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**THE DEVELOPMENT OF MIXED MARRIAGE LEGISLATION
THROUGH MISSIONARY LAW
FROM 1622 TO THE PRESENT**

by
Benyamin Y. BRIA

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
Saint Paul University
1993



Benyamin Y. Bria, Ottawa, Canada, 1993



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May God bless them all!

ABBREVIATIONS

<i>AAS</i>	: <i>Acta Apostolica Sedis</i>
<i>AG</i>	: <i>Ad gentes</i>
<i>Bibliog. Missio.</i>	: <i>Bibliografia Missionaria</i>
<i>CE</i>	: <i>The Catholic Encyclopedia</i>
<i>CIC/1917</i>	: <i>Codex Iuris Canonici/1917 (1917 Code of Canon Law)</i>
<i>CIC/1983</i>	: <i>Codex Iuris Canonici/1983 (1983 Code of Canon Law)</i>
<i>CLD</i>	: <i>Canon Law Digest</i>
<i>CLSA</i>	: <i>Canon Law Society of America</i>
<i>Collect. (1893)</i>	: <i>Collectanea S. Congregationis de propaganda fide (1893)</i>
<i>Collect (1907)</i>	: <i>Collectanea S. Congregationis de propaganda fide (1907)</i>
<i>Collect. (1905)</i>	: <i>Collectanea constitutionum, decretorum, indultorum ac instructionum Sanctae Sedis (1905)</i>
<i>CPR</i>	: <i>Commentarium pro religiosis et missionariis</i>
<i>Fontes</i>	: <i>Codicis iuris canonici Fontes</i>
<i>Guida</i>	: <i>Guida delle missioni cattoliche</i>
<i>LE</i>	: <i>Leges Ecclesiae post Codicem iuris canonici editae</i>
<i>LG</i>	: <i>Lumen gentium</i>

- NCE* : *New Catholic Encyclopedia*
- Periodica* : *Periodica de re morali, canonica et liturgica*
- SCDF* : *Sacred Congregation for the Doctrine of the Faith*
- SCPF* : *Sacred Congregation for the Propagation of the Faith
or the Propaganda*
- Sylloge* : *Sylloge praecipuorum documentorum recentium Summorum
Pontificum et S. Congregationis de Propaganda Fide*

INTRODUCTION

History is not only something that occurred in the past. More than that, history presupposes changes and developments. As J. P. Kirsch describes:

In a general way the subject matter of history is everything that suffers change owing to its existence in time and space; more particularly, however, it is the genetical or natural development of facts, events, situations, that history contemplates. The principal subject of history is man, since the external changes in his life affect closely his intellectual interests. Objectively speaking, history is the genetical development of the human mind and of human life itself in its various aspects, as it comes before us in series of facts, whether these pertain to individuals, or to the whole human race, or to any of its various groups.¹

The law of the Church is also something that suffers change in time and space, so to speak; it is also a fact or an event which develops in the history of Christianity. It is true, therefore, that the ecclesiastical laws do not suddenly appear in a perfect state. They indeed develop within a certain period of time, even through long historical periods.

The present law on mixed marriages, as appears in the 1983 *Code of Canon Law*, is an example of those laws which took centuries to come to their current form. Some significant studies indeed have tried to see how the law on certain aspects of mixed marriages (e.g, the *cautiones*, moral certitude, etc.) developed in the past, yet nobody

¹ J. P. KIRSCH, art. "History, Ecclesiastical," *The Catholic Encyclopedia (CE)*, vol. 7, New York, Appleton, 1910, p. 365.

seems to have realized or at least tried to study specifically the role of *missionary law*, which was enacted by the Holy See as well as various (mission) local Church authorities over the centuries, on that development.

This dissertation, therefore, tries to deal with the problem by investigating the development of mixed marriage legislation through missionary law since the establishment of the Sacred Congregation for the Propagation of the Faith or the *Propaganda* in 1622 until the present. Whether or not the present universal law on mixed marriages is also influenced by this historical development, this study will try to indicate.

The method to be employed in this work is generally the one of "historico-canonical (inductive) analysis". Undoubtedly, the author will go through the relevant literature while always confronting it with the official documents of the Church.² Based on this method, the study in the first place will try to find out the basic understanding of the Church on missionary law by examining its notion, evolution, characteristics, and sources, followed by exploring the background of the establishment of the *Propaganda* mainly to perceive its profound relationship to missionary law (ch. 1). Equipped with this understanding, the study then moves into the main issue: first, exploring the development of mixed marriage legislation since the establishment of the *Propaganda* in 1622 up to

² W. GEE, *Social Science Research Methods*, New York, Appleton, 1950, p. 281: "A simple statement of the aim of history is the study or reconstruction of man's past. The method [historical method] by which this is done is that of determining what the documents that have survived tell us about the past. We cannot come closer to a picture of the past than what these documents can tell us. Thus record with which history provides us is what these extant documents tell us about the past and not necessarily 'what the past was'."

the end of the nineteenth century by which time mixed marriage legislation had been relatively stable (ch. 2); secondly, pursuing the subsequent development from the beginning of the twentieth century up to the present (ch. 3). Finally, a general conclusion will be offered.

