oath.⁵² It was only later that the various ritualistic formalities became necessary.⁵³ These public ceremonies had as their purpose to show the sacred unity which existed, to determine the status of kinsmen and of members of the caste, and to bring grace.⁵⁴ The long rituals are still performed to indicate that the substantial requirements of marriage are complied with.⁵⁵

The process of solemnization is complete once all the ceremonies have been performed. Two of them, homa and saptapadi are essential.⁵⁶ Homa is the sacred fire around which the seven steps (saptapadi) are taken. Since the coming into force of the Hindu Marriage Act, where no custom

52 The form of oath for marriage is found in Rigveda 10.85: "I take thy hand in mine for happy fortune, that thou mayest reach old age with me, thy husband."

53 A.N. Saha, op. cit., p. 64.

54 E.L. Umlin, A Short History of Marriage Rites, Customs and Folklore in Many Countries and All Ages, p. 136: "According to the Hindu Shastras, marriage is an extremely important ceremony"; ibid., p. 137: "In some places the festivities begin seven days before the wedding."

55 G.R. Gupta, op. cit., p. 78.

56 R.B. Pandey, op. cit., p. 207; A.N. Saha, op. cit., pl 63; Patel Sundhari vs Ashidharani, 70 Cal. WN. 28.

exists of dispensing from saptapadi, now a Hindu marriage becomes complete and binding with the taking of the seventh step.⁵⁷ There can be other forms in addition to the eight accepted ones, but any new form has to be proved in a court of law, and failure to do so could result in the declaration of nullity of marriage.

Originally the forms were established according to caste. Later in history, these distinctions disappeared, and the forms came to be used by all alike, as a matter of choice. Before the eyes of the law, however, there is a strong presumption of the solemnization of marriage when the fact of marriage is proved.⁵⁸ There is also another presumption that every marriage has been celebrated according to one of the approved forms. The Epics, Smritis and Dharmasastras mention the widely accepted forms of marriage.⁵⁹ Of these, Manu speaks of four forms as valid (brahma, asura, arsha and daiva) and the other forms (paisacha, prajaptya, rakshasa and gandharva) as unlawful (blamable).⁶⁰ We shall

57 A.N. Saha, op. cit., p. 63.

58 Veerappa vs Michael, AIR 1963 SC 933.

59 J. Jolly (translator), The Institutes of Vishnu, (hereafter mentioned as Vishnu with chapter and verse reference); Vishnu, 24.19-24.

60 Manu, 3.41.

briefly describe each of these forms.⁶¹

Brahma is one of the best and desired forms of marriage. It is so called as it was thought fit for Brahman. In this form, the father or the guardian of the bride carefully selects the son-in-law, invites him to his house and offers his daughter according to proper religious rites and with proper gifts. Although the wife is offered as a gift to the husband, she does not become his property.

Daiva, the second form of marriage, consists in giving a girl to a priest officiating at a sacrifice

61 The following consideration on the forms of marriage is based on Manu, 3.20-42; Vishnu, 24.17-27: "17. There are eight forms of marriage: 18. The Brahma, Daiva, Arsha, Pragapaya, Gandharva, Asura, Rakshasa and Paisacha forms. 19. The gift of a damsel to a fit bridegroom, who has been invited, is called a Brahma marriage. 20. If she is given to a Ritvig (priest), while he is offering a sacrifice, it is called a Daiva marriage. 21. If (the giver of the bride receives a pair of kine in return, it is called Arsha marriage. 22. (If she is given to a suitor) by his demand, it is called Pragapatya marriage. 23. A union between two lovers, without the consent of mother and father, is called a Gandharva marriage. 24. If the damsel is sold (to the bridegroom), it is called an Asura marriage. 25. If he seizes her forcibly, it is called Rakshasa marriage. 26. If he embraces her in her sleep, or while she is unconscious, it is called Paisacha marriage. 27. Among those (eight forms of marriage) the first four forms are legitimate (for a Brahmana)."

(organized by her father) either as a gift or as a sacrificial fee. It is called daiva since it takes place during the daiva sacrifice. This form did not become very popular and disappeared with the Vedic sacrifices.

Arsha is a form in which a pair of cows is given to the girl's father in return for the girl. Since this amounts to a sale, it was condemned by Dharmasastra. Ancient Romans too had a similar form (manus by coemptio), but this also has disappeared.

Asura is literally the sale of the daughter. The sale price, however, went to the bride. The consideration or price in this type of marriage is called sulka which was needed to make the contract binding. Today this form is not common in India.

Prajapatya is very similar to the brahma form. The girl is given to a suitor on demand on the understanding that both husband and wife will together perform civil duties. This has to be done with due solemnities.

Gandharva, although discouraged by Manu, is found predominantly among the Gandharvas. This is a pure and simple form of love marriage, without parental consent. Kamasutra regards this as the ideal form of marriage. Later literature insists on having some form of solemnization to be added or supplied, for this is usually a secret marriage between two lovers. This also has ceased to be one of the

ideal forms with the passage of time and the advent of arranged marriages and child marriages.

Rakshasa is a form in which the girl is foreefully (e.g., in war) married. It refers to the time when women were regarded as prizes of war. This form prevails among the Gonds of Deccan. It is a forcible capture of a girl followed by consummation.

Paisacha is marriage by rape, abduction, intoxication, etc. Since this is a forced form of marriage, it is not in use except in some cases to avoid the embarrassment of the parents and the relatives, especially if pregnancy results.

The law-givers regarded some of these forms as both valid and licit, and others as valid but not licit. However, only three of these forms are common today. It was observed in one of the court decisions that "most of these forms have become obsolete except brahma, gandharva and asura."⁶² Failure to follow any of these approved forms of marriage would only render the marriage illicit. Related to

⁶² Patel Sundhari vs Ashidharni, 70 CWN 28, in this case it was observed that most of these forms are now obsolete except brahma, gandharva and asura.

the question of solemnization is the question when does the marriage become irrevocable and complete.

It is commonly taught that marriage becomes complete and irrevocable only when the most essential ceremony is held. This, however, would vary according to the place and custom. Betrothal has all the qualities of a contract; it is not always absolutely binding and can be rescinded. Irrevocability comes at a later stage. Most authors hold, as do the civil courts, that the parties become husband and wife when the saptapadi (seven steps, most important of all ceremonies) is complete. Thus A.N. Saha says that the process of solemnization stands complete when the seventh step is taken.⁶³ However, in some communities, e.g., the Reddy communities of Telengana, saptapadi has no importance; instead, they consider tali (an ornament tied around the neck of the bride) as important, and so marriage for them is irrevocable when the tali is tied by the groom.⁶⁴ It is at

63 A.N. Saha, op. cit., p. 65: "The process of solemnization stands complete with the taking of the seventh step. It since then becomes a valid marriage." R.B. Pandey, op. cit., p. 209; in a Madras case, Kanyadana and saptapadi were held essential for the validity of marriage, Devani Achi vs Chitambaram Chettiar, AIR 1964 Mad 657.

64 A.N. Saha, op. cit., p. 66.

this time that the bride passes into the gotra (family) of the groom. The change of family name could come only at or after this moment. Other opinions hold that marriage becomes irrevocable only after or with consummation.

To summarize, then, it can be said that originally marriage in India was considered to be a sacrament and the idea of a simple contract was of later origin. The remarks of A.S. Altekar confirm this statement:

Marriage was regarded as a sacred religious union brought about by divine dispensation; it was felt that mutual vows which the parties took in the presence of Sacred Fire sufficiently emphasized all the points that could possibly have been included in a marriage contract. The marriage sacrament united the parties in an indissoluble union, and the husband and the wife each prayed that their love and friendship should be lasting, genuine and indissoluble.⁶⁵

2. Marriage among the early Indian Christians

a) The Early Indian Christians

Against this general background, we are now able to examine the situation among the Christians living in India. This will enable us to understand the concept and praxis of marriage among the early "Indian Christians" as they were called. Their Indianness comes from the heritage of Indian culture, while Christianity derived mainly from Hebrew tradition.

65 A.S. Altekar, op. cit., p. 48.

It is widely accepted among scholars today that a Church existed in India from the early days of Christianity.⁶⁶ But the data referring to the centuries prior to the arrival of the Portuguese is so sparse and disconnected that it is almost impossible to reconstruct a reliable mission history. The available data is gleaned from various ecclesiastical writers and the narratives of the Syrians.⁶⁷ Indeed, not much is known until the fourth century when the early Christians in India were known as Thomas-Christians. According to C.W. Ranson, for example, "When Pope Gregory The Great sent his missionaries to convert England to Christianity in 596, the Christian Church was already established in India."⁶⁸ The Church, however, remained situated along the coasts of Malabar with little effort at evangelization.

Modern research is inclined to accept the fact that the early Church was indeed founded by St. Thomas. Likewise, this Church seems to have had administrative ties with Seleucia from the fifth century,⁶⁹ at least regarding the

66 P. Placid, Die Thomas Christen; F. Plattner, Christian India, C.M. De Mello, Recruitment and Formation of Native Clergy in India; P. Thomas, Christians and Christianity in India and Pakistan; and E. Tisserant, Eastern Christianity in India are the sources for this consideration.

67 Rufinus, ML, 21.478§; Socrates, MG, 67.125.

68 C.W. Ranson, Christian Minister in India, pp. 37, 76.

69 E. Tisserant, op. cit., p. 163; A.S. Atiya, History of Eastern Christianity, p. 364.

appointment of bishops.⁷⁰ Since the prelates came from Seleucia, it is probable that they first introduced the Eastern ecclesiastical discipline. We do not know for certain, though, to what extent the Eastern laws of pastoral care and worship were enforced. It seems probable to conclude that from the earliest times an indigenous ministry was maintained. "The effective ecclesiastical administration was in the hands of local priests officially designated as archdeacons of India."⁷¹ P.J. Podippara writes that these Christians were highly influenced by Hindu culture and customs:

Their Hindu culture had made them a closed community with high sociopolitical privileges. On these privileges they developed special canonical norms. Even their social customs assumed a canonical aspect.⁷²

It has been said that the early Christian community was "Hindu in social life, Christian in religion and Catholic in worship."⁷³ The family customs and social traditions

70 P. Podippara, "Malabar Rite", in New Catholic Encyclopedia, Vol. 9, p. 95.

71 Ibid., p. 95.

72 Ibid., p. 95.

73 A. Cherukarakunnel, "The Hindu Christians of India", in J. Vellian ed., Malabar Church; Symposium in Honour of Rev. Placid J. Podippara, C.M.I., p. 203.

continued even after conversion; the Christians retained many Hindu customs which offered social ranks. Many of these customs were originally special grants or privileges from the various kings.

The Christians were distinguished from the rest of the population by certain characteristics such as: a new place of worship (church and not the temple), a ceremony of initiation (baptism), other ceremonies marking the different stages of life (sacraments), Sunday worship and a new set of concepts taken from the Bible.

The early Christians did not isolate themselves from the rest of society. After conversion they formed almost a part of the Hindu society. They adapted themselves to the ancient culture while living the new faith. Socially they followed their ancient traditions which they had inherited.⁷⁴ Thus it was difficult for the Portuguese to distinguish them from the rest of the population.

Since the early Christians did not adopt a proselytizing attitude, they were more similar to the Hindus than different. They formed a small community within Hindu society, in which they had many relatives and friends. The adult could not change their customs very easily; for the sake of village unity, they also had to follow certain Hindu customs, whether

74 P. Thomas, op. cit., p. 234.

from social necessity or from a personal desire to follow the Hindus at least outwardly if not spiritually.⁷⁵

These early Christians took only biblical names and substituted many customs for the previous ones, or at least renamed them, especially as regards funerals and marriages.

b) Marriage among the early Indian Christians

Like their Hindu counterparts, the early Christians were very attentive to their religious duties. They depended on the decision of their clergy in almost all matters.

As to the administration of law in criminal matters, they depended upon the heathen princes to whom they were tributary; but in civil and ecclesiastical matters they were under the jurisdiction of their own bishop, who conjointly with his Archdeacon, adjusted all their disputes, in the twofold capacity as pastor and judge.⁷⁶

While their social customs did not differ from those of the Hindus, Christian marriage rites and marriages within the Christian community were insisted upon, but could not always be enforced.⁷⁷ The festive aspects of marriage were,

⁷⁵ C.G. Diehl, Church and Shrine Intermingling Patterns of Culture in the Life of Some Christian Groups in South India, p. 161.

⁷⁶ J. Hough, The History of Christianity in India, Vol. 1, p. 326.

⁷⁷ J. Webster, The Christian Community and Change in Nineteenth Century North India, p. 71.

as was the custom, celebrated to the exclusion of spirit and evil worship.⁷⁸ Nevertheless, while complying with the Church requirements of marriage, they did not abandon the practices common among their neighbours: fixing auspicious days, verifying the horoscope, consulting the priest, child and arranged marriages, and so forth.⁷⁹

i) Child marriages

Among the early Christians, child marriages were common. They seem to have arisen as an extension of the patria potestas and the ancient anxiety about the wife's being a virgin. The only difference between India and other places was that the young girl was not given up for co-habitation until she was of marriageable age. With the Christians, child marriage was the law rather than the exception.⁸⁰

Both Manu (9.90-93) and Narada (12.27) give the impression that child marriages were more desirable than any other form. Moreover, in a society where marriage is a family affair, age mattered little, but in some cases the

78 G.B. Ogden, "Married at Sun-Rise", in Massmovement Quarterly, 3(1921), pp. 4-7.

79 C.G. Diehl, op. cit., pp. 96-97.

80 P. Placid, op. cit., p. 74.

children were not considered married until all the rites had been solemnized. Since the children were unable to consent at the time of the agreement, the parents did so on their behalf.⁸¹

ii) Arranged Marriages

Arranged marriages were negotiated and decided upon by the parents or guardians of the parties, as distinguished from courtship marriages. The lack of courtship is to be understood within an overall pastoral context. Since marriage is a family affair, an institution creating new alliances or strengthening old ones,⁸² in India most marriages are still arranged, regardless of caste and creed.⁸³ While in the Western world people generally fall in love and then get married, in India they marry and then fall in love.⁸⁴

As arranged marriage has many requisites among which are family background, endogamy at different levels,⁸⁵ character, personality, complexion, and so forth. The

81 G.H. Joyce, op. cit., pp. 116-117.

82 B. Coutinho, "Marriage and Divorce in Hindu Society", in Jeevadhara, 5(1975), p. 438.

83 K. George, "Marriage and Adjustment in a Traditional Society, A Case Study of India", in M.A. Kanwar, ed., The Sociology of Family, An Interdisciplinary Study, pp. 299-320.

84 Ibid., p. 299.

85 Endogamy at different levels extends to gotra (family), sapinda (stock), language, culture, caste and political affiliation.

intervention of parents was seen as natural in such circumstances. The system protected the morality of youth and avoided unions within the prohibited degrees or different castes. In this way, the arranged marriages contributed to the stability of marriage in general. E. Schillebeeckx writes:

What preserved marriage was not so much the married partners as the entire structure of this working community and of the whole society. The superior power of objective social relationships predominated over personal life.⁸⁶

Notwithstanding any arrangement, the consent of the parties was required prior to any formal negotiation. In most cases today, however, a formal meeting between the partners is arranged by the parents; the negotiations begin either directly, or through a broker, or through advertisements in the newspapers. Even today the children generally leave the choice of a partner to the mature and careful decision of the parents who know their children better and have their best interests at heart.

iii) The Form of Marriage

According to Cardinal E. Tisserant, the official ecclesiastical discipline in India before the coming of the Portuguese was determined by the prelates from Seleucia;

⁸⁶ E. Schillebeeckx, Marriage, Secular Reality and Saving Mystery, Vol. 1, p. 2.

it must, therefore, have been Eastern.⁸⁷ At least by the fourth century, a well-defined form of the celebration of marriage existed in the Eastern Church. Weddings were to be celebrated before a priest who assisted at the nuptial blessing and coronation. By the year 866, these last two elements were even required for the validity of the ceremony. In 895, Emperor Leo made this form obligatory for all free persons; it was later extended to slaves as well.⁸⁸

It is not certain to what extent the early Christians followed non-Christian customs. There is no reference, for instance, to saptapadi in the early Christian marriage rite.⁸⁹ The important ceremony was performed by the groom who tied tali around the neck of the bride after it has been blessed by the priest.⁹⁰ Garlanding and other ceremonies accompanied the rites and a procession was held. Furthermore, there were the blessings of the couples, of the crowns and of the best man.⁹¹

87 E. Tisserant, op. cit., p. 163.

88 W.A. Loftus, "Form of Marriage", in New Catholic Encyclopedia, Vol. 9, p. 277.

89 J. Howard, op. cit., Vol. 4, pp. 673-679.

90 Tali is also called Mangalasutra; it is an ornament worn around the neck as a sign of marital fidelity. See P. Thomas, op. cit., p. 234; C.G. Diehl, op. cit., p. 95.

91 C.G. Diehl, op. cit., pp. 105-110.

While there was no formal exchange of consent before the priest and two witnesses, the entire ceremony was a reminder of the fact that consent is explicative of the essential properties of marriage. The entire congregation witnessed the ceremony and there was no need of formal witnesses.⁹² The fact that formal consent was not required is evident from a decree of the Synod of Diamper in 1599:

Whereas matrimony ought to be celebrated with words signifying a present consent, and in many places in this diocese, it is commonly celebrated with words signifying only a consent for the time to come: therefore the Synod doth command, that when the persons that are to be married, come to the door of the church, the parish priest, or some other priest, having his or the prelate's licence, being in his surplice, with his stole, and at least two witnesses present, shall ask them, if they are pleased to marry.⁹³

Regarding the place of celebration, weddings usually took place in private homes and rarely in the church. The same Synod of Diamper decreed that henceforth they were to be celebrated only in church buildings.⁹⁴

92 A. Mundadan, Sixteenth Century Tradition of St. Thomas Christians, p. 174.

93 Synod of Diamper, De Matrimonio, decree, 2 (The translation is taken from J. Howard, op. cit., Vol. 4, pp. 630ff).

94 Ibid., decree 23.

iv) The Two Common Forms of Marriage

In practice, the early Indian Christians had two forms of marriage. One could be called the ordinary form, the other an extraordinary one. G.M. Moraes speaks of the ordinary form as follows:

Marriage was usually celebrated in the presence of the Catenar /priest/ and solemnized by a ritual, the beauty of which excelled by far the liturgy in use in any Church.⁹⁵

It is not certain when the form acquired its present characteristics. Undoubtedly, it was in use when the Portuguese arrived in India. There was an insistence on the ritual form of marriage, thus incorporating many of the local customs. Regarding the extraordinary form of marriage, the same writer says,

When no Catenar could be found, the parties were married according to the custom prevailing in the country, according to which the groom tied a thread around the bride's neck, and to symbolize the total mutual surrender, one of the parties put grains of gold into the hands of the other.⁹⁶

Whichever form was adopted, the ordinary or the extraordinary one, a procession in a horse-drawn carriage was required.⁹⁷ To the Hindus saptapadi was essential; to the

95 G.M. Moraes, A History of Christianity in India from Early Times to St. Francis Xavier, A.D. 52-1542, p. 192.

96 Ibid., p. 197.

97 C.G. Diehl, op. cit., p. 109.

Westerners the ring became important; to the early Indian Christians tali was important, also crowning and veiling.⁹⁸

This, then, was the situation when the Portuguese arrived in India at the end of the fifteenth century.

3. Marriage under the Portuguese until 1872

a) The Advent of the Portuguese

The sixteenth century witnessed great achievements in the field of evangelization. The Portuguese were the pioneers in this field as far as India was concerned.⁹⁹ They first came for trading purposes in 1498, but then captured Goa in 1510. The Viceroy, Alfonso de Albuquerque, realized that there could be no Christian kingdom without a strong Christian population. Consequently, as a start, he encouraged mixed marriages. In 1514, Pope Leo X established the "Padroado", an arrangement with the Portuguese Crown whereby the Crown was ceded rights over all Christians of the East and given responsibility for evangelization. As a side effect, colonialism began to take deep roots in the

98 J. Arackal, M. Cyriac and A. Koothottil, "Alienation or Latinization? Towards an Evaluation of the History of Christianity in India", in Jeevadhara, 7(1977), p. 32; also see P.J. Podippara, op. cit., pp. 89-91; J. Hough, op. cit., Vol. 4, p. 673.

99 J. Wicki, ed., Documenta Indica, Vols. 1-14, is the source for the following study, i.e., the historical aspect.

Church. The Portuguese policy was that which was prevalent in the West at the time: Cujus regio ejus religio.

In Goa, many were converted at gun point and those who showed reluctance had to flee. The Portuguese persecuted not only Hindus and Muslims, but the old Christians as well. Missionary colonialism reached its apex in 1560 with the establishment of the Inquisition of Goa.¹⁰⁰

By the second half of the sixteenth century, the Portuguese engaged in the upsetting of the old Syrian Church at Travancore by endeavouring to romanize it.¹⁰¹

Although many became Christians in Goa and elsewhere, the imperial approach created hostility and consequently a negative attitude toward the Gospel.¹⁰² The trading centres grew into Catholic centres, converts were westernized in manners, dress and food, even to the point of accepting the Portuguese names and way of life.¹⁰³ But, unlike the British,

100 V. Philip, "Christianity in India during Western Colonialism", Conflict, Reconciliation or Adjustment", in Commission internationale d'histoire ecclésiastique comparée, The Church in a Changing Society: Conflict, Reconciliation or Adjustment?, p. 424; for a vivid description of the Inquisition, see W. Campbell, British India in Relation to the Decline of Hindooism, pp. 125-127.

101 E. Chatterton, A History of the Church of England in India since the Early Days of East India Company, p. 94.

102 R.H. Boyd, India and the Latin Captivity of the Church, p. 7.

103 T.A. Vazhayil, Christians in Secular India, p. 94.

the Portuguese made great efforts to evangelize India from the very early days of their presence. Yet, according to today's standards, in so doing they were directed by a misguided zeal. Alluding to the violent measures adopted in the evangelization process, one writer remarks:

What a great loss Christianity suffered in Asia is very manifest. [...] If the Saracens had held the same principles, [...] they would not have suffered one Christian to live in their dominions.¹⁰⁴

Once the Padroado was established, missionary work began in earnest. The attempt to latinize the Christians was quickened by the 1569 Synod of Bishop Joseph, the 1583 Synod of Abraham, the Goan Synods and the Synod of Diamper in 1599. In spite of persistent efforts on the part of the early Indian Church, the Holy Office decreed in 1736 that the native Christians must conform to the customs of the Portuguese.¹⁰⁵

The undue freedom given to the Portuguese finally resulted in the schism of Goa,¹⁰⁶ the division of the Indian Church (which is not yet healed)¹⁰⁷ and in a lengthy quarrel

104 J. Hough, op. cit., Vol. 1, pp. 151-152.

105 A. Soares, Catholic Church in India, p. 23.

106 C. Pullappilly, "Catholicism and Colonialism in Modern India", in Commission internationale d'histoire ecclésiastique comparée, op. cit., p. 449.

107 C.W. Ranson, op. cit., p. 32.

between the Congregation for the Propagation of Faith which lasted ~~for~~ two centuries over the appointment of bishops, and was finally settled by a concordat on April 15, 1928.¹⁰⁸

i) The Portuguese Intervention

When the Portuguese arrived, the official ecclesiastical discipline consisted of a mixture of Eastern law and local customary laws. Most of the customs were destroyed by the Portuguese. Commenting on this, Cardinal Tisserant wrote:

Whatever were the local customs or the regulations made by the Catholicate of Seleucia, the Portuguese did not lose time in trying to persuade the Christians of St. Thomas to conform to the discipline of the Latin communities.¹⁰⁹

The customs of the Church which prevailed in Portugal became compulsory. The same attitude was reflected in dealings with new converts as well. They were not allowed to relate to their neighbours, or even attend the weddings of their own relatives.¹¹⁰ In fact, the Portuguese forbade the native Christians under them from remaining Indians after conversion.¹¹¹

108 G. Renault, Goa, Rome of the Orient, pp. 162-165.

109 E. Tisserant, op. cit., p. 165.

110 C.M. DeMello, op. cit., p. 25.

111 K. Subramanyam, The Catholic Community in India, p. 28.

The converts had to forego their customs and the Syrians had to abandon their canonical discipline.¹¹² In order to achieve this, when the Synod of Diamper was held in 1599, all existing liturgical books were burned.¹¹³

ii) The Synod of Diamper and the Form of Marriage
Alexis de Menezes, Archbishop of Goa during the pontificate of Clement VIII, convened a synod at Diamper on June 20, 1599.¹¹⁴ It lasted for seven days and was attended by 133 priests and 660 lay persons. It made the Latin-rite liturgy the only acceptable form of worship in the country. It discussed all the sacraments in detail, translating the Tridentine discipline regarding marriage. For instance, in the seventh session on matrimony, the Synod decreed:

The efficient cause of matrimony regularly is the consent of both parties declared by words or signs de praesenti. [..] There are two reasons or ends for which matrimony was ordained and instituted; the first and principal is the procreation or generation of children, for the conservation of the world, and the multiplication of the faithful, and servants of God. The second is for a remedy for uncleanness [..] The benefits of marriage are three principally;

112 C. Pullapilly, loc. cit., p. 450.

113 E. Tisserant, op. cit., pp. 56-68.

114 J. Thaliyath, The Synod of Diamper, ch. 1.

the first is the generation and education of children for the worship and service of the true God; the second is the fidelity which the married couple ought to keep to one another; and the third is the perpetuity of matrimony, which, in that it cannot be dissolved, signifies that inseparable conjunction and union that is betwixt Christ and his Church.¹¹⁵

Regarding the form of marriage, the Synod prescribed that henceforth marriage should be celebrated in the church, before two witnesses (Decree No. 1); the form shall be the actual exchange of consent before the authorized priest (Decree No. 2), and the banns are to be published (Decree No. 3). These regulations, however, were not very strictly observed. For instance, certain marriages could still be celebrated in homes,¹¹⁶ even witnessed by a lay person.

The Synod also condemned all the customary practices prevalent among the native Christians.¹¹⁷ Law as to prohibited degrees was also established (up to the fourth degree of the collateral line). Realizing that there were many illegal unions in existence, the Synod also convalidated any union hitherto entered into. It also referred to the possibility of obtaining dispensations in case of necessity. Further,

115 Synod of Diamper, decree 23 (Session VII).

116 G.M. Moraes, op. cit., p. 197.

117 Synod of Diamper, decree 8.

it put an end to the extraordinary form of marriage that was common among Christians.¹¹⁸

From the foregoing, it can be seen that the Synod of Diamper made every effort to put all the decrees of Trent into effect as much as possible. In doing so, the age-old customs were to be obstructed.¹¹⁹ Decree No. 14 forbade any heathen customs; No. 15 all heathen superstitions, while No. 16 condemned all Jewish ceremonies adopted by the Christians. Thus it resulted in some loss to the Thomas Christians, because since they lost most of their customs, they also lost most of their privileges among the caste Hindus.¹²⁰

However, in some areas it is evident that the decrees were not observed, for in 1736 the Holy Office again recommended the abolition of all customs and the adherence to Portuguese traditions.¹²¹

b) The Celebration of Marriage during the XVII and XVIII Centuries

The Portuguese carried out an exceptional task in the field of evangelization. On the other hand, the British

¹¹⁸ Synod of Diamper, decree 12; G.M. Moraes, op. cit., p. 197.

¹¹⁹ A. Cherukarakunnel, loc. cit., p. 207.

¹²⁰ Ibid., p. 207.

¹²¹ A. Soares, op. cit., p. 23.

followed a policy of religious impartiality which, according to K. Ingham, "served as a useful cloak for their interest in dividends."¹²² Until the enactment of the Indian Christian Marriage Act, 1872, their role in such religious matters was only marginal.

From the XVIIth century, the Latin discipline prevailed all over Christian India (the Syrians were no exception).¹²³ The celebration of marriage, at least in theory, was in full accord with the teaching of the Council of Trent. This is clear from the following observation:

In Christian marriages no Hindu rites or idolatrous practices should precede or follow the marriage ceremony, and a marriage of a Christian with a non-Christian to have special authorization from the bishop. [..] A regular Christian marriage is to be solemnized by an ordained minister after three banns have been published...¹²⁴

During the XVI-XVIII centuries, India lived under three types of laws in the field of marriage: the Portuguese, the French and the British. The form of marriage also varied somewhat depending on the community and customs. The Catholic hierarchy was very keen to have the canonical form observed by all Catholics, while most of the people wanted to retain

122 T.A. Vazhayil, op. cit., p. 95.

123 E. Tisserant, op. cit., p. 171.

124 P. Luke, and J. Carman, Village Christians and Hindu Culture, p. 192.

the traditional customary form of marriage, as the Church wedding alone did not allow for the fulfillment of their social obligations.

In order to illustrate this situation, we propose to study two communities and the form of marriage observed therein: Anglo-Indians¹²⁵ and Tamils.¹²⁶ The latter had an additional form of marriage which for them was essential. The community under the Portuguese, as well as the Anglo-Indians, followed the ordinary Tridentine form.

i) The Form of Marriage among the Anglo-Indians

The celebration of marriage among the Anglo-Indians is one typical example of the form that prevailed in India until the civil law was enacted. The exchange of consent took place in the presence of a priest and two witnesses.

125 The term 'Anglo-Indian' here means a person born of Indian and British parentage. Due to their customs, they form a community within the vast Indian community. Their concept and praxis of marriage is slightly different from the rest of the Indians. They consider marriage as a concern of two parties, with the result that the arranged marriages are rare among them. The concept of romantic love is an essential aspect of Anglo-Indian marriage. They marry only after a prolonged courtship.

126 By the term Tamil-Catholic, we mean the people speaking the Tamil language. They have a special culture distinguished from the rest of the Indians; they are of the Dravidian race. The praxis and concept of marriage among these people vary considerably from the rest of the Christians in India.

Among the Anglo-Indians, mate selection was carried out by the parties themselves, and in most cases with the prior approval of the parents.¹²⁷ The publication of banns was preceded by an engagement. At the time of the wedding, the priest received the consent of the parties in the name of the Church. Thereafter, he joined their hands as they exchanged their vows.¹²⁸ The blessing of the ring was considered important for them (while in other communities tali was held essential). Usually, marriage took place within the community and was celebrated during Mass.

This form of marriage was quite meaningful for marriage was considered to be a personal matter. As S.K. Gupta points out, "except love there is no other basis for marriage in their society."¹²⁹ The rituals gave expression to the mores of marital union prevalent in any given society, and, in the case of the Anglo-Indians, this formal exchange was more important than anything else precisely because there was a free choice, as distinguished from the arranged marriages or the modern guided-choices. This fact can be easily understood by recalling that the Anglo-Indian marriage celebrations were under the exclusive control of the Church.

127 S.K. Gupta, Marriage among the Anglo-Indians, p. 49.

128 Ibid., p. 62.

129 Ibid., p. 49.

ii) The Form of Marriage among the Tamil

Among the Tamil Catholics, the same marriage customs as prevailed among the caste-Hindus existed during the XVIIIth century. A Tamil manuscript, Maranacacanam,¹³⁰ gives details of this: two forms of marriage were in use among the Catholics; although these forms were additions to the canonical rite, they were considered essential.

Regarding the first form, Maranacacanam prescribed that upon returning from the church, the sister of the bride was to put a silver ring on the groom's toe. Then rice was thrown on the spouses. After this, the gifting of the bride (kanyadana) was to take place, followed by the tying of the tali which has been respectfully touched by all present. As the couple went around an altar made for the purpose with joined hands (praying), the people were to join in singing and prayer. Then followed the solemn entering of the house and the exchange of gifts, the garlanding, the parental blessing and procession. The ceremony concludes by leading the couple to the wedding chamber.

The second form of celebration of marriage took place under the supervision of a catechist at the bride's home. It was more elaborate than the ordinary one. The preliminaries:

130 Y.A. Lourdes, "The Ritual of Tamil Marriage", in Indian Theological Studies, 16(1979), pp. 84-88.

the catechist spreads a plantain leaf before the spouses, lays rice, flowers, water, and mango leaves on it; he then begins with the sign of the cross, the Our Father, Hail Mary and Credo, and sprinkles water with a mango leaf.

Garlanding is the next step. The catechist prays and blesses the garland and the elders do the same as well. The couple are exhorted to live faithfully, and then they garland each other. The gifting of the bride (kanyadana) is important: the groom places his hand (palm open upward) in his father's, the bride places her palm in his and then her father places his palm over it, while the catechist pours water on the hands. The bride's father makes a declaration gifting the girl and the groom's father answers, "I do accept". After this comes strewing of rice which is blessed by the catechist. The elders join in blessing the couple who are then led to the chamber. Only then do the festivities commence.

Conclusion

By way of conclusion it can be said that the celebration of marriages among the Catholics in India from the XVIth century until the passing of the civil law in 1872 was substantially the same as for the rest of the Christian world. There remained, however, some understanding on the part of the faithful to the effect that the form was celebrated in two parts: the first in the church and the other either before or after the church ceremony. They abided faithfully by the ecclesiastical law requiring the exchange of consent. But, it is not a simple matter to determine which of these two parts had more weight in their mind. It can be presumed that they attached great value to old traditions. For them, the tali was more important than the ring, with the exception of the Anglo-Indians.

Having considered these aspects of customary marriages, we are now in a position to examine the civil law dimensions to determine how the legislation of the State recognized these customs as they existed at the time and related to the prescribed Catholic form of marriage.

CHAPTER II

THE INDIAN CHRISTIAN MARRIAGE ACT, 1872

The study of the general social and religious context of India shows that there are many ways of considering marriage, a most significant personal and social event. Our efforts shall be directed more particularly now to the civil legislation governing the solemnization of marriages of Christians, which is embodied in the Indian Christian Marriage Act. Our examination, therefore, is directed primarily to this Act, but an understanding of this legislation requires some background study and knowledge. This is the purpose of our second chapter.

1. The Preparation of the Indian Christian Marriage Act, 1872

In order to understand better the Indian Christian Marriage Act, 1872 (hereafter called the ICMA), we shall first outline the context in which it took its final form. To do this, we shall consider the Act in its political and religious contexts and then examine its history.

a) The Political Context

The ICMA was enacted by the British who came as traders to India under the auspices of the East India Company, but later turned themselves into rulers.¹ Until 1833, the

1 A.C. Kapur, Constitutional History of India, p. 48.

British exerted no legislative role in India. Nevertheless, the need for legislation such as the ICMA was already felt in 1828 when doubts were raised about the validity of certain marriages performed by clergymen from the British Isles.² However, until 1833, the British policy was one of non-intervention in the internal affairs of the people. But, with the Charter Act of 1833, the British Parliament began to assume authority over the East India Company. By 1853, after a new Charter Act was passed, Parliament was in full control of the Company; this gave added momentum in the legislative field.³

The Charter Act of 1853 provided for the appointment of a Secretary of State, an India Council and a legislative body for India.⁴ This Act quickened, as it were, the task first undertaken in 1833 when a Law Commission was established to revise and consolidate the existing legislation. Section 53 of the 1853 Charter Act outlines the policy of the legislature. It states:

[...] such laws may be applicable in common to all classes of the inhabitants [...] due regard being had to the rights, feelings and peculiar usages of the people [...] and that

2 A.B. Keith, A Constitutional History of India, p. 130.

3 A.C. Kapur, op. cit., p. 48.

4 Ibid., p. 49.

all laws and customs having the force of law should be ascertained and consolidated, and, as occasion may arise amended.⁵

In the same year, the second Law Commission expressed the view that:

What India needs is a body of substantive civil law, in preparing which the law of England should be used as a basis. It however, emphasized that such a body of law ought to be prepared 'with constant regard to the conditions and institutions of India, and the character, religions and usages of the population.' It also stated that in the social conditions existing in India, it was necessary to allow certain general classes of persons to have special laws, recognized and enforced by courts of justice, with respect to certain kinds of transactions among themselves.⁶

The Government of India Act (1858) made the Queen of England the head of the State and India was governed in her name.⁷ In 1861, the Council of the Governor General was established for the purpose of making laws (with subordinate legislatures in Bombay, Madras and Calcutta). At that time, India did not have a unified system of civil legislation. The existing civil law was generally intricate and uncertain, varying from province to province, with many distinctions and exceptions. The new legislation, enacted by the British,

5 J. Minattur, ed., The Indian Legal System, p. xii.

6 Ibid., p. xiii.

7 A.C. Kapur, op. cit., p. 49.

incorporated customs and jurisprudence, with British law forming its basis.⁸

The purpose of the new legislation, therefore, was simply to generalize the law and the procedures without disturbing the existing practices and institutions of Indian society. It must be recalled, however, that most of the law officers, who were British, were unfamiliar with the law applicable to Indians. In spite of this, reasonable efforts were made to come to know the existing legislation.⁹

This was the political background in the light of which civil legislation affecting the religious practices of the people of India should be studied. For it is here that the laws of England played a more important role than elsewhere.

b) The Religious Context.

As mentioned above, the general thrust of the Law Commission's work was to follow the basic principles of English law with due respect for Indian customs and usages. This approach was particularly evident in the field of marriage. The ICMA followed the laws of England and attempted

8 J. Minattur, op. cit., p. xiii.

9 The Government of India, Legislative Department, Papers, (Manuscripts) Relating to the Bill to Consolidate and Amend the Law Relating to the Solemnization in India of Marriages of Persons Professing the Christian Religion, Delhi, National Archives, (hereafter referred to as, National Arch. Leg. Dept., Papers), Nos. 42-46; 95/1865.

to lay down an elaborate procedure and ceremonial for marriage.¹⁰ The existing British legislation, in turn, derived in great part from the Canon Law. Indeed, at least by 1143, the law of the Church was recognized as the civil marriage law of England.¹¹ According to the Canon Law existing at the time, physical union with an intent of being thereafter husband and wife was sufficient to contract a marriage. However, with time, there were changes, as Pollock and Maitland observe:

The one contract which, to our thinking, should certainly be formal, had been made most formless of all contracts. It is true that from the very early time the Church had insisted that Christian spouses should seek a blessing for their union, should acknowledge their contract publicly and in face of the church. The ceremonies required by temporal law, Jewish, Roman or Germanic were to be observed, and a new religious colour was given to these rites; the veil and the ring were sanctified.¹²

Until the Council of Trent, the law on the celebration of marriages was generally considered to be mostly a secular matter (at least in the Latin Church). The first post-Tridentine marriage legislation in England was passed in 1653 and notable changes were introduced, taking into

10 J. Minattur, op. cit., p. 641.

11 F. Pollock and W. Maitland, The History of English Law before the Time of Edward I, 2nd ed., Vol. 2, p. 367.

12 Ibid., Vol. 2, p. 369.

account the situation in post-Reformation Britain. Cromwell's Civil Marriage Act (1653) prescribed an obligatory ceremony before a Justice of the Peace. The ceremony consisted in expressing consent accompanied by interlocking of hands; the Justice then proclaimed the couple husband and wife. A further Statute of 1753 insisted on the publication of banns and the celebration of marriage during canonical hours.¹³

The Marriage Act (1836) made the solemnities prescribed by the Anglican Church obligatory in England. It also provided for two forms of civil celebration of marriage; one with a marriage licence and the other without it, a certificate to that effect was to be issued by a superintendent.

It is within this legislative context that the Law Commission began its work of enacting the ICMA.

c) The Preparation of the ICMA

Although the task of consolidating the legislation in India was entrusted to a commission in 1833, the need for a law such as the ICMA was felt beforehand.¹⁴ While the law applicable at the time to Christian marriages among British subjects in India was the law of England, the legislation

¹³ O.T. Cuttor, ed., Abstract of the Proceedings of the Council of the Governor General of India Assembled for the Purpose of Making Laws and Regulations, Vol. 3, p. 111.

¹⁴ A.B. Keith, op. cit., p. 130.

did not extend to native Christians. The ICMA was passed for the first time in 1851 and became operative in 1852. Even this law considered only civil marriages and again applied to British subjects in India.¹⁵ The situation of the other native Christians called for special legislation. Thus, finally, in 1862, a Bill was introduced in the Legislative Council regarding the solemnization of marriage; it became law in 1864. Summer Maier, the President of the Council, explained the situation in these terms: "Prior to this legislation that law was chaotic; the Parliament had partially remedied this by the Act of 1851. It provided for the celebration of marriages."¹⁶

Within a short period of time, the ICMA of 1864 had to be further amended. Indeed, this Act had been passed without great input from the Churches concerned. The Catholic Church in India had raised a number of objections to the Act of 1864, particularly as regards the necessity of obtaining a licence from the Government to solemnize marriage in the country.¹⁷ To remedy this situation and to overcome some other lesser difficulties which had arisen in the application

15 1 MLJ 489.

16 O.T. Cuttor, op. cit., Vol. 6, p. 159.

17 National Archives, Leg. Dept., Papers, No. 67/1872.

of the 1864 legislation, a new Act was passed in 1872, consolidating the Christian marriage law in India. This legislation, personal in nature, was addressed to Christians only.

d) Personal Law and its Application in the Courts of Law

Opinions vary as to the extension of personal law. According to one author, it extends to the following: validity and effects of marriage, divorce, annulment, rights and obligations of husband and wife, adoption and legitimation, succession and capacity.¹⁸ It is a law that relates to the personal status of an individual. According to Professor J.D. Derrett:

India is a land of personal laws. The "personal law" is now the system of rules applicable by any court to an individual in respect of the topics covered by that law, determined by reference to the religion which he professes or purports to profess or is presumed to profess; for the law determines what a man's religious affiliation is for the purpose of application of the personal law by methods peculiar to itself.¹⁹

Usually, the personal law is determined by the domicile of the person, but, in this case, it is by his

¹⁸ E.D. Devadason, Christian Law in India: Law Applicable to Christians in India, p. 236.

¹⁹ J.D. Derrett, Religion, Law and State in India, p. 39.

religion.²⁰ Since there are many religions in India, the personal laws are based on a multi-religious background. This is clear from the following extract of a court decision:

While Brahmin, Buddhist, Christian, Mohammedan, Parsee, and Sikh are one nation, enjoying equal rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The Law of Husband and Wife, parent and child, the descent, devolution and position of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.²¹

The personal laws applicable to Christians in India are largely codified, but not uniform. The ICMA, for instance, does not extend to the territories of the State of Travancore-Cochin.²² A foreigner who acquires domicile in Bombay will be governed for marriage purposes, if he is a Christian, by the ICMA; but, if he gets married in Cochin,

20 E.D. Devadason, op. cit., p. 236; "The personal law of a person according to well accepted principles of private international law is determined by lex loci, i.e., the law of the locality or territory in which a person is domiciled."

21 Skinner vs Orde, 14 MIA 309, as cited in J.D. Derrett, op. cit., p. 39.

22 The Cochin Civil Marriage Act is the law governing the Christians of the old Travancore-Cochin State; see Sarkar vs Mathur, 10 TLR 33. In this case it was held that the Syrians of Travancore were governed by customary law.

he will be governed by the Cochin Civil Marriage Act, not by the ICMA.²³ This leads us to a consideration of the extension of the ICMA.

2. The Extension of ICMA

a) The Territorial and Personal Extent of the Act

Unlike many other personal laws, the ICMA is restricted in its extension since it is applicable only to Christians marrying within a given territory. It cannot be carried along, as it were, by a person who moves from one place to another (which is the case with other personal laws), except when its "territoriality" extends also to the new area. By "territoriality" we understand the binding force of a law within the territory for which it has been enacted. Under usual circumstances, this is co-extensive with the jurisdiction of the Parliament; however, such is not the case with the ICMA, for, in its latest revision, it is clearly stated that the law "extends to the whole of India except territories which, immediately before the 1st November, 1956, were comprised in the State of Travancore-Cochin, Manipur and Jammu and Kashmir."²⁴

23 E.D. Devadason, op. cit., p. 241.

24 ICMA, s. 1.

In the States of Manipur and Jammu and Kashmir, special customary laws were in effect. Moreover, in those places to which the Act extends, it is provided that if certain provisions of the enactment are deficient in some respect, the customary or common law would be applied to supplement the prescriptions of the legislation. It has been the policy of the courts to follow customary laws in the absence of statutory provisions. E.D. Devadason clarifies this point further: "In matters not governed by statute or customary law, it is the principles of 'justice, equity and good conscience' that should apply and it is supposed that those principles are to be found in the Common Law of England."²⁵ When such were lacking, the common law was administered even to the Christians. Thus, the Syrians as well as the Christians living in the former French and Portuguese territories were governed by the customary law, either French or Portuguese, according to circumstances.²⁶

The statutory provisions of the ICMA, as well as the jurisprudence, show that the provisions of other customary laws are considered when the extension of the ICMA

²⁵ E.D. Devadason, op. cit., p. 242.

²⁶ Ibid., pp. 243, 270.

is discussed.²⁷ In this perspective it can be asked whether the customary law of the Catholic Church (Canon Law) was approved, or at least recognized implicitly, in the ICMA and in the practice of the courts.

b) The Implicit Recognition of Ecclesiastical Law

The ICMA was enacted to preserve the sacredness of marriage as an institution. Thus, the Churches were asked for their opinion when the law was being revised.²⁸ The spirit of the ecclesiastical legislation influenced the Act somehow since many of the opinions of the Church representatives were accepted and incorporated into the 1872 text. Furthermore, the Act itself leaves ample room for the application of ecclesiastical legislation. For instance, it makes the following provision:

Marriages may be solemnized in India—(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister.²⁹

This can be taken to mean that the law regarding the canonical form of marriage is indirectly recognized by the Act.

²⁷ ICMA, s. 5; s. 88; Varkey vs Thresia, AIR 1955 Ker 255.

²⁸ Maharashtra Government Archives, Bombay, Ecclesiastical Dept., Papers, No. 68/1872; S. Dennis, Christian Mission and Social Progress, Vol. 3, p. 314.

²⁹ ICMA, s. 5(i).

Section 88 of the Act, however, states further: "Nothing in the Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

That section 5 indirectly provides for the incorporation of the canonical law regarding the form of marriage is clear from an Allahabad decision where the court declared that a marriage between a Catholic and a Protestant before a Protestant minister was void due to failure to obtain a dispensation from the bishop for the Roman Catholic to marry a Protestant and on account of the omission of banns. Although the Act does not specify this in clear terms, the practice of the courts has been to recognize the fact. Indeed, in the Allahabad case the court observed:

The question, whether the omission of the banns and the omission of the dispensation will make a marriage, otherwise valid, void, is a question which must be decided according to the 'rules, rites, ceremonies and customs of the Church.' The Church which lays down the rules, rites, ceremonies and customs must necessarily also lay down which of such rules etc. are essential and which are not essential. If the Church says that certain rules should be observed but non-observance will not render the marriage void, there is nothing in S.5, Indian Christian Marriage Act (1872) which says that such a marriage is to be declared void by a court.³⁰

30 Titli vs Jones, AIR 1934 All 278.

The law, and more particularly, the practice of the courts, recognizes the provisions of Canon Law relevant to the form of marriage.³¹ In this regard, we can examine both the extent to which the courts can recognize Church law and its status before the courts in relation to civil law.

Devadason is of the opinion that the Courts in India shall recognize Canon Law or the rules applicable to each community just as any court will enforce the rules applicable to the members of an organization or a club. Similarly, a member of a Church belonging to a denomination is expected to observe the rules applicable to the denomination. One cannot disregard the rules and yet claim to be a member of the Church.³² Since the ICMA recognizes the rules observed by the various denominations, the norms relating to matrimonial impediments are fully recognized by the Act.³³

The status of Canon Law, in the eyes of civil law, was discussed in a Madras case³⁴ where the claimants relied on Privy Council decisions in similar matters (Long vs The

31 E.D. Devadason, op. cit., pp. 257-258.

32 Ibid., p. 142.

33 ICMA, ss. 5, 88.

34 Michael Pillai vs Rt.Rev. Bartle, 39 MLR 1056. The facts of the case: some of the high-caste converts to Christianity wanted a wall to be raised in the church separating themselves from the low-caste converts. They claimed it as a concession given to them by an earlier bishop. The decisions of the court was based on the law of the Church.

Bishop of Cape Town, and Merrimen vs Williams). The Madras case was decided upon the provisions of Canon Law. The court held that "Canon Law knows no distinction of castes among the Roman Catholics and no convert to Roman Catholicism can claim any special or exclusive rights or privileges in the Church on account of any supposed superiority of caste over other."³⁵ As to the claim of the plaintiffs that they were granted privileges by one of the former bishops, the court ruled:

Nothing could be farther from the intentions of their Lordships than the suggestion that where there is a recognized religious association such as the Roman Catholic Church under the supreme authority of the Pope of Rome, persons who become members of that body, at a particular place can, in respect of their local Church, derogate from the authority of the rules of their community by an agreement made among themselves or adopt rules at variance with the Canons of the Church. To do this, they must secede from the Roman Catholic Church and form a new religious association for themselves.³⁶

In another case, regarding the question of a local church making laws different from those of the universal Church, it was declared:

The Roman Catholic Church is not an established Church but a voluntary association. If a particular Church is a part and parcel of the universal Catholic Church, it is bound by the Canon Law. If, however, it is an independent

35 Ibid., 1056.

36 Ibid., 1056.

voluntary association which while adopting in the main the doctrines of the Roman Catholic Church, has yet erected for itself certain rules different from the rules of the Catholic Church, in matters of discipline and management, then those rules must be proved in the same way that a custom has to be proved in a court of law.³⁷

In another case where the plaintiff wanted to oust the vicar appointed by the bishop, the court refused to rule in favour of the plaintiff. Instead, the court held that a church which is under the Catholic bishop is bound to observe Canon Law.³⁸

When a conflict arises, however, between the civil law and the Canon Law, the civil law will prevail. Thus E.D. Devadason reports:

The court held therein that in regard to marriage among Indian Christians, they are looked at from two standpoints, viz., the law of the land and the Canon Law. Both will generally coincide but not necessarily so.

³⁷ Gaspari vs Gonsalves, 35 MLJ 407. This was a case where the local priest filed a suit to recover the arrears of rent from the tenants of church property. The defence was taken that the plaintiff (priest) was not entitled to sue as his appointment as manager of the property was not valid. The property for a long time was managed by a junta who claimed the right of appointment of the manager, and the priest in this case was appointed by the bishop. The law on which the case was decided by the court was Canon Law.

³⁸ Marian Pillai and Others vs Bishop of Mylapore, 27 Mad 447. The church property was administered by a committee appointed by the bishop; this committee could choose a president among themselves, but they went so far as to oust the vicar appointed by the bishop. The plaintiffs lost the case and again the basis of the decision was Canon Law.

Under the Canon Law, where Roman Catholic parties are married by a Schismatic Priest that marriage will not be recognized by the Catholic Church. [..] But this will not invalidate the marriage in the eye of the law of the land or make the offspring illegitimate in the eye of the law of the land.³⁹

In all these decisions, then, the courts accepted the Canon Law. It can be stated, therefore, that the law as well as the practice of the courts in India, recognizes Canon Law and applies it. Its status is similar to that of the rules of associations; in the case of a conflict between the two, the civil law will prevail before the civil courts.

3. Major Provisions of the Act

a) General Outline

The ICMA consists of 88 sections divided into eight parts. A short explanatory note and a preamble are prefixed to the first part and four schedules added at the end. The preamble simply explains the nature of the Act. Sections 1 to 3 deal with scope, extension and application. They also provide some definitions and explanations of terms used in the Act.

Part I treats of those persons whose marriages are to be celebrated and of those by whom marriages may be solemnized. Part II prescribes the time and place for solemnization

³⁹ E.D. Devadason, op. cit., p. 150; Gnanamuthu vs Antony, AIR 1945 Mad 516.

of marriages by episcopally ordained ministers, while ministers of other religions are mentioned in part III.

According to part IV, marriages are to be registered with due diligence. While, according to part V, marriages can be solemnized by Registrars of marriage, they can also be performed by persons licenced under part VI. The Act also provides sanctions; those who contravene its provisions will be dealt with according to the prescriptions of part VII. The final part is a residuary one, dealing with miscellaneous provisions.

From the general outline, we now move to a more detailed study of the text. Since it would not be opportune to give a complete and detailed analysis of the entire Act, we shall limit our considerations to those major provisions which have direct bearing on our subject. We shall thus discuss the subject, the officiating minister, the witnesses, solemnization of marriage, its time and place and the registration.

b) The Subjects of the Act

The subjects of the ICMA are those who come under its prescriptions. In considering who is a subject, three main considerations arise in the case of personal law: religious affiliation, age, and capacity of persons. Section 4 is explicit in this regard: "Every marriage between persons, one or both of whom is or are a Christian or Christians,

shall be solemnized in accordance with the provisions [7]."

The explanatory note of section 1 is more precise: "Marriages between persons at least one of whom is a Christian are governed by the Indian Christian Marriage Act, 1872." At the same time, the preamble states that the law deals with the marriages of "persons professing the Christian religion." It was generally considered obligatory for Christians until the enactment of the Special Marriage Act; however, we shall in the fourth Chapter examine the various decisions of the courts in this regard.

The subjects, therefore, are Christians marrying among themselves or non-Christians marrying Christians. The Act applies to those who are Christians at the time of the celebration of marriage.⁴⁰ Religious affiliation alone is not sufficient to come under the Act; other conditions must also be fulfilled, among which is the capacity to contract.

i) Capacity to Contract Marriage

Since the Act is concerned with the solemnization of marriages, it does not define marriage nor does it deal with

⁴⁰ Maharam and Others vs Emperor, AIR 1918 All 168. In this case it was held that being baptized alone is not enough to be subjected to the ICMA, but being a Christian at the time of marriage. This was a case of a certain person called Maharam, a baptized Christian, son of a preacher, who had his marriage solemnized according to the Bhangi (Hindu) rite by a Hindu priest. It was challenged under the ICMA.

its properties. In the context of the tradition and practice of Indians, marriage is both a contract and a sacrament, as expressed in Ramappa vs Hagal:

Opinions have varied as to whether marriage according to Christian religion is a contract or whether it is something more than a contract, namely a change of status, and the distinction was well provided in a well-known case.⁴¹

In civil law, marriage is also something more than an ordinary contract, as is expressed in another decision: "A marriage is no doubt described as a civil contract but is far from being in the nature of an ordinary contract."⁴²

Marriage considered as a contract can be validly entered into by persons able to contract. The ability to contract, as a general principle, would depend on the lex domicilii of the parties.⁴³ In India all contracts are governed by the Indian Contract Act; under section 12 of this Act, a person must be sui juris to be able to contract. As far as marriages are concerned, the question of sui juris

41 Ramappa vs Hangal, 8 BLR 982.

42 Titli vs Jones, AIR 1934 All 278.

43 E.D. Devadason, op. cit., p. 247. Also see P.M. North, ed., Cheshire's Private International Law, 9th ed., pp. 347-349.

status is determined by personal law⁴⁴ which stipulates that the marriages of minors shall have the consent of the parents or guardians, meaning thereby that minors are unable to contract simply of their own accord.⁴⁵

ii) The Qualities of the Subject

Not all Christians are capable of contracting. To enter into a valid marriage under this act, the parties must be able to contract, must be willing to do so, and must actually enter into an agreement. This contracting has to be done according to any of the three approved forms of solemnization:⁴⁶ the Catholic form, the non-Catholic (religious) form and the civil form of marriage.

iii) Ability to Contract

To be able to contract, the parties firstly must be of the required age as mentioned in section 60: "(1) The

44 A. Gledhil, The Republic of India: The Development of its Law and Constitution, 2nd ed., p. 251: "Indian Majority Act, 1875, does not apply to persons not domiciled in India, or to the capacity of persons domiciled in India in respect of marriage or religious rites or usage [..] the capacity in these matters is governed by personal law."

45 ICMA, s.3: "'Minor' means a person who has not completed the age of twenty one years and who is not a widower or a widow." Section 18 stipulates that such persons can marry with parental consent.

46 ICMA, s.4: "Every marriage between persons one or both of whom is or are a Christian, or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void."

age of the man intending to be married shall not be under eighteen years, and the age of the woman intending to be married shall not be under fifteen years; (2) neither of the persons intending to be married shall have a wife or a husband still living." The parties must not be within the prohibited degrees of relationship to each other.

The ability to contract also includes the mental capacity of the person, not just the age. No one is able to contract a marriage who is insane, or without the use of his senses because of intoxication or otherwise to the point that he is unable to understand what he is doing. In Mouji Lal vs Chandra Bati Kumari, the district judge found that the bridegroom was so insane at the time of marriage that the marriage was invalid.⁴⁷

In Ramappa vs Hangal, the validity of a marriage with an idiot was discussed, and the court came to the conclusion that "among Christians, if a person is an idiot at the time of marriage, he or she is not capable of being bound by the transaction in any shape or form."⁴⁸

46 (cont'd) Section 5 speaks of three ways in which such marriages can be solemnized. Also see, A. Gledhil, op. cit., pp. 254-255.

47 Mouji Lal vs Chandra Bati Kumari, 38 IA 706.

48 Ramappa va Hangal, 8 BLR 982.

iv) Willingness to Contract

To contract validly a third condition is necessary: a party must also be willing to contract. The maxim Nuptias non concubitus sed consensus facit (consent, not cohabitation makes marriage) is quite valid in this instance for it could happen that the parties in cohabitation might have an ability to contract, but are unwilling to do so. This maxim which derives from the Roman law was incorporated both into the Canon and the civil law.

The maxim consensus facit matrimonium applies to two very important elements. Firstly, the parties must be free agents. If freedom is in any way obstructed either from outside or from within, the parties are not considered free agents and the marriage will be void. In a Calcutta case, a marriage was declared null on the ground that the consent was fraudulently obtained by force.⁴⁹

Secondly, the parties must intend to get married; this intention alone is insufficient; the parties must also intend to be married to each other. In other words, they must be ad idem as they exchange consent. Hence, a marriage is void when there is fraud or misrepresentation of fact or of person.

49 Aykut vs Aykut, AIR 1940 Cal 75.

To summarize, then, under the ICMA, one or both parties to a marriage must be Christian. Furthermore, neither party shall have a spouse living at the time of marriage; both must be of the required age; they must not be within the prohibited degrees of consanguinity or affinity;⁵⁰ they must be able to contract, willing to do so, have the intention to contract and must actually contract. If these conditions are met, the parties can contract a valid marriage, provided it is done so according to any of the three approved forms, which in the case of the Catholics, is the canonical form of marriage.

v) Minors and Capacity to Marry

Special consideration is given in the law to minors in order to protect their interests in law. This is particularly true in the case of marriage, one of the most solemn contracts. Minors are not presumed to have a mind of their own in matters of contracts; in other words, they are not persons sui juris. The age of majority under the Indian Majority Act is 18, and in the case of those who have a legal guardian appointed, it is 21. Although minors are

⁵⁰ ICMA, s.88: "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." Section 18 speaks of the impediments.

disqualified from entering into marriage, the personal law provides an exception. Under section 3 of the ICMA, "a person who has not completed the age of 21 years and who is not a widow or a widower" is a minor. Minors can validly marry as per section 18, provided they have parental consent.

Such consent in the marriage of minors was discussed at length when the bill was before the Legislature. The intention of the Act was to make the consent of the parents or guardians as a condition for the legal contracting of marriages between minors, in the case where parents or guardians had a voice in the matter.⁵¹

Failure to obtain parental consent does not necessarily invalidate the marriages of minors.⁵² The law pre-supposes that minors can be sui juris for this purpose. at least in some situations,⁵³ such as when the parents are

51 O.T. Cuttor, op. cit., Vol. 9, p. 760: ICMA, s.19: "The father, if living, of a minor, or if the father is dead, the guardian of the person of such minor, and, in case there is no such guardian, then the mother of such minor, may give consent to the minor's marriage."

52 ICMA, s.77: "Whenever any marriage has been solemnized in accordance with the provisions of section 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following:- (1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law."

53 Sherine vs John, AIR 1952 Punj 277. In this case the validity of a marriage solemnized without the consent of the parents was discussed, and it was held to be valid.

unreasonably obstinate against granting permission to marry. The question of age was discussed in an Allahabad case where the Judge observed:

It appears to me that for a Christian marriage in India, the age of consent at the date of marriage would be 12, in the case of a girl, that being the state of law in England, at the time of marriage.⁵⁴

Under the Child Marriage Restraint Act (1929), marriage below the age of 18 for boys and 15 for girls is subject to penal consequences.⁵⁵ This provision, however, does not affect Christians if they wish to be governed by their customary law. This is evident from the decision of the court in the Allahabad case, the position of the Catholic Church being clarified at the time the marriage law was being enacted. Bishop M. Laouënan, Vicar Apostolic of Pondicherry, made it clear to the Government that the "Catholic Church forbids marriage of minors without the consent of the parents [..], but this prohibition does not affect the validity and indissolubility of marriage in spite of the want of consent."⁵⁶

54 Godal va Goodal, AIR 1933 All 135.

55 The Hindu Marriage Act (1955), s.5 (iii), has the same provision as to the age of the parties; "The bride-groom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage."

56 National Archives, Eccl. Dept., Papers, No. 18/1872. A similar view can be found in ibid, No. 91/1872. L. Charbonnaux, Bishop of Jassen and Vicar Apostolic of Mysore,

Briefly then the subject of marriage under the ICMA must be sui juris, Christian (or non-Christian marrying a Christian) and not under any type of impediment. He should, however, observe the law of the Church as well as that of the State. Both laws demand that marriages be solemnized, which is the topic of our next consideration.

c) The Officiating Minister

Under the ICMA, marriages are to be solemnized by a person authorized to do so. The Act speaks of three categories of such persons: an ordained minister, a person licenced under the Act, and the Registrar of Marriages.⁵⁷

As far as Catholics are concerned, marriages must be celebrated according to the form prescribed by Canon Law and not according to any other forms. Therefore, the Act stipulates

56 (cont'd) wrote to the Government: "With reference to para one of part V, I have to remark that the Canonical Law requires that a girl should be twelve years old, and a bachelor 14 years, to be eligible for marriage. Accordingly, Christian parents of caste generally give their girls in marriage soon after they obtain the age of 12 years. Moreover, the consent of the parents is not required by Canonical Law, sub poena nullitatis, but only as a condition 'honestatis et liceitatis'."

57 ICMA, s.5: "Marriages may be solemnized in India by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister."

under Section 65 that the marriages of Catholics should be celebrated before a priest.⁵⁸

The presence of a priest for the validity of a marriage was emphasized when the bill was being debated in the Legislative Council. The mover of the bill remarked that the Act, with direct intention, rendered necessary the presence of a person in Holy Orders at the ceremony. He stated further that those who drafted the Act commenced their work under the conviction that such presence of a person in Holy Orders was essential to the validity of a marriage, and that they did not believe it necessary to assert the principle in so many words.⁵⁹ However, at that time it was commonly thought that this would apply only to priests and not to deacons since deacons at that time were not recognized by Church law as eligible qualified witnesses of marriage.

After referring to various authors and court decisions, the mover of the bill stated that he considered

58 E.D. Devadason, op. cit., p. 257: "According to Sec. 65, marriages between Roman Catholics cannot be solemnized by such licenced persons. It is not clear whether this prohibition applies where one of them is a Roman Catholic."

59 O.T. Cuttor, op. cit., Vol. 3, p. 112.

the presence of a clergyman to be essential. At the same time, he felt there would result some difficulties if such a law were not enacted. For, as he says:

That it may at some time very possibly be held that a marriage per verba de praesenti is not valid by English Canon Law, and that some judge, /.../ may declare that part of Canon Law is applicable to India. If the opposite view is correct, then a large portion of the native Christian community and perhaps some portion of the European Christian community, may be reduced to a social condition little better than concubinage, no better with respect to the enforcement of certain civil rights, through the instrumentality of imprudent imposters pretending to have authority to solemnize marriages.⁶⁰

Thus, under the Act, the presence of a person in Holy Orders at marriage is essential for its validity.⁶¹ However, this person must have certain qualities.

i) An Episcopally Ordained Minister

The expression "episcopally ordained minister" singles out those thus ordained from those who are not ordained but are also ministers of religion. Under the Act, other ministers are to obtain an authorization from the proper authorities. In the case of both Catholics and Anglicans,

60 Ibid., Vol. 3, p. 115.

61 ICMA, s.5 (1).

priests officiating are to have proper authorization, or at least they must celebrate the wedding according to the rules of the Church.⁶² In other words, the officiating minister shall be either a bishop of the place, or the pastor or a person delegated by either of these. This is clear from the Act itself, for it stipulates that in the case of others, authorization is needed from the Government, while in the case of a Catholic priest, this authorization is to come directly or indirectly from the bishop according to the rules of the Church.

The need for a priest to be appointed or delegated is clear from the fact that the earlier Act (1864) prescribed that Catholic priests hold a licence from the Government. Catholics objected to this rule, since "it is opposed to the doctrine of the Church of Rome that a priest should, quoad his sacerdotal function, receive any authority from a secular power."⁶³

62 Ibid., s.5.

63 The measure requiring the presence of a person in Holy Orders for the validity of marriage between Christians, as incorporated in the Marriage Bill, was never extended to India. However, when a question on this matter arose efforts were made to ascertain the stipulations of Common Law of England on the subject. As a matter of fact, in England the question concerning the requirement of the presence of a person in Holy Orders for the validity of marriage was disputed without any definitive conclusion. In Dalrymple vs Dalrymple case, for example, Lord Stowell stated that by the Common Law of England a contract of marriage "per verba de praesenti"

To solemnize marriage in the presence of a priest, therefore, implies that he must have due authorization. For all practical purposes, this is the same as the canonical legislation. The act of solemnization, as far as the minister is concerned, consists in asking for and receiving the consent of the parties to marriage in the presence of at least two witnesses.⁶⁴

ii) The Duties of the Minister

The duties of the minister solemnizing the marriage are not clearly spelled out in the Act. However, they may be assumed by examining the general policy of the Act as well

63 (cont'd) constituted a valid marriage. This opinion was challenged in 1826 by Mr. Jacob who argued that the presence of a person in Holy Orders was by Common Law of England essential to the validity of marriage. Mr. Jacob's opinion had a significant influence on the outcome of the great Queen vs Mills case in 1842. Nevertheless, this case did not conclusively establish the principle that the presence of a person in Holy Orders was necessary for the validity of marriage.

In the McLean vs Cristal case involving a marriage solemnized in Surat, India, in the presence of a missionary named Fyire, a gentleman of integrity, but without episcopal ordination, the Chief Justice, E. Perry, declared that the whole of Common Law of England was not extended to India, but only as much as was suited to the situation of the country. Therefore, the decision of the court was in favour of the validity of the marriage. Mr. Jacob, however, disagreed with E. Perry's opinion and basing his position on various authors argued that the presence of an ordained clergyman was essential to the validity of marriage between Christians. For a comprehensive treatment on this dispute, see O.T. Cuttor, op. cit., Vol. 3, pp. 211-213.

64 ICMA, s.25: "Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister."

as the norms imposed on others who are permitted to solemnize marriages.⁶⁵ The Act does not spell out those duties which the priest is to carry out according to the Church law. It simply presupposes them. The priest is to carry out a prenuptial investigation and make sure that the parties are free of any impediment to marriage. This is also mandatory in the case of persons licensed under the Act. To verify their freedom, the parties are to make a solemn declaration before the licensed person to the effect that they are not under any impediment and are free to marry: only then is the certificate to be issued.

The certificate mentioned in section 17 shall not be issued until one of the persons intending marriage has appeared personally before the Minister and made a solemn declaration.

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and, when either or both of the parties is or are minor or minors, (b) that the consent or consents required by law has or have been obtained thereto.⁶⁶

Likewise, the priest is to make sure that the banns have been duly published. The priest must also register

65 Ibid., ss. 17, 51.

66 Ibid., s.18.

the marriages as the law requires. This prescription of Canon Law is specifically spelled out in the case of other ministers.⁶⁷

d) Banns, Time, Place and Witnesses

Every intended marriage is to be given due publicity, so that the freedom of the parties to marry shall be determined. In the case of marriages solemnized by persons licensed under the Act, a notice of the intended marriage shall be given and published.⁶⁸ Catholic marriages are not exempt from this provision; they are to be celebrated according "to the rules of the Church" which require that banns be published before a marriage is celebrated. This point was made clear by Clems Piele, the Advocate General: "[...] the publication of banns must be regarded as one of the 'rules, rites, ceremonies and customs' [...] The law of banns follows that of marriage."⁶⁹

Failure to publish banns has been mentioned as one of the irregularities in a case which received a declaration of nullity of marriage. However, this decision of the Allahabad court did not establish a commonly accepted

67 Ibid., ss. 12, 13. Notice of the intended marriage and publication of the notice.

68 Ibid., ss. 14-17: Marriage before a person licensed; ibid., ss. 37-40: Marriages before the Registrar of Marriage.

69 O.T. Cuttor, op. cit., Vol. 8, p. 96.

precedent. The court held: "The question whether the omission of banns and the omission of dispensation will make the marriage, otherwise valid, void, is a question which must be decided according to the 'rules, rites, ceremonies and customs of the Church'."⁷⁰ The Church law on this matter holds that under the normal circumstances banns should not be omitted.

The Act prescribes that marriages be celebrated during the canonical hours. Section 11 requires that "Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening." The law allows an exception for Catholics if they have permission to that effect from the bishop. It states:

Provided nothing in this section shall apply to—(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or a special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is to be solemnized, or from such person as the same Bishop has authorized to grant such licence.⁷¹

According to section 11, addressed to Anglican clergymen, under usual circumstances, the marriage must be

⁷⁰ E.D. Devadason, op. cit., p. 258.

⁷¹ ICMA, s.10.

celebrated in the church building:

No clergyman of the Church of England shall solemnize a marriage in any place other than a Church where worship is generally held according to the forms of the Church of England, unless there is no such Church which is within five miles distance by the shortest road from such place, or unless he has received a special licence authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

To solemnize a marriage according to the norms of the Church, the celebration must take place in the presence of a duly authorized priest and two witnesses. This provision is to be inferred from the Act. The presence of witnesses is required in any type of solemn contract. Other marriage laws too have similar provisions. For instance, the Special Marriage Act, section 12, insists that the exchange of consent be made in the presence of at least three witnesses. We find the same provision in section 51 of the ICMA which requires that "every such marriage shall be solemnized in the presence of some Marriage Registrar [..] and of two or more credible witnesses besides the Marriage Registrar."⁷²

⁷² Ibid., s.51; s.25: "After the issue of the certificate by the Minister, marriage may be solemnized between persons therein described according to such form or ceremony as the Minister thinks fit to adopt: Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister."

The presence of witnesses is compulsory in the case of marriages solemnized by persons holding licences under section 25. The same provisions apply to Catholic marriages as well. As regards the qualification of witnesses, the law simply says that they must be credible. The meaning is that they must be able to understand what is taking place, and, if called upon, shall be able to testify to the fact of such a marriage. There is no explicit provision in the Act regarding the religious affiliation of the witnesses.

The witnesses shall be present simultaneously and must be able to partake in the ceremony. The exchange of consent must be manifested in the presence of the two credible witnesses other than the officiating minister.⁷³ As we gather from the Act, Catholic marriages are exempted from some of its provisions because there are similar norms in the Church law. Furthermore, there are some explicit provisions from which Catholics are exempted.

e) Exemptions for Catholics

The Act exempts Catholics from the operation of part V, which deals with the publication of the intended marriage, the certificate of marriage and the registration after the

⁷³ Lopez vs Lopez, 12 Cal 766; Goodal vs Goodal, AIR 1933 All 135.

ceremony. The exemption is granted with the understanding that the Roman Catholic Church has similar provisions of law which are to be observed in the solemnization of marriages.⁷⁴

The Act regulates not the marriage law but the solemnization of marriages.⁷⁵ As far as Catholics are concerned, the celebration or solemnization of marriage means the solemnization in accordance with the provisions of Church law. The Act presupposes many of the formalities, such as the publication of banns and the premarital investigation. These are to be carried out according to Church law.⁷⁶

This in no way implies that the entire Canon Law has been either approved or incorporated into the Act. Indeed, there have been conflicting decisions on this point. It was once held that the whole law regarding the form of marriage was incorporated into the Act by sections 5 and 88. One author feels that this is asking too much of the law. He says, "Unfortunately, the judgement in Lopez vs Lopez has

⁷⁴ National Archives Leg. Dept., Papers, Nos. 18, 67-117/1872.

⁷⁵ ICMA, Preamble: "Whereas it is expedient to consolidate and amend the law relating to the solemnization in India of marriages of persons professing the Christian religion; it is hereby enacted as follows:..."

⁷⁶ Ibid., s.5.

been understood to mean that the entire Canon Law has been grafted into the Indian Christian Marriage Act by virtue of section 88."⁷⁷

The status of the Church law was clarified when the Act was being debated in the Legislature:

Roman Catholics will therefore be married according to the forms prescribed by their Church, and should any question arise as to the validity of marriage between a man and his niece, it will be for them to satisfy the court that the union is in accordance with the rites, rules, ceremonies and customs of the Church of Rome.⁷⁸

The exemptions as well as the recognition of the Church law were simply meant to facilitate the celebration of marriages according to the rules of the Church.

f) Forms of Solemnization of Marriages

Our study so far has been centered on the main purposes of the Act, the solemnization of marriage of Catholics. The Act has, as one of its purposes, to put an end to the then existing "simple forms of marriage"⁷⁹ (customary marriages) by making the new law on form mandatory.⁸⁰

77 E.D. Devadason, op. cit., p. 264.

78 O.T. Cuttor, op. cit., Vol. 3, p. 212.

79 Ibid., Vol. 9, p. 563.

80 ICMA, ss. 5, 25, 51.

There are, however, besides the solemnization of marriage by a priest, other forms of marriage recognized under the Act. The second approved form consists in having marriages solemnized by persons holding a licence to do so under the Act.⁸¹ The officiating minister in such instance is free to follow any ceremony of his choice, provided there is an exchange of consent between the parties in the presence of two witnesses other than the person officiating.⁸²

The third mode consists of a civil ceremony and exchange of consent. This has to take place in the presence of a Registrar of Marriage and two witnesses. In this form the ceremonies may also be adapted as the Registrar sees fit. The formula of exchange of consent is found in section 51, which has to be observed at least in essence.⁸³

i) The Nature of Solemnization

Since the entire Act is concerned with the solemnization of marriages, it is good to consider what is meant by

81 Ibid., s.5.

82 Ibid., s.25.

83 Ibid., s.51: "And in some part of the ceremony each of the parties shall declare as follows, or to the like effect: 'I do solemnly declare that I know not of any impediment why I, A.B., may not be joined in matrimony to C.D.' And each of the parties shall say to the other as follows or to the like effect: 'I call upon these persons here present to witness that I, A.B., do take thee C.D., to be my lawful wife or husband'."

this term. The Act does not define the word but leaves it to the law of the Church to do so. The civil courts have also dealt with this question:

Unless the marriage is celebrated or performed with proper ceremonies and in due form, it cannot be said to be "solemnized." If a marriage is not valid according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband and wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eyes of the law. The bare fact that a man and woman live as husband and wife does not, at any rate, normally give them the status of husband and wife, even though, they hold themselves before our society as husband and wife, and the society treats them as husband and wife.⁸⁴

Under the newer Special Marriage Act (1954), no marriage is complete unless the consent is mutually exchanged in the presence of at least three witnesses and the Marriage Officer. This form, however calls for some type of ceremony, but it is left to the parties to decide which form is to be used.⁸⁵ The Act allows the marriages of Catholics to be celebrated according to the law and practice of the Church.

84 Bhunilot vs Ram Karan, 1977 AWC 53.

85 ICMA, s.5. The Special Marriage Act (1954), s.12: "Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage Officer and three witnesses and in any language understood by the parties, 'I, (A), take thee (B), to be my lawful wife (or husband)'."

The requirements regarding the form can be gathered from the Act itself. These are mandatory when the marriage is celebrated under the second or the third mode.⁸⁶ Such explicit provisions to be applied in the case of non-Catholics are to be reasonably presumed to exist in the case of Catholics as well, for the purpose of law is to prevent irregular unions and tighten up the "simple forms of marriages."

The Act simply states that there must be some form of celebration of marriage. The practice of the courts is very clear in this regard.⁸⁷ The importance of solemnization of marriage according to rites was clarified in the Ragupat vs Gouri case: "This solemnization of marriage has a special significance in as much as unless lawfully wedded, a woman does not inherit a share as widow [..] and as much as unless the second marriage or subsequent marriage is solemnized, punishment for bigamy or polygamy would never follow."⁸⁸

86 ICMA, ss. 25, 51, 5.

87 Gopal Krishna vs Mithilesh Kumari, AIR 1979 All 316. Although this was a case under the Hindu Marriage Act, the principles are valid in ICMA as well. It was observed in this case: "A marriage when performed by a Hindu according to Shastric rites, the institution of matrimony under the Hindu law is a sacrament, and not a mere social contract. Its content is religious, [..]. It is a holy spiritual union corresponding to the consortium omnis vitae of Rome, a process by which husband and wife become one."

88 A.N. Saha, Marriage and Divorce, 2nd ed., p. 60.

The courts have gone a step further and insisted on the fact that religious ceremonies (ritual form) are essential for the valid solemnization of marriage, and consequently for the validity of marriage itself.⁸⁹ In Hindu law, for example, the ritualistic formalities are stipulated for the purpose of making the union public. The process of solemnization stands complete when the ritualistic formalities are carried out according to common understanding.⁹⁰ Only then does a marriage become valid and binding.

There is a strong presumption of the validity of marriage if it can be proved that the ceremonies of the marriage have been observed:

Where a man and a woman intend to become husband and wife, and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, the presumption in favour of everything necessary to give validity to such marriage is of exceptional strength, and, unless rebutted by evidence, strong, distinct, satisfactory and conclusive, must prevail, [...] According to the rule of the Church of Rome, a dispensation from the proper ecclesiastical authority is necessary to give validity to a marriage between a man and the sister of his deceased wife.⁹¹

89 Devani Achi vs Chithambaram Chettiar, AIR 1954 Mad 657.

90 A.N. Saha, op. cit., p. 65.

91 Lopez vs Lopez, 12 ILR Cal 706.

The Act does not specify what the essential ceremony is.⁹² In Hindu law, it varies from place to place; but this is not the case with Catholics, for they must celebrate according to the practice and desires of the Church. The same legislation is found in the recent law which can be chosen by any one (irrespective of religion) in the solemnization of marriage: "(2) The marriage may be solemnized in any form which the parties may choose to adopt: Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the marriage Officer and three witnesses and in any language understood by the parties--'I, (A), take thee (B), to be my lawful wife (or husband)'. "⁹³

When the fact of marriage has been proven, there exists a presumption to the effect that the required ceremonies have taken place. This is clear from the following observation: "Where there is evidence of a ceremony of marriage having gone through followed by cohabitation, [...] everything necessary for the validity of marriage will be presumed."⁹⁴ The presumption of correct solemnization is

92 ICMA, ss.5, 25, 51.

93 Special Marriage Act, s.12(2).

94 Gnanamuthu vs Anthoni, AIR 1960 Mad 430; Veerappa vs Michael, AIR 1963 SC 933; Linga vs Ajodhya, AIR 1974 Ori 107.

common in court decisions. For example, in a case it was held:

In a suit for restitution of conjugal rights, the fact of the celebration of marriage having been established, the presumption, in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with.⁹⁵

As was the case with the canonical form, so it is with the liturgical celebration. The Church can also decide what is essential for the validity of marriage. This point was made clear in the Allahabad decision mentioned earlier,⁹⁶ where the praxis of the Church was deemed sufficient for validity.

Commenting on the discussions that took place in the courts of law, E.D. Devadason remarks that with regard to the solemnization of marriage, the intention of the legislature was clear. The legislature did not want the country flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance. This result would be equally produced by a state of concubinage not regularized by any form of marriage.⁹⁷

95 Kumorkar vs Kumorkar, 12 ILR Cal 140.

96 Titli vs Jones, AIR 1934 All 278.

97 E.D. Devadason, op. cit., p. 262.

The Act, therefore, is concerned only with the solemnization of marriage, i.e., the forms according to which marriages can be solemnized.

ii) Rituals and Sacraments

From the foregoing considerations it can be deduced that the Act considers marriage both as a contract and as a sacrament.⁹⁸ To bring this into effect, there must be some type of ritual added to the form of marriage. This idea has been clear from the many court decisions mentioned above. The Church is responsible for the way its ritual is observed.

Rituals accompany the celebration of sacraments. These two terms, ritual and sacrament, are sociological constructs that evolved in the process of history, and were given a theological connotation; it is a way of expressing one's faith in relationship with the Divine. In Hinduism, rituals were generally considered as channels of grace. In Christianity, they are more meaningful in the context of the doctrine of grace. For a Christian, the sacraments are instituted by Christ who also raised natural marriage to the dignity of a sacrament. This fact is accepted by the courts in India.