Various documents of the Holy See will be thoroughly investigated, namely pontifical and curial documents, especially those of the *Propaganda* and the Holy Office (now the Congregation for the Doctrine of the Faith), conciliar documents (universal and local), and other documents of local Churches issued for or in mission countries during the period indicated. All these documents will be chronologically arranged and examined in the dissertation, particularly in chapters two and three, according to their sources (the Pope, the *Propaganda*, the Holy Office, councils/synods, etc.), regardless what issue or issues (e.g., dispensation, the *cautiones*, celebration, etc.) they dealt with respectively.³ Ultimately, each chapter will conclude by summarizing and analyzing the discussion to see how the legislation itself developed.

By and large, as the inductive method suggests, the process of the study will start by examining the individual and disconnected facts or data (the documents), then try to obtain some universal and long-term knowledge or judgement.⁴

³ One of the consequences of this approach is that the same issue(s), e.g., dispensation and the *cautiones*, might be back again and again during the study, yet not without any significant development.

⁴ See P. COFFEY, art. "Induction," In *CE*, vol. 7, pp. 779-783.

1 - MISSIONARY LAW AND THE CONGREGATION FOR THE PROPAGATION OF THE FAITH

Strictly speaking, so-called "missionary law" is a law that is not found in, but outside, the *Code of Canon Law*, although some canons in fact speak of missionary activity. Nevertheless, "missionary law" is not a special law enacted by the Church as absolutely distinct from or totally unrelated to that of common law, despite the differences between the two.¹

This chapter will try to highlight briefly the notion of missionary law according to the Church's understanding, the evolution of missionary law itself, its characteristics, its nature, its sources, its relation to the Congregation for the Propagation of the Faith or *Propaganda*, and the background of the establishment of the *Propaganda* itself. It will conclude with a summary and an analysis.

1.1 - Missionary Law as Understood by the Church

To understand missionary law exactly as it is according to the Church, the first step

¹ See J. DE REEPE, *A Missionary Companion: A Commentary on the Apostolic Faculties*, Dublin, Browne and Nolan, 1952, p. 3.

to take is to examine the notion of "mission".

1.1.1 - Notion of Mission

The English word "mission" is derived from the Latin noun *missio* which basically means a sending away. *Missio* comes from the verb *mittere* which means to send away, to cause to go, to let go, to dispatch, to release, to dismiss, etc.²

From a biblico-theological point of view, "mission" means "the sending away by God of a person for the purpose of communicating his will to other people or to do his business in the world."³ The prophets were the first to be sent and their mission was to proclaim God's will and his ways to all peoples. This mission reached its highest fulfilment in Jesus Christ the supreme "sent one", whose mission is defined in a pericope found in Luke's Gospel, quoted verbatim from Isaiah: "The Spirit of the Lord is upon me, therefore he has anointed me. He has sent me to bring the glad tidings to the poor, to proclaim liberty to captives, recovery of sight to the blind and release to the prisoners,

² C. T. LEWIS, and C. SHORT, *A Latin Dictionary*, Oxford, Clarendon Press, 1969, s. vv. "missio" and "mitto." A further lexical description in C. SARTORI, *Iuris missionarii elementa, adiuncto commentario facultatum quas S. Congregatio de Propaganda Fide pro locis missionum concedit*, Romae, Secretaria Missionum Ord. Fr. Minorum, 1947, p. 9.

³ R. HOFFMAN, art. "Mission," in *New Catholic Encyclopedia*, vol. 9 (hereafter: [name of author], [title], in *NCE*, vol. [...]), New York, McGraw-Hill, 1967, p. 904; A. HASTINGS, art. "Mission," in K. RAHNER (ed.), *Encyclopedia of Theology: A Concise Sacramentum Mundi* (=RAHNER), London, Burns & Oates, 1975, p. 967.

to announce a year of favour from the Lord."⁴

The mission was then passed on by Jesus to his disciples: "As the Father has sent me, so I am sending you."⁵ The same mission is continued by the Church to this present day, a mission which by its very nature is twofold.⁶ The first is the general or universal mission as pointed out by Vatican II, i.e., a concern for the entire world without distinction and all human needs according to the Lord's command: "Go, therefore, and make disciples of all the nations. Baptize them in the name of the Father, and of the Son, and of the Holy Spirit. Teach them to carry out everything I have commanded you."⁷ The second is the special mission, i.e., evangelization and the establishment of particular churches only in certain places in the world where Christ is not yet known.⁸ This special mission requires that the Gospel be preached and the Church be established among people who do not as yet believe in Christ or have not as yet heard the Gospel message. These

⁴ Lk 4:18-19; cf. Is 61:1-2 (the Bible texts quoted in this dissertation are taken from *The New American Bible*, New York, Collier-Macmillan, 1970).

⁵ Jn 20:21.

⁶ See L. LUZBETAK, art. "Mission of the Church," in *NCE*, vol. 17, pp. 422-423; HASTINGS, art. "Mission," in RAHNER, pp. 967-969.

⁷ Mt 28:19-20; see SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church, *Lumen gentium* (=LG), 21 November 1964, no. 1, in *Acta Apostolicae Sedis* (=AAS), 57 (1965), p. 5 (the English translation in A. FLANNERY [gen. ed.], Vatican Council II: The Conciliar and Post Conciliar Documents [=FLANNERY], Study edition, Northport, NY, Costello Pub. Co., 1987, p. 350); Id., Decree on the Church's Missionary Activity, *Ad gentes* (=AG), 7 December 1965, no. 1, in AAS, 58 (1966), p. 947 (the English translation in FLANNERY, p. 813).