⁹⁸ Ramappa vs Hangal, 8 BLR 982; Titli vs Jones, AIR 1934 All 278.

For Catholics, sacraments are celebrated in a liturgical context. This is probably why the ICMA allowed marriages to be celebrated according to the rites and the ceremonies of the Catholic Church.⁹⁹ The fact that civil law incorporates many of the provisions of the Church law or Christian tradition is evident from the statement on the form of marriage made in the legislative council:

The theory which they hold, I believe, is that marriage is a civil institution, consecrated by Christianity; consequently, they take definition of what constitutes marriage from the civil and secular law, and in this country, from the heathen law, but the incidents and consequences of marriage, they interpret by Christian law.¹⁰⁰

Rituals have a social objective apart from the imparting of grace. In the context of Indian culture, marriage has a social connotation. In accord with tradition, (which was the plan and policy of the legislators), the Act insists that the marriage of Christians be given the needed publicity. This in part is achieved by the publication of the banns of the marriage and partly by the publicity given through the ceremonies of marriage. Marriage rituals are an announcement to the rest of the community that the marriage is being celebrated.

99 ICMA, s.5.

100 O.T. Cuttor, op. cit., Vol. 4, p. 28.

Conclusion

The law as we have explained it in this chapter can be stated in brief. As regards marriages contracted under the ICMA, the principal requisites are that at least one of the parties be Christian; both parties should be of the required age with sufficient mental capacity; neither must have a spouse living; nor be within the prohibited degrees; they must be free to contract and have the intention to do so. These qualities must co-exist at the time of marriage and the parties must actually contract. In addition, the marriage must be solemnized in accordance with the rules of the Church, i.e., according to the canonical form. To be married according to the canonical form means to exchange matrimonial consent in the presence of two witnesses and an authorized minister. Both civil and Church law recommend that there be some fitting form of liturgical celebration (ritual) of marriage.

CHAPTER III

THE FORM OF MARRIAGE IN THE CIC AND THE ICMA

The essence of matrimonial consent consists in the mutual consent of the parties.¹ This consent, which is a deliberate act of the will, must be externally manifested according to some type of ceremony.² To be juridically valid, the external manifestation of consent must be accompanied by certain legal formalities known as the "form" of marriage. Depending on the mode of expressing or eliciting consent, the form of marriage can be said to be either natural, civil or canonical.³ According to natural law, the expression of consent between the parties alone suffices and no formalities

1 C.I.C., (1917), c. 1081(1). C.I.C., (1983), c. 1057 (1): "Matrimony is brought about through the consent of the parties, legitimately manifested between persons who according to law are capable of giving consent which no human power can substitute." Also see Gaudium et Spes, n.48, in A. Flannery, ed., Documents of Vatican II, p. 950.

2 F.M. Cappello, Tractatus canonico-moralis de sacramentis, 4th ed., Vol. 3, part 2, p. 1: "Sane matrimonium est contractus. [...]. Praeterea matrimonium qua sacramentum constat materia et forma, quae consistit in mutua traditione et acceptatione juris in corpus (n.30), seu in verbis vel signis consensum exprimentibus quoad hujusmodi traditionem et acceptationem." Also see E.F. Regatillo, Jus sacramentarium, 4th ed., p. 829; P. Gasparri, Tractatus canonicus de matrimonio, nova ed., Vol. 2, p. 6; P. Cerato, Matrimonium a Codice J. C. integre desumptum, 4th ed., pp. 130-131; G. Payen, De Matrimonio in missionibus ac potissimum in sinis tractatus practicus et casus, 2nd ed., Vol. 2, pp. 2-3.

3 J.W. Goldsmith, The Competence of Church and State over Marriage: Disputed Points, p. 89.

as demanded by ecclesiastical or civil law are required;⁴ for instance, the gandharva form of marriage under the traditional (textual) law of the Hindus is an example of such a mutual union.

The natural form of marriage has been modified by both the Church and the State which each prescribed certain external formalities. Accordingly, we have the civil form and the canonical form of marriage. In this study we shall focus our inquiry solely on the celebration of marriages according to Canon Law and the Indian Christian Marriage Act (ICMA), 1872. Both laws consider an external form necessary for the validity of marriage.

Civil law requires that contracts of major importance be made formally; under normal circumstances, this means that the terms of the contract shall be in writing.⁵ However, in the case of marriage, although it is a contract of utmost importance and vital significance, the praxis and the law do not insist on exchange of matrimonial consent in writing

4 A. De Smét, Tractatus theologico-canonicus de sponsalibus et matrimonio, 4th ed., p. 84: "Ex natura rei sufficit consensus quomodocumque ad invicem manifestatus, sive verbis, sive nutibus, sive alio signo, nec ullius tertius personae praesentia et opus." Also see F.M. Cappello, op. cit., p. 101; M. Coronata, Institutiones juris canonici ad usum utriusque cleri et scholarum de sacramentis tractatus canonicus, Vol. 3, p. 740.

5 The Indian Contract Act, ss. 19-22.

(except for its registration); nevertheless, a due solemnization is regarded as essential. Thus, the ICMA, while making the form of marriage mandatory, prescribes that Catholics are to follow the canonical form of marriage rather than any of the other forms provided by the Act itself.⁶ Since the coming into effect of the Special Marriage Act, 1954, Catholics are free to opt for a mere civil form of marriage,⁷ which was not directly provided for under the ICMA.

The purpose of this chapter is to make a comparative study of the ecclesiastical and civil laws concerning the celebration of marriages of Catholics of the Latin rite. Therefore, we shall briefly examine the essential aspects of the canonical legislation on the form of marriage and then compare them with the parallel provisions of the ICMA.

1. The Form of Marriage

a) Historical Overview

Marriage was considered sacred from the very early days of Christianity. The Apostles, for instance, linked the

⁶ The Indian Christian Marriage Act (hereafter referred to as ICMA), ss. 5, 65; E.D. Devadason, Christian Law in India, p. 257; C.I.C., (1983), c.1117 speaks of the canonical form as binding when one of the contractants is presently a Catholic.

⁷ The Special Marriage Act, s. 4: "Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act."

conjugal union to the relationship between Christ and the Church.⁸ Gradually it came to be regarded as a public religious act subject to the authority of the Church.⁹ By the middle of the second century, it was customary to solemnize marriages publicly with a priestly blessing. As E. Westermarck remarks, "The founder of the Christian Church had not prescribed any ceremonies in connection with it, but in the earliest times, the Christians, of their own accord, asked for their pastor's benediction."¹⁰

In the course of time, public religious ceremonies associated with marriage gained greater importance. The Latin Church taught that marriage resulted from consent, and not from the priestly blessing.¹¹ The Fathers of the Church as well as the early Councils also encouraged the public

8 Eph. 5.32; I Pet. 3.7.

9 S. Woywod, A Practical Commentary on the Code of Canon Law, revised and enlarged ed., Vol. 1, pp. 823-824. Also see W. Cahill, "Change the Marriage Law?", in H.P.R., 64 (1963-1964), p. 116; E. Graf, "The Marriage Contract in Early Church", in ibid., 36(1935-1936), pp. 535-536; S. Woywod, "Catholic Form of Marriage Contract", in ibid., 41(1940-1941), pp. 147-148.

10 E. Westermarck, The History of Human Marriage, p. 427; J.J. Carberry, The Juridical Form of Marriage: An Historical Conspectus and Commentary, p. 11.

11 J. De Reeper, "The History and Application of Canon 1098", in The Jurist, 14(1954), p. 152; E. Friedberg, "Zur Geschichte der Eheschliessung", 2. Art., in Zeitschrift für Kirchenrecht, 3(1863), p. 171.

celebration of marriage,¹² and the Eastern Church considered such necessary for validity.¹³ By the end of the 9th century, the public celebration of marriages was mandatory in France, that is, marriages contracted other than in facie ecclesiae were presumed to be invalid. This was, however, a rebuttable presumption. In England, the Synod of Winchester (1076) declared that marriages entered into without a church ceremony were per se invalid in foro externo.¹⁴

During the Middle Ages, there arose a confusion because of the Church's position on clandestine unions, that is, on marriages celebrated without the active participation of a priest. The Church, while forbidding such unions, did not regard them as invalid.¹⁵ By promulgating the decree Tametsi, the Council of Trent attempted to put an end to the confusion and abuses. The decree prescribed solemnization of

12 J.J. Carberry, op. cit., pp. 12-13. The Council of Arles forbade marriage without public celebration. The Council of Verno insisted on public celebration of marriages. Also see A. Scheurl, "Zur Geschichte des kirchlichen Eheschliessungsrechts", in Zeitschrift für Kirchenrecht, 15(1880), p. 77.

13 J. De Reeper, loc. cit., p. 152: "The Latin Church did not dare to introduce the drastic measure of Patriarch Leo VI (866-911) by which he declared for the Greek Church any marriage contracted without the Church's blessings null and void and therefore invalid." Also see J. Schödrey, "Das Domicil bei Eheabschliessungen", in A.K.K., 30(1873), p. 3.

14 J. De Reeper, loc. cit., p. 153.

15 Ibid., p. 154: "Pope Alexander III issued an ex-communication against those contracting clandestine marriages, and many local Synods followed him in this and issued decrees

marriages before the pastor and two witnesses.¹⁶ This decree, however, was not wholly effective because of its limited extension (it was applicable only where promulgated), because of the personal jurisdiction of pastors (who could marry their subjects anywhere), and because of its non-applicability in cases of mixed marriages.¹⁷ The result was a dichotomous discipline in the Church: the form was binding on some, and at the same time not binding on others. With the French revolution, the conflict between the Church and the State over marriage legislation widened, and this had influence on ecclesiastical legislation.¹⁸

The decree Ne Temere, (1907) remedied the confused situation created by Tametsi. It had universal application:

15 (cont'd) against clandestine marriages, e.g., The Synod of Winchester (1076), London (1102), Traves (1227), Bourges (1280), Salzburg (1420)." Also see J.J. Carberry, op. cit., p. 18.

16 H.A. Ayrinhac, Marriage Legislation in the New Code of Canon Law, new revised ed., p. 235. Also see P. Hüzling, "Kirche und Standesamtliche Trauung", in Liturgisches Jahrbuch, 22(1972), p. 138; P. Gasparri, op. cit., pp. 102-103; J. Schödrey, loc. cit., pp. 24-40.

17 H.A. Ayrinhac, op. cit., pp. 236-237. Also see F.M. Cappello, op. cit., pp. 126-127.

18 G.H. Joyce, Christian Marriage, pp. 262-265. Also see P.F. Stälin, "Die Form der Eheschliessung nach den neueren Gesetzgebungen", in Zeitschrift für Kirchenrecht, 4(1864), pp. 351-352.

jurisdiction became territorial and the role of the pastor active rather than merely passive.¹⁹ The 1917 Code of Canon Law did not make significant changes in the norms contained in Ne Temere. The Code legislation on the form of marriage governs the marriages of Catholics marrying among themselves or marrying non-Catholics and non-Christians.²⁰

The formalities surrounding the ecclesiastical solemnization of marriages as prescribed by law are known as the "canonical form of marriage". This form consists essentially of the external solemnities that accompany the manifestation of consent;²¹ the law insists that such be performed according to religious rites.²² Like any good law, Canon Law admits of

19 S.C.C. Decretum, Ne Temere, in A.S.S., 40(1907), pp. 525-530. Also see J.J. Carberry, op. cit., pp. 34-40.

20 C.I.C., (1917), c.1099; H.A. Ayrinhac, op. cit., pp. 267-269. Also see J. Berger, "Proof of Parties Bound to the Prescription of Canonical Form", in The Jurist, 26(1966) pp. 103-109. C.I.C., (1983), c.1117: "Without prejudice to the prescriptions of c.1127(2), the form stated above is to be observed whenever at least one of the contractants was baptized in the Catholic Church or has been received into it, and has not left it by a formal act." Ibid., c.1127(1) speaks of the form binding a Catholic and an Oriental non-Catholic as necessary only for liceity.

21 C.I.C., (1917), c.1094. C.I.C., (1983), c.1108. P. Cerato, op. cit., p. 151.

22 C.I.C., (1917), cc.1100-1102. H.A. Ayrinhac, op. cit., pp. 272-275. Also see E.F. Regatillo, op. cit., pp. 849-851; F.M. Cappello, op. cit., pp. 184-187. C.I.C., (1983), c.1119 desires that the liturgical form of marriage be observed. Ibid., c.1120 permits the Bishops' Conferences to draw up a marriage ritual accommodating customs, but maintaining the manifestation of consent.

exceptions under extraordinary circumstances and in this case it has provided for an extraordinary form of marriage.²³

Although the Code of 1917 has been considerably amended and revised in subsequent years, there are only a few changes in the law regarding the form of marriage and these will be referred to in due course.

b) The Ordinary Form of Marriage in Canon and Civil Law

According to canon 1117 of the 1983 Code, all Catholics are bound by the form of marriage.²⁴ Canon 1108(1) of the 1983 Code states:

Only those marriages are valid which are contracted before the pastor or the Ordinary of the place, or a priest or a deacon delegated by either of these, and at least two witnesses, but

²³ C.I.C., (1917), c.1098. P. Cerato, op. cit., p. 163. Also see H.A. Ayrinhac, op. cit., pp. 261-266; D.M. Maloney, Some Questions about Canonical Form of Marriage, pp. 2-6; J. De Reeper, loc. cit., pp. 148-184. C.I.C., (1983), c.1116 maintains the law regarding the extraordinary form of marriage.

²⁴ C.I.C., (1917), c.1016: "The marriage of baptized person is governed not only by divine law but also by canon law, without prejudice to the competency of the civil power to regulate the merely civil effects of such marriages." C.I.C., (1983), c.1108 has a new subsection which explains the meaning of the term "assisting at marriage": being present at marriage and asking for and receiving consent in the name of the Church. This canon also refers to a deacon who can be delegated to assist at marriage. See A. Flannery, op. cit., p. 387. According to Gaudium et Spes, n.29, assisting at marriage pertains to the office of deacon, in so far as it may be assigned to him by the competent authority.

in accordance with the rules laid down in the canons which follow, and with the exceptions mentioned in canons 144, 1112(1), 1116 and 1127(2) (3).

Under the ICMA, the ordinary form of marriage includes not only the exchange of consent but also the other rites and ceremonies.

Marriage in Indian law is a personal relationship which emerges from a sacramental and contractual context.²⁵ To bring this relationship into effect certain things are necessary, namely: manifestation of consent, authorization, and solemnization with due formalities and ceremonies.²⁶ The form prescribed under the ICMA binds all Christians when they marry among themselves or when they marry non-Christians.²⁷ Since the promulgation of the Special Marriage Act, 1954, Christians may marry under this Act. However, they may not

²⁵ Eapen Punnan vs Koruthu Maria, 10 TLR 95. It was held in the following cases that marriages cannot be said to be solemnized unless celebrated with due ceremonies by someone authorized to do so: Empress vs Fischer, 1 MLJ 458; Kolandaivelu vs Dequidt, 40 Mad 1030; Dhrama Manjhi vs Emperor, AIR 1943 Pat 109; Rajdei vs Lautan, AIR 1980 All 109.

²⁶ ICMA, ss. 5, 41; Moahn vs Shyamapada, AIR 1952 Cal 771; Sherine vs John, AIR 1952 Punj 277.

²⁷ ICMA, ss. 1, 4; Empress vs Johan, 17 Mad 391.

marry under other Acts like the Hindu Marriage Act, the Parsi Marriage and Divorce Act, etc., unless there is a recognized custom to that effect. Like the canonical form, the ICMA requires the solemnization of marriage in the presence of at least two witnesses other than the person officiating at the marriage.²⁸

The first requisite is that the parties be competent to contract a marriage.²⁹ The second requirement is that persons other than Catholics or Anglicans procure a certificate (permit) to marry.³⁰ This certificate is issued either by a marriage Registrar or by a licenced person once due publicity of the intended marriage has been made,³¹ and the declaration of the parties that they are not under any

28 ICMA, ss. 5, 25, 51; Veerappa vs Michael, 1963 SC 933. In this case it was held that when the fact of marriage is proved, there is a presumption that it was done according to the form and with due ceremonies. In Badri Prosad vs Dy. Director, Consolidation, AIR 1978 SC 1557, it was held that when a man and a woman live as husband and wife for fifty years, a strong presumption of marriage exists.

29 ICMA, ss. 18, 42. Goodal vs Goodal, AIR 1933 All 135. In this case the marriage was challenged on the basis of lack of age, the bride was only 13, but the court held that apparently the age of the Christians at the time of marriage for consent was 12 as it is customary according to Church law.

30 ICMA, ss. 17, 41. The certificate to marry is issued only when it is established that there is no hindrance or impediment.

31 Ibid., ss. 13, 14, 38, 39.

impediment has been received.³² The third requisite is solemnization, which, in the case of Catholics, is none other than the canonical form. Other Christians are permitted to use some similar form with an appropriate ceremony.

The Church, while holding that the natural form is sufficient for the validity of marriages in the case of the unbaptized and of other Christians, makes the canonical form obligatory only for Catholics. The ICMA, while making the form mandatory, desires also that the solemnization take place within a ritual context.³³ Canon Law now provides for the possibility of a dispensation from the ordinary form of marriage,³⁴ while the ICMA does not. This as well as other similar exceptions, such as the extraordinary form of marriage, can however be brought into effect under section 5 of the Act, which permits a marriage to take place according to "the rules, rites, ceremonies and customs of the Church." Three elements are to be considered when speaking of the celebration of marriage: the parties, the witnesses and the solemnization.

32 Ibid., ss. 17, 41.

33 Ibid., s. 5.

34 C.I.C., (1917), c.1098; C.I.C., (1983), c.1116.

i) The Parties

Canon 1117 of the 1983 Code specifies who are subject to the canonical form. All those baptized in the Catholic Church or received into it and have not left the Church by a formal act, when they marry among themselves or when they marry non-Catholics, are bound by the canonical form of marriage.³⁵ According to the 1917 Code, the valid reception of baptism or the profession of faith in the Catholic Church makes a person subject to the form of marriage,³⁶ while in Indian civil law it is the affiliation to a Church at the time of marriage that does so.

Those who are subject to Church law have an inherent right to marry, provided they do so according to the prescriptions of law and not otherwise prohibited.³⁷ The canons do

³⁵ F.M. Cappello, *op. cit.*, pp. 175-176. Also see H.A. Ayrinhac, *op. cit.*, pp. 267-271. This does not bind children born of a marriage between a Catholic and a non-Catholic parents, see *A.A.S.*, 21(1929), p. 573. Also see W.J. Doheny, *Canonical Procedure in Matrimonial Cases*, 2nd enlarged ed., Vol. 1, p. 1041; W.F. Cahill, "Historical Notes on the Canon Law on Solemnized Marriage", in *The Catholic Lawyer*, 2(1956), p. 117; W.F. Allen, "The Test of Catholicity under Canon 1099", in *The Jurist*, 3(1943), pp. 595-602.

³⁶ *C.I.C.*, (1917), c.1099; *C.I.C.*, (1983), c.1117. J. Berger, *loc. cit.*, p. 105. According to the 1983 Code the canonical form binds when at least one of the contractants is Catholic. Also see, *C.I.C.*, (1983), c.1059.

³⁷ *C.I.C.*, (1917), c.1035: "All persons who are not prohibited by law can contract marriage." Also see *C.I.C.*, (1983), c.1058.

not allow any one who is bound by a non-dispensed diriment impediment to contract marriage validly.³⁸ Those who are free from impediments must have the capacity to contract, i.e., they shall neither be suffering from any mental or physical disorders, or be under pressure induced by fear, error, or dolus which takes away freedom to consent. Thus in the marriage of Catholics, the subjects should be baptized, be free of any impediment, have the intention and freedom to consent and observe the canonical form of marriage.

The ICMA extends to all Christians (although our consideration is limited to Catholics) marrying Christians or non-Christians if they wish to marry under this legislation.³⁹ Section 5 of the ICMA is the important one because it enables

³⁸ C.I.C., (1917), cc.1036-1080; C.I.C., (1983), cc.1073-1094. These canons speak of the impediments of marriage. For a detailed study on the subject, see P. Gasparri, op. cit., Vol. 1, pp. 121-465; J.T. Finnegan, "The Capacity to Marry", in The Catholic Lawyer, 15(1969), pp. 248-258.

³⁹ ICMA, ss. 1, 4. In civil law, being a Christian is not enough to be governed by the ICMA, but one must be a Christian at the time of marriage. In Muthuswami Mudaliar vs Masillamani, 33 Mad 342, the bride was brought up as Christian but she was married by a Brahmin priest, which was held tenable by the trial court as there existed the practice of Christian girls being married to Hindus. A similar view was taken in Maharam vs Emperor, AIR 1918 All 168. The courts tend to interpret the law widely, and the form binds absolutely when both the contractants are Catholics (Christians); see Empress vs Johan, 17 Mad 391. C.I.C., (1983), c.1117 speaks of the same thing, i.e., the form binding when they marry among themselves.

Catholics to be governed by the law of the Church. In virtue of this section 5, the civil law readily accepts the validity of Church marriages, provided the requirements of Church law are observed. Section 65 even makes the canonical form mandatory for Catholics. The general policy of the Act outlined in its preamble is confirmed by section 4; section 5 further specifies that Catholics are governed by the canonical law which section 65 makes obligatory.

A superficial reading of the Act may give the impression that mere affiliation with the Catholic Church (as in 1917 Code) makes a person subject to the ICMA. This, however, does not seem to be the spirit of the law, and certainly not the praxis of the courts where the law is interpreted in such a way that to be subject to it under the Act, a person must be professing the Catholic faith at the time of the marriage. The decision in Maharam vs Emperor has set a precedent on this issue.⁴⁰ The question of who is a subject under the ICMA, as it refers to Catholics, was discussed in this case. Maharam

⁴⁰ Maharam vs Emperor, AIR 1918 All 168. In this case, the court has taken a moderate view as to interpreting of the law on the form of marriage (binding all even when only one party is a Christian), which was not so in Empress vs Johan, 17 Mad 391.

was baptized and educated in the Church, but he did not follow the ICMA. The validity of his marriage was challenged in the court on the basis of non-observance of the ICMA. The court declared:

A person is not a person professing the Christian religion simply because he is baptized as an infant, when he has no possibility of saying to the world what is the faith to which he belongs. A person, who on the eve of marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony, [..] is not a person professing the Christian religion.⁴¹

The conclusion was that, although Maharam was baptized in the Church, he was not to be considered subject to the ICMA, since at the time of the marriage he was not a practising Christian, and thus was not bound by the form of marriage under the ICMA.

Over and above affiliation to the Church at the time of marriage, other essential requirements should be met.⁴² The

41 Maharam vs Emperor, AIR 1918 All 168.

42 Supra, chapter 2, pp. 63-68. The courts have considered the capacity to marry in the following cases: those who suffer from disorders (mental or physical) like impotency, schizophrenia, epilepsy, etc., would not be capable of marrying. For instance, see State vs Lemos, AIR 1970 Goa 1; Manjula Deshmukh vs Suresh Deshmukh, AIR 1979 Delhi 93; Rajender Pershad vs Shanti Devi, AIR 1978 Punj 181; Roshanlal vs Kadambari, 81 Punj LR 232; Bani Devi vs Banerjee, AIR 1972 Del 50; Kartic Chandra vs Manju, 78 CWN 36; Pronab Ghosh vs Krishna Ghosh, AIR 1975 Cal 109.

Act permits Canon Law to determine its own conditions for considering a person capable of entering into marriage. However, the ICMA stipulates that for a person to have the capacity to marry, he must be free of any impediment,⁴³ not be a minor and be domiciled in the territory to which the Act extends. In the case of minors, the consent of parents or guardians is necessary.

It is generally accepted in civil law that the capacity to marry should be determined according to personal law.⁴⁴ Because of the Special Marriage Act, 1954, a serious concern emerged concerning the age of the parties. According to this Act, the girl must be 18 and the boy 21 years of age to be considered legally capable of marriage.⁴⁵ Yet, there have

43 ICMA, ss. 17, 18, 41, 42. These sections insist that there be no impediment to marriage, to be considered capable to marry. In many cases, the courts have declared marriages null due to impediments: Bijan vs Ranjit Lal, 46 CWN 753. It was held in this case that the doctrine of factum valet cannot cure the defect of marriage within the prohibited degrees. In D. Meenakshi Sundaram Pillai vs Nemmalwar, AIR 1970 Mad 402, the court ruled that marriage with one sister's daughter is void. Indian Divorce Act, s. 19 allows a petition for annulment of marriage if the parties are within the prohibited degrees of consanguinity or affinity.

44 Lakshmi Dhar vs Sachit, 70 CWN 1001. Even though the marriage between first cousins is not usually valid, the marriage in this case was held valid because it was entered into with previous dispensation of the Catholic Church. In a case where dispensation from affinity was granted, the marriage was held valid, Lopez vs Lopez, ILR 12 Cal 706.

45 A. Gledhil, The Republic of India: The Development of its Law and Constitution, 2nd ed., p. 251. Also see Goodal vs Goodal, AIR 1933 All 135. In this case the court decided

been decisions from different courts to the effect that marriages of minors are not necessarily null because the parties were not of the age required by law. For instance, if a Catholic minor contracts a marriage which is valid according to Canon Law, section 5 of the ICMA provides for its validity on the grounds that it was celebrated according to the law of the Church.⁴⁶ Since the Special Marriage Act has not revoked the provisions of personal laws nor the principle that capacity to marry shall be determined according to personal law, we may be justified in concluding that these particular prescriptions of the 1954 Act do not apply in the case of Catholics marrying under the ICMA.

Indeed, section 60 of the ICMA summarizes the law regarding the subjects as follows:

45 (cont'd) that the age prescribed by customary law (Canon Law) enables one to be capable to consent in marriage. The age under the ICMA is 21 (see s. 3). There is a decision on this matter which took a different view on the age of marriage, which under the Special Marriage Act, 1954, is 18 for a girl and 21 for a boy. The decision was that in considering the age, the physical and mental maturity of the person is to be taken into consideration. See High Court of Kerala, O.P. No. 2363 of 1981 (M.S.).

46 Lish vs Lish, 1923 Pat 301. This was a marriage between minors which was not declared invalid just because they were minors. Also see Lakshmi Dahr vs Sachit Dhar, 70 CWN 1001. In Sherine vs John, AIR 1952 Punj 277, the prescription of the ICMA regarding obtaining parental consent was not observed although the parties were minors; yet the marriage was held to be valid.

Every marriage between Indian Christians applying for certificate shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise—(1) the age of the man intending to be married shall not be under eighteen years, and the age of the woman intending to be married shall not be under fifteen years; (2) neither of the persons intending to be married shall have a wife or husband still living; [...] Provided that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as mentioned in section 19 has been given to the intended marriage, or unless it appears there is no person living authorized to give such consent.

Sections 17 and 42 further insist that there shall not be any impediment of kindred or affinity, or other lawful hindrance to the said marriage.

ii) The Witnesses: Ordinary and Qualified

Once the capacity and freedom of the parties to marry have been established, the next requirement is to provide for the presence of proper witnesses at the manifestation of consent.⁴⁷ Depending on their function, according to Canon Law, they are known either as "ordinary" or "qualified" witnesses; under the ICMA, they are called "witnesses" and "officiating minister". The qualified witness is a person authorized to receive the consent of the parties on behalf of the Church; the ordinary witnesses are those persons who are

⁴⁷ C.I.C., (1917), c.1094; C.I.C., (1983), c.1108; ICMA, ss. 5, 25, 51.

capable of witnessing to and certifying the fact of marriage if they are called upon to do so.⁴⁸

Statutory provisions calling for at least "two persons" witnessing marriages have a long history.⁴⁹ For instance, the Slav peoples required that the newly-weds go to bed in front of witnesses. Up to the 18th century, Germans considered marriage valid when two witnesses certified that the couple had been seen in bed together under a blanket.⁵⁰ According to Hindu customary law, the whole community witnesses marriage, and, therefore, there is no insistence on formal witnesses. The same was true in the early Church,⁵¹ and the custom of having the pastor and two witnesses present at the marriage appeared at a later date. Even though the practice of having the entire community witness marriage prevails among

48 C.I.C., (1917), c.1095; C.I.C., (1983), cc.1109-1111. H.A. Ayrinhac, op. cit., pp. 240-241; E.F. Regatillo, op. cit., p. 811.

49 C.I.C., (1917), c.1094; C.I.C., (1983), c.1108, ICMA, ss. 25, 51. For the Parsees, two witnesses are needed; see Parsi Marriage and Divorce Act, 1936, s. 3. The Hindu Law does not speak of witnesses, for the community does the witnessing; among the Muslims, marriage without witnesses will be irregular.

50 S.K. Gupta, Marriage among the Anglo-Indians, p. 64.

51 J. Schödrey, loc. cit., p. 3.

the Indian Christians, the Act makes the presence of two "credible" witnesses mandatory for the solemnization of marriage.⁵² The legislation on the qualified witness has evolved in the new Code. On February 15, 1648 the Sacred Congregation for the Council was asked whether a marriage would be valid even if the assisting pastor did not understand the words of the spouses. The Sacred Congregation replied, "marriage subsists, even if the pastor did not understand the words of the spouses, if the disposition can be legitimately construed from other signs according to common law; this pertains to the directives of the bishop."⁵³ It was considered sufficient for validity if the witnesses were able to testify to the priest present about the exchange of consent, or if the priest heard only one of the parties consenting.⁵⁴ His role was so passive that even mere presence was considered sufficient in the pre-code law. Benedict XIV

52 ICMA, ss. 51, 60. Section 60(3) mentions that there must be two credible witnesses present at marriage. Also see W.J. Doheny, op. cit., p. 1041: "The only requirements demanded of these witnesses are that they enjoy the use of reason and that they are able to testify to the marriage." Also see J.J. Carberry, op. cit., p. 58.

53 J. Zamboni, Collectio declarationum sacrae congregationis, Vol. 4, pp. 434-435.

54 Ibid., p. 435.

then made it clear in 1741 that the priest assisting was to be able to hear and understand the parties exchanging consent, to make it valid before law.⁵⁵ This provision was retained by Ne Temere and then incorporated into the 1917 Code.

We note three stages in the development of the form before the pastor's role was finally defined in the 1983 Code. The 'optional law' of Trent was extended to a few more countries by the Benedictine declaration "Matrimonia" on November 4, 1741. Later, the Constitution "Provida", January 18, 1906 abolished the distinction between tridentine and non-tridentine parts in the same countries (e.g., in Germany). Finally, on February 22, 1909, by Ne Temere, Pius X made the canonical form obligatory for all Catholics entering into marriage. This law was embodied in the Code of 1917 with few changes except that in the 1917 Code, an active form of assistance was foreseen, which is clearly spelled out in the 1983 Code. The qualified witness shall be either the local Ordinary, or the pastor or a priest or a deacon delegated by either of them.⁵⁶ In Catholic marriages under the ICMA, the

55 S. Pallotini, Collectio omnium conclusionum et resolutionum, Vol. 13, p. 151.

56 C.I.C., (1917), c.1094; C.I.C., (1983), c.1108. W.J. Doheny, op. cit., pp. 1030-1031.

primary requisite of a qualified witness is that he is validly ordained.⁵⁷ The law requires that marriages be duly solemnized by persons authorized to do so by the government. This authorization, in the case of the Catholics, comes from the reception of Holy Orders (hence the expression "episcopally ordained" in section 5 of the Act) and assignment to a parish.

To be able to solemnize marriages validly, the qualified witness must meet certain requirements under both ecclesiastical and civil law. In the first place, Canon Law insists that he have taken possession of his office or at least assumed it,⁵⁸ and he should not be under any ecclesiastical penalty.⁵⁹ Similarly, the civil law requires that the qualified witness, in addition to being episcopally ordained, be appointed a minister, which is equivalent to taking possession of the office. It further states that the minister should function according to the rules, rites, ceremonies

57 ICMA, s.5(1).

58 C.I.C., (1917), c.1095(1). F.M. Cappello, op. cit., pp. 127-131. Also see P. Gasparri, op. cit., Vol. 2, pp. 122-124; E.F. Regatillo, op. cit., pp. 832-833; M. Mathis and N. Meyer, The Pastoral Companion: A Handbook of Canon Law, 12th ed., p. 245; M. Coronata, op. cit., pp. 741-743; S. Woywod, op. cit., p. 824; S. Woywod, "The Catholic Form of Marriage Enacted by the Code of Canon Law", in H.P.R., 41(1940-1941), p. 276. C.I.C., (1983), c.1109 does not speak of all these details of taking possession of the office or benefice, etc., but it speaks of "by virtue of office" and as long as one holds it. Also see ibid., c.1111.

59 H.A. Ayrinhac, op. cit., p. 243; A. De Smet, op. cit., p. 90; G. Payen, op. cit., p. 179. C.I.C., (1983), c.1109 speaks of assisting at marriage; the law is the same as in the

and customs of the Church.⁶⁰ That is to say, he shall not be under any ecclesiastical penalty; for if he is under one, he is usually unable to function according to the rules of the Church. Furthermore, he is expected to observe the prescribed ritual, for solemnization of marriages by a Catholic priest shall be in full accord with the law of the Church (section 5).

Secondly, the qualified witness must function only within his territorial jurisdiction.⁶¹ However, the following persons are exempt from this rule: personal pastors, pastors of national parishes and rectors of pious houses, who according to Canon Law may validly assist at the marriages

59 (cont'd) 1917 Code. C.I.C., (1983), c.1110 is new; it speaks of a personal ordinary and a personal pastor who can assist at the marriages of their own subjects anywhere.

60 ICMA, s.5; O.T. Cuttor, ed. Abstract of the Proceedings of the Council of Governor General Of India Assembled for the Purpose of Making Laws and Regulations, Vol. 3, pp. 112-117. The question of matrimonial jurisdiction was explained to the government by the Church in India, while the marriage bill was tabled and discussed. The Catholic Church claimed exception from the requirement of being licenced by the government, which was granted under the Marriage Act of 1872. The law, however, presumes that the priest has jurisdiction from the Church. For details on this, see Diocesan Archives, Allahabad, Papers Relating to the Marriage Bill, (1864); Letter of Bishop L. Charbonnaux, (dated June 11, 1864) to the government, in the National Archives of Delhi, Papers, Leg. Dept., Nos. 42-46/1865.

61 C.I.C., (1917), c.1095(1)(2). P. Gasparri, op. cit., p. 125. Also see F.M. Cappello, op. cit., p. 131; E.F. Regatillo, op. cit., p. 833; F.X. Wernz, Jus canonicum: ius matrimoniale, 3rd ed., p. 676. C.I.C., (1983), c.1109.

of their subjects anywhere.⁶² Since according to civil law, the minister of religion is expected to act in full accord with the law and praxis of the Church, the question of territorial jurisdiction is not spelled out for Catholics. The authorization given to individuals to solemnize marriage in virtue of their office is limited to territory and a person is not allowed to act outside it. This is clearly defined in the case of those holding a licence under the Act and of Marriage Registrars who likewise do not have jurisdiction outside their districts. If any of these persons in virtue of their office solemnize or profess to solemnize marriage outside the defined territory or a specified group, it will be invalid.⁶³

61 (cont'd) Territorial jurisdiction extends to all, provided one of the contractants is of the Latin rite (this is a new provision).

62 H.A. Ayrinhac, op. cit., p. 244. Personal pastors such as military chaplains, rectors of pious houses as per c.464(2), of the 1917 Code pastors of national parishes are exempt from the territorial jurisdiction. Also see M. Coronata, op. cit., pp. 748-749; S. Woywod, op. cit., p. 826; W.J. Doheny, op. cit., pp. 1033-1035. On this subject a new canon is added in the 1983 Code, c.1110: By virtue of his office and within the limits of his jurisdiction a personal Ordinary or a personal parish priest validly assists at the marriage celebration only of those of whom at least one contractant is his subject.

63 ICMA, ss. 6, 7. The marriage licence is granted for a definite territory and the Marriage Registrars are appointed for a district only; these Registrars may exercise their function within the territory designated to them, i.e., the jurisdiction is territorial in civil law.

Thirdly, the qualified witness must act as a free agent, that is, he shall not in any way be forced to do so.⁶⁴ His role as free agent must be active and such active assistance is presumed under the Act. This can be gathered from the duties imposed on him by law regarding the investigations and publication of marriages.

The Canon Law authorizes those who can validly assist at marriages to delegate any priest (or deacon) to act on their behalf.⁶⁵ The delegation must be specific and for a definite marriage. According to recent law, deacons can also be delegated.⁶⁶ Those persons who would require delegation to act and do so without it celebrate the marriage invalidly and

64 C.I.C., (1917), c.1095(1)(3). F.M. Cappello, op. cit., p. 134. Also see P. Gasparri, op. cit., p. 126; A. De Smet, op. cit., p. 92; F.X. Wernz, op. cit., p. 679; G. Payen, op. cit., p. 180; J.J. Carberry, op. cit., p. 74; W.F. Cahill, loc. cit., p. 115.

65 C.I.C., (1917), cc.1095(2), 1096; C.I.C., (1983), c.1111. The 1983 Code permits general delegation; it must be in writing, and can be given to a deacon or a priest. Specific delegations are also possible. A. De Smet, op. cit., pp. 94-96. Also see M. Coronata, op. cit., p. 753; S. Woywod, op. cit., p. 97; ibid., pp. 827-835; W.J. Doheny, op. cit., p. 1039; S. Woywod, "Delegation to Witness Marriage", in H.P.R., 41(1940-1941), pp. 410-420; C. Hettinger, "Collegiality and the Form of Marriage", in The Jurist, 24(1964), pp. 342-345.

66 C.I.C., (1983), c.1108.

illegally.⁶⁷ There is no specific provision in the ICMA concerning delegation, but it can be assumed from section 10(2) which permits a slight deviation from the law, provided the qualified witness has a special licence from his bishop. This licence can readily be taken to mean delegation. At any rate, the officiating minister must act with due authorization or authority. If he acts otherwise, his act will be invalid and he will be liable to punishment under section 68 of the Act.

The right of assisting at marriage is akin to the power of jurisdiction in so far as it is had by reason of an office and can be delegated. While a priest or a deacon generally is expected to know that he needs jurisdiction to assist at a wedding outside his territory, it happens occasionally that assistance at marriage without proper delegation takes place. In certain bona fide situations, the common teaching is that the prescription of canon 209 of the 1917 Code (ecclesia supplet) can be applied in such cases, where there is common error or doubt of law or fact.⁶⁸

67 P. Gasparri, op. cit., p. 119: "Donec delegatio permanet, delegatus illicite quidem, sed valide matrimonium assistit, licet delegans assistentiam prohibuerit, quia jus assistendi, permanente delegatione habet a lege."

68 F.M. Cappello, op. cit., pp. 138-140; A. De Smet, op. cit., p. 91; S. Woywod, "Does the Church Supply Jurisdiction for Witnessing of Marriage?", in H.P.R., 33(1932-1933), pp. 179-181; id., "Witnessing of Marriage with Supplied Jurisdiction", in H.P.R., 41(1940-1941), p. 167; J. Hannan,

In addition to the general requirements for the qualified witnesses, both Church and civil laws also impose certain personal obligations. They are to carry out a pre-nuptial investigation which, in the case of non-Catholics, is carried out under oath (if the parties opt for any form of celebration under the Act, other than the canonical form).⁶⁹ According to Church law, the qualified witnesses should see to it that due publicity is given to the marriage by banns and notices.⁷⁰ The law also requires that there shall not be a lapse of more than six months between the publication of the banns and the solemnization of the marriage. In the case of such a lapse of time, the banns are to be published anew.

68 (cont'd) "Supplied Jurisdiction for Marriage", in The Jurist, 2(1942), pp. 170-172. This canon on ecclesia supplet is incorporated into the 1983 Code, c.144: "(1). In errore communi de facto aut de jure, itemque in dubio positivo et probabili sive juris sive facti, supplet Ecclesia, pro foro tam externo quam interno, potestatem regiminis executivam. (2). Eadem norma applicatur facultatibus de quibus in cann. 883, 966 et 1111(1)." In other words, the Church supplies jurisdiction in confirmation (c.883), confession (c.966) and in marriage (c.1111(1)).

69 ICMA, ss. 17, 41; C.I.C., (1917), c.1020. In Canon Law, the investigation is not under oath as in civil law; the parties, however, are expected to speak the truth only. C.I.C., (1983), c.1067 permits the Conference of Bishops to draw up guidelines for this purpose.

70 C.I.C., (1917), cc.1022-1025. C.I.C., (1983), cc.1066-1067 insist that all the necessary preparations be made and measures taken to ensure the freedom of the parties to marry. ICMA, ss. 12-13; 38-39.

In civil law, the time limit between the publication and solemnization is two months.⁷¹

It can be gathered from the spirit of the Act that, by making the presence of a person in Holy Orders mandatory, all things are to be done in full accord with the law. Hence it is the duty of the qualified witness to see that due publicity is given of the intended marriages, that the preliminaries are carried out, and that he assists with due authority. The penalty for acting without authorization is imprisonment up to seven years. An interesting case was brought before the Madras court in 1891. The pastor had carried out all the preliminaries, but because of some unexpected situation, could neither be present at the wedding nor make any alternative arrangements. A certain Mr. Fischer assisted at the marriage which was subsequently declared null for lack of authorization, and Fischer was found guilty under section 68.⁷²

The rationale behind the law's making the presence of a priest mandatory can be understood against both the tradition that a marriage is sacred and that the praxis of the courts is

⁷¹ C.I.C., (1917), c.1030(2). ICMA, ss. 26, 52. The 1983 Code does not speak of such limitation as in C.I.C. (1917), c.1030; this would be presumed to be in effect according to the custom of the Church.

⁷² Empress vs Fischer, 1 MLJ 458.

to see marriage as a contract and a sacrament.⁷³ In Indian tradition as well as in the civil context, to bring about a sacrament, the instrumentality of a person in Holy Orders is required in the case of Catholics and of a poojari (priest) in the case of Hindus. Hence, the insistence that Catholics follow the canonical form of marriage. We are not referring here to the theological teaching that in marriage the parties themselves administer the sacrament which is not the case in Oriental theology.

Some problems arise in the case of certain inter-faith celebrations, wherein both Catholics and non-Catholic ministers "actively assist" at marriages. In such instances, the question can arise whether the marriage was celebrated according to the rules of the Church. According to section 5, it must be celebrated according to the rules of the Church of which the qualified witness is a minister. Canon Law does not provide for the active presence of two qualified witnesses; indeed such is expressly forbidden. The practice of allowing

⁷³ Eapen Punnan vs Korathu Maria, 10 TLR 95. The question of marriage as a contract as well as a sacrament was discussed in this case, and the court upheld its sacredness. Also see Titli vs Jones, AIR 1934 All 278; Stella Pakiam vs Rajah Ratnam, AIR 1966 Mad 225.

lay persons to act as official witnesses also creates certain difficulties in the context of the ICMA.⁷⁴

c) The Extraordinary Form of Marriage

It sometimes occurs that an authorized priest is neither available nor accessible to the parties of a projected marriage; or, the situation may be so urgent that there is not enough time for the priest to reach them. Under such circumstances, and according to certain conditions outlined in the canonical legislation, one may invoke the exception to the general law and validly exchange consent before witnesses alone. This is known as the extraordinary form of marriage.⁷⁵

74 A lay person can be a qualified witness, in a reply of the S.C. for Sacraments of May 15, 1974, a lay person was permitted to be an official witness at marriages; see C.L.D., Vol. 8, pp. 815-818. In areas where priests and deacons are scarce, it is difficult for the engaged persons to present themselves before a person in Holy Orders as per C.I.C., (1917), c.1094; a lay person could be delegated by the bishop. This has been incorporated into the 1983 Code; c.1112 stipulates that the diocesan bishop can delegate a lay person to assist at the celebration of marriage whenever priests or deacons are lacking. He can do so after a previous favourable vote by the Conference of Bishops, and after he has obtained this faculty from the Holy See. The canon further states that a suitable lay person should be chosen who is capable of giving instructions to those to be wed, and who is qualified to perform the marriage liturgy correctly.

75 C.I.C., (1917), c.1098; C.I.C., (1983). c.1116; C.L.D., Vol. 7, pp. 753-756; F.M. Cappello, op. cit., pp. 163-174. Also see J. De Reeper, loc. cit., pp. 166-188; P. Gasparri, op. cit., 134-142; A. De Smet, op. cit., pp. 106-110; E. Fuss, The Extraordinary Form of Marriage According to Canon 1098: A Historical Synopsis and Commentary, pp. 49-57; R. Dowdall, The Celebration of Marriage in Danger of Death, pp. 116-133; J.G. Chatham, "Evolution of the Juridical Form of Marriage in the Latin Rite", in The Jurist, 16(1956), p. 307.

It is permitted in two cases: in danger of death and in other circumstances when the absence of the priest is foreseen to last for thirty days.

To invoke this norm, the following conditions shall be verified in the case of danger of death: the danger shall be to either or both parties, resulting from external or internal causes such as war, catastrophies, death sentence, illness, child-birth, etc.⁷⁶ This must probably be according to the prudent judgement of the parties.⁷⁷ The law does not call for certainty of ensuing death. In the second case certain requirements are also set out for the use of this exception: there must be grave inconvenience either to the priest or to the parties or to both. The inaccessibility could be moral or physical, and it must be foreseen to last for at least one month. Such a situation could arise from various causes such as religious persecution, distance, lack of priests, rebellion, floods, fire, excessive heat, etc.⁷⁸

76 W.J. Doheny, op. cit., p. 1057.

77 Marriage before witnesses alone is valid if there was moral certitude regarding non-accessibility of the priest; see the reply of the Commission for Interpretation of the Code, Nov. 10, 1925, in A.A.S., 17(1925), p. 583. In another reply the same Commission stated that the grave inconvenience can be present even when a priest is physically present and cannot morally assist at the marriage: A.A.S., 23(1931), p. 388; R. Dowdall, op. cit., pp. 116-133.

78 P. Gasparri, op. cit., pp. 137-138; F.M. Cappello, op. cit., pp. 167-168; G. Payen, op. cit., p. 216; D.M. Maloney, op. cit., 5.

Even when a priest is physically present, there can morally be grave inconvenience in having access to him.⁷⁹ The use of this form has also been suggested in certain difficult cases.⁸⁰

It is sufficient that there be grave inconvenience either to the priest,⁸¹ to the parties, to a third party or to the general public good.⁸² In all cases, however, if there is any priest available, although he is not authorized to solemnize marriage, he must be called in ad liceitatem.⁸³

79 S. Woywod, op. cit., p. 844.

80 The use of the extraordinary form was suggested in a difficult case; see C.L.D., Vol. 5, pp. 523-524. A Catholic girl and a Baptist boy who were minors and who could not obtain a licence to marry in one state went to another state and received a licence. They could not marry in their home town as the parish priest would be threatened by prosecution by the parents of the boy. The priest at the neighbouring parish refused to marry them for want of documents, so they were married in court. As they came back, they wanted to have the marriage convalidated. In such a case, it was suggested by the Apostolic Delegate to use canon 1098 of the 1917 Code.

81 J. De Reeper, loc. cit., p. 170. This grave inconvenience to the priest or the parties can arise because of great distance, great expense, danger of infectious disease, etc.

82 D.M. Maloney, op. cit., p. 4. Also see G. Payen, op. cit., pp. 217-228; P. Gasparri, op. cit., pp. 137-138.

83 C.I.C., (1917), c.1098; C.I.C., (1983), c.1116; F.M. Cappello, op. cit., p. 170; S. Woywod, op. cit., p. 843.

Failing this, the parties can exchange consent before two competent witnesses or even simply between themselves without any witness at all.⁸⁴

The ICMA, unlike Canon Law, does not provide for an extraordinary form of marriage and does not even contemplate the possibility of such circumstances. One can only assume then that this form could be availed of under section 5. However, the parties might confront another problem if a person in Holy Orders was not present, for the Act recognizes the canonical form for Catholics under the presumption that the marriage was celebrated by an ordained person.

The ICMA places great emphasis on the presence of an ordained person at marriage. At the same time it cannot be ruled out that the extraordinary situations can arise. In a well-publicized case, where a priest was present at the wedding under extraordinary circumstances (death bed), the marriage was later challenged on the ground of affinity. It was declared valid. There were conflicting decisions from the lower courts and finally the case was decided on remand:

⁸⁴ P. Gasparri, op. cit., p. 135. Gasparri gives an example of a person dying in a prison, longing to contract marriage, which is not permitted civilly and so no witnesses are possible. Also see F.M. Cappello, op. cit., p. 170. Cappello considers it as epikeia. D.M. Maloney, op. cit., p. 3. Maloney opines that even a heretical minister can be a witness under these circumstances.

"According to the rule of the Catholic Church, a dispensation for such a marriage might be obtained and I ought to presume that such dispensation was granted in this case and accordingly the marriage was valid."⁸⁵

Analogically, at least in the case of a similar provision, we can presume that the extraordinary form of marriage is not directly in conflict with the ICMA. Should any question arise as to the validity of the union, there is always room for pleading "done according to custom and customary law".⁸⁶ Such a plea was successful in Rabindra Nath Dutta vs State of West Bengal;⁸⁷ the principle involved in this case was that someone who pleads custom must prove it.⁸⁸ Moreover, the principles of equity, justice and good conscience will protect the validity of such marriages.

85 Lopez vs Lopez, 12 ILR 710.

86 A.N. Saha, Marriage and Divorce, 2nd ed., p. 65.

87 Rabindra Nath Datta vs State of W. Bengal, AIR 1969 Cal 55. In the absence of proof of custom, marriage will be declared invalid; see Shakuntala vs Nilkanth, AIR 1973 All 203; Boloram Baruati vs Surya Baruati, AIR 1969 Ass 90; Jalsi Kaur vs Emperor, AIR 1933 Pat 471.

88 K. Venkata Lakshmi vs Paroathanarayanna, 1969 CrLJ 836. It was mentioned in this case that the custom must be proved to be continuous and long-standing, to be valid.

Under the enacted civil law, marriage without the presence of an authorized person and witnesses is both invalid and illegal.⁸⁹ However, there existed a custom among the Christians of Madras of having marriages solemnized by a layman with the recitation of the Lord's prayer and the tying of tali.⁹⁰ This would probably enable one to plead custom safely in other similar instances.

Particular situations can arise in some parts of India apart from those mentioned above, where it may be morally impossible to have a priest without grave inconvenience; for example, in places where the Anti-conversion Laws are operative, or where anti-Christian movements such as the Rastriya Swayamseva Sangh (R.S.S.) and the Jan Sangh are active and where Christians are like a drop in the ocean. Since the ruling in Titli vs Jones set a precedent permitting the Church to lay down rules essential for validity of marriages,⁹¹ it is possible to accept this extraordinary form, at least under

89 ICMA, ss. 68-69.

90 O.T. Cuttor, op. cit., Vol. 2, p. 563.

91 Titli vs Jones, AIR 1934 All 277, "The Church which lays down the rules, rites, ceremonies and customs must necessarily also lay down which of such rules, etc., are essential and which are not essential."

the customary law.⁹²

2. The Rites and Ceremonies of Marriage

Before the Council of Trent, there was no specific universal law on the juridical form or on the liturgical form of marriage in the Latin Church. The Oriental Churches, on the contrary, from the very early days of Christianity attached great importance to the form and especially to the priestly blessing.⁹³ The Latin Church taught that consent and not priestly blessing was essential for the validity of marriage.

The present law prescribes a liturgical celebration of marriage.⁹⁴ This, however, is not for validity,⁹⁵ and the ceremonies to be observed, together with the appropriate

92 Muthuswami Mudaliar vs Masillamani, 1910 Mad 342. This was a marriage entered into in contravention of the provisions of the ICMA, and yet the marriage was declared valid, for only one of the contractants was a Christian, and the marriage was celebrated according to Hindu custom. Since custom was well pleaded and proved, it was declared valid, which otherwise would not have been valid as was in the case Empress vs Johan.

93 J.J. Carberry, op. cit., pp. 11-14; G.H. Joyce, op. cit., p. 186.

94 C.I.C., (1917), cc.1100-1102. C.I.C., (1983), cc. 1119-1120. For a discussion on different liturgical forms, such as mixed marriage, disparity of cult, etc.; see F.M. Cappello, op. cit., pp. 183-197; P. Gasparri, op. cit., pp. 148-161. The Code of 1983 (c.1120) speaks of the liturgical form of marriage, which should be drawn up by the Conference of Bishops, incorporating the customs of the local church.

95 P. Hüizing, loc. cit., p. 144; K. Richter, "The Liturgical Celebration of Marriage: The Problems raised by

liturgical laws, can be found in the Ritual.⁹⁶

In Indian tradition, rituals and ceremonies play a vital role and even more so in marriage celebrations. On the other hand, in post reformation Europe, marriage became subject to State control.⁹⁷ Emphasizing the importance of ceremonies, T.A. Lacey remarks:

While divines and ecclesiastical lawyers maintained in their jurisprudence the sufficiency of a marriage contracted per verba de praesenti, without religious rites and even without witnesses, the common lawyers on the other hand were beginning to maintain that a marriage was not valid unless contracted in the presence of a clerk in Holy Orders.⁹⁸

The insistence of the ICMA on the rites and ceremonies of marriage has to be understood against the background of the Indian tradition of ritualistic tendencies and the legal ecclesiastical history of England. Both traditions insist on

95 (cont'd) the Changing Theological and Legal Views on Marriage", in Concilium, 9(7)(1973), pp. 72-87.

96 The Rites of the Catholic Church (as revised by the Second Vatican Council), pp. 529-570.

97 T.A. Lacey, Marriage in Church and State, p. 189.

98 Ibid, p. 190.

the liturgical solemnization of marriage.⁹⁹

When the validity of a marriage is either questioned or contested, one of the first things that the courts will inquire into is whether a ceremony of marriage took place; if so, the court will generally presume the validity of the act.¹⁰⁰ "The presumption applies to the question whether the formal requisites of a valid ceremony were satisfied."¹⁰¹ The tendency of the courts is to hold that unless the marriage is celebrated or performed with proper ceremonies and in due form, it cannot be said to be solemnized.¹⁰²

99 ICMA, s.5. In Patal Sundari vs Ashidharini, 70 CWN 28, it was ruled that when the ceremonies of marriage are performed, marriage becomes complete and binding. Also see Kastoori vs Chiranjlal, AIR 1960 All 446; Rabindra vs Provita, AIR 1970 Tripu 30. Customary marriages were held valid in the following cases: Gopi Krishna vs Musammat, AIR 1936 PC 198; Rajdei vs Lautan, AIR 1980 All 109.

100 Shakuntala vs Nilkanth, AIR 1973 All 203. Due to lack of proof of marriage ceremonies, this marriage was declared null. Also see Devani Achi vs Chettiar, AIR 1954 Mad 657; Khusal Chand vs Pandey, AIR 1963 MP 126.

101 Mouji Lal vs Kumari 38 IA 706. Where fact of marriage is proved, it will be considered to have been celebrated according to due form. Also see Veerappa vs Michael, AIR 1963 SC 933. This presumption was held rebuttable in Beera Jeena vs Tauli Devi, AIR 1972 Ori 143.

102 Bhunilot vs Ram Karan, 1977 AWC 53.

The ICMA, while insisting on the rites and ceremonies, does not distinguish between the juridical and the liturgical forms of marriage. Rather, these are seen as naturally completing and supplementing each other. Even in the case of civil marriage celebrated under the Act, some form of ceremony has to take place: the precise form, however, is left to the choice of the parties.¹⁰³ This does not mean that there is no need of distinguishing between the juridical and the liturgical forms. Apparently, in civil law the latter conforms to the former. The consent which has to be formally expressed by the couples is solemnly confirmed by the ritual celebration, in the eyes and understanding of the civil law.

3. Validation of Marriage

Some people appear to have been married, although they never participated in a wedding ceremony; while others celebrated their union, but for some reason, it was invalid.¹⁰⁴ In the first case, the only remedy is to have a wedding

¹⁰³ ICMA, s.51. Marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate, or certificates, be solemnized between them according to such form and ceremony as they think fit to adopt.

¹⁰⁴ M. Coronata, *op. cit.*, p. 929. Coronata suggests four remedies in such situations: dissimulation of fact and living in good faith, declaration of nullity, fraternal cohabitation and convalidation.

celebrated at least in its substantial form; in the latter case, Canon Law provides for the validation of marriages.¹⁰⁵ We are concerned here with those marriages that can be validated according to Church law. Invalidity can arise from three possible causes: presence of an undispensed impediment at the time of marriage,¹⁰⁶ lack of consent,¹⁰⁷ and lack of form.¹⁰⁸

The process by which the invalid marriages are made valid is generally called convalidation in Canon Law; it can be either simple or radical.¹⁰⁹ In simple validation, renewal of consent is necessary, while in radical sanation such renewal is not required; in both cases, though, the removal of any existing impediment is mandatory before the convalidation can take place.¹¹⁰

105 C.I.C., (1917), cc.1133-1142. For details on this subject, see P. Gasparri, op. cit., pp. 251-274; M.J. Reinhardt, "Canonical and Civil Matrimonial Actions: A Comparison", in The Catholic Lawyer, 12(1966), pp. 5-6. C.I.C., (1983), cc. 1156-1160.

106 F.M. Cappello, op. cit., p. 374. C.I.C., (1917), c.1133(1); C.I.C., (1983), c.1156(1).

107 C.I.C., (1917), cc.1133(2), 1134-1135; C.I.C., (1983), cc.1156-1158.

108 C.I.C., (1917), c.1137; C.I.C., (1983), c.1160. A. De Smet, op. cit., p. 618.

109 F.M. Cappello, op. cit., p. 373. Also see P. Gasparri, op. cit., p. 253; B.J. Ganter, "Problem of Simple Convalidation and Sanatio in Radice", in The Jurist, 21(1961), p. 57.

110 C.I.C., (1917), c.1135(1), (2). P. Gasparri, op. cit., pp. 253-258. For ways of renewing consent, see

a) Simple convalidation

Simple convalidation is the validation of a marriage with the renewal of consent. Should the invalidity result from a public impediment which has now ceased, consent must be renewed by both parties in public according to law, i.e., before a priest and two witnesses.¹¹¹ If the impediment was occult, or known to one party alone, consent can be renewed privately, by the party concerned. If the marriage was null because of a lack of form, contracting according to the prescribed form is necessary.¹¹² If the invalidity arises from lack of consent, such consent must be supplied.¹¹³ The rule of renewing consent is applicable to the party who withheld it, if such a defect was private and the other party did

110 (cont'd) F.M. Cappello, op. cit., pp. 376-378. C.I.C., (1983), c.1158.

111 C.I.C., (1917), cc.1133,1135. A. De Smet, op. cit., p. 622; F.M. Cappello, op. cit., p. 377. C.I.C., (1983), cc.1156-1158. Some authors suggest that there is no need to renew consent, but mere continued cohabitation is enough. See C.B. Alford, "Common Law Marriage in Relation to the Code", in The Jurist, 2(1942), p. 261. Invalidity due to nonage can be sanated by cohabitation; J.D. Hannan, "Ratification of Nonage Marriage", in The Jurist, 8(1948), p. 75.

112 C.I.C., (1917), c.1137; C.I.C., (1983), c.1160; B.J. Ganter, loc. cit., p. 62.

113 C.I.C., (1917), c.1136; F.M. Cappello, op. cit., pp. 379-380; S. Woywod, op. cit., pp. 894-895. C.I.C., (1983), c.1159.

not know of it; if both parties publicly refused consent, it is to be given anew by both according to form.¹¹⁴

b) Radical sanation

Radical sanation is an extraordinary form of convalidation of an invalid marriage; it is extraordinary in the sense that the need of renewing consent, as well as the observance of the form of marriage, are not required in this process.¹¹⁵ It is done on the basic assumption that the consent persists, for, according to canon 1057 of the 1983 Code, consent cannot be supplied by anyone. The non-existence of any impediment and the existence of true consent are pre-requisites for a radical sanation.

To grant a radical sanation, certain conditions must be fulfilled.¹¹⁶ There must be a species of marriage; that is: a consent was given which was naturally sufficient but not juridically effective. This ineffectiveness could be due

114 M. Mathis and N. Meyer, op. cit., pp. 293-298; P. Gasparri, op. cit., p. 258; B.J. Ganter, loc. cit., p. 62.

115 C.I.C., (1917), c.1138. M. Mathis and N. Meyer, op. cit., pp. 298-299. Also see S. Woywod, op. cit., p. 896; F.M. Cappello, op. cit., p. 384; J.J. Danagher, "The Radical Sanation of Marriage", in H.P.R., 53(1952-1953), pp. 1077-1079. C.I.C., (1983), c.1161 briefly explains the law on the validation of marriages and it is retroactive as in the old law.

116 F.M. Cappello, op. cit., pp. 389-396; E.F. Regatillo, op. cit., p. 898-899; C. Bastangel, "Validation of Convert's Marriage", in The Jurist, 4(1944), p. 147.

to the existence of an impediment or to lack of form, but the consent ineffectively given persists.¹¹⁷ This provision can be availed of, even without the knowledge of the parties.¹¹⁸ According to canon 1165 of the 1983 Code, only the Holy See can grant such a favour; however, in individual cases it can be granted by the diocesan bishop for a just cause. He cannot do so, however, if it is a question of an impediment whose dispensation is reserved to the Apostolic See in accord with canon 1078(2), or if it is a question of the natural law or of the divine positive law which has already ceased to exist. The following would be just causes for granting this favour: the parties cannot be asked to give consent, one party refuses to renew consent before the Church, or the couple live in good faith unaware of the invalidity. If it so happens that only one party is aware of the invalidity,

117 P. Gasparri, op. cit., p. 264. Also see E.F. Regatillo, op. cit., p. 898; S. Woywod, op. cit., p. 896; B.J. Ganter, loc. cit., p. 66; a reply from the Holy Office on May 12, 1953, granted sanation of a marriage, when total impotence occurred subsequent to the attempted marriage; see C.L.D., Vol. 5, pp. 549-550.

118 C.I.C., (1917), c.1138; F.M. Cappello, op. cit., p. 387; C.I.C., (1983), c.1161.

the favour is then given in such a way that this party renews consent and the other does not; in such instances it is known as an "imperfect sanation"; if both parties are dispensed from renewal of consent, it will be known as a "perfect sanation".

Civil law does not provide for convalidation, nor does the ICMA do so. Under normal circumstances, law presumes the validity of every marriage. If, however, the invalidity of a marriage is determined to exist, a procedure similar to simple validation is advisable, one that is not too uncommon in some cases.

In the event that the validity of a marriage is questioned or the invalidity is proven, one of the following remedies could be applied: contract a fresh marriage with some ceremonies, apply for annulment, or file a declaratory suit.¹¹⁹ Although radical sanation as such is unheard of in civil law, the legislature is able to deal with such situations by a new enactment. There have been cases that called for such an intervention of the legislature and many invalid

¹¹⁹ Aina Devi vs Bachan Singh, AIR 1980 All 174. The petitioner (wife) in this case sued for a declaration of nullity of her husband's marriage with the respondent n.2 and in turn for declaration of the validity of her marriage. It was held such petition was tenable. In civil law, suits can be introduced for declaration of validity as well as for nullity of marriage.

marriages were validated by Validation Acts.¹²⁰

However, before examining this special procedure, we shall briefly discuss the concept of void and voidable marriages. Civil law maintains a distinction between the two types of marriages; the former gives no status to the parties and consequently no obligation ensues. But in the case of a voidable marriage, the union can be annulled by the court; however, until then it is deemed to be valid.¹²¹ By the same reason, a person is entitled to petition for an annulment or for a declaration of validity of marriage. This latter is known as a declaratory suit and is needed among other things for purposes of inheritance. It is also known as a jactitation of marriage, that is, the assertion that a marriage exists between the persons and the prayer of the petitioner for silencing the respondent on the nullity or voidability of the marriage is accepted. This is done only when no impediment existed and the marriage was presumed to have been good

120 O.T. Cuttor, op. cit., Vol. 34, pp. 512-518. To sanate marriages solemnized by a minister of religion outside his jurisdiction, the Marriage Validation Act was passed on Oct. 17, 1895.

121 Gowri Ammala vs Thulsi Ammal, AIR 1962 Mad 510. In this case the distinction between void and voidable marriage was pointed out.

ab initio.¹²² The declaratory suit will operate by way of injunction which prevents the other party from contracting a second marriage, on the assumption of the invalidity of the first.¹²³

There are indeed cases when marriages are juridically invalid. Many cases were brought to the attention of the government as defect of form cases, since, in most cases, the officiating ministers had no authorization or acted beyond their powers. The remedy consisted in enacting legislation validating such marriages.

A Mr. A. Asirvatham of the Seventh Day Adventist Church purported to join many persons in matrimony after his licence was revoked. To remedy this situation, the government enacted three Validation Acts: The Madras Christian Marriage Validation Act of 1928, 1934 and 1935. In 1940 a similar Act was enacted to validate marriages performed by Rev. K. Anandam

¹²² Gani Pala vs Khati, AIR 1970 J&K 35. This suit was to restrain the respondent from entering into another marriage, and it was filed as a suit for injunction, it was maintainable and the marriage was declared valid.

¹²³ Bhornilal vs Kaushaliya, AIR 1970 Raj 83. In this case, the wife obtained an injunction restraining her husband from contracting another marriage. His disobedience was then reason for a contempt of court procedure. When a marriage is void ab initio the parties are at liberty to ignore the first marriage and to remarry; this was held in Krishna Devi vs Tulsan Devi, AIR 1972 Punj 305. This would, however, run the risk of litigation so it is advisable to obtain a declaration of nullity. Also see Sankarappa vs Basamma, AIR 1964 Mys 247.

of the American Baptist Mission. An Act of 1941 validated those done by A. Chinnamallela of the Telgu Church Council of South India; in the same year another Act was passed to validate marriages performed by M. Lazarus of the London Missionary Society. The Marriage Validation Act of 1952 (against the marriages by E. Devadoss) is the latest in the series of such Acts. One can only presume that similar enactments will have to be passed in the future because of other irregular situations.

4. Marriages of Conscience

We have so far considered the celebration of marriages under ordinary and extraordinary circumstances. In both cases there was nothing preventing the publicity of the marriages. But there can also be cases where the marriages have to be contracted secretly and without publicity. Such marriages are called marriages of conscience. According to A. De Smet,

Marriages of conscience are those which are celebrated in the form prescribed by law, but in such a manner that they remain secret. The banns are not published and the priest and witnesses who assist at the ceremony are bound to secrecy.¹²⁴

¹²⁴ De Smet as cited by H.A. Ayrinhac, op. cit., p. 281. Also see F.M. Cappello, op. cit., p. 204; P. Gasparri, op. cit., pp. 161-162. For a short history of marriages of conscience, see V. Coburn, Marriage of Conscience: A Historical Synopsis and Commentary, pp. 31-38; S. Woywod, op. cit., p. 858; F.X. Wernz, op. cit., p. 721.

Secret marriages existed in the Church from the early centuries, but the express legislation on the subject was passed under Benedict XIV through the Encyclical letter Satis Vobis of Nov. 17, 1741.¹²⁵ The present law of canon 1104 of the 1917 Code is very much the same as it was in Satis Vobis:

Only for the gravest and most urgent reasons, and by Ordinary of the place in person, not by the Vicar General without a special mandate, can it be permitted that a marriage of conscience be contracted; that is, that a marriage be celebrated without the banns and in secret, according to the canons which follow.¹²⁶

Canons 1131-1133 of the 1983 Code speak of the secrecy needed for marriages of conscience and their registration in secret registers. The 1983 Code calls this form a "secret celebration of marriage." There must be a grave and legitimate reason for this kind of marriage to take place.¹²⁷ For instance, a situation where a couple living in concubinage are commonly believed to be married, would be a justifying cause. Similar situations can arise where a civil official is not permitted to marry a particular woman and still has reasons to go ahead with the wedding; or, a widow wants to raise her child and carry on a business which cannot be done easily

125 H.A. Ayrinhac, op. cit., p. 281. Also see G. Payen, op. cit., pp. 306-307; A. De Smet, op. cit., p. 138. J. Petrovitus, The New Church Law on Matrimony, p. 29.

126 C.I.C., (1917), c.1104; C.I.C., (1983), cc.1130-1131.

127 H.A. Ayrinhac, op. cit., p. 283; A. De Smet, op. cit., p. 137; F.M. Cappello, op. cit., pp. 205-206; V. Coburn, op. cit., pp. 41-42.

without such a marriage. There can also be instances when the civil law does not authorize a union that would be valid according to Canon Law. Such situations could justify a marriage of conscience. Once it is certain that there is a justifying cause for this type of marriage, and the gravity of the cause has been reasonably assessed, permission may be obtained from the bishop to proceed.¹²⁸ The marriage is to take place in due form with secrecy and without banns.

A marriage of conscience is generally not recognized in civil law. Yet, in some cases, marriages of conscience are the only option available to the couple when the civil law provisions do not allow for the celebration of the marriage.¹²⁹

Such cases arise when a person who is civilly married, but whose marriage is not recognized canonically, cannot obtain a decree of divorce; or, when a person for some reason cannot go through a civil form of marriage, yet cannot invoke the provisions of canon 1116 of the 1983 Code. In some cases, there would result a loss of a necessary pension if the

128 C.I.C., (1917), c. 1104. C.I.C., (1983), c.1130.

129 F.M. Cappello, op. cit., p. 205: "Ex stylo et praxi S. Poenitentiarie talis censetur, si vir et femina in figura matrimonii publice vivant et de quibus nulla viget criminis suspicio, in occulto tamen concubinato perseverent." Also see H.A. Ayrinhac, op. cit., p. 283.

persons enter into a civilly recognized marriage. It is only with reluctance that marriages of conscience can be admitted, for, with the broader provisions for divorce, the chances of justifying a marriage of conscience are rather rare. Present South African legislation against inter-race marriage would provide for such a case.

It could, however, be argued from the ICMA that a marriage of conscience is really a marriage celebrated in accordance with the law of the Church, and undoubtedly it would be recognizable in civil law. For, if such a marriage is challenged, the party can always plead custom and the law of the Church. But the difficulty remains: can such a marriage be divulged? To divulge the secret would be contrary to the nature of a marriage of conscience unless the Ordinary authorizes its publication. At the present time we can only presume the possible civil validity of a marriage of conscience, for, in civil law, the safeguards are meant to prevent illegal and irregular unions: the law does not provide for such exceptional situations. The position is justifiable in view of the secular nature of the State (India) and in virtue of the religious and fundamental freedom granted in the Constitution. We can hold then, that marriages of conscience are not irreconcilable with the provisions of the Act. Moreover there is generally no knowledge of the same and problems do not arise too frequently in the Indian context.

5. Effect of Conversion on Marriage

Conversions are not rare in India. The voluntary acceptance of a new faith is marked either by an initiation rite or some other method.¹³⁰ Conversion has many consequences, not just on the spiritual life of the convert, but also on his social life as well as on his civil status. It has direct bearing on family life, property matters, inheritance, etc.; even the very law that governs the person will be changed after conversion. For example, a Hindu who becomes a Christian is severed from the coparcenery (joint-family property system),¹³¹ and is governed thenceforth by the Indian Succession Act, unless he makes an option to be governed by Hindu law.

According to Canon Law, the convert may make use of a privilege whereby he is authorized to leave an unbelieving and deserting partner, if it is not possible to cohabit without danger to faith. This provision is known as the privilege of the faith.¹³²

¹³⁰ Perumal vs Ponnuswami, AIR 1971 SC 2351. In this case it was held that no formal ceremony or expiation is necessary to effect conversion.

¹³¹ E.D. Devadason, op. cit., p. 358.

¹³² C.I.C., (1917), cc. 1121-1127; C.I.C., (1983), cc.1143-1146.

a) Privilege of the Faith

Canon Law speaks of the privilege of the faith in the event of conversion and in the case of a marriage which is not ratum. It is called the privilege of the faith, as this provision can be invoked to preserve one's faith whether it be newly acquired or otherwise. This favour has two aspects, commonly known as the Pauline and Petrine privileges. The Pauline privilege has great importance in mission countries. Paul, in his letter to the Corinthians, authorizes a new Christian to marry a second time in the event one's former spouse departs;¹³³ hence the name Pauline privilege. In virtue of this privilege, a legitimate marriage between two unbaptized persons can be dissolved in favour of the faith of the convert. For the valid use of this privilege, the following conditions are to be fulfilled: 1) a valid marriage before conversion between two non-baptized persons; 2) conversion and baptism of one of the spouses; 3) departure of the unbaptized spouse or refusal to cohabit peacefully, and 4) interpellations.¹³⁴ Interpellations consist in asking

133 1 Cor 7. 12-15. S.J. Kelleher, "Ecclesiastical Annulments and Dissolutions of Marriage", in The Catholic Lawyer, 12(1966), p. 14.

134 C.I.C., (1917), cc.1121-1124. C.I.C., (1983), cc.1144-1146.

the non-baptized spouse whether he wants to cohabit peacefully with the convert, and if the partner refuses to appear or answer, his actions can be considered to be a sure sign of departure. After the interpellations have produced the required results, the convert is free to marry. Under certain circumstances, the interpellations may be dispensed with according to law.¹³⁵

In connection with the Pauline privilege, mention could be made of the Petrine privilege which is another application of the privilege of the faith. It consists in the dissolution of a marriage entered into by the parties, one of whom was not baptized. This can be granted by the successor of Peter alone, hence the common name, Petrine privilege. It is generally admitted among the canonists that the Pope as Vicar of Christ, can dissolve, for a just cause, any marriage that is not ratified and consummated.¹³⁶ The procedure in

¹³⁵ C.I.C., (1917), cc.1123-1126; C.I.C., (1983), 1144-1146.

¹³⁶ M. Mathis and N. Meyer, op. cit., pp. 285-286. Also see M.J. Reinhardt, loc. cit., p. 8; F.J. Keida, "Direct Dissolution of a Legitimate Marriage by Papal Authority", in The Jurist, 2(1942), p. 135. Privilege of the faith cases are governed by the instruction of the S.C.D.F. issued on Dec. 6, 1973; see C.L.D., Vol. 8, pp. 1177-1184. This, being a personal prerogative of the Vicar of Christ, is not included in the Code of Canon Law.

Petrine privilege cases is regulated by the Instruction of the S.C.D.F. of Dec. 6, 1973. It has to be proved that at least one of the spouses was not baptized at the time of marriage, that there was no use of marriage after the baptism of the unbaptized party (if such were the case), that it is impossible to live peacefully since the marital life is broken down, and that there would be no scandal if the privilege were granted.

b) Petrine Privilege, Indissolubility and Civil Law

The Catholic Church does not admit of divorce with a right to remarry in the case of a valid sacramental and consummated marriage.¹³⁷ The ICMA, on the other hand, does not deal with this matter for it is only concerned with the form of marriage. Hence, we seek for a similar provision elsewhere; the Indian Divorce Act, for example, does not easily grant divorces as the courts uphold the sacredness of marriage. Like Canon Law, The Native Christian Converts Marriage Dissolution Act, 1866, admits a relative type of indissolubility, as it permits dissolution of the bond of marriage in the event of conversion. This, however, has to be done after interpellation.¹³⁸

137 C.I.C., (1917), c.1119; C.I.C., (1983), c.1141.

138 The Native Converts Marriage Dissolution Act, ss. 13-17, 33.

A similar situation created by conversion calling for favour of the faith can be found in some inter-faith marriages. Some marriage situations are intolerable where there is no peace and faith cannot be practised; a Catholic party who was married to a non-baptized person later turns to the Church for some solution and peace. In such cases, the Pope has granted dispensations in favour of faith, particularly in five special circumstances.

The first category concerns marriages between a baptized non-Catholic and an unbaptized person with subsequent conversion of the latter to the Catholic faith. Dissolutions have been given under the Petrine privilege.¹³⁹ Another type of case: a Catholic validly marries an unbaptized person; the marriage breaks down and the non-baptized person becomes a Catholic. Dissolution of the bond is granted in favour of the faith.¹⁴⁰ In another type of case, when a valid marriage between a Catholic and a non-Christian was set aside by a civil divorce, the Catholic was permitted to remarry.¹⁴¹ There

139 C.L.D., Vol. 1, pp. 553-554. This is commonly known as the Helena case. Also see the Frenso case, in ibid., Vol. 3, p. 485.

140 Ibid., Vol. 3, pp. 486-487.

141 Ibid., Vol. 4, pp. 350-352. In this case there was no conversion involved, still the bond was dissolved in favour of the faith.

are cases of two validly married non-Christians, whose union had subsequently broken down. One wished to marry a Catholic and the previous marriage was dissolved in favour of the faith of the Catholic party although there was no conversion.¹⁴²

In the above mentioned typical cases, the Pope has granted a dissolution of the bond in favour of the faith. Here, although we speak of favour of faith, there is not always a conversion involved; nevertheless, a papal dispensation was granted because none of these were sacramental marriages. The civil law speaks of conversion as a ground for applying for a dissolution in the case of Catholics. If we take into consideration the spirit of the law, it can be argued that the Petrine privilege is also applicable in civil law: the reason for such is found in the basis for granting a dissolution: the peaceful exercise of one's faith. Of course, the civil law is not preoccupied directly with the practice of one's faith. For reasons of civil security, it would be preferable for the parties to make this privilege operate in the civil law to obtain a civil divorce first and then apply for a papal dispensation.

¹⁴² Ibid., Vol. 5, pp. 543-546. Also see ibid., pp. 539-540. For dissolution of the bond without conversion, see ibid., pp. 543-546. For the dissolution of a marriage in view to contract a mixed marriage, see ibid., pp. 546-547. This permission is not given if the first union was mixed and the party still contemplates another mixed marriage, see ibid., p. 547.

Another area where the possibility of a papal dispensation exists is that occurring when one of the parties to a ratified marriage wishes to enter religious life. In such cases, the bond is automatically dissolved in the event of solemn profession, if the marriage has not been consummated, and the other party is then free to marry. Such cases are almost non-existent today and are not being retained in the new law. The civil law has a similar provision. Under the Hindu legislation, if one of the parties becomes a hermit or renounces the world, there exist grounds for divorce.¹⁴³

c) Conversion and the ICMA

Since a person may convert to any religion, the law provides for all such cases. In most instances a court dissolution is available. Muslim personal law permits quicker divorce, although the right of a Muslim woman is very limited. According to Hanafi jurisprudence, a Muslim woman can receive another faith, obtain an automatic dissolution of her marriage, and marry again. Later on, this provision of conversion was broadened to include changing over to another (Maliki) sect. Here there is only a change of tenets and not of religion which would have been sufficient reason for divorce.¹⁴⁴ In

143 The Hindu Marriage Act, s. 13(1)(vi).

144 Moyin vs Nafeesa, AIR 1973 Ker 176.

Kaneez vs Angela, for instance, it was held that apostasy provided automatic grounds for a dissolution of marriage.¹⁴⁵

In Hindu law, conversion to another religion is also a ground for the dissolution of the bond of marriage.¹⁴⁶ Under the indigenous Hindu law and tradition, conversion is said to dissolve marriage. The courts, however, prefer to receive a petition for dissolution; the bona fide of conversion is then immaterial. The position of both Hindu and Muslim laws is the same: the bond is dissolved automatically and the other party is free to contract a new marriage. The position of Christian law is slightly different on this score.

The law that governs the Christians on conversion is the Native Converts Marriage Dissolution Act, 1866. This Act was enacted against the background of the practice of Hindus and Muslims. In the process of discussion on the bill in the Legislature, many called for automatic dissolution of marriage. Main, who introduced the bill, explained some practices among the Indians of marriage after repudiating the former spouse on the ground that remaining in "heathenism is spiritual

¹⁴⁵ Kaneez vs Angela, 2 Andr PLR 356. This was the case of a Christian lady who became a Muslim and married a Muslim. In 1952 she changed her religion again. It was held that apostasy operated to dissolve her marriage. As to her claim of Dower, the court held that it was barred by limitation.

¹⁴⁶ The Hindu Marriage Act, s.13.

adultery".¹⁴⁷ The law was enacted prescribing a procedure for dissolving a previous marriage on the occasion of conversion and this law is much the same as the Pauline privilege.¹⁴⁸

Sections 4 and 5 of the Native Converts Marriage Dissolution Act (NCMDA) provides for the following procedure in the event of conversion (if it is against the will of the other spouse). First, a suit for restitution of conjugal rights has to be filed. When the deserting spouse appears, the reason for departure shall be asked, as per section 13. If such reason is conversion, the case will be adjourned for one year.¹⁴⁹ If the refusal to cohabit continues, the marriage will be dissolved. The law for Christians in the event of conversion does not advocate automatic dissolution of marriage.¹⁵⁰

Consequent upon conversion to Christianity, the procedure under the Canon Law and the civil law is similar. Both have as a motive the facilitating of practice of faith and peaceful cohabitation. The procedure can be summarized

¹⁴⁷ O.T. Cuttor, op. cit., Vol. 3, p. 157. For details, see ibid., pp. 157-162.