⁸ See AG, no. 6, in AAS, 58 (1966), pp. 952-955 (the English translation in FLANNERY, pp. 818-821).

goals are achieved through missionary activity and are carried out in defined territories recognized by the Holy See such as in Africa, Asia, and Oceania.⁹ These territories are known as missionary lands, mission territories, or missionary countries, and those who undertake such mission are called missionaries.¹⁰

From a canonical standpoint, the term "mission" indicates the mandate which the Church received from Jesus Christ, its divine founder. This duty is expressed clearly in c. 747, # 1, of the 1983 Code which reads:

The Church, to whom Christ the Lord entrusted the deposit of faith so that, assisted by the Holy Spirit, it might reverently safeguard revealed truth, more closely examine it and faithfully proclaim and expound it, has the innate duty and right to preach the Gospel to all nations, independent of any human power whatever, using the means of social communication proper to it.¹¹

⁹ *AG*, nos. 6 and 10, in *AAS*, 58 (1966), pp. 952-955, 959, (the English translation in *FLANNERY*, pp. 818-821, 824-825); *LUZBETAK*, art. "Mission of the Church," in *NCE*, vol. 17, pp. 422-423; *HASTINGS*, art. "Mission," in *RAHNER*, pp. 967-969.

¹⁰ *AG*, no. 23, in *AAS*, 58 (1966), pp. 952-955 (the English translation in *FLANNERY*, pp. 840-841). *AG*, no. 23 is the source of c. 784, which defines "missionaries" as those persons who are either secular clerics, religious, or lay members of the Christian faithful chosen from those who are native or non-native to the country to be sent to engage in missionary work by the competent ecclesiastical authority. (The English translation of the Code used in this dissertation is *Code of Canon Law*, Latin-English ed., translation prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1983 [=CIC/1983]). However, the description in *AG* seems to be richer than in the canon. *AG* includes the elements such as a calling by Christ, gifts of the Holy Spirit, proper natural temperaments, preparation to undertake missionary work, being sent by the legitimate authority to those who are far from Christ, serving in faith and obedience.

¹¹ "Ecclesiae, cui Christus Dominus fidei depositum concredidit ut ipsa, Spiritu Sancto assistente, veritatem revelatam sancte custodiret, intimius perscrutaretur, fideliter annuntiaret atque exponeret, officium est et ius nativum, etiam mediis communicationis socialis sibi propriis adhibitis, a qualibet humana potestate independens, omnibus gentibus

The entire Church, therefore, is missionary, a fact which is clearly reiterated in c. 781:

Since the entire Church is missionary by its nature and since the work of evangelization is to be viewed as a fundamental duty of the people of God, all the Christian faithful, conscious of their own responsibility in this area, are to assume their own role in missionary work.¹²

Canonists, however, define the term "mission" both in a broad and in a strict sense.

In a broad sense, "mission" signifies the act of the legitimate authority by which one is

Evangelium praedicandi." The canon closely parallels c. 1322, # 1 of the 1917 Code (=CIC/1917) which states: "Christus Dominus fidei depositum Ecclesiae concredidit, ut ipsa, Spiritu Sancto iugiter assistente, doctrinam revelatam sancte custodiret et fideliter exponeret." A point that is strongly made in the above canon is that the right and duty to preach the gospel to all nations are innate (*officium est et ius nativum*) to the Church. For further comments on this canon, see H. MUSSINGHOFF, Commentary on c. 747, in K. LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici, unter besonderer Berücksichtigung der Rechtslage in Deutschland, Österreich und der Schweiz*, Essen, Ludgerus Verlag, 1985-; L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, vol. 1, Napoli, Edizioni Dehoniane, 1988, pp. 840-841; E. TURIRO in *Code de droit canonique*, édition bilingue et annotée sous la responsabilité de l'Institut Martin de Aspilueta, traduction française établie à partir de la 4e éd. espagnole sous la direction de E. Caparros, M. Thériault, J. Thorn, Montreal, Wilson & Lafleur Limitée, 1990, pp. 442-443.

¹² "Cum tota Ecclesia natura sua sit missionaria et opus evangelizationis habendum sit fundamentale officium populi Dei, christifideles omnes, propriae responsabilitatis conscii, partem suam in opere missionali assumant." The canon, besides stating that the whole Church by its nature is missionary, also reminds the entire Church that missionary work is the responsibility of each member of the Church and not only a responsibility of the hierarchy and foreign missionaries. For more comments on this canon, see J. A. CORIDEN, "Missionary Action of the Church [cc. 781-792]," in J. A. CORIDEN, T. J. GREEN, and D. E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary* (hereafter: [name of author], [title], in *CLSA Commentary*), commissioned by The Canon Law Society of America, New York, Mahwah, NJ, Paulist Press, 1985, p. 560; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, pp. 868-869; MUSSINGHOFF, Commentary on c. 781, in LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*; TURIRO in *Code de droit canonique*, p. 461.

assigned (sent out, deputed) to exercise a jurisdiction or by which one is designated juridically for the ministry of proclaiming the Word of God. In this sense the designated person is said to possess a "canonical mission".¹³ In a strict sense, the term refers, first of all, to the so-called *missio popularis* or *sacra missio*, that is the mission of proclaiming the Word of God together with other spiritual exercises undertaken for the purpose of promoting and fostering Christian life among the faithful.¹⁴ This mission is also called internal mission (*interna missio*) or mission within the Church itself, since it is established for the purpose of maintaining and promoting both the faith and Christian life among