¹⁴⁸ C.I.C., (1917), cc.1121-1127. C.I.C., (1983), cc.1143-1146.

¹⁴⁹ The Native Converts Marriage Dissolution Act, ss. 15, 17.

¹⁵⁰ Tapita Peter vs Lakshmi, 17 Mad 239; Emperor vs Lazar, 30 Mad 550.

as follows. The intentions of the party who is not converted are to be found out, as well as the reasons for departure.¹⁵¹ The interpellation in civil law takes the form of a suit for restitution of conjugal rights, followed by a petition for the dissolution of the marriage.¹⁵²

Canon Law considered this as a privilege while the civil law regards it as a right. The law respects one's freedom to profess any religion, which includes the free practice of religion. To enjoy and exercise this right, it is sometimes necessary to obtain a decree of dissolution of marriage. The courts at times accept customary divorce as a case for dissolution.¹⁵³ This can be successfully pleaded in the case of Catholics as well, once the canonical interpellations have been made.

151 C.I.C., (1917), cc.1121-1123.

152 The Native Converts Marriage Dissolution Act., ss. 15,17.

153 Puyam vs Moriup, AIR 1956 Mani 18. Also see Hirabai vs Ram Chandra, AIR 1958 Bom 26.

Conclusion

In our effort to make a comparative study of the celebration of marriages of Catholics, we have found that both Canon Law and civil law consider marriage as a contract creating a new status enabling intimate personal relationships. Both laws regard marriage as sacred and more than a mere contract. Although, the ICMA does not refer to marriage as a sacrament, the practice of the courts is to accept its sacred sacramental character. Thus, the Act makes it mandatory to have marriage formally and solemnly celebrated with some type of ceremony prescribed by the law of the Church.

Marriage being a sacred institution, Catholics are not allowed to use any form other than the canonically recognized ones. The canonical form is substantially the same as the forms of marriage authorized under the ICMA, and the Special Marriage Act, however, Catholics are also permitted to have their marriages celebrated according to the civil form. A person who marries under the Special Marriage Act may petition for divorce, although some say this was not previously allowed under the Indian Divorce Act. Thus, in a certain sense, Christians have access to some form of civil matrimonial relief.

Both laws recognize the inherent right of every person to marry, but all must marry according to law. Both laws hold that one has to be free of impediments to marry validly.

Other formalities, such as banns of marriage and certificates are obligatory before a person can actually solemnize the marriage. The solemnization of marriages of Catholics, if carried out under the ICMA, has to be done in full accord with the law of the Church. Thus the Indian civil law and the law of the Church are in general agreement regarding the celebration of marriages.

CHAPTER IV

DEVELOPMENTS REGARDING THE FORM OF MARRIAGE SUBSEQUENT TO THE PROMULGATION OF THE LAWS

So far, we have considered the basic laws on the form of marriage as found in the 1917 Codex Iuris Canonici and the ICMA (1872). However, both of these laws underwent revisions, either in their text or in the interpretations of the courts. It is to these developments that we now turn our attention.

1. Changes in Canon Law Since the Promulgation of the 1917 Code

a) The Assisting Priest

The 1917 Code had resolved the delicate problem of who could assist actively at marriage. However, there remained further questions to be resolved: who can assist at marriages by virtue of an office other than that of the local Ordinary and the pastor mentioned in canon 1094? The Pontifical Commission for the Authentic Interpretation of the Code of Canon Law issued a number of instructions in this regard.

On July 14, 1922, the Code Commission stated that a vicar substitute, after the approval of the bishop as per c. 465(4) (of the 1917 Code) can validly assist at marriages ex officio.¹ This seems to have been the first time that a

¹ A.A.S., 14(1922), pp. 527-528. Also see P. Ciprotti, Observaciones al texto del Codex Iuris Canonici, 2nd ed., pp. 34-35. The expression "Code Commission" in this chapter refers to the Pontifical Commission for the Authentic Interpretation

priest other than a pastor was acknowledged to hold a licentia to assist at marriage in virtue of his office.

In the following year it was stated that a legitimately constituted vicar oeconomicus (during vacancy) also has the licentia to assist at marriage and to delegate it to another. A vicar or any priest supplying as per c. 465(5) of the 1917 Code (with the approval of the bishop) has the same power. So also does the vicar of a religious parish, once he has been appointed by the bishop.²

In 1927, a doubt regarding the possibility of general delegation was clarified in the affirmative.³ In 1942, another interpretation was given according to which a vicarius co-operator could not assist at marriage in virtue of his office.⁴ He needed to be delegated either for a particular instance or through general delegation. An episcopal delegate with general faculties as per c. 199(1) is said to have more powers than a pastor, but he does not have the licentia to assist at marriages, in virtue of his position or of general

1 (cont'd) of the Code of Canon Law.

2 A.A.S., 16(1924), pp. 114-115.

3 Ibid., 20(1928), pp. 61-62.

4 Ibid., 34(1942), p. 50.

delegation. This was the reply of the Code Commission in 1943.⁵

With these replies, the issue of assistance at marriage by virtue of office seems to have been settled. In the meantime, however, we find another development, on the legislation regarding persons who are subject to the form of marriage.

b) Development of Law on Those Subject to the Form

Two cases seem to have given rise to a clarification in the law on those subject to the form. In the first, a Catholic man married a Russian Orthodox woman according to the Orthodox rite. They were separated after one year and later divorced. The lower court upheld the validity of marriage by invoking c. 1098 of the 1917 Code. But the Rota decided that it was null due to lack of form. The provision of c. 1098 did not apply in the case of mixed marriages, and moreover, in this instance, a Catholic priest was available nearby.⁶

The second case concerns an Italian prisoner of war, who while in Hungary, attempted marriage with a Calvinist

⁵ *Ibid.*, 35(1943), p. 58. Also see *S.R.R. Dec.*, 34(1942), c. Grazioli, May 25, 1942, pp. 408-430. It was mentioned in this case that a priest who has a general delegation from the bishop does not have the *licentia* to assist at marriage. Another point mentioned is that a subdelegated faculty cannot be further subdelegated unless it is so mentioned. See *ibid.*, p. 411.

⁶ W. Doheny, *Canonical Procedure in Matrimonial Cases*, 2nd enl. ed., Vol. 1, pp. 1064-1065.

before a non-Catholic minister and two witnesses. Some 11 kilometers away there was a resident Catholic priest. The man later returned to Italy and asked for a declaration of nullity of his marriage. The Rota decided in favour of nullity due to lack of form.⁷

We must recall that the 1917 Code had made exceptions for those ab acatholicis nati who were brought up outside the Church.⁸ Those who were born of mixed marriages but raised as non-Catholics, although baptized in the Catholic Church, were bound by the canonical form until Dec. 2, 1929.⁹ From this date, they were no longer bound. In this regard,

V. Schaaf remarks:

Among the replies to doubts given by the Pontifical Commission for the Authentic Interpretation of the Canons of the Code, 20 July, 1929, the second is one that may have surprised many. The great majority of canonists held that those born of a valid mixed marriage and baptized in the Catholic Church were bound to observe the form of marriage laid down for Catholics in Canons 1094-1099; and that even if they had from infancy been raised outside

7 Ibid., p. 1066.

8 C.I.C., (1917), c.1099(2); also see C.I.C., (1983), c.1117.

9 A.M. Darmanin, "Exemptio a forma substantiali matrimonii", in Jus Pontificium, 10(1930), pp. 328-330; A.A.S., 21(1929), p. 573. The reply of the Commission for the Authentic Interpretation of the Code, July 20, 1929, was promulgated on Sept. 2, 1929, and came into effect on Dec. 2, 1929. Also see S.R.R. Dec., 62(1970), c. Fiore, May 30, 1970, p. 597; "Juxta responsum Comm. Pont. ad Codicis Canones authenticae interpretandos diei 20 Julii 1929 'ab acatholicis natus' dicendus est etiam natus ab altero parente acatholico."

the Catholic Church. However, the Pontifical Commission has taken the opposite view and declared that the phrase ab acatholicis nati in Canon 1099, (2) embraces such children too; that also those born of parents one of whom was a Catholic, and the other a non-Catholic, even if the parents had at the time of their marriage made the promises required by Canons 1061 and 1071, can validly marry without observing the form for the celebration of the marriage prescribed in Canons 1094-1099, although they may have been baptized in the Catholic Church, provided (a) that from infancy they had been reared outside the Catholic Church, i.e., in heresy, schism, infidelity or without any religion; and (b) that they marry a non-Catholic.¹⁰

By the 1929 interpretation of the law, although those ab acatholicis nati were exempted from the canonical form, those who left the Church were still considered bound by it. In a 1931 reply, the Code Commission clarified that apostates are bound to the form as the Church could not see at that time how a person could sincerely renounce his faith.¹¹

10 V. Schaaf, "An Exemption from the Canonical Form of Marriage", in The Ecclesiastical Review, 83(1930), p. 484.

11 A.M. Darmanin, "De Apostatarum filiis quoad canonicam matrimonii formam", in Jus Pontificium, 11(1931), p. 238: "Apostata ipse forma canonica matrimonii ligatus manet; nati vero ab apostatis ab hujusmodi forma liberantur etiamsi in Ecclesia catholica baptizati fuerint; sed tunc requiritur aut alia quoque conditio, in cit. (2) can 1099 recensita, locum habeat, nempe de iis agitur, qui extra Ecclesiam penitus adoleverunt." Also see A.A.S., 22(1930), p. 195; M. Forrest, "Children of Apostates and the Canonical Form of Marriage", in The Ecclesiastical Review, 84(1931), pp. 522-524; W. Grosam, "Erlässe des Apostolischen Stuhles", in Theologisch-Practische Quartalschrift, 83(1930), p. 617.

The law on the form was officially amended in 1949 when the second paragraph of c. 1099 was abrogated by Pius XII on August 1, 1948.¹² Until 1949, certain non-Catholics baptized in the Catholic Church were exempted from the form of marriage under three conditions: (1) they were born of non-Catholic parents, or at least of one non-Catholic; (2) from early childhood they were raised outside the Church; and (3) they married persons who were not bound by the form. Since the decision went into effect, the children of non-Catholics baptized in the Church were considered to be bound by the canonical form.

With the promulgation of Crebrae allatae, the CIC form was restricted in its scope since the Oriental Catholics were no longer bound by this form, but by their own one.¹³ It

12 A.A.S., 40(1948), pp. 305-306: "Abrogamus itaque alterum comma paragraphi secundae c.1099, et jubemus ut verba item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut in infidelitate aut sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint ex can. 1099 expungantur." Also see W. Bühler, Katholisch-evangelische Mischehen, pp. 305-306; S.R.R. Dec., 62(1970), c. Fiore, May 30, 1970, p. 597. These points were further highlighted in a case judged c. Lefebvre in 1971; see S.R.R. Dec., Dec. 11, 1971, in M.E., 97(1972), p. 195.

13 Pius XII, Motu proprio "Crebrae allatae", in A.A.S., 41(1949), pp. 89-117. Also see J. Listl, H. Müller and H. Schmitz, eds., Grundriss nachkonziliaren Kirchenrechts, p. 575.

later came to be accepted by the Church at Vatican II that the form binds the Orientals only for liceity, if they are contracting with an Orthodox, according to Orthodox form.

c) Towards the Recognition of the Orthodox Form of Marriage

i) The Vatican Council II

There were many changes expected to be announced by the Second Vatican Council in the field of marriage; not all were realized. However, a remarkable change was introduced concerning the form of marriage: the acceptance of the Orthodox form of marriage as valid under a number of conditions. While, strictly speaking, this topic refers to mixed marriages, we shall, nevertheless, consider it in as much as it touches the form of marriage and not under the prescriptions regarding mixed religion.

Many factors led to this legislation's recognizing the Orthodox form of marriage, in particular a spirit of ecumenism and a desire for Christian unity.

Archbishop P. Naaba's (Beirut) intervention in the Council in favour of recognizing marriages between Orthodox and Catholics as valid,¹⁴ even though the ceremony did not

14 F. Anderson, ed., Council Daybook, Vol. 1, p. 173.

take place before a Catholic priest, apparently crystallized contemporary thinking.¹⁵ Archbishop J. Schneider of Bamberg made practical suggestions for avoiding frequent illegal and invalid marriages. Cardinal J. Gilroy went further and suggested that the impediment of disparity of cult be removed.¹⁶

On Nov. 27, 1963, Bishop I. Ghattas of Thebes (Egypt) pleaded for the recognition of marriages celebrated between Oriental Catholics and Orthodox persons before an Orthodox minister. On Dec. 2, 1963, Archbishop G. Layrk of Aleppo (Syria) supported this view and also spoke in favour of recognizing mixed marriages as valid.¹⁷ The subsequent sessions witnessed a variety of interventions from the Council Fathers. Most of them preferred retaining the canonical form only for liceity in cases of marriages with the Orthodox.

Taking into account the desires of the Fathers of the Council and of the experts, the preparatory commission drafted a schema on marriage.¹⁸ Initially this subject was treated in different schemas, such as the Dogmatic Constitution

15 An elaborate study on this matter was made by Cardinal A. Coussa in 1959. See A. Coussa, "Animadversiones in C. LXXII Trullanae Synodi", in Apollinaris, 32(1959), pp. 170-181.

16 F. Anderson, op. cit., Vol. 2, p. 286.

17 Ibid., Vol. 1, p. 321.

18 Ibid., Vol. 2, p. 289; J. Morales, Mixed Marriages and the Second Vatican Ecumenical Council, p. 131.

on the Church, the Decree on the Apostolate of the Laity and the Pastoral Constitution on the Church in the Modern World.

Later, the matters pertaining to marriage were grouped in one schema which came before the Council for discussion on Nov. 4, 1964.

Cardinal A. Cicognani had announced on Oct. 15, 1964, that a Catholic priest's presence at a mixed marriage between Eastern Christians would be required for a marriage within law (liceity) unless a dispensation is granted, but not for a valid marriage.¹⁹

ii) Report on the Votum

The proposed schema presented a list of suggested changes in the marriage legislation regarding impediments, mixed marriages and the canonical form. While maintaining the prohibition against clandestine marriages, a revision of the ordinary form of marriage was felt to be necessary. Also, it was suggested that a marriage contracted before a priest, even contrary to the prescriptions of the law, provided the priest was not under any ecclesiastical penalty and the marriage took place in the church, be held valid.²⁰ While

19 F. Anderson, op. cit., Vol. 2, p. 137. Archbishop J. Krol suggested that the presence of a priest should be considered sufficient for validity of marriage; see ibid., Vol. 2, p. 294.

20 J. Morales, op. cit., p. 134.

these matters were all discussed in the session, only the changes in the law on the form of marriage were eventually incorporated into the decree on the Oriental Churches.

iii) The Decree on the Oriental Churches

The schema on marriage underwent numerous changes.

As Cardinal J. Ritter stated:

The schema proceeds wisely and prudently in its approach to the canonical form. It offers a middle-course between the extremes of inflexible retention and complete relaxation of the form. Although each extreme has its adherents, I believe that the compromise affords the best response to the needs of our time.²¹

It is against this background that we situate the significant change brought forth by the Council through its decree on the Oriental Churches. The relevant part of the decree states:

In order to provide against invalid marriages, when Eastern Catholics marry baptized Eastern non-Catholics, and also in order to promote the permanence and sanctity of marriage as well as peace at home, the holy council determines that the canonical form of celebration of marriages is of obligation only for liceity. For their validity the presence of a sacred minister is sufficient, provided that the other prescriptions of canon law are observed.²²

21 F. Anderson, op. cit., Vol. 2, pp. 297-299.

22 A. Flannery, ed., Documents of Vatican II, pp. 447-448. This suggestion was voted in the 128th general congregation with 2110 for and 39 votes against, and Pope Paul IV promulgated the decree on Nov. 21, 1964. It became law on Jan. 22, 1965. Also see J. Morales, op. cit., p. 114.

Thus, the Orthodox form of marriage was recognized. But, another difficulty remained: the Orthodox form was permitted only in the case of Orientals. Thus, at the same time, a Latin Catholic marrying an Orthodox before an Orthodox minister would enter into an invalid marriage.²³ This created an uneasy situation, so it is not surprising that the next development consisted in making this prescription applicable for the Latins as well.

iv) Crescens Matrimoniorum

To obviate all practical difficulties and to avoid odious comparisons, the Orthodox form was given general recognition by the decree Crescens Matrimoniorum.²⁴ It says:

In the exceptional circumstances of today, mixed marriages between the Catholic faithful of the Latin rite and non-Catholic Oriental faithful are taking place, and the variety in canonical disciplines has brought about many grave difficulties both in the East and the West. For this reason petitions from various regions have been addressed to the Supreme Pontiff asking that he unify canonical discipline in this matter by permitting to Catholics of

23 F. Cappello, "Annotationes", in Periodica, 37(1948), pp. 291-292. In the case of a dissident Oriental and a Latin woman, the Latin pastor is to delegate the faculty to assist at marriage. See S.C. for Oriental Churches, reply, July 11, 1952, "Roman Decisions affecting the Families of the Oriental Rite", in The Jurist, 12(1952), pp. 475-476.

24 A.A.S., 59(1967), pp. 165-166. Also see K. Mörsdorf, Lehrbuch des Kirchenrecht, Vol. 2, p. 253; U. Mosiek, Kirchliches Eherecht, p. 214.

the Latin rite too what has been decreed for Catholics of the Eastern rite.

His Holiness Pope Paul VI [..] has kindly granted that, when Catholics, whether Orientals or Latins, contract marriage with non-Catholic Oriental faithful, the canonical form for the celebration of these marriages obliges only for lawfulness; for validity the presence of a sacred minister suffices, as long as the other requirements of law are observed.²⁵

This is a further development from the Vatican II documents, especially from no. 18 of the decree on the Eastern Churches. As mentioned in the text of the decree of 1967, this resulted from many requests from the bishops for further legislation.²⁶ Without this decree, there would have been a dichotomous situation similar to that which existed under the Tametsi law.

The decree on Eastern Churches finds three reasons for making this change: firstly to prevent invalid marriages, since we note a rapidly increasing number of marriages celebrated between Catholics and Orthodox. Secondly, to protect

25 A. Flannery, op. cit., pp. 481-482.

26 C.L.D., Vol. 6, pp. 605-606; A.A.S., 59(1967), pp. 165-166. For a good study on this subject, see M. Breydy, "El decreto sobre matrimonios mixtos entre catholicos y orientales", in Revista Española de Derecho Canonico, 32(1967), pp. 375-392; C. Pujol, "Adnotationes ad decretum de matrimoniis mixtis inter Catholicos et Orientales baptizatos acatholicos (22 Feb. 1967)", in Periodica, 56(1967), pp. 505-517; T.P. Cunningham, "Mixed Marriages with Orientals", in I.E.R., 107 (1967), pp. 408-409; A. Carr, "Marriage of Catholic with Orthodox—New Decree", in H.P.R., 67(1966-1967), pp. 795-796; M. Hurley, "Mixed Marriages: The Canonical Form", in The Furrow, 19(1968), pp. 94-97.

the permanence and sanctity of marriage; and finally, to promote domestic harmony.

v) Response of the Orthodox Church

The response of the Orthodox Church to the amended law was very favourable. For instance, in the U.S.A., a joint statement was issued some years later recognizing reciprocity on this matter. Prior to this, the situation of those in mixed marriages between Catholics and Orthodox was considered irregular by the Orthodox. In other words, if the marriage took place before a Catholic priest, this was unacceptable. As in the Catholic Church, such people were excluded from ecclesiastical communion, especially from the Eucharist. In the light of the joint statement, this prohibition was lifted by the Orthodox Church. At the same time, they insisted that the couple receive the blessing of the priest, which they consider essential for validity. The joint statement reads in part:

We acknowledge that according to present practice this condition can be rectified, if the existing marriage be blessed by the Orthodox Church, thus restoring the Orthodox partner with full communion with his or her church. We wish to assure the Roman Catholic partner and all concerned that such a blessing will not jeopardize his or her ecclesiastical standing in the Roman Catholic Church.²⁷

²⁷ Agreement on Orthodox Roman Catholic Marriages, in Origins, 10(1980-1981), p. 734.

The law would appear not to be retroactive. However, provision was made to regularize any previously irregular marriages by receiving the blessing of the priest. The law on the form of marriage has gone one step further by this mutual recognition of the form by both Churches. A further point to consider concerns assistance at marriage.

d) Assistance at Marriage

The sacred ministers empowered to assist at marriages by virtue of their office are the local Ordinary and pastors. This licentia can be delegated. Assisting at marriage otherwise than in virtue of office or by delegation would invalidate a marriage under normal circumstances.²⁸ For instance, in a case before Fagiolo, a marriage celebrated by a bishop outside his territory and without delegation, was declared null.²⁹

28 A.A.S., 44(1952), p. 497 (common error); ibid., 44 (1952) p. 552 (within one's territory); J. Listl, H. Müller and H. Schmitz, op. cit., pp. 578-580. Also see S.R.R. Dec., 10(1918), c. Many, July 9, 1918, pp. 78-87. A marriage took place between a Catholic and a Protestant with a dispensation granted in the domicile of the boy; the pastor did not receive delegation, but was presumed to have had given it and the marriage was held to be valid. Under similar circumstances another mixed marriage was declared null as it took place before a Protestant minister. See S.R.R. Dec., 62(1970), c. Anné, Jan. 14, 1970, pp. 49-52.

29 S.R.R. Dec., 61(1969), c. Fagiolo, Mar. 28, 1969, pp. 338-346. Also see S.R.R. Dec., 63(1971), c. Masala, June 20, 1971, pp. 568-575; ibid., c. Abbo, Dec. 16, 1971, pp. 1005-1010.

There was no presumption of delegation or common error in this case.³⁰

Assisting at marriage is generally considered to be neither an act of jurisdiction, nor an exercise of the power of orders; rather it is an act carried out in virtue of an office.³¹ The CIC (1917) spoke of this as 'licentia' (cc. 1092, 1096) while the new law refers to a 'facultas' (c.1111). Prior to the new Code, some authors like F. Cappello, G. Michiels, V. Tirado did refer to this as facultas. The change of terminology, from licentia to facultas might be an indication that the delegation to assist at marriage is something akin to confessional jurisdiction: for in the context of confession the word used is facultas.³²

30 See, however, S.R.R. Dec., 61(1969), c. Parisella, Jan. 16, 1969, pp. 26-33, for a case involving common error.

31 Failing office or delegation, the prescription of c. 209 is to be applied, replied the Code Commission on March 25, 1952; see, C.L.D., Vol. 3, p. 76.

32 U. Mosiek, op. cit., p. 258: "Der CIC verwendet hinsichtlich der Übertragung der Trauungsvollmacht unpräzise den Ausdruck "licencia" (CIC 1095.2, 1096.1,2), was lediglich auf ein Erfordernis zur Erlaubtheit hinderten würde. Es unterliegt jedoch überhaupt keinen Zweifel, dass, "licencia" ein Gültigkeitserfordernis darstellt und daher im Sinne vom Delegation verstanden werden muss." Also see A.J. Victor (Tirado), De jurisdictionis acceptione in jure ecclesiastico, pp. 216-221; G. Michiels, De potestate ordinaria et delegata, pp. 53-57; F.M. Cappello, Tractatus canonico-moralis de sacramentis, 4th ed., Vol. 3, pp. 141-143. Cappello uses the word potestas, ibid., p. 103.

Under the CIC (1917), delegation was to be given to a priest alone, but it now embraces a priest or deacon or even a lay person in certain circumstances. Furthermore, the pressing needs of the day, especially the scarcity of priests and deacons are some of the reasons for allowing this faculty to be delegated to lay persons.

The CIC (1917), preferred particular delegation while the new law shows more openness to general delegation. In a 1949 decision c. Caiazzo³³ lengthy mention was made of regular but unlawful delegation (regulariter tamen illicite) for assistance. When Ne Temere was made compulsory for all, scholars interpreted the delegation required under it as something to be given to a determinate priest for a determinate wedding. The priest was to be designated at least by office.³⁴

The licentia to assist as well as the right to delegate are, however, limited to one's own jurisdiction, irrespective of the type of delegation. If the delegation is general it

33 S.R.R. Dec., 39(1947), c. Caiazzo, Mar. 29, 1947, pp. 208-212. "Jure superiore delegatio valide (regulariter tamen illicite) sacerdoti etiam indeterminato concedi poterat": ibid., p. 209. Also see ibid., 40(1948), c. Brennan, June 30, 1948, pp. 257-267.

34 Ibid., 40(1948), c. Heard, Jan. 17, 1948, pp. 22-25; ibid., 41(1949), c. Teodori, June 11, 1949, pp. 287-291; S.C.C., Decretum "De sponsalibus et matrimonio", Aug. 2, 1907, in Periodica, 4(1909), p. 105.

is often given in writing.³⁵ The new law provides that it must always be in writing. In spite of these provisions, and in the interest of the good of souls, the new Code specifically refers to supplied jurisdiction in case of positive doubt of fact or of law.³⁶ This provision (ecclesia supplet) was generally understood to have been provided for in the present c. 209 of the 1917 Code which dealt with common error and doubt.³⁷

35 J. Listl, H. Müller and H. Schmitz, op. cit., p. 579; the Conference of Bishops can decide on the type of delegation; general as well as particular delegation is possible. See S.R.R. Dec., 43(1951), c. Caiazzo, May 4, 1951, p. 353. A person receives this delegation only after it is given; see ibid., 64(1972), c. Ewers, Apr. 22, 1972, p. 191. Such delegation is not needed if one uses the extraordinary form; see ibid., 45(1953), c. Heard, Oct. 17, 1953, p. 586.

36 C.I.C., (1983), cc.1111, 144(2). The Commission for the Authentic Interpretation of the Code replied that if a priest assists at marriage without delegation in case of common error of law or fact, c. 209 applies. Periodica, 41 (1952), p. 359. The reply also states that where a priest is under dominative power (religious) ecclesia supplet. Also see A.A.S., 44(1952), p. 497; J. Reed, "Error communis in actu assistendi matrimonio", in Periodica, 48(1959), pp. 551-571; P.C. Barry, "Error communis et delegatio ad matrimonium assistendum", in ibid., 48(1959), pp. 201-212; S.R.R. Dec., 41(1949), c. Teodori, Mar. 31, 1949, pp. 146-150 (common error); ibid., 40(1948), c. Heard, Jan. 17, 1948, pp. 22-25 (ecclesia supplet); ibid., 64(1972), c. Pompedda, Apr. 17, 1972, pp. 173-178 (non supplet).

37 The Church supplies jurisdiction for the common good. There must be common error; mere error does not suffice. See S.R.R. Dec., 42(1950), c. Heard, Mar. 25, 1950, p. 181.

According to the 1917 Code legislation, for licit assistance, compliance with other provisions of law such as the prenuptial inquiry and publications of banns is required. Detailed norms on this are found in Sacrosanctum matrimonii, an instruction from the Sacred Congregation for Sacraments in 1941.³⁸ The obligation to make prenuptial inquiry (not publication of banns) is maintained in the 1983 Code.

i) Juridical Role of the Pastor³⁹

In connection with the principle of assistance at marriages, we shall briefly discuss the juridical role of the pastor who assists at marriage. In a 1965 Rotal case, referring to this matter, Sabattani made the following points clear:⁴⁰ according to positive law, marriage should be contracted either before the local Ordinary, the pastor or their delegate. The same conditions apply to all three persons. While receiving the consent of the parties, they may also act as notaries. The presence of the qualified witness

³⁸ S.C. Sacr., Instruction, "Sacrosanctum matrimonii", in A.A.S., 33(1941), p. 299. Also see C.I.C., (1917), c.1097.2; C.I.C., (1983), c.144(2), J. King, "Jurisdiction in Administrative Matrimonial Cases", in The Jurist, 21(1961), p. 80; J. Listl, H. Müller and H. Schmitz, op. cit., p. 581.

³⁹ "Pastor" is here understood to be the one in whose parish either or both parties has a domicile or residence. C.I.C., (1983). cc.1063-1066. See S.R.R. Dec., 13(1921), c. Massimi, Aug. 6, 1921, p. 207.

⁴⁰ Ibid., 57(1965), c. Sabattani, Feb. 19, 1965, pp. 183-205.

must be moral and human.⁴¹ Hence, if he is under pressure to assist at the marriage, its validity is in jeopardy, since there would be no moral presence at the time. Furthermore, his will and reason should be adequate. Thus, for instance, if he is intoxicated, the validity of marriage is questionable.⁴² The witnesses should be able to certify the fact of marriage, and apprehend the individual external contract and its circumstances. He must be able to make a reasonable judgment regarding these and other required characteristics: to perceive the individual contract, the circumstances, and the manifestation of the consent.

ii) Deacons and Lay Persons as Witnesses

The qualified witness can be the local Ordinary, the pastor, a priest or a deacon delegated by either or a duly-recognized sacred minister (as in the case of mixed marriages). The *Motu proprio*, Sacrum Diaconatus Ordinem, altered the general law somewhat (c.1094) by allowing a deacon to receive

41 *Ibid.*, p. 187. A. Sabattani cites Sanchez: "Constat necessarium esse, ad valorem matrimonii praesentiam parochi et testium, non tantum physicam, idest corpoream, sed praesentiam moralem et humanam, quae, ultra physicam, addit usum rationis et advertentiam: igitur ut parochus et testes usum rationis habeant, et intelligant consensum utriusque contrahentis." For instance, if a priest is intoxicated or deprived of his freedom and assists at marriage, it will not be valid, see C.L.D., Vol. 4, p. 342.

42 S.R.R. Dec., 19(1927), c. Mannucci, June 11, 1927, pp. 221-230.

delegation to assist at marriages.⁴³ Initially, it was understood that the so-called transient deacons could not be delegated for this purpose.⁴⁴ The situation was clarified and there is no distinction now between the permanent deacon and the transient one as far as the possibility of delegation to assist at marriage is concerned. In the 1983 Code, deacons can receive general delegation as well.⁴⁵

The law has been further modified by making it possible also to delegate a lay person to assist at marriage.⁴⁶ On May 15, 1974, the instruction Sacramentalem indolem was issued by the S.C. Sacraments. The purpose of the instruction is given in the instruction:

[...] it happens, especially in our day, that where the Church suffers from lack of priests or of deacons, it is difficult for the engaged persons to present themselves at the desired time before an official witness, ordained to sacred Orders, as required by canon 1094 of

43 A.A.S., 59(1967), p. 702; C.L.D., Vol. 6, p. 582. Cardinal D. Staffa explains who is sacred minister: see "Nullitas matrimonii inter Orthodoxos absque ritu initi", in Apollinaris, 44(1971), pp. 24-25; ibid., 45(1972), pp. 383-385.

44 S.C.Sacr., Decision, Aug. 30, 1968 (N. 16660/68), reported in C.L.D., Vol. 7, p. 689.

45 C.I.C., (1983), c.1111(1).

46 S.C.Sacr., Instruction, "Ad Rev.mos locorum ordinarios de canonica celebratione matrimonii coram solis testibus in casibus particularibus", Dec. 7, 1971, in A.K.K., 141(1972), pp. 510-512. Also see C.L.D., Vol. 7, pp. 753-756 (marriage before witnesses alone).

the Code of Canon Law, in order to declare their matrimonial consent and to receive the nuptial blessing. [...]. For this reason, a certain number of bishops have petitioned the Apostolic See that, in default of a priest or a deacon in specified canonical circumstances, the right to preside as the official witness at the celebration of marriage be accorded to a layman who has been fully prepared.⁴⁷

If the Episcopal Conference receives the indult from the Holy See to this effect, the diocesan bishop may authorize individual lay persons to witness the celebration of marriage. The designated person is to be given proper preparation and must be able to prepare the couples for the marriage.⁴⁸ The 1983 Code incorporates this prescription:

(1) The diocesan bishop can delegate lay persons to assist in the celebration of marriage whenever priests or deacons are lacking. He can do so after a previous favourable vote by the Conference of the Bishops, and after he has obtained this faculty from the Holy See. (2) A suitable lay person should be chosen who is capable of giving instructions to those to be wed, and who is qualified to perform the marriage liturgy correctly.⁴⁹

e) The Extraordinary Form

The law on the extraordinary form of marriage did not change from the time of Trent to the 1917 code. Since then, however, some interpretations have been offered by the Code Commission. The law (c.1099 of the 1917 Code) states that

47 Ibid., Vol. 8, p. 816.

48 Ibid., Vol. 8, pp. 815-818. This faculty was obtained by the Brazilian Conference of Bishops in 1974.

49 C.I.C., (1983). c.1112.

when a priest cannot be available or cannot be present, marital consent can be exchanged before witnesses alone. On Nov. 10, 1925, the Code Commission specified that the gravity of inconvenience should be morally certain, in order to use the extraordinary form of marriage.⁵⁰

A further reply of March 10, 1928 was given on this question; according to this, canon 1098 of the 1917 Code applies to the physical absence of the pastor or local Ordinary. Another reply of July 25, 1931 clarified it further:

The physical absence of the pastor or the Ordinary also applies to the case where the pastor or the Ordinary is physically personally present, but because of grave inconvenience is unable to assist at the celebration of marriage and cannot ask for and receive the consent of the contractants.⁵¹

It was then accepted that grave inconvenience suffices as far as the priest is concerned. Yet, further difficulty arose regarding the inconvenience to the parties themselves.

50 A.A.S., 17(1925), p. 583.

51 Ibid., 23(1931), p. 388: "An ad physicam parochi vel Ordinarii absentiam, de qua in interpretatione diei 10 Martii 1928 ad Canonem 1098, referendus sit etiam casus, quo parochus vel Ordinarius, licet materialiter praesens in loco, ob grave tamen incommodum celebrationi matrimonii assistere nequeat requirens et excipiens contrahentium consensum." R. Affirmative." The reply of the Commission for the Authentic Interpretation of the Code, March 10, 1928: "An ad canon 1098 ita intelligendus sit ut referatur tantum ad physicam parochi vel Ordinarii loci absentiam. R. Affirmative." See A.A.S., 20(1928), p. 120.

In 1945 a broader interpretation was given to the clause on inconvenience. Accordingly, when any notable harm is possible either for the priest, the parties or for the common good, the extraordinary form can be used.⁵² The harm could be either physical or moral.

A 1970 Rotal decision is notable in this regard. Two Mexicans were married before witnesses on Nov. 25, 1934, for fear of religious persecution. The marriage was civilly registered on the following day. Later, the parties came to the court requesting freedom to marry on the ground of invalidity of their first marriage. Ferraro stated that in order to contract a marriage before witnesses alone, it is not sufficient that the pastor is not present, but a moral certitude of his absence for one month without grave inconvenience should be verified. The marriage was declared null.⁵³

Another Rotal decision by Ewers recalls the evolution of the law. Under the Tridentine discipline, when it was impossible or difficult to have access to a priest, use of

52 Ibid., 37(1945), p. 149.

53 S.R.R. Dec., 62(1970), c. Ferraro, July 23, 1970, p. 832: "Ad valide et licite matrimonium coram solis testibus contrahendum, non sufficit factum absentiae parochi, sed requiritur etiam moralis certitudo, ex notorio vel ex inquisitione, parochum per mensem neque haberi neque adire sine gravi incommodo."

the extraordinary form was justified. Ne Temere added to this the fact that such a situation would be presumed to last for at least a month.⁵⁴ Regarding the absence of the priest, two points are to be noted: haberi vel adiri non potest. That is to say, one's own priest is not present and another priest is not available or cannot be present.

The law is not altered in the 1983 Code. The only change introduced is the addition of the word "deacon", alongside with the word "priest": when a priest or a deacon cannot be had without grave inconvenience, marriage may be celebrated in the presence of two witnesses alone.⁵⁵ From this consideration we shall pass on to consider the development of civil law on the form of marriage.

2. Civil Legislation Since the ICMA

a) Conflicting Decisions

The ICMA makes it clear that it is concerned with the form of celebration of marriages. By the term "Christian

54 Ibid., 64(1972), c. Ewers, July 22, 1972, p. 486: "Jam jure Tridentino, si impossibile aut difficillium erat parochum habere, connubia coram testibus celebrata erant valida ac ita agnoscebantur constanti jurisprudentia. Juxta vero decretum 'Ne Temere' (a. VIII) impossibilitas dimetienda erat ex conditionibus regionis, atque debuit a mense perdurare."

55 J. Listl, H. Müller and H. Schmitz, op. cit., p. 584. C.I.C., (1983), c.1116.

marriage" the law refers to a marriage between Christians or one where at least one of the contractants is a Christian. In the interpretation of the law as to who are bound by the form of marriage, there has been considerable difficulty and confusion, apparently caused by interpretations of three sections of the Act: 4, 68 and 88. Section 4, for instance, states:

Every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

The literal sense of the section makes a marriage between a Christian and a non-Christian void if a form other than that contemplated under the ICMA is followed. Furthermore, the person solemnizing such a marriage will be punishable under section 68, as was held in Kolandaivelu vs Dequidt before the Madras High Court.

The facts of this case are as follows. Both contractants were of the Valluva caste. The girl was a Christian, aged 11 years. The marriage was solemnized by a Hindu purohit (priest) according to Hindu rites. The lower court found both the priest and the girl's father guilty under s.68. The case went in appeal. The appellate judge thought that this

decision as well as two earlier ones⁵⁶ on which it was based, was wrong. Hence he referred this case to the Full Bench.

The Madras Full Bench confirmed the lower court's verdict and expressed the view that the earlier decisions were valid as well. The court concluded: "In our opinion, the Act was intended to apply to marriages of all Christians in India, including marriages when only one of the parties is a Christian."⁵⁷

In this decision as well as in the earlier ones, the courts did not seem to take into consideration the existence of other religions and the right of their members to marry according to their rites. Moreover, as E. Devadason clearly points out, such inter-faith marriages were not anything new to the courts then.⁵⁸ Yet, the courts failed to steer a middle course, thus slipping into an apparent error.

The decision in Kolandaivelu vs Dequidt was based on two earlier decisions by the same court on similar issues: Empress vs Johan (1871) and Empress vs Paul (1894). These decisions created an unpleasant precedent. Already, at the time of the third case, judicial opinions were being expressed

⁵⁶ Empress vs Johan, 17 ILR Mad 391; Empress vs Paul, 1871 HMC 20. These were cases where one of the parties was a Muslim. The marriages were celebrated according to Muslim rites in both cases. The courts held that both marriages were invalid as the ICMA form was not observed.

⁵⁷ Kolandaivelu vs Dequidt, 40 Mad 1030.

⁵⁸ E.D. Devadason, Christian Law in India, p. 348.

about the fallacy of such decisions, since they overlooked the principle of neutrality, so important in Indian civil law. When a similar case came before the Madras High Court in 1910, the court took a different view.⁵⁹ It concerned a marriage between a Catholic girl and a Hindu boy, solemnized by a Brahmin priest according to Hindu rites. The girl freely went through the ceremony, and such marriages were nothing new to the comparatively small community of Christians. Furthermore, there was also a plea that such a custom existed among them.

If the court were to have interpreted the law as in the previous decisions, or have considered itself bound by its own precedents, the marriage would have been declared null and the parties penalized. However, this time the court decided in favour of the validity of the marriage. It referred to the difficulty of interpreting the law in its literal sense, and this was one of the reasons for deviating from its own precedents. However, this decision did not solve the problem of the confusion created by the three previous decisions of the same court. The confusion existed both as regards the interpretation of the law and its extension: was the ICMA applicable to non-Christians and if so, is it mandatory to follow it, while they have their own personal laws? These and

⁵⁹ Muthuswami Mudaliar vs Masillamani, AIR 1910 Mad 342.

similar issues remained dubious and unclear until 1918 when all precedents were practically reconsidered.

In 1918, a case came before the Allahabad High Court: a boy named Maharam was baptized when he was three years of age. His father was an outspoken preacher in the town. Maharam was educated in a school which was exclusively for Christians, which meant that he had a good Christian upbringing. Yet, he used to tell some of his companions that he would not get married according to Christian rites. Efforts were made to dissuade him from his intentions, but without success. He was eventually married according to Bhangi rites and even went through Devika Pooja (worship of the goddess Devi). This was challenged and the Sessions judge found Maharam and those who were involved in the marriage guilty under s.68 of the ICMA. They were sentenced to one year of rigorous imprisonment. The matter came up before the High Court in appeal.

The presiding judge observed: "I am not satisfied therefore that at the time of marriage, when the marriage was solemnized, Maharam was a Christian. It follows that no offence under the Act was committed."⁶⁰ The concurring judge gave a detailed interpretation and application of law. He remarked:

60 Maharam vs Emperor, AIR 1918 All 168.

The case of Queen Empress vs Paul decided in 1896 turned on the word "solemnized". The Sessions judge had acquitted on the ground that the part taken by the Hindu priest did not amount to solemnization. He seems to me to have been feeling for a way of evading the construction of the Act now contended for and to have seized on the word "solemnization". The Appellate Court disagreed, but I think their minds were diverted from the real difficulties. They went on to hold that the contracting parties themselves ought to have been convicted of abetment. As I have said, this is a startling result, and satisfied me that there must be a fallacy in the reasoning which reaches it. I have carefully considered the recent case of Kolaṇḍaivelu vs Dequidt decided by the Chief Justice and two Judges on a reference by Napiér J. I cannot agree with it. I see no answer to the reasoning in Napeir J's referring order while the Chief Justice slips into an apparent error. S. 68, he says: 'merely provides for a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act'. This is not so. It provides a penalty for any person who does under S. 5 what he is not authorized to do, namely, solemnize a Christian marriage.⁶¹

In order to substantiate his position, the judge cited Muthuswami Mudaliar vs Masillamani, decided by the same High Court. This decision was contrary to the previous one on the same matter; thus, the precedents were at least implicitly questioned. The final decision in the 1918 case was that no offence had been committed under the Act.

⁶¹ Ibid., p. 168.

From the jurisprudential point of view, the latter two decisions, namely, Maharam vs Emperor, and Muthuswami Mudaliar vs Masillamani, are landmarks. The latter did not refer to earlier decisions of the High Court. At the same time the first set a precedent which put an end to the long lasting controversial interpretation of the law. For, in it, we find the judges making allowance for other religions and respecting them. Moreover, the one-sided argumentation and interpretation of law is supplemented by a fair response by steering a middle course. In a secular state like India, such circumspection is of great importance.

We can deduce certain applications from these decisions. Courts are meant to impart justice which consists in being impartial. The court has to consider the rights of both parties. If someone can marry under the ICMA, by the same reason why should he not be permitted to marry someone else according to that person's personal law?

In a recent case before the Supreme Court, this point came up for further consideration. Again, the decision by the Supreme Court can be considered to have set a valuable precedent. It was a question of a Christian girl named Ammapazham, 19 years of age, who married Perumal, a Hindu. The marriage was celebrated according to Hindu rites and was a happy one. Its validity was challenged under the ICMA since the Christian form was not followed. The court, however, held that the marriage was valid. A recognized ceremony was held

which was sufficient for validity. Moreover, the Hindu also has the right to follow his belief, which is the very meaning of a secular State. In deciding this case, the court took the same line of thinking as in the 1918 Allahabad decision.⁶²

In the light of these precedents, the tendency today is to hold for a milder interpretation of s.4. While this contravenes the earlier views of the courts, the change is for the better and follows a more mature interpretation of law. It appears that the earlier trend was one-sided, and the interpretation partial to Christians, even to the exclusion of the rights of the other party where he or she was a non-Christian.

b) Who is Subject to the Act?

According to a plain reading of the Act, every marriage of Christians or at least a marriage that takes place when one of the contractants is a Christian, shall be solemnized according to the ICMA.⁶³ In other words, as the very name of the Act implies, every marriage of persons who are Christians shall be governed by this Act.

This understanding, however, has undergone considerable change with the case-law development. The decisions of the early 20th century could be considered to be conservative and

62 Perumal vs Ponnuswami, AIR 1971 SC 2351.

63 ICMA, ss. 4-5.

even one-sided. The use of the term "conservative" is deliberate, since it is meant to show how preoccupied the courts were with the literal interpretation of the law.

By 1910, we find at least a regret for the past one-sided approach of the Madras High Court, although this was not expressed in clear terms. This is evident from Muthuswami Mudaliar's decision which was a silent acceptance of the mistakes of earlier decisions, since no reference was made to its precedents.

Then followed the 1918 decision. It was easier for the court to make reference this time to the earlier decisions of the Madras court, since it was not the same tribunal. The fallacy was pointed out, but here too we find another apparent error that creeps into the decision. The court seems to have taken the view that the ICMA is applicable to persons who were Christians at the time of marriage. The decision is justifiable for the person accused in this case was no longer a Christian at the time of marriage since he accepted the Hindu Pooja (worship). It is on this ground that the purohit (priest) was spared from conviction. To justify this view, the judge said that the provisions of the Act will be applied when a person does what he is not permitted to do under the Act, namely having a Christian marriage solemnized by a non-Christian.

The view held in Maharam's case was that to be subjected to the ICMA, one had to be a Christian at the time of marriage. This is quite similar to the provision of the 1983 Code (c.1117) which exempts from the canonical form of marriage those who have left the Church by a formal act. The courts, however, now take it for granted that where a person has gone through a Hindu form of religious ceremony or any other form of Hindu worship, it can be reasonably presumed that he is no longer a Christian. The point brought forth is the question of faith required for a Christian marriage.

The matter of faith and the interior disposition of the subjects is usually not a matter for the civil courts to decide. Yet, at the same time, in the light of the decisions, the subjects of the ICMA are those who are Christians at the time of marriage.

There is no doubt that a prescribed form should be maintained when Christians marry among themselves, or when they marry non-Christians. But in the event of such an inter-faith marriage, the rite or the form of solemnization need not necessarily be the one prescribed under the ICMA. For validity there should be some form of solemnization, whether religious or secular. This thinking has gained more recognition since the promulgation of the Special Marriage Act. For, under this Act, any person can marry and there is no need to follow any specific religious form, since this legislation

concerns civil marriage. Moreover, the Special Marriage Act is applicable to all Indians irrespective of creed and cult. At the same time, it is desired that the personal law application be maintained. Accordingly, all Catholics remain to be governed by the canonical form of marriage for all practical purposes. This is the spirit of the ICMA, and it remains so until the ICMA is revoked or revised.

If we take a look into the various court decisions we can understand the slow evolution of law. Initially any marriage where one of the contractants was a Christian, had to be celebrated according to the Christian form. This position was later altered and the courts held that a marriage should be celebrated in the Christian form when at least one of the contractants was a Christian at the time of marriage. Since the 1954 Act, (Special Marriage Act), marriage may or may not be celebrated in the Christian form, if the person decides to get married under the Special Marriage Act which does not make it obligatory for the Christian form to be observed in the case of Christians.

To conclude, then, various tribunal decisions led the courts to hold the view that a marriage should be solemnized according to the provisions of the ICMA when at least one of the following conditions is verified: (1) both contractants are Christians, or (2) at least one of them is a Christian at the time of marriage. A further step can even be taken: when

it is a question of inter-faith marriage, the form can be decided between the parties themselves and the marriage solemnized in the manner they prefer.

c) Validity of Marriage and Section 88

The interpretation of s.88 of the ICMA also led to conflicting decisions by various courts. The section states: "nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." The question was asked to what extent the Canon Law was recognized or grafted into the civil law in virtue of s.88. The first reported case touching this matter is from Calcutta, Lopez vs Lopez. Although we have already referred to the facts of this case, we shall summarily mention them here. A person entered into marriage with his deceased wife's sister. The union was contested on the grounds of affinity. S.88 does not allow anyone to enter into a marriage which the personal law of the parties does not permit. The case has to be seen against the background of levirate marriages which were prevalent in some parts of India.⁶⁴

64 A.N. Saha, Marriage and Divorce, p. 63. Also see A.K. Sur, Sex and Marriage in India, p. 9. The courts have upheld the validity of first cousin marriages in some cases; see, Venkata vs Subhadra, 7 Mad 549; Aswini Kumar vs Fulcumari Dassi, 77 CWN 349. The latest and most recent law on marriage prohibits marriage within prohibited degrees of relationship; see Special Marriage Act, s.4(d). The courts also have taken such a view (corresponding to the Special Marriage Act): see Thimaku vs Bandhu, AIR 1977 Kant 115; Aukhoy vs Jatin, 60 CWN 166; Bijan vs Ranjit Lal, 46 CWN 753.

However, it was contended here that such a marriage was prohibited because of affinity, and so it should be invalid. The court observed in this case:

According to the Church of Rome, a dispensation from the proper ecclesiastical authority is necessary to give validity to a marriage between a man and the sister of his deceased wife.⁶⁵

The court came to the conclusion that a ceremony was performed by a competent clergyman. From this, the court added, it was bound to presume that the needed dispensation was obtained and that, therefore, the marriage was valid. This decision created an impression of apparent patronization of the Canon Law of the Church by the courts in India.

In two other Madras decisions, the application of Canon Law was again upheld by the court. One was a property case, Gaspari Louis vs Gonsalves. It was pleaded in this case:

The Canon Law recognizes no distinction between the spiritual and temporal powers of the Papacy and its local representatives, the episcopate. [..] The temporal provisions of the Church vest in the Pope whose authority must be regarded as delegated to bishops to the extent of their several dioceses.⁶⁶

And in Michael Pillai vs Rt. Rev. Bartle, the same court held:

⁶⁵ Lopez vs Lopez, 12 ILR Cal 706.

⁶⁶ Gasparri Louis vs Gonsalves, 35 MLJ 407.

The Canon Law knows no distinction of castes among the Roman Catholics and no convert to Roman Catholicism can claim any special or exclusive rights or privileges in the church, on account of any supposed superiority of caste over that of others.⁶⁷

These two cases show that the courts based their ruling on the law of the Church in matters other than marriages. But our concern here is for matrimonial law. For instance, if two Christians who are first cousins marry without a proper dispensation from the Church, the marriage will be invalid. But if the marriage is solemnized with a dispensation from the Catholic Church, it will be considered valid by civil law.⁶⁸ This is another case referring to s.88.

The Calcutta court decided in Bomwestch vs Bomwestch: "Marriage with a deceased wife's sister is void ab initio, and the child in law is an illegitimate child, and the mother is entitled, unless a strong case is made out to the contrary to the custody of the child."⁶⁹ Previously the court had declared null a marriage between a man and his former wife's sister.⁷⁰ The Allahabad court followed suit.⁷¹

67 Michael Pillai vs Rt.Rev. Bartle, 39 MLR 1056.

68 Lakshmi Dhar vs Sachit, 70 CWN 1001.

69 Bomwestch vs Bomwestch, 35 ILR Cal 38.

70 Hilliard vs Mitchell, 17 ILR Cal 324.

71 Queen Empress vs Robinson, 16 ILR All 214.

These and many similar decisions were based on the assumption that the whole of Canon Law on marriage was grafted into the ICMA by s.88. This view was corrected in a 1930 Bombay case,⁷² where the court ruled that only the absolute prohibitions under the personal law would render marriage invalid. It was also mentioned that the case Lopez vs Lopez refers only to prohibited degrees and does not set a precedent in any other matter. This point was made even clearer in a 1945 Madras decision, where the court, referring to Saldhana vs Saldhana, remarked:

I respectfully agree with the view expressed by Kemp J that Sec. 88 relates to impediments to marriage and not all impediments enumerated in the Canon Law are necessarily attracted by the section.⁷³

These decisions did not succeed in establishing a strong precedent. For instance, in a 1949 case, the Calcutta court drew an apparently wrong conclusion which even went to the extent of stating that there can never be a marriage between a Christian and a non-Christian. It observed:

The personal law of a woman belonging to the Roman Catholic Church forbids her to enter into a contract of marriage under the provisions

72 Saldhana vs Saldhana, AIR 1930 Bom 105.

73 Gnanasoundari vs Nallathambi, AIR 1945 Mad 516.

of the Act with a Jew in India, who is of the Sephardin and the marriage ceremony does not effect a valid marriage.⁷⁴

Likewise, in Gnanasoundari vs Nallathambi, the validity of a marriage between a Catholic and a Protestant with a ceremony conducted by a Protestant minister was challenged. The ruling was in favour of the validity of the marriage. In yet another case (Re Alisons Trust) where an English Protestant married an American Protestant before a Catholic priest, according to the Catholic rite, the marriage was declared null due to non-observance of the Protestant form of marriage.⁷⁵

Finally, in 1951, a case came before the Allahabad court where it was held that s.88 does not refer to marriages with persons of other religions or even to mixed marriages. The court pointed out that it would be absurd to insist and to compel a non-Christian marrying a Christian, to marry only according to the Christian form.⁷⁶ This decision in Dubey vs Dubey has set a precedent which is now generally accepted.

i) Delegated Lay Person and the ICMA

Under the present situation of the ICMA, there seems to be no difficulty in having a deacon assist at a Catholic marriage. The requirements are that he have proper delegation

74 E.D. Devadason, op. cit., p. 265.

75 Re Alisons Trust, 3 ILT 638, as cited in A.N. Saha, op. cit., p. 358.

76 Dubey vs Dubey, AIR 1951 All 529.

and perform the ceremony according to the rites and rules of the Church. The law does not specifically state that the minister at marriage must be a priest, but that he should be in Holy Orders (i.e., one who has received episcopal ordination).⁷⁷ It may not be easily contested that a deacon is not in Holy Orders, since he is a cleric.

Such, however, is not the situation in the case of a lay person who is delegated to assist at marriage. Unless certain measures are taken, difficulties are likely to arise in the case of a marriage officiated at by a lay person. Furthermore, such a person could be found guilty under section 68 of the ICMA. The precedent from the case Queen Empress vs Fischer provides an example of such a situation. According to the common concept, a lay person is unable to perform ceremonies required in a religious context, as in the case of marriage.

The civil courts in India allow a person to plead custom when the validity of marriage is in question. If a person were to plead custom in the case of a marriage officiated at by a lay person, such would not be accepted as this is a new law which has been recently introduced. The only way out from this practical difficulty, it seems, is to obtain a license under the Act (section 5). If a lay person can be

⁷⁷ ICMA, s.5.

licensed under the Act, then both purposes will be served: the requirements of the Church and those of the State. It is not difficult for a lay person to receive this license. Still some doubts remain to be clarified. They concern, among other things, the certificate to marry. It is doubtful whether the publication of banns would be sufficient for this purpose. As it now stands, the law insists that, in the case of a marriage celebrated before the Registrar or a person licensed under the Act, the contractants shall obtain the certificate to marry as per sections 12-19.

The position of a lay person delegated by the Church to solemnize marriages would be similar to that of a minister of religion who also needs a license under the Act. In which case, the observance of the other provisions of law would be mandatory, and the observance of the canonical prescriptions would certainly not suffice alone.

Conclusion

Viewed from a non-partisan point of view, we can readily agree with the better understanding and the well-balanced jurisprudential approach of the civil courts in the area of mixed marriages and inter-faith marriages. Initially, we find in the civil jurisprudence, a desire to interpret the law literally and to cling to it. The result is the reluctance to accept any form of marriage other than the Christian one, when a Christian is one of the contractants.

Eventually, but slowly, there grew up an awareness among the judges of the respect due to other religions and of the need to be more just in interpreting and applying the Act. Thus the courts were prepared to accept as a reality marriages between Christians and non-Christians. Coupled with this realization was another reality: each party has the right to follow the form of his religion, in the case of inter-faith marriages.

In interpreting sections 4, 68 and 88 of the ICMA, the jurisprudence eventually developed on different lines, touching mixed marriages and disparity of cult as well (to use a canonical term). The present jurisprudence, especially in the light of Dubey vs Dubey, Gnanasoundari vs Nallathambi, Perumal vs Ponnuswami, Muthuswami vs Masillamani, Maharam vs Emperor, etc., accepts forms of marriage other than

those considered under the strict interpretation of s.4. It is only recently that the Catholic Church has adopted a similar view by recognizing the Orthodox form of marriage as valid when a Catholic party contracts with an Orthodox.

CHAPTER V

EVALUATION AND PROPOSALS

It is now time to present some proposals in the light of our study and in the context of some of the opinions recently expressed by canonists regarding the canonical form of marriage. In so doing, we shall also consider contemporary needs in the midst of changing life situations.

In an evolving secular State such as India, laws can hardly remain static and rigid. When we speak about revising marriage legislation for Catholics in India, we must remember that there exist two legislative bodies: the Church and the State.

Usually, the areas of mutual concern and common interest for Church and State are regulated by clearly defined terms. Instruments which define such terms are, generally known as concordats, agreements concluded between the head of the State and the Roman Pontiff. The temporal and spiritual administration of the Church, questions of education and of marriage, are some of the objects of concordats. From 1915 to 1982, many concordats and agreements were entered into by the Holy See with other governments.¹ Most

¹ J. Abbo, "Concordats", in New Catholic Encyclopedia, Vol. 4, pp. 117-119.

of these have been with Catholic or Christian States. There is no concordat with India; yet, the canonical form of marriage is recognized by the State as is the case with numerous other countries (such as Canada, the United States of America, and so forth). Nor does the State interfere in internal Church administration, for India is a secular State.

This particular situation must be kept in mind as we evaluate the current civil and religious legislation and make proposals for necessary changes in both.

1. An Evaluation of Existing Civil and Religious Legislation

- a) Civil Law

- i) The context: India is a secular State

India is a land of religions, where peaceful coexistence among all religions is essential to personal well-being and where freedom of individuals is necessary. These goods are secured quite well by the secular nature of the State. Indeed, secularism is one of the important features of India's constitution. This is particularly important and significant today since India is surrounded by countries with State religions; for instance, Burma and Sri Lanka patronize Buddhism, Pakistan is a Muslim nation and Nepal a Hindu State.

Secularism has two aspects: one positive, the other negative. Considered negatively, it consists in tolerance

which derives from the rich heritage of Indian philosophy. Taken positively, secularism is the expression of a desire to share a heritage with others and the conviction that the culture of one group can lead to the enrichment of others.² The different communities and peoples in the country have contributed both positively and negatively to the evolution of the secular State. According to the National Christian Council of India, the secular State is the only practical ideal in a land of many religions.³

As a secular State, the Constitution of India guarantees fundamental freedoms for the protection of individuals.⁴ Religious freedom is one of these.⁵ Being a secular state, India does not have a state religion; religious freedom thus means that any one is free to profess a religion of his choice, or not to profess one. If a person is free to profess a religion, it would then follow that he has the right to make his religious beliefs known to others.⁶ Hence, no one is barred from propagating a religious or non-religious ideology; this, however, has to be done without

2 E. Devadason, Christian Law in India, p. 34.

3 T. Vazhayil, Christians in Secular India, p. 117.

4 Constitution of India, Arts. 14-26.

5 Ibid., Art. 25(1).

6 R. Boyd, India and the Latin Captivity of the Church, p. 131.

arousing religious or communal feelings.⁷

The basic freedoms, including religious freedom afforded in the Constitution, are not absolute and unlimited. They are, however, subject to public order, morality and health⁸ and to the other provisions of the Constitution. For instance, if a particular practice of faith is opposed to public morality as in the case of some cults, it is not protected under the Constitution. Thus, it was held in a court decision that religion as used in Arts. 25 and 26 must be construed in its strict etymological sense. But it would be absurd to suggest that a Constitution for a secular state ever intended that every human being and mundane activity

⁷ Narayan Das vs State, AIR 1952 Ori 149. This was the case of a man who claimed to be a living god and said that the Hindu gods were nothing but stones, and he would desecrate them. He was found guilty under S.298 of the Indian Penal Code. Also see Kitab vs Santi, AIR 1965 Trip 22. In this case it was held that the deliberate intention of hurting the religious feelings of others is punishable by law. In Sheikh Amjad vs King Emperor, 21 Pat 315, exhibiting of cow's flesh was held to be an offence under section 298 of the Indian Penal Code. For similar decisions on the violation of other religious freedoms, see Saidulla Khan vs State of Bhopal, AIR 1967 Bhop 23; Public Prosecutor vs Ramaswami, AIR 1964 Mad 258; Ahmad vs State, AIR 1967 Punj 190; Gulab vs State, AIR 1955 Nag 9.

⁸ Constitution of India, Arts. 25(2), 26. Also see State vs Narasu Appa Mali, 55 BLR 20. Durga Committee, Ajmeer vs Hussain Ali, AIR 1961 SC 1402. The protection given under Art. 26 of the Constitution is restricted to religious practices that are an essential and integral part of religion.

was to be protected under the guise of religion.⁹ The High Court of Bombay also held in one case:

[...] a sharp distinction must be drawn between religious faith and belief, and religious practices. What a State protects is the faith and belief. If religious practices run counter to public order, morality or health or policy of social welfare [...] then, the religious practices must give way before the good of the people and of the State as a whole.¹⁰

At the same time, the freedom of religion contemplated under the Constitution is more than a liberty of choice or absence of external constraint. It is something positive which means and includes the possibility of achieving what one wills without being hindered by external constraint or lack of power. This is the nature of the basic freedoms envisaged in the Constitution.

Furthermore, the secularisation process has affected the religious life of the individuals such as many of the life-cycle rituals, as marriage rites or the schooling ceremony of the Hindus.¹¹ Even then, although the ICMA maintains the necessity for a religious ceremony for the

⁹ Ratilal Parachand Gandhi vs State of Bombay, AIR 1958 Bom 242. Also see Ram Prasad vs State of Uttar Pradesh, AIR 1957 All 411.

¹⁰ State of Bombay vs Narasu Appa, AIR 1952 Bom 84. Also see Ratilal Parachand Gandhi vs State of Bombay, AIR 1958 Bom 242; Venkatarama Devaru vs State of Mysore, AIR 1958 SC 255; Srinivas vs Sarasvati, AIR 1952 Mad 193.

¹¹ M. Srinivas, Social Change in Modern India, p. 125.

solemnization of Catholic marriages, it also gives an option for the civil form¹² (for non-Catholics).

It is within the context of plurality of religions and the secular nature of the State that the application of personal law is situated. This application is, indeed, a rare concession granted by the legislature under its policy of non-interference with religious beliefs. When we say this is a concession, it is interesting to compare the situation with many Catholic countries of Europe, where the states are not as secular as we understand it here. Portugal only accepted the Catholic form of marriage after the concordat of May 7, 1940; until then a civil form of marriage was necessary for all.¹³ In India it is just the opposite. The State recognizes the canonical form of marriage as sufficient for the civil validity of marriage. Furthermore, unlike the other ministers of religion, the Catholic clergy do not require a licence from the government for the celebration of marriage. Also, the Catholics are exempt from Part VI of the ICMA, which treats of certifying and registration of marriages.¹⁴ This exemption is a recognition of the fact that the Church

12 ICMA, ss. 5, 42.

13 B.J. Wenzel, "Kirchliches Eherecht in Portugal", in A.K.K., 126 (1953-54), p. 329.

14 ICMA, s.65.

possesses and abides by laws similar to the provisions of the ICMA. These are good aspects of the law, although it too has many faults and defects.

ii) Defects in the Civil Legislation

An Act which was enacted 110 years ago, in spite of its recent amendment in 1976, has many faults that would call for immediate attention. These arise from some textual errors as well as from the fact that the Act does not meet the needs of the day. To begin with, the very name itself could be improved upon. Two reasons can be given for this suggestion: the law governs only Christians and being an Indian law it is meant for Indians. Another reason is that other similar laws like the Hindu Marriage Act, the Parsi Marriage Act, etc. are not preceded by the word "Indian".¹⁵ At the same time, the law does not apply to all Christians in India. The preamble speaks of its application to Christian marriages, yet section 4 apparently contradicts it by extending the law to marriages when only one of the contractants is Christian. The Act has only limited extension. For example, the states of Travancore-Cochin, Manipur, Jammu and Kashmir are exempt from

¹⁵ Since the subjects are Christians, the term "Indian" seems out of place; as for those who are not Indians but living in India there is a law governing them: The Foreign Marriage Act.

its operation.¹⁶ There is also a judicial opinion that the Syrians are governed by customary law and not by the ICMA.¹⁷

Certain expressions such as the "Church of Scotland", "Church of England" and so forth are obsolete and no longer relevant, for there does not exist a Church in India bearing those names. Instead, we have the Church of South India, the Church of North India, etc., which are not mentioned in the law. The Act does not treat of Christian marriages as a whole, but only of the celebration of marriages. Hence the name could be altered or an Act passed to cover all aspects of marriage. The textual division of the Act into parts is not systematic, and the headings at times have little to do with the contents. For example, Part II speaks of marriages solemnized by ministers of religion while the heading is "Time and place of marriage". These are minor defects which could be easily remedied. In any case a revision is required.

There are, however, more serious defects. Any law on the form of marriage should take into consideration the various situations under which marriages are to be celebrated. The ICMA does not consider any situation other than the normal one. This causes concern when an urgent situation

16 ICMA, s.1.

17 Sarkar vs Mathur, 10 TLR 33. It was held in one case that the Anglicans are governed by the Anglican Canon law; see Eapen vs Kolathur, 10 TLR 95.

arises and there is little time to comply with all the procedures of the ICMA, such as publication of marriage notices, obtaining of certificate to marry, etc. A death-bed marriage is a typical example, or the case when there is urgency to contract marriage; the law is silent on these points. As far as Catholics are concerned, the problem can be solved by having recourse to various canonical provisions, but such is not the case with other Christians. What is said about death-bed marriages could also be true of marriages of conscience.¹⁸

Inter-faith marriages, whether between Christians of different denominations or between Christians and non-Christians, cause concern since the ICMA does not say anything about them. The judicial opinions (case laws) on this point are conflicting. For instance: "what form is to be followed?", "under what conditions?", "who can officiate at such marriages?", etc., are questions that will have to be answered.

Another defect of the Act is that it does not treat of marriages generally but only of the celebration of marriage. It is rather idealistic to be concerned with the

¹⁸ Supra, Ch. 3, pp. 139-143.

celebration of marriage and say nothing about the possible nullity of marriage, especially in situations where the conditions for a valid celebration are not fulfilled. In other words, the law is silent on convalidation of marriages, and this is why many Validation Acts had to be enacted. The Act is equally silent on the issue of matrimonial reliefs for which other personal laws provide.¹⁹

Although the ICMA does not speak of validation of marriages, it does contemplate the possibility of non-observance of the prescriptions of law. Hence, it provides sanctions for those who act in violation of the Act. By prescribing a penal provision, it means to deter various types of wrongs or of non-observance of the form of marriage. However, the penal provision is out of proportion, for the law speaks of 7-10 years imprisonment for those who solemnize marriages irregularly.²⁰ This point of disproportionate

19 For instance, the Parsi Marriage and Divorce Act; Muslim Marriage Dissolution Act; Hindu Marriage Act; Special Marriage Act provide for matrimonial relief.

20 ICMA, s.68. If a person solemnizes marriage without witnesses or out of time the punishment will be up to two years. For other irregularities, see ibid., ss.70-75. Provision for due authorization to solemnize marriages is very important in society: see Jayaraj vs Mary, AIR 1967 Mad 242.

punishment is evident if we compare the penal provisions under the ICMA with those of other personal laws. In the Hindu Marriage Act, for instance, the penalty is imprisonment for up to a maximum of one month with or without a fine, which may extend to one thousand rupees.²¹ The Parsi marriage law restricts the punishment to a maximum of six months imprisonment with or without a fine.²² To ensure that all marriages are validly contracted, the legislature prescribes a penalty for those who act otherwise than in due accordance with the law. The legislation undoubtedly has only good intentions when it prescribed sanctions, but the penalty should be proportionate to the gravity of the act.

The Converts Marriage Dissolution Act is meant for those who embrace Christianity. It does not provide for automatic dissolution of marriage in the event only one of the parties to a marriage is converted, which was formerly the case with Muslims.²³ If one or two sections were added

21 Hindu Marriage Act, s.18 (hereafter referred to as HMA).

22 Parsi Marriage and Divorce Act, ss.11-12 (hereafter referred to as PMDA).

23 Dissolution of Muslim Marriage Act, s.4 abolished the custom of automatic dissolution of marriage on conversion; it now needs to be dissolved by the court, and conversion is one of the grounds for dissolution.

to the ICMA regarding conversion, there would be no need for the Converts Marriage Dissolution Act. This is just for uniformity among the personal laws: both Hindu and Muslim law on marriage incorporate such provisions.²⁴ As it stands today, Christians would seem to be in a privileged position, while in fact they are not, especially with so many special Acts in effect, such as the Divorce Act, the Dissolution Act, etc.

A peculiar situation regarding the validity of marriage has arisen among Christians since the unification of various Churches. The ICMA prescribes that marriages shall be solemnized according to the rules and ceremonies of the Church of which the person solemnizing is an episcopally ordained minister.²⁵ In the Church of North India, however, there are ministers who are not episcopally ordained (e.g., the Presbyterians) and yet they solemnize marriages as if they were ordained ministers (and without a licence from the government). The result is the probable invalidity of marriage. To remedy this situation, either the law must be amended or Validation Acts requested.²⁶

24 HMA, s.13(1)(iii). Also see Thapita Peter vs Thapita Lakshmi, 17 Mad 235.

25 ICMA, s.5.

26 E. Devadason, op. cit., pp. 263-264.

Another situation arises because of the rapid movements of people. It is not uncommon for a minister of religion licenced in a particular territory to be invited by friends or relatives to a distant place where he does not have jurisdiction. The validity of such marriages could be at stake under the ICMA for want of jurisdiction. This, of course, is common in many territories to which the Act extends. Even marriages celebrated by licensed ministers can also call for validation, if they act beyond the territories to which the Act extends.

The Act does not have provisions governing void and voidable marriages as found in the Hindu Marriage Act and the Special Marriage Act. It would be desirable to provide for the situation of those born of an invalid union, i.e., whether they are considered legitimate as if the marriage was valid.²⁷ The Special Marriage Act also has a similar provision, but not the ICMA. In this regard we shall consider forms of matrimonial relief available to Catholics, although the ICMA remains silent on this score.

iii) Matrimonial Relief

The ICMA is silent on the validation of marriages as well as on the granting of matrimonial relief. In the

²⁷ HMA, s.16; Special Marriage Act, s.26 (hereafter referred to as SPMA).

absence of such provisions we have to turn either to the Indian Divorce Act or to the Special Marriage Act. In the latter case, it is a commonly held opinion among the courts that one should have been married either under the Special Marriage Act, or at least subsequently registered under this Act.²⁸ We say it is a commonly held opinion since there have been certain practical difficulties in this regard, such as in a 1974 Allahabad case, where two Christians were married according to Christian rites.²⁹ The wife deserted the man; after three years the husband sued for relief, and it was contended that such a petition was maintainable under the Special Marriage Act, but not under the Indian Divorce Act. The court observed that the petition could not be maintained when a person has neither married under the Special Marriage Act, nor registered under it.³⁰ This decision is in conflict with a previous decision which granted relief although the marriage was not even registered under the Special Marriage Act.³¹ To remove such difficulties, a reform of the Act is needed.

28 SPMA, s.15. In Lagna Bhattacherya vs Shymal Bhattacherya, 79 CWN 65, it was held that a marriage solemnized under the HMA cannot be given relief under s.25 of SPMA.

29 Anlvin Singh vs Chandrawati, AIR 1974 All 278.

30 Ibid., 281.

31 Christopher Andrew Nilkantan vs Anne Nilkantan, AIR 1959 Raj 133. Also see Alice Raju vs B.R. Antony Raju, AIR 1975

The Special Marriage Act maintains a distinction between void and voidable marriages, and contemplates forms of relief.³² This distinction is not found in Church law. Marriage is considered void civilly under certain situations, such as: if the parties were below the prescribed age (18 and 21), within prohibited degrees of relationship; were impotent, insane or not capable of giving consent, or if either party has a spouse living.³³ Marriage is voidable if it was not consummated because of wilful refusal on the part of the respondent, pregnancy of the respondent prior to marriage from a third person, or when consent was obtained by force or fraud. Voidability is subject to certain conditions: the petition must be presented within one year

31 (cont'd) Karn 3; Promila vs Rajnish Kumar, AIR 1979 Del 78; Gobardhan vs Jasodamani, 18 Cal 252.

32 Bimla vs Shankarlal, AIR 1959 MP 8, concealment of illegitimacy of the groom was held to have vitiated the consent. A voidable marriage is one which is valid until and unless it is annulled: Sisir Kana vs Sabitarani, AIR 1972 Cal 4. Voidable marriages subsist until they are declared void, see Krishna Peasar vs Tulsam Devi, AIR 1972 Punj 305. Also see Ananth vs Smti Lajjabati, AIR 1959 Cal 778; B. Ankamma vs B. Bamanappa, AIR 1937 Mad 332.

33 Void marriages, see SPMA, s.24. Also see Bani Devi vs Banerjee, ILR 2 Del 120.

after marriage, and no cohabitation shall have taken place after discovery of the facts.³⁴

The Indian Divorce Act speaks merely of the declaration of nullity of marriages. Impotency, lunacy (insanity), prohibited degrees of relationship and existing bond are grounds for declaring a marriage null.³⁵ This relief is, however, open to all Christians regardless of any civil registration as demanded under the Special Marriage Act. In either case, the District Court is competent to entertain petitions for a declaration of nullity.³⁶

The judicial opinions seem to be divided on the question of whether a person can obtain a decree of nullity after the death of one of the parties to the marriage. In Gowri Ammal vs Thulsi Ammal the answer was in the negative.³⁷ Even in appeal this question was not settled since the appeal was dismissed.³⁸ Yet, 14 years later that same court decided

34 SPMA, s.25; Harbhajan vs Smti Brij Balal, AIR 1964 Punj 359. Also see Surjit Kumar vs Raj Kumari, AIR 1967 Punj 172. But in Kanta vs Siriram, AIR 1963 Punj 235, the plea of fraud was successful, although there was a valid ceremony after the abduction of the girl.

35 Indian Divorce Act, s.19 (hereafter referred to as IDA)

36 Ibid., s.18; SPMA, s.31; Rose Simpson vs Binimoy Biswas, AIR 1980 Cal 214.

37 Gowri Ammal vs Thulsi Ammal, AIR 1962 Mad 510.

38 Thulsi Ammal vs Gowri Ammal, AIR 1964 Mad 118.

that such petitions are maintainable for purposes of deciding an inheritance.³⁹ Thus, even a third party can file such a petition and obtain a declaration of nullity, even after the death of the surviving spouse.⁴⁰

The Punjab High Court, however, distinguishes in granting a decree of nullity after the death of one of the parties. The distinction is based on the notion of void and voidable marriages.⁴¹ Andhra Court also has expressed a similar view.⁴² This position is in direct conflict with the provisions of the Special Marriage Act which limits to one year the period for petitioning in the case of voidable marriages.⁴³ The Special Marriage Act and the Indian Divorce Act also provide for restitution of conjugal rights by way of matrimonial relief, a move which is often very successful in practice.⁴⁴

39 Ponnuthayee Ammal vs Ammal, AIR 1978 Mad 226; Kusum Kumari vs Kusum Kumari, AIR 1977 MP 90.

40 Nagavva vs Parvathava, AIR 1974 Mys 8.

41 Krishna Devi vs Tulson Bibi, AIR 1972 Punj 305.

42 Lakshnamma vs Thayamma, AIR 1974, AP 255.

43 SPMA, s.25(iii)(b).

44 Ibid., s.22; IDA, ss. 32,34.

It is doubtful whether or not judicial separation can be regarded as a form of matrimonial relief. The doubt is based on the fact that in most cases it is seen as a prelude to divorce and the separation does not solve the problem of relief since it does not give the right to marry anew. However, judicial separation can be obtained from a competent court either when the consortium of life is terminated or when the marriage is irreparably broken down.⁴⁵

In practice, an order for a declaration of separation puts a person in an awkward position, since the marriage is neither declared null nor dissolved. The marriage subsists but the parties are permitted to live apart. In this the only hope is that the living apart might afford the parties an opportunity to repent and reconcile their differences.⁴⁶ Judicial separation presupposes a valid marriage, and after separation only the direct obligations of marriage are suspended, but the annexed obligations (i.e., those arising out of marriage) continue as beforehand.⁴⁷

Under special circumstances another form of matrimonial relief can be sought. Technically, it is known as

⁴⁵ SPMA, s.23; IDA, ss. 22-23. Also see B. Ram Syal vs Ram Syal, AIR 1968 Punj 489.

⁴⁶ Kunthikannam vs Malu, AIR 1973 Ker 273.

⁴⁷ Biswanath Mitra vs Anjali Mitra, AIR 1975 Cal 45. Also see P.V. Veeraraghavan vs T.S. Parvati, AIR 1974 Ker 43.

jactitation of marriage. While marriage laws do not contemplate this provision, it comes from a civil law notion of protection of a person's rights. When these rights are infringed, or feared to be endangered, one can file a suit requesting the court to declare the existence of such a right in the plaintiff, thereby deterring the wrong-doer from further action. Thus, when a party attempts or threatens to attempt a second marriage, the injured party can petition for jactitation. The court comes to his or her aid by declaring that a marriage exists between the petitioner and the respondent.⁴⁸ This will have the same effect as a court injunction.

For a Catholic who wishes to follow the teaching of the Church, these forms of relief such as a declaration of nullity, or a declaration of validity, etc. are available, while for others additional reliefs are at hand. It is good to remember that the ICMA gives the Church the power only to supervise the celebration of marriages. Since the Church's purpose is to provide for the good of the souls, it must give pastoral care to the married. The possibility of granting matrimonial relief is not mentioned in the civil law; this is important in the context of India where there is no concordat. A close reading of the Special Marriage Act

48 Harmohan Singh vs Kamala Kumari, AIR 1979 Ori 51.

and the Indian Divorce Act gives one the impression that granting of matrimonial relief is reserved to the civil courts.⁴⁹ These laws insist that petitions for matrimonial relief "shall" be filed in a court of original jurisdiction. Furthermore, the policy of the government as well as that of the judiciary is to preserve the integrity of marriage as an institution. This statement in Munishwar vs Smti. Indira removes any fear of the State's being too liberal in granting matrimonial relief.⁵⁰

Would it be possible to consider that the Church could provide matrimonial relief? The answer, as far as it can be anticipated, is not in the affirmative even though custom were to be evoked. For example, in the remote areas of the nation, there are customary divorces granted by village Panchayats (a body of five village leaders). The mere fact that such things occur does not guarantee their legality. For the sake of argument, it could be stated that if customary matrimonial divorces are sometimes permitted,⁵¹ customary matrimonial reliefs (as given by the Church such as declaration of nullity and judicial separation) could possibly be recognized.

This argument could hold good until such customary practices are called into question or challenged in a court

49 SPMA, s.31; IDA, s.45.

50 Munishwar vs Smti Indira, AIR 1963 Punj 449.

51 Menwva vs Chandranappa, AIR 1978 Kant 123.

of law. For instance, in Damodar vs Urmila,⁵² a marriage duly solemnized was dissolved by a village Panchayat according to custom. The court held that the plea of matrimonial relief granted by custom is not tenable. Equally weak would be our argument, although such practices have not been abrogated because of the decision! However, as long as there is no fear of an ecclesiastical matrimonial relief being contested in a court of law, such practices could be continued. It is very possible that this will involve a risk. Therefore, as law-abiding citizens, it would be prudent for Catholics to seek such forms of relief first from the civil courts. The grounds of relief are quite restricted in the case of Catholics as compared with the Hindus.⁵³ This is yet another reason for change or revision of the personal law system which we consider next.

iv) Personal Law: to Revise or to Change?

Two factors called for the preparation of personal laws. One was the fact that each religious group lived separate from the other; the second was the fact that new urgent situations regarding the validity of marriages had come to light. The first situation was eventually altered by the growth of industry and subsequent migration of peoples

52 Damodar vs Urmila, AIR 1980 Raj 57.

53 HMA, ss. 11-12.

from one part of the country to another. This has resulted in and led to confusion and conflict of laws, especially in view of an increasing number of inter-faith marriages.⁵⁴ Because of this, the system of laws also needs some change, most particularly in the area of personal laws.

This will meet with some objections from various religious groups (especially the Muslims) who have added advantages from the existing personal laws; customary divorce is one such example.⁵⁵ Furthermore, there are some who think that personal laws are sacred and should not be amended. Others hold that they are indeed alterable, but some are of the opinion that enough amendments have already been made.⁵⁶ Yet, if we look at the present personal law administration, we find many discrepancies.⁵⁷

This discrepancy existing between Christians of Kerala and elsewhere retains no justification: the existence

54 The term inter-faith marriage in this chapter is used for mixed marriages as well as for disparity of worship.

55 The codification of Hindu Law met with objections. The Bombay Prevention of Hindu Bigamous Marriage Act, for example, was challenged (unsuccessfully) in State of Bombay vs Narasu Appa Mali, 55 BLR 19. Also see Ram Prasad vs State of Uttar Pradesh, AIR 1957 All 411.