¹³ SARTORI, *Iuris missionarii elementa*, pp. 9-10; T. GREENTRUP, *Ius missionarium*, t. I, Steyl Hollandiae, Typographiae Domus Missionum a. S. Michaelis Archang., 1925, p. 1. Canon 109 of the CIC/1917, which speaks of "canonical mission" and has no corresponding canon in the CIC/1983, states: "Qui in ecclesiasticam hierarchiam cooptantur, non ex populi vel potestatis saecularis consensu aut vocatione adleguntur; sed in gradibus potestatis ordinis constituuntur sacra ordinatione; in supremo pontificatu, ipsomet iure divino, adimpleta conditione legitimae electionis eiusdemque acceptationis; in reliquis gradibus iurisdictionis, canonica missione." According to this canon the "canonical mission" is necessary for those who are inferior to the Supreme Pontiff. However, the contents of this canon have been partially taken up by cc. 332, # 1, and 375 of the 1983 Code.

¹⁴ GREENTRUP, *Ius missionarium*, p. 1. Unlike c. 1349 of the 1917 Code which put the responsibility on bishops to see that such mission were held for their people, c. 770 of the 1983 Code assigns this responsibility to pastors to arrange those types of preaching or spiritual exercises or sacred missions. It reads: "Parochi certis temporibus, iuxta Episcopi dioeceseos praescripta, illas ordinent praedicationes, quas exercitia spiritualia et sacras missiones vocant, vel alias formas necessitatibus aptatas" ("At certain times according to the prescriptions of the diocesan bishop, pastors are to arrange for those types of preaching which are called spiritual exercises or sacred missions or for other types of preaching adapted to their needs"). For more comments, see CORIDEN, "The Preaching of the Word of God [cc. 762-772]," in *CLSA Commentary*, p. 554; MUSSINGHOFF, Commentary on c. 770, in LODICKE (ed.), *Münsterischer Kommentar zum Codex iuris canonici*; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 860; TEJERO in *Code de droit canonique*, p. 455.

those who have embraced the faith.¹⁵ Second of all, the term refers also to the external or foreign mission (*externa* or *extera missio*) which is a part of ecclesiastical ministry instituted for the proclamation of Catholic faith among non-Christians.¹⁶ Thus, "mission", in a strict sense, refers to the Church's obligation to foster and renew Christian life among the Christian faithful (internal mission) or obligation to spread the Catholic faith among unbelievers (external mission).¹⁷

1.1.2 - Notion of Missionary Law

By examining the notion of "mission", the elements of missionary law seem to have been constituted. Hence the question to be asked is: What exactly is missionary law?

Since the whole Church by its nature is missionary and each member of the Church

¹⁵ I. TING PONG LEE, *Praelectiones iuris missionarii*, Romae, Pont. Instit. Mission. Scientificum de Prop. Fide, 1951, p. 2.

¹⁶ TING PONG LEE, *Praelectiones iuris missionarii*, p. 2; ID., *Facultates Apostolicae S. C. de Prop. Fide et S. C. Consistorialis*, Roma, Commentarium pro religiosis, 1962, pp. 23-24; GREENTRUP, *Ius missionarium*, pp. 1-2 and 7; SARTORI, *Iuris missionarii elementa*, pp. 9-10; G. VROMANT, *Ius missionarium: introductio et normae generales*, 2nd ed., Louvain, Museum Lessianum, 1934, p. 2.

¹⁷ A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici cum commentariis ad scholas et ad usum privatum*, vol. 2, ed. 7a, Mechliniae-Romae, H. Dessain, 1954, p. 477, no. 682: "Missiones sunt *sacrae expeditiones* quae, sive ad renovandum fervorem christianum et convertendos peccatores, sive ad dilatandam fidem catholicam inter haereticos vel infideles, directe instituuntur." See VROMANT, *Ius missionarium: introductio et normae generales*, p. 2; SARTORI, *Iuris missionarii elementa*, p. 9.

is responsible for missionary work, in a broad sense,¹⁸ any law enacted by the competent ecclesiastical authority to regulate the life of the Church and its mission in the world can be said to be missionary law, though the expression "missionary law" is never used in that way.

In a strict sense, however, missionary law can be described as the composite of canonical norms by which the work of mission is regulated.¹⁹ These norms emanate from the Roman Pontiff, the Secretariate of State and some dicasteries,²⁰ particularly the Congregation for the Propagation of the Faith or the *Propaganda*, the Congregation for the Doctrine of the Faith (formely the Holy Office),²¹ the Congregation of Divine Worship and the Discipline of the Sacraments,²² The Apostolic Penitentiary,²³

¹⁸ See footnote 12.

¹⁹ "Ius missionarium est summa normarum canonicarum quibus opus missionum ordinatur." -- VROMANT, *Ius missionarium: introductio et normae generales*, p. 13; GRENTROP, *Ius missionarium*, p. 12; TING PONG LEE, *Praelectiones iuris missionarii*, p. 4.

²⁰ See JOHN PAUL II, Apostolic Constitution *Pastor bonus*, 28 June 1988, in *AAS*, 80 (1988), II-III, pp. 870-889.

²¹ *Ibid.*, p. 873, art. 48 states that the proper function of the Congregation is to promote and to safeguard the doctrine pertaining to the faith and morals in the universal Catholic world.

²² *Ibid.*, p. 876, art. 62 states that with due regard for the competence of the Congregation of the Doctrine of the Faith, the Congregation on Divine Worship and the Discipline of the Sacraments can do things pertaining to the moderation and promotion of the sacred liturgy, especially the sacraments.

²³ *Ibid.*, p. 890, art. 117 states that the Apostolic Penitentiary is competent in those matters regarding the internal forum and indulgences. Art. 118 says that this Penitentiary can bestow absolutions, dispensations, commutations, sanations, condonations, and other favours in both sacramental and non-sacramental internal forum.

as well as individual bishops, conferences of bishops and particular councils held for or in the mission territories under the *Propaganda's* jurisdiction. The Congregation for Bishops²⁴ and the Congregation for the Eastern Churches²⁵ might be excluded in this regard, for they have their own competence over certain territories respectively.

The above delineation, however, is merely external and hence does not reveal the essence of missionary law itself. Therefore, it must be noted that, as is true of law in general, missionary law comprises divine and ecclesiastical laws; the latter ones are either universal because they contain the norms of universal law enacted for the universal Church, or particular law given to a certain region or community of mission countries. Missionary law also consists of general law binding all the faithful of mission countries without distinction, and special law that binds only certain groups such as institutes of consecrated life, priests, and lay missionaries, etc.²⁶

Missionary law even also can be understood in a very strict sense. This refers solely to all canonical norms enacted by the *Propaganda* for missionary lands under its own jurisdiction. Hence, missionary law in this respect could be called the law of the

²⁴ Ibid., p. 879, art. 75 says that, with due regard for the competence of the Congregation for the Evangelization of Peoples [indeed also the competence of the Congregation for the Oriental Churches], the Congregation for Bishops examines matters concerning the constitution and provision of particular churches and the exercise of the episcopal function in the Latin Church.

²⁵ Ibid., p. 874, art. 56 indicates that this Congregation only deals with matters regarding persons or things with respect to Eastern Catholic Churches only.

²⁶ VROMANT, *Ius missionarium: introductio et normae generales*, pp. 13-15; SARTORI, *Iuris missionarii elementa*, pp. 13-14.

Propaganda. It will be seen in the later discussion on the evolution of missionary law that for some period of time after the establishment of the *Propaganda*, the very strict sense of missionary law as the law of the *Propaganda* was indisputably true. Thus, the criteria for missionary law to be understood in the very strict sense are: (1) the norms must be enacted by the *Propaganda* itself; and (2) the norms must be intended for those mission territories under the *Propaganda*'s jurisdiction.

1.1.3 - A Brief Evolution of Missionary Law²⁷

Generally speaking, the evolution of missionary law can be divided and described in three periods as follows.

1.1.3.1 - The First Period (From the Apostolic Age to the Establishment of the *Propaganda* in 1622)

Historically, this period is coextensive with the development of general universal law and hence cannot be said to be dealing specifically with "missionary law" in the strict sense. However, the development of missionary law as quite distinct from common law cannot be repudiated. This was clear since the fourth century when many missionary lands tried to form in part their own (missionary) law, due to the fact that common law

²⁷ VROMANT, *Ius missionarium: introductio et normae generales*, pp. 20-31; cf. GREENTRUP, *Ius missionarium*, pp. 20-25; S. M. PAVENTI, *Breviarium iuris missionalis*, Romae, Officium Libri Catholici, 1952, pp. 18-21; SARTORI, *Iuris missionarii elementa*, pp. 18-20.

was unable to solve their own needs.²⁸

The rapid development of missionary law started in the twelfth century. Although missionaries were still under the common law of the universal Church, they were granted, by the Roman Pontiff, wider faculties than those enjoyed in the territories of Christianity to deal with unique circumstances and needs of mission lands.²⁹ This was obvious when the Dominican and Franciscan missionaries began their missionary work in the thirteenth century and during the subsequent centuries. They, in fact, were granted many apostolic faculties by the Popes, of whom the first was Pope Honorius III (1216-1227). On 7 October 1225, by means of his Bull *Vineae Domini custodes*, he granted the apostolic faculties to a group of the Order of Friars Preacher and the Order of Friars Minor to preach to the Saracens, to baptize converts, to reconcile apostates, to hear confessions, and to absolve from excommunications.³⁰ Then, on 16 May 1227, Pope Gregory IX (1227-1241), by means of the Bull *Descendentibus olim mare*, granted apostolic faculties

²⁸ C. VOGEL, art. "Canon Law, History of (1. Early Church)," in *NCE*, vol. 3, pp. 35-37; H. FUHRMANN, art. "Canon Law, History of (2. Carolingian Era)," in *NCE*, vol. 3, pp. 37-38; C. A. BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 1, St. Louis, MO, B. Herder Book Co., 1929, pp. 20-29.

²⁹ See PAVENTI, *Breviarium iuris missionalis*, p. 19.