56 J.D. Derrett, Religion, Law and the State in India, pp. 538-539.

57 Although the Indian Succession Act in principle extends to all of India, it was ruled that the Travancore Christian Succession Act remains in force. See Kurián Augusty vs Devassy Aley, 1956 KLT 658.

of two personal laws. These divergent situations exist among other religions as well. For instance, a Hindu may adopt a child legally while a Muslim or a Christian may not do so (although custom might permit such an adoption). Other examples could be given: a Hindu can will away his property after providing for his dependants, a Christian may will away everything irrespective of any dependant and a Muslim can will away only his share of the property (i.e., after making provision for his heirs). A Muslim can create a Wakf (trust) exclusively for his family but no such privilege exists for others (non-Muslims).⁵⁸ A Hindu can make a gift to a Hindu or a Muslim, but if a Muslim makes a gift to a Hindu it is revokable. To permit such discrepancies is often hard to justify, no matter where the divergent situations are found to exist.⁵⁹ They deprive the law of its reciprocity, and when reciprocity fails the law is at its weakest.

The dichotomies are clearer in the marriage laws than elsewhere. Some people enjoy a privileged position over others. For example, a Muslim can marry more than one woman at a time, he can also divorce his wife at will.

58 Siril vs Monga, AIR 1964 Ass 58. If a Christian dies intestate, a Hindu relative of such a Christian can inherit from him.

59 J.D. Derrett, op. cit., p. 543.

b) Church Law: Effective Legislation

We all experience changes more than ever in every walk of life. Ideologies and notions vary when change occurs in social structures. Indian society today, for example, is not the same as it was at the time of Manu, Narada, or Jajnavalkya, the great law-givers. We find new thinking along with new changes; side by side with these, we also find new laws formulated to meet the needs of the day. Since even a law enacted by the Indian legislature often fails to meet the needs of the people, it is rather inconceivable how a law enacted for the universal Church could answer all the needs of Indian Catholics unless it is adapted to local situations and ways of thinking. We might even venture to state that a blind application of the law enacted according to western thinking might not necessarily be relevant to the Indian context.

There is no doubt that a uniform law is required for the whole Church. The Church by necessity must enact laws for the whole people of God, but these laws can be of a general nature. The particular churches must be invested with the power of making more detailed and relevant applications. Without this, the legislation can hardly be effective and is less relevant to the people. We shall explain this further with an example. In India there are a number of communities of vegetarians. If the Church were to insist in

teaching that they shall abstain from meat on Fridays, does this make any impact on them? Is the law relevant for those who perpetually abstain from fish and meat? The point is that often the laws that are important and imported fail to take into account the local church's needs. One way of making a law of abstinence for these people would have been by prescribing abstinence from milk produce or something like that.

We can ask what this has to do with the Church's matrimonial legislation. The fact is that the existing legislation does not meet the needs of the day, for the simple reason that the mentality and outlook in which the laws are enacted are different. European societies have their own social overtones, and the Church laws are enacted in such a setting; many a local church is committed to the view that what is good for Europeans is also good for them.

In a country such as India, where religious and traditional values are strongly adhered to, and where religious ceremonies play a very important role in the lives of the people, it is not possible to say how the relationship between exchange of consent and the form of marriage exists. It is a fact that the law on the form of marriage is well observed everywhere in India. But the Christians in the mission areas often regard the mere exchange of consent as a formality to which they attach little value. This is

clear from the fact that these people prefer to follow the customs and traditions rather than simply adhering to the canonical form of marriage.

It is more a question of making the law effective, meaningful and relevant to the people rather than providing for its mere observance. Had the law been enacted by the local church, these needs would certainly have been taken into consideration. The result would have been much better for the law would have become both effective and meaningful. Religious law becomes meaningful and relevant to the people when it satisfies their needs, aspirations and yearnings. In the present situation, it seems that one available remedy in the field of marriage would be to frame proper liturgical laws suited for this purpose.

Related to the question of effective legislation is another concerning the practice of receiving converts into the Church. When two persons who were married civilly or according to custom and lived happily embrace the Catholic faith, should that marriage be regularized? The present customary practice in India is to supply the form, although this is not required by the common law of the Church. The marriage is raised to sacramental dignity by the reception of baptism of both parties. It should be asked whether it would not be preferable in India - and more according to Church law - for the Church simply to impart a blessing. It could even

be argued that it would be preferable to have no ceremony at all.

2. Proposals for Revision

a) Civil Law: A Uniform Civil Law?

Article 44 of the Indian Constitution envisages that the State shall endeavour to secure a uniform civil code throughout India. This is to come at an opportune time when proper national integration has taken place. It is a good thing that all the citizens be governed by a uniform law which does not distinguish one from the other on the basis of religious affiliation. This would not in any way contravene the religious freedoms guaranteed under the Articles 25, 29 and 30 of the Constitution.⁶⁰ According to a noted jurist, a uniform civil code would have to meet the following requisites:

(i) a refusal to interfere with any right conferred at the present time by a religious law, whilst (ii) citizens are protected from abuse of those rights so that ultimately no member of any religious community or no one is disadvantaged by such membership or non-membership. Moreover (iii) every step must be able to shelter under a precedent, the efficacy of which can be judged from experience.⁶¹

60 J. Minattur, ed., Indian Legal System, p. 17.

61 J.D. Derrett, op. cit., pp. 546-547.

The ICMA is the oldest of all personal laws. It demands strict adherence to the form of marriage among Christians,⁶² and the courts have taken a strict view as regards the interpretation of the law.⁶³ Thus, while the earlier decisions held that adherence to the form of marriage was mandatory when even only one of the parties was a Christian, there slowly evolved a jurisprudence advocating a semi-optional adherence to the form of marriage in the case of inter-faith marriages.⁶⁴ Thus it came to be accepted by the courts in India that a valid marriage could exist when one of the contractants was a non-Christian and the non-Christian form was followed.

The Parsi Marriage and Divorce Act advocated adherence to law and custom. Later, the Hindu Marriage Act insisted on the customary form of marriage or on any recognized form. Then a major breakthrough occurred with the Special Marriage Act, applicable to all citizens of India, and not a personal law. As it now stands, it is not obligatory to follow the Special Marriage Act as long as one of the parties prefers to be governed by the personal law on marriage. The Special

62 ICMA, s.5.

63 Empress vs Paul, 1871 MHCR 20; Empress vs Johan, 17 ILR 391; Kolandaivelu vs Dequidt, 40 Mad 1030.

64 Maharam vs Emperor, AIR 1918 All 168.

Marriage Act is the first step towards a uniform civil law for it permits a simple celebration of marriage without any religious ceremony. A Law Commission was appointed by the government in 1981 to review the situation of a possible uniform civil law. While awaiting its findings, it can be anticipated that the Commission will conclude that the situation is not yet ripe for the introduction of a uniform civil law.

Even if such were introduced, it would not prevent anyone from following the canonical form of marriage. For the chances that an enactment absolutely binding on all without room for religious tenets would be passed are quite slim. Even so, the very idea of a uniform civil code is a welcome one for most citizens. It would only help the secularism that India has adopted, and above all would put an end to the existing confusion and inadequacies.

We have so far made a constructive critical study of the ICMA, which was undertaken in the light of personal law application. This was done with the intent of determining which practical difficulties exist and to suggest some remedies for these. Our finding is that the law needs to be amended or revised in order to serve the very purpose for which it was enacted, namely to avoid invalid marriages. A revised law would have to take into consideration the changed situation of a pluralistic society like India and slight

modifications are to be made accordingly. We shall discuss some of these practical needs of the Catholics in India today, as far as personal law application is concerned.

b) Church Law: Changes in the Law on the Form of Marriage

Since the early sixties, many canonists have expressed opinions in favour of a change in the marriage legislation of the Church, especially regarding the canonical form.

J. Barry, for example, a consultor on the Code Commission, is of the opinion that the present law on the canonical form of marriage should be retained only for liceity. His proposal is that the Tridentine form of marriage is anomalous in many respects and is contrary to the traditional mens ecclesiae.⁶⁵ Hence the invalidity involved in the present law is contrary to the good of souls.⁶⁶

This opinion was also expressed in the Second Vatican Council. For example, Cardinal J. Gilroy suggested that civil marriages, even of Catholics, should be recognized as valid although unlawful, provided the civil ceremony can

65 J. Barry, "The Tridentine Form of Marriage: Is the Law Unreasonable?", in The Jurist, 20(1960), p. 160.

66 Ibid., p. 172. Also see G.C. Gallen, "Proposal for a Modification in the Juridical Form of Marriage", in Australasian Catholic Record, 38(1961), pp. 314-328.

be proved with documents.⁶⁷ F. McManus refers to this as follows:

To return to the specific question of form, there is another possibility which deserves consideration, namely, the revocation of the Tridentine law on clandestinity, so that the marriages of Catholics before civil officials and ministers would be valid.⁶⁸

Furthermore, the same author feels that this position could be accepted since present-day conditions are different from those existing at the time of Trent. The Fathers of Trent did not speak of the civil form as an alternative to the canonical one, for there was no separate civil form in Europe at that time.⁶⁹

Those who hold for not having the canonical form argue that the present law is no guarantee for the validity of consent, since many ignore this element of marriage legislation, and this defeats the purpose of law since it is not conducive to the good of the souls.⁷⁰ The reasons for this and similar arguments can be summarized as follows:

67 F. Anderson, The Council Daybook, vol. 2, p. 286.

68 F. McManus, "The Second Vatican Council and the Canon Law", in The Jurist, 22(1962), p. 283.

69 Ibid., p. 283.

70 J. O'Connor, "Should the Present Canonical Form be Retained for the Validity of Marriage?", in The Jurist, 25(1965), pp. 68, 70.

In view of the history of the law on canonical form, the circumvention of the law by many Catholics, the deterrent effect it is hoped a change of law would have on teenage marriages, the obligation of the Church to protect the sacredness of marriage contract, the weakness of Catholics in the observance of the existing law, the duty not only to defend the kingdom of God but to propagate it, the ecumenical spirit and its promotion so prevalent today and in the Second Vatican Council, the removal of various forms of inequality and injustice, especially as regards liberty of conscience, the better provision for the legitimacy of children, the unsound fear of a return to clandestinity, the existing conditions favourable to a change of law, it is submitted that to the proposed question: Should the present canonical form be retained for the validity of marriage? The reply is: No. ⁷¹

The 1980 Synod of bishops dealt with these opinions and at that time the Sacred Congregation for Sacraments, through its information committee for the Synod, released a report whose relevant points are:

(a) For the baptized a valid matrimonial contract is always and necessarily a Sacrament. ... (b) For baptized Catholics the canonical form is required for a valid marriage. ... (d) Cohabitation of persons who have attempted a marriage as indicated in Point (c) is gravely illicit. Nor can it be approved, proposed or promoted. On this point there is a very clear statement by Pius IX in the allocution Acerbissimum: 'Any other kind of union between a Christian man and woman outside of the sacrament, even if following civil law is nothing but vile and mortal concubinage condemned by the Church'.⁷²

⁷¹ Ibid., p. 81.

⁷² "Synod '80, Marriage Questions Addressed", in Origins, 10(1980-1981), pp. 315-316.

From the statement of the S. Congregation for Sacraments it is clear that they consider canonical form necessary for the validity of marriages. Moreover, the new Code of Canon Law generally retains the form for validity.⁷³

This will be in keeping with the tradition in India as well as with the present civil legislation on the matter.

C. Gallen, in support of the canonical form says that the civil authority does not possess power over the marriages of baptized persons except in regard to the merely civil effects. A proposal according to which the civil form of marriage would be adopted as adequate for the validity of the marriages of Catholics would appear to be conceding to the civil authority a degree of competency in relation to the requirements of the valid celebration of the marriages of baptized persons.⁷⁴

By mentioning the above comment, it is not meant to share the same kind of anxiety; we have, instead, a different

73 C.I.C., (1983), c.1108. For a study in favour of the form of marriage, see W. Cahill, "Change the Marriage Law?", in H.P.R., 64(1963-1964), pp. 115-129. Also see G. Vass, "Is the Canonical Form of Marriage Expendable?", in The Clergy Review, 50(1956), pp. 586-605; E. Wilkens, "Reform of the Roman Catholic Law on Mixed Marriages", in Ecumenical Review, 14(1961-1962), pp. 437-448; P. Huizing, "Should the Ecclesiastical Marriage Law be Revised?", in Concilium, 2/8(1966), pp. 82-88; J. Abbo, "A Change in the Form of Marriage", in The Priest, 19(1963), pp. 670-674; Id., "The Form of Marriage", in The Priest, 20(1964), pp. 64-66; E. Dunderdale, "The Canonical Form of Marriage: Anachronism or Pastoral Necessity?", in Studia Canonica, 12(1978), pp. 41-55.

74 G.C. Gallen, "Further Observations Concerning a Modified Form of Marriage", in Australasian Catholic Record, 39(1962), p. 233.

kind of concern: unnecessarily abdicating a concession granted to the Church by the State, namely, the recognition of canonical form as sufficient for the validity of marriages of Catholics. C. Gallen contends that in virtue of this adoption of civil form, it becomes the canonical form which in turn will guarantee the validity of the marriages of Catholics.⁷⁵ This opinion is, of course, subject to criticism.

One reason in favour of maintaining the canonical form of marriage is that it is well suited to the Indian context of civil law because of its recognition by the State. The ICMA presupposes that all the requirements of law will be faithfully observed by the Church in supervising the solemnization of marriages. To opt for a merely civil form of marriage might only create confusion, which would be against the spirit of the ICMA which makes it mandatory to have a religious ceremony for Catholic marriages, something which is not present in civil marriages.

Retaining the form of marriage as it stands today would be in conformity with the tradition of the early Church and with the Indian tradition. The early Christians were urged to marry with the approval of the bishop.⁷⁶ This

75 Ibid., pp. 234-235.

76 W. Cahill, loc. cit., p. 116.

is presently done not directly through the bishops, but through the pastors and other priests. In this regard, C. Hettinger speaks of collegiality and the form of marriage.⁷⁷ He finds an immediate relationship between the bishops of Trent and the publication of Tametsi at the parish level - a "collegiate relation" - as he terms it. The discipline manifests a relation between the college of bishops and the individual faithful.⁷⁸ This collegiality is manifested in the solemnization of marriage: the officiating minister represents the Church, the celebration of sacraments is subject to the authority of the bishops.⁷⁹ In this, as well as in delegation to assist at marriage, we find the expression of shared responsibility reaching the people.⁸⁰ We could even go one step further and say that when a marriage is duly solemnized by a Catholic minister, under the ICMA, he acts also as a representative of the State, in virtue of delegation from the State.⁸¹

77 C. Hettinger, "Collegiality and the Form of Marriage", in The Jurist, 24(1964), pp. 335-346.

78 Ibid., p. 338.

79 Ibid., p. 340. Also see Pius X, "Afflictum propioribus", Letter to the Bishops of Bolivia, Nov. 24, 1906, in J. Byrnes, (Trans), Papal Teachings: Matrimony, p. 204.

80 C. Hettinger, loc. cit., p. 342.

81 ICMA, s.5.

It could be said that it is with this intent of bringing forward a representative aspect that the law insists on the solemnization of marriage with accompanying ceremonies. This would also highlight the sacramental aspect of marriage which is better manifested in a communitarian context. However, such a procedure does not rule out the possibility of changing, altering, amending or adapting the law on the form of marriage.

The present thinking of some jurists and canonists for accepting the civil form of marriage as valid would probably do more harm to the situation in India than good. We can recall that the first Indian Christian Marriage Act of 1852 and its subsequent two amendments did not recognize the Catholic form of marriage as valid, as is the case today. It was only after numerous requests from the Church that the canonical form was accepted as fulfilling the State's requirements for validity.⁸²

82 Maharashtra Government Archives Bombay, Ecclesiastical Department, Papers, no. 90A/1864; no. 68/1972; The Government of India, Legislative Department, Papers (Manuscripts Relating to the Solemnization in India of Marriages of Persons of Christian Religion), Delhi, National Archives, Legislative Department, nos. 67-117/1872; ibid., Ecclesiastical Department, no. 18/1872.

c) Church Legislation and the Indian Church

Through the course of centuries, the Church became more and more centralized.⁸³ With the Second Vatican Council, we note a move towards a form of decentralization, possibly under the influence of such factors as liberation of colonies and dominions, disappearance of imperial powers, a new outlook on man, individualistic philosophies and, above all, the genuine desire of the Church for effective administration which takes into consideration the needs of the local churches in different parts of the world.

The local churches are different from one another as each one is rooted in local customs, cultures and other religious values. Thus, they have a peculiar heritage and cultural values which depend to some extent on the socio-political conditions under which people live.⁸⁴ Unless such an assimilation into the very soil of the place takes place, the Church can hardly be called a living reality in that particular region. It is with this purpose in mind that the Second Vatican Council authorized a number of policies to

83 J. Thannikot, "The Process of Centralization in the 2nd Millennium", in Jeevadhara, 5(1975), pp. 276-290. Also see M. Hebga, "The Particular Church and the Universal Church", in Indian Theological Studies, 17(1980), pp. 47-63.

84 J. Chettimattam, "The Process of Decentralization in the Church", in Jeevadhara, 5(1975), p. 303.

foster renewal of life of the Church. In enacting laws, cultural values and social factors are to be taken into consideration. While this cannot readily occur at the level of the Universal Church, the role of the local churches in legislation is a key one as they strive, within the framework provided by the universal law, to adapt the legislation as required.

Our concern here is to seek ways and means of making ecclesiastical legislation relevant and meaningful. In this connection, J. Biechler remarks: "To be effective in promoting the general welfare, the law must take into account the nature of the society for which it has been established."⁸⁵ This means taking into consideration the legitimate aspirations and needs of the people. It is here that the local churches assume heavy responsibilities; the universal Church can provide the general principles which then have to be made effective locally.

Since the Universal Church cannot prepare a detailed law totally suited to the needs of each local church, these too are vested with powers of legislation, in accord with the principle of subsidiarity. This principle can be stated as follows:

⁸⁵ J. Biechler, (ed), Law for Liberty; The Role of Law in the Church Today, p. 193.

The principle of subsidiarity is to be applied in the new Code, allowing decisions to be taken at the most appropriate level. This also calls, in certain instances, for decisions to be taken at the national or regional level. [..] Today, the principle of subsidiarity is generally used to describe the fact that decisions are taken at the most appropriate level, while the expression 'decentralization' is used in reference to sharing of authority.⁸⁶

The term subsidiarity here means recognizing the right to take decisions at the most appropriate level according to the norms of law.⁸⁷ "This principle is applied specifically in the new Code through the means of particular legislation. This legislation is taking for granted that a law made for all countries, peoples, cultures and circumstances must be adapted to particular necessities."⁸⁸

The notion of subsidiarity calls for active involvement on the part of the local churches in the realization of the mission to proclaim the message of Christ to the world. This does not destroy the unity of the Church, but rather

⁸⁶ F.G. Morrissey, "The Revision of the Code of Canon Law", in Studia Canonica, 12(1978), pp. 187-188. Also see Communicationes, 1(1969), pp. 82-83.

⁸⁷ F.G. Morrissey, "The Significance of Particular Law in the Proposed Code of Canon Law", in CLSA Proceedings, 1981, pp. 3-4.

⁸⁸ Ibid., p. 4.

enhances its unity in diversity.⁸⁹ The new Code entrusts the local churches and especially the Conference of Bishops with powers of legislation, most of which find their source in the Second Vatican Council.⁹⁰ The Conferences of Bishops entrusted with the task of providing some of the local legislation should see that their laws do not in any way contradict or contravene the law of the Universal Church.

Some episcopal conferences have not appeared too eager to prepare local legislation. The same could be true of India. One author remarked that the Church and its leaders in India are not yet fully conscious of and committed to the creation of a local church that is authentically Indian and Christian. We are not yet ready to use creatively even the limited freedom given to us in the post-Vatican documents for liturgical renewal.⁹¹

It is urgent that Catholics in India be provided with a better marriage law. Examples could be given to show how this is so. The Catholic Church has recently recognized the validity of a marriage celebrated before an Orthodox

89 J. Chettimattam, loc. cit., p. 310.

90 F.G. Morrissey, "The Significance of Particular Law in the Proposed Code of Canon Law", in CLSA Proceedings, 1981, pp. 10-15. Also see D. Nichodemus, The Democratic Church, pp. 96-113.

91 M. Amaldoss, "Liturgical Renewal and Ecclesiastical Law", in Word and Worship, 10(1977), p. 259.

minister. But a 1945 decision of the Madras court seems to be in conflict with this. For the court rules that there is no marriage, in the case of a Catholic, if it takes place before a schismatic priest.⁹² Of course, the Catholic Church law at the time held the same opinion. The Mysore court ruled in Rajammal vs Mariyammal that a marriage between a Christian and a Hindu celebrated according to Hindu form is valid.⁹³ Without referring to this decision, however, the Calcutta court maintained that there could not be a valid marriage between a Hindu and a Christian.⁹⁴ Such contradictions will have to be resolved.

Furthermore, in India, where most of the marriages are suitably arranged by parents and relatives of the parties, where marriages are seen by the people more as a community affair than as a mere isolated contract (as contemplated in the canonical form), it is up to the leaders of the Church to make effective laws for the same.

We do not suggest that the present law on the form of marriage be abolished, but merely that it be further modified

92 Gnanamuthu vs Antony, AIR 1945 Mad 516.

93 Rajammal vs Mariyammal, AIR 1954 Mys 38. Also see Dubey vs Dubey, AIR 1951 All 529.

94 Swapna vs Bassanta, AIR 1955 Cal 533.

to suit the needs of the people. For example, the customary marriage ceremonies could be included for the effectiveness of the form. If customary marriage ceremonies would be required for liceity, this would be in tune with the Indian mind and thinking, and the civil courts in India seem to subscribe to this view.⁹⁵ From an ecclesiastical point of view, customary marriage ceremonies could be incorporated by particular legislation either at the diocesan level or at the regional level, because uniform legislation is not possible in a country which is so diverse. Therefore, determination of elements for customary marriage ceremonies would depend on the particular legislation. Ceremonies which have no pagan overtones such as tying of tali, mangala-sutra, the symbolic joining of the couples by tying of the wedding garment, strewing of rice, waving of lights, saptapadi etc., could easily be made part of the conditions for the liceity of marriage.

Incorporating important ceremonies into the form of marriage would bring out the traditional and long-existing ideology of the people and their ritual-oriented life. For

⁹⁵ Edamma vs Hussainappa, AIR 1965 AP 455. In a petition for the restitution of conjugal rights, it was successfully pleaded that there was no essential ceremony of marriage performed; see Parbia Ram vs Smti Thopli, AIR 1966 HP 20.

them, marriage generally comes into being as a result of the negotiations protracted over a period of time and accompanied by many preliminaries such as a proposal, betrothal, etc. These stages imply the co-operation of the parents and relatives of the contractants. Since each of these stages is marked by ceremonies, it would be appropriate to prescribe ceremonies for marriage as constituent elements of the celebration. The mere exchange of consent before two witnesses, in the Indian religious context, is hardly meaningful. If we reduce marriage to a mere personal event, it fails to express the manifold meaning of the sacrament of marriage. To take other examples from the life of the Church, we can refer to some of the remaining sacraments. In most cases, the Church asks for a guarantee of the continued life in faith and growth in grace. Thus in baptism, the Church demands the presence of godparents; in confirmation, sponsors, and in Ordination, a title for the ordination (although this is dropped in the new Code), but such is not the case with marriages.

To bring out the communitarian aspect of marriage, and to include other ceremonies for this purpose, it could be proposed to have the entire community serve as the ordinary witnesses of marriage. The question of registration arises immediately, though, for both civil and ecclesiastical law prescribe that marriages be registered; this needs

authentication by witnesses. This could easily be done by letting two witnesses sign the marriage register on behalf of the community. One can argue that this communitarian aspect could easily be brought about by the liturgical celebration of marriage, and this is true. But the point is whether this really makes the law meaningful and effective. The correct approach would seem to start from the life situation and the needs of the people. Any law, be it civil or ecclesiastical, should take into consideration the originality of Indian life experience, which is ritually oriented and communitarian, to make it meaningfully effective for the people. This point becomes even clearer in the light of the following consideration.

India has been (and still is) the melting pot of all the great religions of the world. This aspect of cultural significance might have been forgotten in the past by Indian Church leaders. But, of late, there is a welcome awakening to the need of building up an Indian Theology. From the West, there is a steady influx of people to India, especially to the Himalayan Valley, in search of spiritual values and of an initiation into mystical life and experience. For example, many take yoga as a life-style more than as a mere physical fitness programme. The West has popularized Indian music and dance. Yet the Church leaders are often inclined to look elsewhere for inspiration and legislation. They

often end up trying to translate the Roman law, and then looking for means of adaptation. Much remains to be done in this regard.

Conclusion

In our attempt to evaluate the present law on the form of marriage, we made a constructive critical study of the matter. We call this study critical as our intention was to make some suggestions for an improvement of the legislation. Thus we reached the conclusion that the ICMA needs to be amended to serve the needs of the day. In this connection we noted how laudable it is to have uniform personal law for all citizens of India, but we would need a Validation Act to set aright many invalid marriages which have been celebrated.

We made an attempt to evaluate the law on the canonical form of marriage in the Indian context. The particular Indian life situation, the ritual-oriented Indian life, the scrupulous observance of rubrics by the Indian mind, and the values attached to ceremonies in traditional Indian thinking, call for a revision of the canonical form of marriage through the incorporation of certain customary marriage ceremonies. This also calls for effective and meaningful legislation by the Church in India at the diocesan and regional levels. The life experience and the cultural

contexts are to be given serious consideration in legislation to make it meaningful. It is in this context that we feel that the Indian Church leaders should take necessary measures to implement fully the legislative faculties granted to local churches. The specific steps that should be taken in the immediate future are the following:

1) With regard to canonical legislation

1. The local church should play the role allotted by the Universal Church in drafting laws, and perhaps request more powers for effective marriage legislation.

2. The law should be adapted so as to make it effective and meaningful to the people of India. For this, the specific nature of Indian society and culture are to be taken into consideration.

3. The general Indian mentality and outlook on marriage as a family arrangement and its communitarian aspects should be considered in adapting the law. For this, some customary ceremonies such as, tali, mangalasutra, sindhur, etc., should be prescribed for liceity or at least highly recommended. This, however, has to be done at the diocesan or regional level.

4. Where betrothal is an important ceremony, the Church should be ready to incorporate such practices in her law.

5. The concept of the whole community witnessing marriage should be highlighted in the legislation, and at least two

persons should sign the marriage register on behalf of the community.

6. If the communitarian aspect in the context of arranged marriages is emphasized, the publication of banns need not be required, for enough publicity is otherwise guaranteed.

7. It should be obligatory to solemnize marriages in a ritual context; however, exceptions could be permissible.

8. Since most marriages in India are arranged, the wishes of the parents of the parties should be given due consideration, especially when the parties are under 21 years of age (minor).

9. Due respect should be given even to preliminaries of marriage, such as sagai (betrothal), kanyadana (giving away of the virgin) and sadi (wedding proper) by prescribing customary ceremonies of sagai, kanyadana, etc; for this the law needs to be adapted.

2) With regard to civil legislation

1. The title "Indian Christian Marriage Act could be abridged into "Christian Marriage Act".

2. The Act should be extended to all Christians.

3. Certain expressions like 'Church of Scotland', 'Church of England', etc., should be changed into 'Church of South India' and 'Church of North India', etc.

4. The act should be made to cover all aspects of marriage, not just their celebration, or otherwise, the name should be

"The Celebration of Marriages of Christians".

5. The textual division of the Act into parts must be made systematic and the title should convey the contents.

6. The Act should take into consideration urgent situations such as death-bed marriages, at least by adding a word "under normal circumstances" where the Act makes the solemnization of marriage mandatory (for instance s.4).

7. There should be specific provision for inter-faith marriages, as to their form, minister of solemnization, etc. The parties, however, should be able to choose one form according to law.

8. It is necessary that the Act should cover effects of marriage, and provide for validation of invalid marriages. The same is true of matrimonial reliefs.

9. The excessive penal provision should be abolished and the penalty be made light as in the case of Hindu Marriage Act, for instance, imprisonment up to one month or a fine.

10. Provision should be made for delegation of one's authority to solemnize marriages, especially for those who hold a licence from the government.

11. The existing fragmentary legislations such as the ICMA, the Indian Divorce Act, the Native Converts Marriage Dissolution Act, should be blended into one simple Act which will deal with Christian marriages at least until the enactment of a uniform civil code.

12. The Act must provide for void and voidable marriages as found in the Hindu Marriage Act and the Special Marriage Act. It should also take into consideration the status of the children of invalid marriages.

13. To clarify the conflicting decisions of the various courts as to whether a person who neither married nor registered his marriage under the Special Marriage Act, entered into a valid marriage, amendment is needed. The best way to bring about the desired changes would be for the Church leaders to request satisfactory legislation from the government.

CONCLUSION

At the end of this historico-analytical study of marriage, some conclusions can be drawn. Ever since the fourth century, B.C., marriage in India was considered as a socio-religious institution. It was seen as a basic social structure moulded by tradition and evolved in history. To marry was considered both a religious necessity and a sacred duty; a number of ceremonies were thus prescribed as essential for any valid contract of marriage. It is clear that life is ritually oriented among most Indians, and all important stages of human existence are marked by rituals and ceremonies. Hence, we find insistence on and value attached to the ceremonies of marriage, which are considered necessary for bringing about a valid union.

Centuries of tradition have instilled into the minds of the people the need for performance of such ceremonies. This tradition was kept alive and intact, to the exclusion of invoking gods, in the Indian Christian tradition up to the Synod of Diamper. The Synod of Diamper made the tridentine form of marriage absolutely binding on all Catholics, and barred all the traditional marriage ceremonies under pain of excommunication. Thus, the southern states of India followed the Roman discipline from the 16th century. There had been up to that time a number of customary practices. These, however, took place either before or after the church celebration to which some persons attached little

importance, other than a mere formality.

Both Canon and civil law consider marriage as a special kind of contract. Words such as covenant, consortium vitae, status, relation, institution, sacrament, etc., are used to explain it. The Catholic Church holds that marriage is a sacrament when contracted by two baptized persons. While the civil law does not specifically state that marriage is a sacrament, the courts in India uphold the sacredness of marriage. To bring it into being, civil law prescribes certain formalities, namely, the publication of the intended marriage, a certificate to marry, solemnization and registration. These formalities are prescribed for avoiding irregular and illegal unions. Hence, the civil law demands that marriages be solemnized according to the prescribed formalities.

Viewed as a civil contract, marriage involves three parties: the man, the woman and the State. The State permits the Church to follow its laws on the form of marriage; thus, by a general delegation, the Church assumes responsibilities of the third party to marriage on behalf of the State. The civil law, in other words, desires that the Church supervise the marriages of its subjects. This has to be done in full accord with the rules, rites, customs and ceremonies of the Church. When two say the solemn and irrevocable "I do", the priest or deacon also receives the consent of the parties in the name of the State through the Church. From this

sacrament and contract, a number of rights and obligations arise and a new status comes into being. It arises when marriage is duly solemnized with proper ceremonies (as the ICMA desires). On performance of these ceremonies, i.e., solemnization, the wife passes from her family to the family of the bridegroom, and only at that time does the change of name of the spouse take place.

Marriage ceremonies play a very important role in India which is a land of faith and festivities. Even in civil marriages, the law desires that there should be a form of public ceremony. This should encourage the Church to incorporate into her law some of the customary ceremonies required for liceity of marriages, which would satisfy the aspirations of the people. The mutual exchange of consent should take place in the course of such ceremonies. This would give an added significance to marriage among the ritually oriented Indian minds. The performance of such ceremonies is so important that the first thing the courts will inquire about is their observance when the validity of a marriage is called in question.

Usually, Catholics in India abide by the canonical form of marriage which is mandatory under the ICMA, for those who prefer to be married according to the Church law. Since the promulgation of the Special Marriage Act, however, Christians can be married according to the form of one's

choice including a purely civil form.

Both State and Church insist on some kind of investigation to ensure the freedom of the parties to marry. Thus, among Catholics, a canonical inquiry precedes all marriages. In the case of Christians, who do not follow the canonical form, the investigation will be carried out by means of a notice of marriage, a certificate to marry and an inquiry by the notary or person appointed for that purpose.

It is the responsibility of the pastor to make the inquiries to ensure the freedom of the parties to marry. Thus, he makes sure, among other things, that the parties are confirmed, that no impediment exists, that any required dispensations are obtained, that the parties are domiciled in his territory, etc. The civil law has similar provisions, so that both the Church and State agree on the need for and the manner of conducting prenuptial inquiries.

Canon Law established diriment and impedient impediments, while the civil law does not speak in such terms. Civil law speaks of the following impediments: non-age, existing marriage, prohibited degrees (consanguinity and affinity) and inability to contract. Unlike Church law, impotency is a ground for a declaration of nullity of marriage, but not an obstacle to its celebration. This, however, does not prohibit anyone from following the detailed prescription of Canon Law on impediments.

Canon Law fixes the age of consent as fourteen for girls and sixteen for boys. The ICMA does not prescribe the age, but states that one should not be a minor at the time of marriage unless there is parental consent. The age of majority under the Indian Majority Act is twenty-one, yet marriage is not governed by the Act, but by the personal law which is the same as the canonical legislation. The age of consent under the Special Marriage Act is 18 for girls and 21 for boys, which, however, is optional for the time being.

Existing marriage is an impediment invalidating any subsequent one. That is to say, bigamy is not permitted by the State or by the Church. The State, however, permits divorce which entitles a person to remarry. There are also two occasions where the State permits remarriage without dissolution of the bond: presumed death (i.e., if one of the parties has not been heard of for seven years), and civil death (i.e., one becomes a hermit or monk). While the Church also allows such marriages, her laws are more stringent than those of the State on this matter.

Both State and Church law consider vitiated consent as invalidating marriage. The factors that vitiate consent are force, fear, fraud, insanity, etc. These must be proven, as there is no automatic invalidation giving a declaration of nullity. When the consent is vitiated, the civil law considers marriage voidable. Once the vitiating element is

detected or removed, a party must petition for nullity, or else the court will presume the validity of the marriage due to continued cohabitation.

Both State and Church law generally regard the presence of a minister in Holy Orders and two witnesses as necessary for the validity of marriages. Moreover, the minister should have due authorization. This authorization comes from the State, which in the case of Catholic clergy is given by law itself, and in the case of others, by way of licence. Canon Law speaks of active assistance at marriage while the civil law regards the presence of a minister as essential for solemnization. Canon Law provides for a lay person to be delegated to solemnize marriages; but he must first obtain a licence from the State before he can act validly, since he is not in Holy Orders. Authorization to solemnize is needed in both laws.

In the event of invalidity of marriage, two ways are open to the parties under both Church and State law: convalidation and matrimonial relief. In civil law, voidable marriages can be convalidated by continued cohabitation after the removal of the obstacle which vitiated the consent. In civil law there is no validation of an invalid marriage, except by a new solemnization. The Church speaks of simple convalidation and radical sanation of invalid marriages. To remedy invalid marriages, the State can enact Validation Acts,

with retroactive effects; the Church accepts retroactivity after the convalidation of a marriage.

Both Church and State laws are inadequate in many respects as they sometimes fail to be effective and meaningful. It is necessary for efficient legislation that laws be enacted either locally, or be adapted by the local church, taking into account the mentality, culture, thinking and needs of the people. Both laws need be reformed to meet these needs. Symbolism and ceremonies that are of importance and have no specific religious overtones such as tali, mangalasutra, sindhura, veiling, touching of hearts, etc., should be incorporated into the law as one of the conditions for liceity of marriage.

As can be seen, in most cases, both State and Church law are in close agreement. Both systems have more similarity than differences. The Church in India is desirous to comply with the requirements of civil law which is entrusted to it by the State when it grants power to supervise the solemnization of marriages in accordance with the ecclesiastical law.

If the form of marriage is meant to safeguard the public nature and sanctity of marriage, it would be urgent for the Church in India to prescribe the customary marriage ceremonies as elements required for liceity. The ceremonies celebrated in this context are meant for publicity as well as for religious satisfaction. If the Church in India is

to be at the service of the people, it must formulate a positive legislation on the form of marriage in such a way that it could take into account the needs and aspirations of the ritually oriented life of the people and their thinking. If Indian Christians are proud to have an Indian Theology, Indian ecclesiology, etc., it is only a natural consequence of this that they also have an Indian marriage legislation.

BIBLIOGRAPHY

a) Canon Law

i) Sources

Codex Juris Canonici, Pii X Pontificis Maximi jussu digestus Benedicti Papae XV auctoritate promulgatus, Romae, Typis Polyglottis Vaticanis, 1917, LXXI, 918 p.

Codex Juris Canonici, auctoritate Joannis Pauli PP. II promulgatus, Romae, Typis Polyglottis Vaticanis, 1983, XXX, 317 p.

Collectanea S. Congregationis de Propaganda Fide, decreta, instructiones, rescripta pro apostolicis missionibus, Romae, Typographia Polyglotta de Propaganda Fide, 1907, 2v.

PONTIFICIA COMMISSIO CODICI JURIS CANONICI RECOGNOSCENDO, Communicationes, Romae, 1969-1982, 14v.

-----, Relatio: complectens synthesim ainmadversionum ab em.mis atque exc.mis Patribus Commissionibus ad Novissimum Schema CIC exhibitarum, cum responsibus a Secretaria et Consultoribus datis, (Patribus Commissionis stricte reservata), Typis Polyglottis Vaticanis, 1981, 358 p.

SACRAE ROMANAE ROTAE, Decisiones seu sententiae quae prodierunt annis 1909-1972, Romae, 1909-1929; in Civitate Vaticana, 1930 to the end of 1972, 64v.

PAUL VI, Motu Proprio, June 18, 1967, "Sacrum diaconatus ordinem," in A.A.S., 59(1967), pp. 697-704.

PIUS XII, Motu Proprio, August 1, 1948, "Decretum Ne temere," in A.A.S., 40(1948), pp. 305-306.

-----, Motu Proprio, February 22, 1949, "Crebrae allatae," in A.A.S., 41(1949), pp. 89-117.

U.S. Apostolic Delegate, Letter, June 28, 1961, "Extraordinary Form Suggested in Difficult Case," (private), in C.L.D., Vol. 5, pp. 523-524.

ii) Decrees, Instructions and Replies of
the S. Congregations

S.C.C., Decree, August 2, 1907, "Ne Temere (De sponsalibus et matrimonio)", in A.A.S., 40(1907), pp. 525-530.

S.C.S., Instruction, June 29, 1941, "Sacrosanctum matrimonii", in A.A.S., 33(1941), pp. 279-318.

-----, Rescript, February 9, 1957, "Sanation after Cessation of Impediment of Divine Law", (private), in C.L.D., Vol. 5, pp. 551-552.

-----, Reply, August 30, 1968, "Temporary Deacon: Assistance at Marriage", (private), in C.L.D., Vol. 7, p. 689.

-----, Instruction, December 7, 1971, "Marriage before Witnesses only", (private), in C.L.D., Vol. 7, pp. 753-756.

-----, Instruction, Dezember 7, 1971, "Ad rev.mos locorum Ordinarios de canonica celebratione matrimonii coram solis testibus", in Archiv für Katholisches Kirchenrecht, 141(1972), pp. 510-512.

-----, Instruction, May 15, 1974, "Lay Person as Official (Qualified) Witness", (private), in C.L.D., Vol. 8, pp. 815-818.

S.C.O.C., Reply, July 11, 1952, "Roman Decisions affecting Families of the Oriental Rite", in The Jurist, 12(1952), pp. 475-476.

-----, Decree, February 22, 1967, "Crescens matrimoniorum", in A.A.S., 59(1967), pp. 165-166.

S.C. Holy Office, Rescript, July 18, 1947, "The Fresno Case", (private), in C.L.D., Vol. 3, p. 485.

-----, Decision, January 30, 1950, "Privilege of the Faith: Dissolution of Former Marriage contracted before the Church", (private), in C.L.D., Vol. 3, pp. 486-487.

-----, Reply, May 12, 1953, "Sanation Granted When Total Impotence Occurred Subsequent to Attempted Marriage", (private), in C.L.D., Vol. 5, pp. 549-550.

-----, Decision, August 8, 1955, "Dissolution in Favour of the Faith of a Marriage Contracted with Dispensation from Disparity of Cult, where no Conversion now Involved", (private), in C.L.D., Vol. 4, pp. 350-352.