³⁰ A. POTTHAST (ed.), *Regesta pontificum romanarum inde ab anno post Christum natum MCXCVIII ad annum MCCCIV*, vol. 1, Berolini, Prostat in Aedibus Rudolphi de Decker, 1874, p. 645, no. 7490: "Fratribus Praedicatoribus et Minoribus in regno Miramolini a sede apostolica destinatis concedit, ut in praedicta regione eis liceat praedicare, baptizare Saracenos ad fidem noviter venientes, et reconciliare apostatas, etc." The Pope did not use the words "facultas" or "facultates", but the language refers to what was later known as "faculties". See P. B. CHYANG, *Decennial Faculties for Ordinaries In Quasi-Dioceses*, *Canon Law Studies*, no. 402, Washington, DC, The Catholic University of America Press, 1961, p. 9.

to the same missionaries to preach everywhere, to hear confessions, to impart twenty-day indulgences, and to impose penances upon penitents.³¹

About one hundred years before the establishment of the Congregation for the Propagation of the Faith, Pope Leo X (1513-1521), with his briefs of 25 April 1521, issued special faculties for the Franciscan missionaries going to Mexico. Three years later (1524), the Franciscans entered Mexico.³² In subsequent years, three Popes almost one after the other, namely, Paul III (1534-1549), through his Apostolic Constitution *Altitudo* of 1 January 1537; Pius V (1566-1572), through his Apostolic Constitution *Romani Pontificis* of 2 August 1571; Gregory XIII (1572-1585), through his Apostolic Constitution *Populis ac nationibus* of 25 January 1585, granted special faculties to all religious superiors whose members were sent to the missions anywhere in the world.³³

To be clear, faculty, in a broad sense, signifies "a certain power, founded either on one's own right or on other's, of validly or lawfully doing some action." In a strict sense,

³¹ POTTAST, *Regesta pontificum romanarum*, vol. 1, p. 685, no. 7906: "Iordano magistro ordinis Praedicatorum [Blessed Jordan of Saxony, second master general of the Dominicans] concedit potestatem ubique praedicandi, confessiones poenitentium audiendi et, cum in alemania personaliter fuerit, elargiendi indulgentiam 20 dierum." See CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 9-10.

³² See J. MCANDREW, *The Open-air Churches of Sixteenth-century Mexico* (Cambridge, Mass, Harvard University Press, 1969, pp. 1-47, esp. pp. 25-33).

³³ J. ZAMPETTI, *Facultates apostolicae*, Shillongae, Sacred Heart Theological College, 1961, pp. 3-4; DE REEPER, *A Missionary Companion*, pp. 1-2; G. B. ENGLETON, *The Diocesan Quinquennial Faculties, Formula IV: A Historical Synopsis and Commentary*, Canon Law Studies, no. 248, Washington, DC, The Catholic University of America Press, 1948, pp. 8-12. The said faculties for those missionaries were later abrogated, i.e., after the *Propaganda* was established (1622) and became the single supreme authority for missionary activity in the world (see sect. 1.1.3.2).

it signifies "the power which an ecclesiastical superior, having jurisdiction *in foro externo*, grants personally to one who is in some way his subject, to do something in the internal or in the external forum validly or licitly."³⁴ Both the 1917 and the 1983 Codes speak of habitual faculties which are granted perpetually, or for a certain period of time, or for a certain number of cases. The above mentioned special faculties and the decennial faculties, as will be discussed later, are the examples of these faculties.³⁵

1.1.3.2 - The Second Period (1622-1908)

The second period started with the establishment of the *Propaganda* (1622)³⁶ and ended at the promulgation of the Apostolic Constitution *Sapienti consilio* of Pius X on 29 June 1908. During this time, the *Propaganda* brought greater uniformity in missionary law, and thus coordinated the rapid development of missionary law in its very strict sense.

³⁴ E. L. TAUNTON, *The Law of the Church: A Cyclopedia of Canon Law for English Speaking Countries*, London, K. Paul, 1906, p. 339.

³⁵ See c. 66 of the 1917 Code, and c. 132 of the 1983 Code. For more comments on the habitual faculties, see U. BESTE, *Introductio in codicem*, Neapoli, M. D'Auria, 1956, p. 124; BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 1, pp. 159-161; J. A. ABDO and J. D. HANNAN, *The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church*, vol. 1, St. Louis, MO, B. Herder Book Co., 1957, pp. 98-99. Notice that habitual faculties in the 1917 Code are governed by the norms of privileges *praeter ius*, whereas in the 1983 Code they are governed by the prescriptions of delegated power as stated very clearly in c. 132, # 1.

³⁶ The historical background/development of the establishment of the *Propaganda* will be discussed later in sect. 1.2.

The *Propaganda's* competence in the beginning included all matters related to missionary activity in all mission territories in the world as recognized as such by the Church, with the exception of some major affairs that had to be referred to the Roman Pontiff. "Mission territory" in this context is understood as "all parts of the world where the hierarchy has not yet been established, or where, although the hierarchy is really established, the Church is still in its formative years."³⁷ Thus, for instance, although the hierarchy was established in Indonesia in 1961 (3 January), this country is still under the *Propaganda* at the present moment; or in the United States, the hierarchy was established in 1789, but that country was still under the Congregation until it was excluded (except the Diocese of Fairbanks in Alaska which is still under the *Propaganda*) by Pope Pius X with his Apostolic Constitution *Sapientis consilio* in 1908.

It was stated very clearly in the Apostolic Constitution *Inscrutabili* of Gregory XV (22 June 1622) that the Congregation had the full, free, and sufficient authority, faculty, and power to perform, to manage, to treat, to do, and to execute all matters whatsoever pertaining to the propagation of the faith throughout the world.³⁸ Its jurisdiction reached

³⁷ E. L. HIRSTON, *The Holy See at Work*, Milwaukee, WI, The Bruce Pub. Co., 1950, p. 95.