Holy Office, Decision, August 9, 1959, "Dissolution of Natural Bond between Two Infidels without any Conversion", (private), in C.L.D., Vol. 5, pp. 543-546.

-----, Reply, January 23, 1960, "Dissolution of Natural Bond with Permission to each Party to Contract a Mixed Marriage", (private), in C.L.D., Vol. 5, pp. 546-547.

iii) Replies from the Commission for the Authentic Interpretation of the Code of Canon Law

July 14, 1922, "De Vicariis substitutis et suppleantibus quoad assistentiam matrimonii (can. 465 §4 et 5)", in A.A.S., 14(1922), pp. 527-528.

May 20, 1923, "De licentia assistendi matrimonii", in A.S.S., 16(1924), pp. 114-115.

May 20, 1923, "Circa assistentiam matrimonii, can. 1096 §1", in A.A.S., 16(1924), p. 115.

November 5, 1924, "Dispensation from the Bond of Natural Marriage: The Helena Case", in C.L.D., Vol. 1, pp. 523-524.

November 10, 1925, "De forma celebrationis matrimonii", in A.A.S., 17(1925), p. 583.

December 28, 1927, "De subdelegatione assistendi matrimonii", in A.A.S., 20(1928), pp. 61-62

March 10, 1928, "De forma celebrationis matrimonii", in A.A.S., 20(1928), p. 120.

March 12, 1929, "De matrimonio filiorum apostatarum", in Periodica, 19(1930), pp. 268-269.

July 20, 1929, "De matrimonio acatholicorum", in A.A.S., 21(1929), p. 573.

February 17, 1930, "De matrimonio filiorum apostatarum", in A.A.S., 22(1930), p. 195.

July 25, 1931, "De celebratione matrimonii", in A.A.S., 23(1931), p. 388.

January 31, 1942, "De vicario cooperatore quoad matrimonia", in A.A.S., 34(1942), p. 50.

January 25, 1943, "De delegatio episcopali quoad matrimonia", in A.A.S., 35(1943), p. 58.

May 3, 1945, "De forma celebrationis matrimonii", in A.A.S., 37(1945), p. 149.

March 26, 1952, "De Interpretatione can. 299; de applicatione praescriptorum can. 197, 199, 206-209, potestate dominativae", in A.A.S., 44(1952), p. 497.

July 8, 1952, "Canonis 86 §1 n.2 interpretatio authentica", in A.A.S., 44(1952), p. 552.

iv) Rotal Jurisprudence and Decisions of
the Apostolic Signatura

July 9, 1918, c. MANY, in S.R.R.Dec., 10(1918), pp. 78-87.

August 6, 1921, c. MASSIMI, in ibid., 13(1921), pp. 206-210.

June 11, 1927, c. MANNUCCI, in ibid., 19(1927), pp. 221-230.

May 25, 1942, c. GRAZIOLI, in ibid., 34(1942), pp. 408-430.

March 29, 1947, c. CAIAZZO, in ibid., 39(1947), pp. 208-212.

January 17, 1948, c. HEARD, in ibid., 40(1948). pp. 22-25.

June 30, 1948, c. BRENNAN, in ibid., 40(1948), pp. 257-267.

March 31, 1949, c. TEODORI, in ibid., 41(1949), pp. 146-150.

June 11, 1949, c. TEODORI, in ibid., 41(1949), pp. 287-291.

March 25, 1950, c. HEARD, in ibid., 42(1950), pp. 180-184.

May 4, 1951, c. CAIAZZO, in ibid., 43(1951), pp. 346-356.

October 17, 1953, c. HEARD, in ibid., 45(1953), pp. 585-590.

February 19, 1965, c. SABATTANI, in ibid., 57(1965), pp. 183-205.

January 16, 1969, c. PARISELLA, in ibid., 61(1969), pp. 26-33.

March 28, 1969, c. FAGIOLO, in ibid., 61(1969), pp. 338-346.

January 14, 1970, c. ANNÉ, in ibid., 62(1970), pp. 49-52.

May 30, 1970, c. FIORE, in ibid., 62(1970), pp. 596-599.

June 26, 1971, c. MASALA, in ibid., 63(1971), pp. 568-575.

December 11, 1971, c. LEFEBVRE, in M.E., 97(1972), pp. 194-199.

December 16, 1971, c. ABBO, in S.R.R.Dec., 63(1971), 1005-1010.

April 17, 1972, c. POMPEDDA, in ibid., 64(1972), pp. 173-178.

April 22, 1972, c. EWERS, in ibid., 64(1972), pp. 189-198.

July 22, 1972, c. EWERS, in ibid., 64(1972), pp. 485-493.

December 19, 1972, c. ANNÉ, in ibid., 64(1972), pp. 804-809.

b) Civil Law

i) Statutes

Constitution of India, 1950, (with subsequent amendments), Delhi, Govt. Press, 1980, 246 p.

Cochin Christian Civil Marriage Act, 1916, Cochin, Govt. Press, 1916, 24 p.

Hindu Marriage Act, 1955, (with subsequent amendments), Delhi, Govt. Press, 1980, 22 p.

Indian Christian Marriage Act, 1872, (with subsequent amendments), Allahabad, Central Law Agency, 1980, 24 p.

Indian Contract Act, 1872, (with subsequent amendments) Allahabad, Central Law Agency, 1970, 196 p.

Indian Divorce Act, 1869, Allahabad, Central Law Agency, (reprint), 1970, 36 p.

Indian Majority Act, 1872, (with subsequent amendments), Bombay, Govt. Press, 1952, 20 p.

Native Converts Marriage Dissolution Act, 1866, Delhi, Govt. Press, (reprint), 1956, 22 p.

Parsi Marriage and Divorce Act, 1936, (with subsequent amendments), Allahabad, Central Law Agency, 1980, 16 p.

Special Marriage Act, 1954, (with subsequent amendments), Allahabad, Central Law Agency, 1980, 42 p.

ii) Reports of Cases

All India Reporter, Allahabad Series, Nagpur, All India Reporters Ltd., 1913 to 1980, 67v.

All India Reporter, Andra Pradesh Series, Nagpur, All India Reporters Ltd., 1922 to 1980, 58v.

All India Reporter, Bhopal Series, Nagpur, All India Reporters Ltd., 1956 to 1980, 24v.

All India Reporter, Bombay Series, Nagpur, All India Reporters Ltd., 1913 to 1980, 67v.

All India Reporter, Calcutta Series, Nagpur, All India Reporters Ltd., 1913 to 1980, 67v.

All India Reporter, Delhi Series, Nagpur, All India Reporters Ltd., 1948 to 1980, 32v.

All India Reporter, Goa Series, Nagpur, All India Reporters Ltd., 1956 to 1980, 24v.

All India Reporter, Karnataka Series, Nagpur, All India Reporters Ltd., 1956 to 1980, 24v.

All India Reporter, Kerala Series, Nagpur, All India Reporters Ltd., 1956 to 1980, 24v.

All India Reporter, Madras Series, Nagpur, All India Reporters Ltd., 1913 to 1980, 67v.

All India Reporter, Madhya Pradesh Series, Nagpur, All India Reporters Ltd., 1948-1980, 32v.

All India Reporter, Mysore Series, Nagpur, All India Reporters Ltd., 1948 to 1956, 8v.

All India Reporter, Orissa Series, Nagpur, All India Reporters Ltd., 1948 to 1980, 32v.

All India Reporter, Tripura Series, Nagpur, All India Reporters Ltd., 1956 to 1980, 24v.

Andra Weekly Cases, Hyderabad, Govt. Press, 1955 to 1980, 25v.

Bombay Law Reports, Bombay, Associated Advertisers and Publishers, 1899 to 1980, 81v.

Indian Appeals and Cases in the Privy Council on Appeal from the East Indies, London, William Clowes and Sons, 1872 to 1950, 77v.

Indian Law Reports, Madras Series, Madras, J. Higginbotham, 1876 to 1922; Law Publishers, 1922 to 1936; Govt. Press, 1936 to 1980; 104v.

Kerala Law Times, Ernakulam, Kerala Law Times, 1928 to 1980, 52v.

Madras High Court Reports, Madras, J. Higginbotham, 1862 to 1875, 8v.

Madras Law Journal, Madras, Govt. Press, 1891 to 1980, 89v.

iii) Other Sources (Manuscripts)

Archives, Diocese of Allahabad, Papers Relating to the Marriage Bill, 1863.

Archives, Government of Maharashtra, Bombay, Papers Ecclesiastical Department, Nos. 11-90/1864; 30-217/1872.

National Archives, Delhi, Papers (Legislative Department) relating to the Indian Christian Marriage Act, Nos. 42-95/1865; 18-117/1872.

c) Books

ALTEKAR, A.S., Position of Women in Hindu Civilization from Prehistoric Times to the Present Day, 2nd ed., New Delhi, Motilal Banarasidass, 1973, xii, 380 p.

ANDERSON, F., (ed.), Council Daybook Vatican II, (Sessions 1-4), Washington, D.C., National Catholic Welfare Conference, 1965-1966, 3v.

ATIYA, A.S., History of Eastern Christianity, Notre Dame, Indiana, University of Notre Dame Press, 1967, xiv, 486 p.

AYRINHAC, H.A., Marriage Legislation in the New Code of Canon Law, rev. and enl. by P.J. Lydon, New York, Benziger Brothers, 1939, xix, 394 p.

BASSETT, W., (ed.), The Bond of Marriage: An Ecumenical and Interdisciplinary Study, Notre Dame, Indiana, University of Notre Dame Press, 1968, xxi, 265 p.

BENNETT, C., The Problem of Consent in the Arranged Marriage of Tamils of Jaffna, Pontificium Institutum Missionale Scientificum, 1977, xxiv, 186 p.

BERNARD, C., Hinduism in Spotlight, Manjummel, Little Flower Press, 1948, 163 p.

BHATTACHARYYA, H., (ed.), The Cultural Heritage of India, 2nd rev. and enl. ed., Calcutta, Ramakrishna Mission, 1953-1962, 5v.

BHATTACHARYYA, N.N., Ancient Indian Rituals and Their Social Contents, Delhi, Manohar Book Service, 1975, xvi, 184 p.

BIECHLER, J., (ed.), Law for Liberty: The Role of Law in the Church Today, Baltimore, Helicon, 1967, 221 p.

BOUSCAREN, T.-ELLIS, A.-KORTH, F., Canon Law: A Text and Commentary, 4th rev. ed., Milwaukee, The Bruce Publishing Company, 1966, xvi, 1011 p.

BOYD, R.H., India and the Latin Captivity of the Church: The Cultural Context of the Gospel, London, Cambridge University Press, 1974, xiv, 151 p.

BÜHLER, G., (tr), The Laws of Manu, Delhi, Motilal Banarasidass, 1967, cxxxviii, 620 p. (reprint).

BÜHLER, W., Katholisch-evangelische Mischehen in der Bundesrepublik nach dem geltenden katholischen und evangelischen Kirchenrecht, Heidelberg, C. Winter, 1963, 116 p.

BYRENS, M.J., (tr), Papal Teachings: Matrimony, Boston, Daughters of St. Paul, 1963, 617 p.

CAMPBELL, W., British India in Its Relation to the Decline of Hindooism and the Progress of Christianity, London, J. Snow, 1839, xii, 596 p.

CAPPELLO, F.M., Tractatus canonico-moralis de sacramentis juxta Codicem Juris Canonici, 4a ed., Romae, Marietti, 1921-1939. 3v.

CARBERRY, J.J., The Juridical Form of Marriage: An Historical Conspectus and Commentary, Washington, D.C., The Catholic University of America, 1934, x, 169 p. /Canon Law Studies, No. 847.

CERATO, P., Matrimonium a Codice J.C. integre desumptum; Pontificae Comm. et SS. Congregationum responsis et decretis hucusque datis adnotationibus et factorum speciebus locupletatum, 4a ed., Padova, Typis Seminarii Patavini, 1929, xxviii, 283 p.

CHATTERTON, E., A History of the Church of England in India since the Early Days of the East India Company, London, Society for Promoting Christian Knowledge, 1924, xxiv, 353 p.

CIPROTTI, P., Observaciones al texto del Codex Juris Canonici, 2nd rev. ed., Salamanca, Instituto San Raimundo de Penafort, 1950, 208 p.

COBURN, V.P., Marriages of Conscience: An Historical Synopsis and Commentary, Washington, D.C., The Catholic University of America Press, 1944, xi, 172 p. /Canon Law Studies, No. 1917.

COMMISSION INTERNATIONALE D'HISTOIRE ECCLESIASTIQUE COMPARÉE, The Church in a Changing Society: Conflict, Reconciliation or Adjustment?, Proceedings of CIHEC, Uppsala, Swedish Society of Church History, 1978, xv, 508 p.

CORONATA, M., Institutiones juris canonici ad usum utriusque cleri et scholarum, de sacramentis tractatus canonicus, Taurini, Marietti, 1943-1946, 3v.

CRONIN, C.J., The New Matrimonial Legislation: A Commentary on the Decree of the S. Congregation of the Council, Ne Temere, Published on the 2nd of August 1907, by Order of Pope Pius X, on Betrothal and Marriage, London, Washbourne, 1908, vii, 339 p.

CUTOR, O.T., (ed.), Abstracts of the Proceedings of the Council of the Governor General of India Assembled for the Purpose of Making Laws and Regulations, Calcutta, M. Orphan Press, 1862-1895, 34v.

DE BARRY, T., (ed.), Sources of Indian Tradition, New York, Columbia University Press, 1960, xxvii, 961 p.

DE MELLO, C.M., The Recruitment and Formation of the Native Clergy in India: An Historico-Canonical Study, Lisboa, Agencia General do Ultramar, 1966, xxxi, 358 p.

DENNIS, J.S., Christian Missions and Social Progress: A Sociological Study of Foreign Missions, New York, Fleming H. Revell Co., 1897-1906, 3v.

DERRETT, J.D., Religion, Law and the State in India, London, Faber and Faber, 1969, 615 p.

DE SMET, A., Tractatus theologico-canonicus de sponsalibus et matrimonio, 4a ed., Brugis, Beyaert, 1927, xlv, 840 p.

DEVADASON, E.D., Christian Law in India: Law Applicable to Christians in India, Madras, D.S.I. Publication, 1974, v, 414 p.

DIEHL, C.G., Church and Shrine: Intermingling Patterns of Culture in the Life of Some Christian Groups in South India, Uppsala, H.O. Boktryckeri, 1965, 203 p.

DOHENY, W.J., Canonical Procedure in Matrimonial Cases, 2nd rev. and enl. ed., Milwaukee, The Bruce Publishing Company, 1948, 2v.

DOWDAL, R., The Celebration of Matrimony in Danger of Death, Vatican Polyglot Press, 1944, xii, 146 p.

DUBOIS, J.A., Hindu Manners, Customs and Ceremonies, 3rd ed., Oxford, Clarendon Press, 1928, xxiv, 741 p.

EMBREE, A.T., (ed.), The Hindu Tradition, New York, Modern Library, 1966, xv, 363 p.

FLANNERY, A.P., Documents of Vatican II, Michigan, W. Eerdmans Publishing Co., 1978, 1062 p.

FUSS, E.A., The Extraordinary Form of Marriage according to C. 1098, Washington, D.C., The Catholic University of America Press, 1954, ix, 205 p. [Canon Law Studies, No. 348].

GASPARRI, P., Tractatus canonicus de matrimonio, nova ed., ad mentem Codicis J.C., Romae, Typis Polyglottis Vaticanis, 1932, 2v.

GLEDHIL, A., The Republic of India: The Development of Its Law and Constitution, 2nd ed., London, Stevens, 1964, xi, 399 p.

GOLDSMITH, J.W., The Competence of Church and State over Marriage: Disputed Points, Washington, D.C., The Catholic University of America Press, 1944, x, 128 p. [Canon Law Studies, No. 197].

GRISWOLD, H.D., The Religion of the Rigveda, Delhi, Motilal Banarasidass, 1971, xxiv, 392 p.

GUPTA, G.R., Marriage, Religion and Society: Pattern of Change in an Indian Village, New York, Wiley, 1974, viii, 187 p.

GUPTA, S.K., Marriage Among the Anglo-Indians, Lucknow, Ethnographic and Folk Culture Society, 1968, xiv, 86 p.

HANSTEIN, H., Kanonisches Eherecht, ein Grundriss für Studierende und Seelsorger, 4. auf., Paderborn, F. Schöningh, 1953, 272 p.

HARING, B., Marriage in the Modern World, tr. by G. Stevens, Westminster, Newman Press, 1966, 492 p.

HOPKINS, E.W., The Religions of India, New Delhi, M. Manoharlal, 1970, xiii, 612 p.

HOUGH, J., The History of Christianity in India from the Commencement of the Christian Era, London, R.B. Seeley and W. Burnside, 1839-1845, 4v.

HOWARD, G.E., A History of Matrimonial Institutions: Chiefly in England and the United States with an Introductory Analysis of the Literature and Theories of Primitive Marriage and Family, New York, Humanities Press, 1964, 3v.

HUDSON, J.E., (ed.), Documentation II on Marriage Nullity Cases, Ottawa, Saint Paul University, 1979, xvi, 503 p.

JOHNSON, S., Oriental Religions and their Relation to Universal Religion, Boston, J.R. Osgood, 1873, vi, 802 p.

JOLLY, J., (tr), The Minor Law Books, Delhi, Motilal Banarasidass, 1965, xxiv, 396 p. (reprint).

JOYCE, G.H., Christian Marriage: An Historical and Doctrinal Study, London, Sheed and Ward, 1933, xiii, 632 p.

KANE, P.V., History of Dharmasastra, Poona, Bhandarkar Oriental Institute, 1941, 2v.

KANWAR, M.A., (ed.), The Sociology of Family: An Interdisciplinary Approach, Connecticut, Shoe String Press, 1971, x, 326 p.

KAPUR, A.C., Constitutional History of India, 1765-1970, New Delhi, Niraj Prakashan, 1970, viii, 900 p.

KEITH, A.B., A Constitutional History of India, 1600-1935, London, Methuen and Co. Ltd., 1969, xiv, 581 p.

LACEY, T.A., Marriage in Church and State, London, R. Scott, 1912, xxi, 248 p.

LAUNAY, A., Histoire des missions de l'Inde: Pondichery, Maissöur, Coimbatour, Paris, P. Téqui, 1898, 6v.

LESAGE, G. - MORRISEY, F.G., Documentation on Marriage Nullity Cases, Ottawa, Saint Paul University, 1973, vi, 312 p.

LISTL, J. - MÜLLER, H. - SCHMITZ, H., (eds.) Grundriss des nachkonziliaren Kirchenrechts, Regensburg, F. Pustet, 1980, xli, 969 p.

LUKE, P.V. - CARMAN, J.B., Village Christians and Hindu Culture: Study of a Rural Church in Andhra Pradesh, South India, London, Lutterworth Press, 1968, xv, 246 p.

MACE, V. - MACE, D., Marriage: East and West, New York, Doubleday, 1960, 392 p.

MACMUNN, G.F., The Religion and Hidden Cults of India, Delhi, Oriental Publishers and Distributors, 1975, xii, 244 p.

MAHONEY, E.J., Marriage Preliminaries: The Instruction "Sacrosanctum", 29 June 1941, with a Commentary, London, Burns, Oates and Washbourne, 1949, 93 p.

MALONEY, D.M., Some Questions about the Law of Canonical Form of Marriage, Denver, Canon Law Society of America, 1951, 15 p.

MATHIS, M. - MEYER, N., The Pastoral Companion: A Handbook of Canon Law, 12th ed., Cork, Mercier Press, 1961, xiv, 474 p.

MAYER, A.C., Caste and Kinship in Central India, a Village and its Region, Berkeley, University of California Press, 1970, xvi, 295 p.

MEHTA, P.D., Early Indian Religious Thought: An Introduction and Essay, London, Luzac, 1956, 532 p.

MICHIELS, G., De potestate ordinaria et delegata: commentarius Tituli V Libri II Codicis Juris Canonici, canones 196-210, Tournaci, Desclée, 1964, xx, 365 p.

MINATTUR, J., (ed.), The Indian Legal System, New Delhi, Indian Law Institute, 1978, xviii, 683 p.

MORAES, G.M., Christianity in India: From Early Times to St. Francis Xavier, (A.D. 52-1542), Bombay, Manaktalas, 1964, 320 p.

MORALES, J.F., Mixed Marriages and the Second Vatican Ecumenical Council: A Comparative Study in Latin-Oriental Canon Law, Rome, Pont. Universita Lateranense, 1966, xv, 222 p.

MORGAN, W., (ed.), The Religion of the Hindus, New York, The Ronald Press Company, 1953, xi, 434 p.

MÖRSDORF, K., Lehrbuch des Kirchenrechts auf Grund des Codex Juris Canonici, II. verb. und verm. Auf., Paderborn, F. Schöningh, 1964-1979, 3v.

MOSIEK, U., Kirchliches Eherecht unter Berücksichtigung der nachkonziliaren Rechtslage, Freiburg, Verlag-Rombach, 1968, 292 p.

MUJUMDAR, D.N., Races and Cultures of India, 4th rev. and enl. ed., London, Asia Publishing House, 1961, xx, 483 p.

MÜLLER, M., Lectures on the Origin and Growth of Religions as Illustrated by the Religions of India, 2nd ed., London, Longman Green, 1878, xvi, 394 p.

-----, (ed.), The Sacred Books of the East, Delhi, Motilal Banarasidass, 1965-1969, 50v. (reprint).

MUNDADAN, A., Sixteenth Century Traditions of St. Thomas Christians, Bangalore, Dharmaram College, 1970, xxiv, 190 p.

McMULLEN, C.O., Rituals and Sacraments in Indian Religions, Delhi, Christian Institute of Sikh Studies, 1979, 144 p.

NICHODEMUS, D., The Democratic Church, Milwaukee, The Bruce Publishing Company, 1969, xi, 145 p.

NORTH, P.M., (ed.), Cheshire's Private International Law, 9th ed., London, Butterworth, 1974, lxxviii, 740 p.

NEUNER, J., (ed.), Religious Hinduism: A Presentation and Appraisal, 2nd ed., Allahabad, St. Paul Publications, 1964, 330 p.

ORGAN, T.A., The Hindu Quest for the Perfection of Man, Ohio, Ohio University, 1970, x, 439 p.

PALLOTTINI, S., Collectio omnium conclusionum et resolutionum quae causis propositis apud sacram Congregationem Cardinalium S. Concilii Tridentini interpretum prodierunt an ejus institutione anno MDLXIV ad annum MDCCCLX, Romae, Typis S. Congregationis de Propaganda Fide, 1867-1893, 17v.

PANDEY, R.B., Hindu Samskara (Socio-Religious Study of the Hindu Sacraments), 2nd rev. ed., Delhi, Motilal Banarasidass, 1969, xxvii, 327 p.

PAYEN, G., De matrimonio in missionibus ac potissimum in sinis: tractatus practicus et casus, 2a ed., Zi-ka-wei, Typographia t'ou-sé-wé, 1935-1936, 3v.

PENNY, F., Church in Madras, London, Murray, 1904-1922, 3v.

PETROVITS, J.J., The New Church Law on Matrimony, Philadelphia, J.J. McVey, 1921, xvi, 458 p.

PHILLIMORE, R.J., The Ecclesiastical Law of Church of England, London, H. Sweet, 1873, 2v.

PICKETT, J.W., Christian Mass Movements in India: A Study with Recommendations, New York, Abingdon Press, 1933, 382 p.

PILPEL, H.F. - ZAVIN, T., Your Marriage and the Law, new rev. ed., New York, Collier Books, 1966, 352 p.

PLATTNER, F.A., Christian India, London, Thames and Hudson, 1957, 147 p.

PLACID, P., Die Thomas-Christen, Würzburg, Augustinus-Verlag, 1966, 201 p.

POLLOCK, F. - MAITLAND, W.F., The History of English Law Before the Time of Edward, I, 2nd enl. ed., Cambridge, University Press, 1965, 2v.

RADHAKRISHNAN, S., Religion and Society, 2nd ed., London, George Allen and Unwin Ltd., 1966, 248 p.

-----, (ed.), The Principal Upanisads, London, George Allen and Unwin Ltd., 1953, 958 p.

RANSON, C.W., The Christian Minister in India: His Vocation and Training, London, Lutterworth Press, 1946, 317 p.

RAULIN, J.F., Historia ecclesiae malabaricae, Westmead, Gregg International Publishers Ltd., 1969, 529 p.

REGATILLO, E.F., Jus sacramentarium, 4a ed., Santander, Editorial Sal Terrae, 1964, xi, 998 p.

RENAULT, G., Goa, Rome of the Orient, London Arthur Barker Ltd., 1957, 238 p.

RICHTER, J., A History of Missions in India, New York, F.H. Cavell, 1908, viii, 469 p.

ROBERTS, R.P., Matrimonial Legislation in Latin and Oriental Canon Law, Westminster, Newman Press, 1961, viii, 110 p.

SAHA, A.N., Marriage and Divorce, 2nd ed., Calcutta, Eastern Law House Private Ltd., 1981, 104, 618 p.

SASTRI, H.C., Studies in the Social Background of the Forms of Marriage in Ancient India, Calcutta, Sanskrit Pustak Bandar, 1972, 2v.

SCHILLEBEECKX, E., Marriage: Secular Reality and Saving Mystery, tr. by N.D. Smith, London, Sheed and Ward, 1965, 2v.

SCHMITZ, H., Reform des kirchlichen Gesetzbuches Codex Juris Canonici, 1963-1978, 15 Jahre Päpstliche CIC Reformkommission, Trier, Paulinus-Verlag, 1979, 119 p.

SHRIRAMA, D., Social Structure and Values in Later Smritis: Social Philosophy in Some Later Smritis, Calcutta, Indian Publications, 1972, 376 p.

SIMONDS, V., (ed.), Ecclesiastical Law: Being a Reprint of the Title Ecclesiastical Law from Halsbury's Laws of England, 3rd ed., London, Church House Book Shop, 1957, 107, 777 p.

SOARES, A., Catholic Church in India: A Historical Sketch, Nagpur, Govt. Press, 1964, 259 p.

SRINIVAS, M.N., Social Changes in Modern India, Berkeley, University of California Press, 1971, xv, 194 p.

STEVENSON, M.S., The Rites of the Twice-Born, 2nd ed., New Delhi, Oriental Books, 1971, xxiv, 474 p.

STRANGE, J., Elements of Hindu Law: Referable to British Judicature in India, London, Payne and Foss, 1825, 2v.

SUBRAMANYAM, K.N., The Catholic Community in India, Madras, Macmillan and Co. Ltd., 1970, xiv, 146 p.

SUR, A.K., Sex and Marriage in India, New Delhi, Allied Publishers, 1973, vii, 194 p.

THALIYATH, J., The Synod of Diamper, Roma, Pont. Institutum Orientalium Studiorum, 1958, xx, 238 p.

TISSERANT, E., Eastern Christianity: A History of the Syro-Malabar Church from the Earliest Times to the Present Day, Calcutta, S.C. Ghose Press, 1957, xviii, 266 p.

THOMAS, P., Christians and Christianity in India and Pakistan: A General Survey of the Progress of Christianity in India from Apostolic Times to the Present Day, London, George Allen and Unwin Ltd., 1954, 260 p.

URLIN, E.L., A Short History of Marriage: Marriage Rites, Customs and Folklore in Many Countries and All Ages, Detroit, Singing Tree Press, 1969, xi, 276 p.

VAZHAYIL, T.A., Christians in Secular India, Rutherford, Fairleigh Dickinson University Press, 1974, 246 p.

VELLIAN, J., The Malabar Church: Symposium in Honour of Rev. Placid J. Podippara, C.M.I., Roma, Pont. Institutum Orientalium Studiorum, 1970, vii, 312 p.

VICTOR, A.J., De jurisdictionis acceptione in jure ecclesiastico praemittitur ejusdem notio in jure romano, Romae, Collegium Internationale SS. Teresiae a Jesu et Joanis a Cruce, 1940, xx, 244 p.

VIDYARTHI, L.P., (ed.), Aspects of Religion in Indian Society, Ranchi, Kedar Nath Ram Nath, 1961, x, 410 p.

WALKER, B., Hindu World: An Encyclopedic Survey of Hinduism, London, George Allen and Unwin Ltd., 1968, 2v.

WEBSTER, J., The Christian Community and Change in Nineteenth Century North India, Delhi, Macmillan Company of India, 1976, xii, 298 p.

WESTERMARCK, E.A., The History of Human Marriage, London, Macmillan and Co., 1891, xix, 644 p.

WERNZ, F.X., Jus canonicum ad codicis normam, 3a ed., Romae, Apud Aedes Universitatis Gregoriana, 1927-1946, 7v.

WILKINS, W.J., Modern Hinduism: An Account of the Religion and Life of the Hindus in Northern India, 2nd ed., London, Curzon Press, 1975, 423 p.

WILLIAMS, M., Religious Thought and Life in India: An Account of the Religions of the Indian Peoples based on a Life's Study of Their Literature and on Personal Investigations in Their own Country, London, John Murray, 1833, xii, 520 p.

WICKI, J., (ed.), Documenta indica, Romae, Via Penitentizieri, (apud Monumenta Historica Societatae Jesu), 1948-1981, 15v.

WOYWOD, S., A Practical Commentary on the Code of Canon Law, rev. and enl. by C. Smith, (vols I & II combined), New York City, Joseph F. Wagner, Inc., 1962, 903, 1020 p.

YOUNGER, P., The Indian Religious Tradition, Varanasi, B.V. Prakashan, 1970, vii, 138 p.

ZAMBONI, J.F., Collectio declarationum Sacrae Congregationis Cardinalium Sacri Concilii Tridentini interpretum, Aterbati, apud Rousseau-Leroy Bibliopolam, 1860, 4v.

ZAEHNER, R.C., Hinduism, London, Oxford University Press, 1962, vii, 272 p.

d) Articles

ABBO, J., "A Change in the Form of Marriage", in The Priest, 19(1963), pp. 670-674.

-----, "Concordats", in N.C.E., Vol. 4, pp. 117-119.

-----, "The Form of Marriage", in The Priest, 20(1964), pp. 64-66.

ALFORD, C.B., "Common Law Marriage in Relation to the Code", in The Jurist, 2(1942), pp. 248-262.

ALLEN, W.F., "The Test of Catholicity under Canon 1099", in The Jurist, 3(1943), pp. 595-602.

AMALDOSS, A., "Liturgical Renewal and Ecclesiastical Law", in Word and Worship, 10(1977), pp. 249-260.

ARACKAL, J. - CYRIAC, M. - KOOTHOTTIL, A., "Alienation or Liberation? Towards an Evaluation of the History of Christianity in India", in Jeevadhara, 7(1977), pp. 17-85.

BAHADUR, K., "The Hindu Law of Marriage and Divorce", in Jaipur Law Journal, 5(1965), pp. 112-115.

BARRY, J., "The Tridentine Form of Marriage: Is the Law Unreasonable?" in The Jurist, 20(1960), pp. 159-178.

BARRY, P.C., "Error communis et delegatio ad matrimonium assistendum", in Periodica, 48(1959), pp. 201-212.

BASTANGEL, C., "Validation of a Convert's Marriage", in The Jurist, 4(1944), pp. 142-150.

BERGER, J., "Proof of Parties Bound to the Prescription of Canonical Form", in The Jurist, 26(1966), pp. 103-109.

BHAT, C., "Marriage among the Waddars", in Bulletin of the Anthropological Survey of India, 17(1968), pp. 257-272.

BREYDY, M., "El decreto sobre matrimonios mixtos entre catholicos y orientales", in Revista Española de Derecho Canonico, 32(1967), pp. 375-392.

CAHILL, W., "Change the Marriage Law?", in H.P.R., 64(1963-1964), pp. 115-129.

-----, "Historical Notes on the Canon Law on Solemnized Marriage", in The Catholic Lawyer, 2(1956), pp. 108-119.

CAPPELLO, F., "Annotationes", in Periodica, 37(1948), pp. 286-293.

CARR, A., "Marriage of Catholic with Orthodox: New Decree", in H.P.R., 67(1966-1967), pp. 795-796.

CHATHAM, J.G., "Evolution of the Juridical Form of Marriage in the Latin Rite", in The Jurist, 16(1956), pp. 298-309.

CHETTIMATTAM, J., "The Process of Decentralization in the Church", in Jeevadharma, 5(1975), pp. 291-310.

COUSSA, A., "Animadversiones in c. LXXII Trullanae Synodi, seu de mixta religione tanquam impedimento dirimente, disciplina ecclesiae byzantinae", in Apollinaris, 32(1959), pp. 170-181.

COUTINHO, B., "Marriage and Divorce in Hindu Society", in Jeevadharma, 5(1975), pp. 435-457.

CUNNINGHAM, T.P., "Mixed Marriages with Orientals", in I.E.R., 107(1967), pp. 408-409.

DANAGHER, J.J., "The Radical Sanation of Marriage", (Part I), in H.P.R., 53(1952-1953), pp. 1077-1082.

-----, "The Radical Sanation of Marriage", (Part II), in H.P.R., 54(1953-1954), pp. 38-43.

DARMANIN, A.M., "De apostatarum filiis quoad canonicam matrimonii formam", in Jus Pontificium, 11(1931), p. 238.

-----, "Exemptio a forma substantiali matrimonii", in Jus Pontificium, 10(1930), pp. 328-330.

DEUSSEN, P., "Asrama", in Encyclopedia of Religion and Ethics, Vol. 2, pp. 128-131.

DUNDERDALE, E., "The Canonical Form of Marriage: Anachronism or Pastoral Necessity?", in Studia Canonica, 12(1978), pp. 41-55.

DE REEPER, J., "The History and Application of Canon 1098", in The Jurist, 14(1954), pp. 148-184.

FINNEGAN, J.T., "The Capacity to Marry", in The Catholic Lawyer, 15(1969), pp. 248-258.

FORREST, M., "Children of Apostates and the Canonical Form of Marriage", in The Ecclesiastical Review, 84(1931), pp. 522-524.

FREIDBERG, E., "Zur Geschichte der Eheschliessung", (2.Artikel), in Zeitschrift für Kirchenrecht, 3(1863), pp. 147-186.

GALLEN, G.C., "Further Observations Concerning a Modified Canonical Form of Marriage", in Australasian Catholic Record, 39(1962), pp. 233-237.

-----, "Proposal for a Modification in the Juridical Form of Marriage", in Australasian Catholic Record, 38(1961), pp. 314-328.

GANTER, B.J., "Problems of Simple Convalidation and Sanatio in Radice", in The Jurist, 21(1961), pp. 57-74.

GRAF, E., "The Marriage Contract in Early Church", in H.P.R., 36(1935-1936), pp. 535-536.

GRIFFITHS, B., "Hinduism", in N.C.E., Vol. 6, pp. 1123-1136.

GROSAM, W., "Erlässe des apostolischen Stuhles", in Theologisch-Practische Quartalschrift, 83(1930), pp. 614-618.

HANNAN, J., "Ratification of Nonage Marriage", in The Jurist, 8(1948), pp. 75-76.

-----, "Supplied Jurisdiction for Marriage", in The Jurist, 2(1942), pp. 170-172.

HEBGA, M., "The Particular Church and the Universal Church: Sociological and Ecclesiological Considerations", in Indian Theological Studies, 17(1980), pp. 47-63.

HETTINGER, C., "Collegiality and the Form of Marriage", in The Jurist, 24(1964), pp. 335-346.

HUIZING, P., "Kirche und standesamtliche Trauung", in Liturgisches Jahrbuch, 22(1972), pp. 137-147.

-----, "Should the Ecclesiastical Marriage Law be Revised?", in Concilium 2/8(1966), pp. 82-88.

HURLEY, M., "Mixed Marriages: The Canonical Form", in The Furrow, 19(1968), pp. 94-97.

KELLEHER, S.J., "Ecclesiastical Annulments and Dissolution of Marriage", in The Catholic Lawyer, 12(1966), pp. 13-18, 91.

KIEDA, F.J., "Direct Dissolution of a Legitimate Marriage by Papal Authority", in The Jurist, 2(1942), pp. 134-144.

KING, J.P., "Jurisdiction in Administrative Matrimonial Cases", in The Jurist, 21(1961), pp. 75-93.

KUNTZ, J.M., "The Petrine Privilege: A Study of Some Recent Cases", in The Jurist, 28(1968), pp. 486-496.

LOFTUS, W.A., "Form of Marriage", in N.C.E., Vol. 9, pp. 276-280.

LOURDES, Y.A., "The Ritual of Tamil Marriage", in Indian Theological Studies, 16(1979), pp. 71-96.

McMANUS, F., "The Second Vatican Council and the Canon Law", in The Jurist, 22(1962), pp. 259-286.

MENON, P.K., "The Role of Customs in Hindu Jurisprudence", in The Jurist, 26(1966), pp. 69-94.

MORRISEY, F.G., "The Revision of the Code of Canon Law", in Studia Canonica, 12(1978), pp. 177-198.

-----, "The Significance of Particular Law in the Proposed Code of Canon Law", in C.L.S.A. Proceedings (1981), pp. 3-17.

O'CONNOR, J., "Should the Present Canonical Form be Retained for the Validity of Marriage?", in The Jurist, 25(1965), pp. 66-82.

OGDEN, G.B., "Married at Sun-Rise", in Massmovement Quarterly, 3(1921), pp. 4-7.

PALMER, P., "Christian Marriage: Contract or Covenant?", in Theological Studies, 33(1972), pp. 617-665.

PODIPPARA, P., "Malabar Rite", in N.C.E., Vol. 9, pp. 92-96.

PUJOL, C., "Adnotationes ad decretum de matrimoniis mixtis inter catholicos et orientales baptizatos acatholicos", (22 Feb. 1967)", in Periodica, 56(1967), pp. 505-517.

RATSCHOW, C.H., "Ehe und Hochzeit, Religionsgeschichtlich", in Die Religion in Geschichte und Gegenwart, 3 Aufl., Vol. 2, pp. 314-315.

REED, J., "Error communis in actu assistendi matrimonio", in Periodica, 48(1959), pp. 552-571.

REINHARDT, M.J., "Canonical and Civil Matrimonial Actions: A Comparison", in The Catholic Lawyer, 12(1966), pp. 4-12.

RICHTER, K., "The Liturgical Celebration of Marriage: the Problems raised by the Changing Theological and Legal Views on Marriage", in Concilium, 9/7(1973), pp. 72-87.

SARKAR, U.C., "Hindu Law of Marriage: Its Nature and Development", in Jaipur Law Journal, 5(1965), pp. 60-65.

SCHAAF, V., "An Exemption from the Canonical Form of Marriage", in The Ecclesiastical Review, 83(1930), pp. 484-496.

SCHEURL, A., "Zur Geschichte des kirchlichen Eheschließungsrechts", in Zeitschrift für Kirchenrecht, 15(1880), pp. 65-92.

SCHODREY, J., "Das Domicil bei Eheabschliessungen", in Archiv für Katholisches Kirchenrecht, 30(1873), pp. 3-40.

STALIN, P.F., "Die Form der Eheschliessung nach den neueren Gesetzgebungen", 1. Art., in Zeitschrift für Kirchenrecht, 4(1864), pp. 350-380.

-----, "Die Form der Eheschliessung nach den neueren Gesetzgebungen", 2. Art., in Zeitschrift für Kirchenrecht, 5(1865), pp. 145-207.

THANNIKOT, J., "The Process of Centralization in the 2nd Millennium", in Jeevadhara, 5(1975), pp. 276-290.

VASS, G., "Is the Canonical Form of Marriage Expendable?", in The Clergy Review, 50(1965), pp. 586-605.

WENZEL, B.J., "Kirchliches Eherecht in Portugal", in Archiv für Katholisches Kirchenrecht, 126(1953-1954), pp. 329-332.

WILKENS, E., "Reform of the Roman Catholic Law on Mixed Marriages", in Ecumenical Review, 14(1961-1962), pp. 437-448.

WOYWOD, S., "Catholic Form of Marriage Contract", in H.P.R., 41(1940-1941), pp. 147-155.

-----, "The Catholic Form of Marriage Enacted by the Code of Canon Law", in H.P.R., 41(1940-1941), pp. 274-283.

-----, "Delegation to Witness Marriage", in H.P.R., 41(1940-1941), pp. 410-420.

-----, "Does the Church Supply Jurisdiction for Witnessing Marriage?", in H.P.R., 33(1932-1933), pp. 179-181.

-----, "Witnessing Marriage with Supplied Jurisdiction", in H.P.R., 41(1940-1941), pp. 166-167.