³⁸ *Collectanea constitutionum, decretorum, indultorum ac instructionum Sanctae Sedis*, Hongkong, Typis Societatis missionum ad Exteros, 1905 (= *Collect.* [1905]), no. 1; P. GASPARI (ed.), *Codicis iuris canonici fontes* (= *Fontes*), vol. 1, Romae, Typis Polyglottis Vaticanis, 1926, no. 200, 8: "[...] Nos enim eis, tam praemissa, quam omnia, et singula alia desuper necessaria, et opportuna, etiamsi talia fuerint, quae specialem, specificam, et expressam requirant mentionem, faciendi, gerendi, tractandi, agendi, et exequendi, plenam, liberam, et amplam facultatem, auctoritatem, et potestatem, apostolica auctoritate, earundem tenore praesentium concedimus, et impertimur." See N. DEL RE, *La Curia romana: lineamenti storico-giuridici*, Roma, Edizioni di Storia e

all areas designated as mission territories, and included all persons and cases, even those of the internal forum,³⁹ although some canonists pointed out that the solution of doctrinal, ritual, and sacramental (especially the internal forum) questions was by custom, but not by obligation, referred by the Congregation to other respective dicasteries designated specifically for those matters, namely, the Holy Office, the Sacred Penitentiary, etc.⁴⁰ Hence all existing contrary legislation was abrogated, including the privileges, indulgences, and apostolic letters granted to any orders, congregations, societies, and institutes.⁴¹ Thus, during this period, the entire system of missionary work was

Letteratura, 1970, pp. 189-191; R. HUNG SIX SONG, *The Sacred Congregation for the Propagation of the Faith*, Canon Law Studies, no. 420, Washington, DC, The Catholic University of America Press, 1961, p. 19.

³⁹ S. B. SMITH, *Elements of Ecclesiastical Law*, vol. 1, New York, Benzinger Bros., 1893, pp. 279-281, no. 508: "While, therefore, ecclesiastical matters from canonically-organized dioceses must be referred to respective congregations having charge of the specific affair, those from missionary countries must be referred *exclusively* to, and are arranged *solely* by, the *Propaganda*. Hence, of this congregation it is said: *Caeteras congregationes habet in ventre* - i.e., for missionary countries the *Propaganda* is the *sole* congregation, combines in itself the powers and discharges the duties or functions not merely of several, but of all the other congregations; so that while the priests and bishops of countries where canon law obtains must refer matters to the respective congregations, the priests and bishops of missionary countries must, *in all cases*, address themselves to the *Propaganda*, but to no other congregation [...]". See also SONG, *The Sacred Congregation for the Propagation of the Faith*, p. 19; HESTON, *The Holy See at Work*, pp. 95-97; R. HOFFMAN, art. "Propagation of the Faith, Congregation for the," in *NCE*, vol. 11, p. 841.

⁴⁰ See SONG, *The Sacred Congregation for the Propagation of the Faith*, pp. 20-23.

⁴¹ *Collect.* (1905), no. 1; see SONG, *The Sacred Congregation for the Propagation of the Faith*, p. 19; HOFFMAN, art. "Propagation of the Faith, Congregation for the," p. 841.

centralized under a single supreme authority, namely, the *Propaganda*. The advantages of this centralization among other things were:

(1) The single system achieved a substantial simplicity of communication in mission matters; (2) the special conditions of mission territories were supervised in all directions by the supreme authority and they could be considered correctly in legislation, jurisdiction, and administration; (3) the material and spiritual promotion of the missions could be accomplished methodically and with uniformity.⁴²

As far as faculties are concerned, Pope Urban VIII (1623-1644) in 1633 tried to incorporate and unify rather than expand the faculties issued by his predecessors. For this purpose, he appointed a special commission, which was known as the *Congregatio Urbaniana super facultatibus missionariorum*, consisting of five cardinals, two of whom were from the Congregation of the Roman and Universal Inquisition (later called Holy Office) and three from the *Propaganda*, plus an assessor and a secretary. The result of the Commission's effort was published on 10 February 1637 when the Pope, through his Constitution *Operosum*, promulgated seven general rules called the *Septem regulae generales*,⁴³ and five different *Formulae* (Formulas), which were known as the *Quinque*

⁴² T. GREENTRUP, "Die rechtlichen Beziehungen der Missionsländer zur römischen Kurie in der Gegenwart," in *Archiv für katholisches Kirchenrecht*, 93 (1913), p. 279: "[...]: 1) Sie bewirkte eine grosse Einfachheit des Verkehrs in Missionsachen. 2) Die besonderen Verhältnisse der Missionsgebiete wurden nach *allen* Richtungen hin von derselben Oberbehörde eingehend geprüft und konnten in Gesetzgebung, Gerichtsbarkeit und Verwaltung genau berücksichtigt werden. 3) Die Förderung des Missionswesens nach der spirituellen und materiellen Seite konnte zielbewusst und einheitlich durchgeführt werden." The English version from SONG, *The Sacred Congregation for the Propagation of the Faith*, pp. 33-34.

⁴³ These rules were composed to be used as the general guidelines for granting the apostolic faculties to the missionaries according to the missions' needs, etc. The seven general rules read as follows:

typicae facultatum formulae, to wit, Formula I (for the bishops of Asia, Africa and America), Formula II (for the European bishops in areas still ruled by infidels and far from the Holy See), Formula III (for the apostolic nuncios and the bishops in

Rule I. In regions where bishops and parish priests are not rare, the faculty to administer the parochial sacraments, i.e., baptism, matrimony, Holy Communion for the Easter duty, and extreme unction, should not be granted to the missionaries, unless there be fulfilled the clause: "si in illis non sint Ordinarii vel parochi, vel, si adsint, de eorum licentia."

Rule II. In regions where the Catholic faith is practised freely but not publicly: a) Rule I should be observed in regard to the following three parochial sacraments, i.e., baptism, matrimony, and extreme unction; b) Rule I should be observed in regard to the administration of the sacrament of matrimony, in places where the decrees of the Council of Trent have not been promulgated; c) the faculty to administer sacraments other than the three above-mentioned sacraments can be given to missionaries altogether apart from all observances of the clause: "si in illis non sint Ordinarii vel parochi, vel, si adsint, de eorum licentia."

Rule III. In regions where the practice of the Catholic Faith either publicly or privately is prohibited, the faculty to administer the parochial sacraments can be given to missionaries, with or without reference to the clause: "nisi facile et sine periculo Ordinario vel parochi adiri possint."

Rule IV. In regions where recourse to the Holy See is difficult for any reason, especially that of great distance, the faculty to absolve from the cases which are reserved to the Holy See should be granted to the missionaries, apart from all references to the clause stated in the previous rule.

Rule V. In Italy, France, Germany, and Belgium, the faculty to absolve from the reserved cases for those who had been heretics and then became converted to the Faith should for the initial absolution be given to the missionaries; in regions other than the above-enumerated countries, the said faculty should belong simply to the Apostolic Nuncios, who may subdelegate it for particular cases and places.

Rule VI. The faculty to dispense from matrimonial impediments should be given to missionaries in regions where a hierarchy has not been established, namely in such a way that, if the missionaries did not have bishops, the said faculty would be operative *in utroque foro*, and if they had, then only *in foro conscientiae*.

Rule VII. The *Congregatio Urbaniana super Facultatibus Missionariorum* has the right to neutralize any of the foregoing Rules, if necessary, i.e., in the event that the localities and the attendant circumstances do not reflect the contingencies enumerated in the preceding six Rules. -- The English version from CHIANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 19-20; see also EAQLITON, *The Diocesan Quinquennial Faculties, Formula IV*, pp. 15-17.

neighbouring parts of Europe in which heresies had taken root), Formula IV (for mission prefects and other mission superiors who lacked the episcopal character), and Formula V (for bishops or other mission superiors to whom any of the foregoing formulas could not be given due to the particular circumstances in their territories; this formula was also designed for ordinary missionaries going to the missions). These Formulas, which had binding force until 31 December 1919, except Formula V, were composed according to the following three considerations: (1) the condition of religion in various provinces (countries), (2) the distance and the difficulty of recourse to the Holy See, and (3) the status of persons to whom the faculties were to be granted.⁴⁴

Later, there emerged some additional number of Formulas composed by Cardinal Francesco Ingoli, the secretary of the above special committee. Those Formulas were called *Formula VI*, *Formula VII*, *Formula VIII*, and *Formula IX*. Interestingly, unlike the others, these Formulas had never been discussed and approved officially either in a general or in a particular session by the special commission.⁴⁵ Then appeared a *Formula*

⁴⁴ A. VERMERSCH, "Commentaria de Formulis facultatum quas S. Cong. de Propaganda Fide concedere solet," in *Periodica de re morali, canonica et liturgica* (= *Periodica*), 11 (1923), pp. 39-41 (the full text [faculties] of each Formula is on pp. 47-61); TING PONG LEE, *Facultates apostolicae S. C. de Propaganda Fide et S. C. Consistorialis*, pp. 26-34; see also H. L. MOTRY, *Diocesan Faculties According to the Code of Canon Law*, Canon Law Studies, no. 16, Washington, DC, The Catholic University of America Press, 1922, pp. 1-5; DE REEPER, *A Missionary Companion*, pp. 1-2; EAGLETON, *The Diocesan Quinquennial Faculties Formula IV*, pp. 14-18; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 18-21.

⁴⁵ CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, p. 22. There was no formal meeting to discuss and to give an official approval to the new Formulas as usual. The members of the special commission seem to have no objection that the newly emerged Formulas could be conceded to the missionaries without such a meeting and

X, which was also known as the *Formula prolixior*, for it was an enlarged edition of *Formula III*. These Formulas (VI-X) together with the *Quinque typicae facultatum Formulae* were called *Formulae ordinariae*.⁴⁶

Then, by the middle of the nineteenth century, again some new Formulas of apostolic faculties appeared. They were identified as *Formula extraordinaria A, B*, etc., *Formula extraordinaria a, b*, etc, and *Formula extraordinaria aa, bb*, etc. These Formulas were called *Formulae extraordinarie*.⁴⁷

By 1873 all the apostolic faculties were conceded as follows: *Formula I*, to the Ordinaries in China, the West and East Indies, Australia, Africa, North and South America; *Formula II*, to the Ordinaries in England, Scotland, Greece, Albania, Bosnia, Valachia, Denmark; *Formula III*, to the Ordinaries in Prussia, Hungary, Germany, The Netherlands, Poland, Belgium, and Russia; *Formula IV*, to the mission prefects throughout the world; *Formulae V, VII, VIII, IX* were possibly no longer used by this time; *Formula VI*, to the Ordinaries in Ireland; *Formula X*, to the Ordinaries in France and Switzerland. Pertaining to the *Formulae extraordinariae*, they were issued as follows: *Extr. a and aa*, to Ordinaries in South America; *Extr. b*, to Ordinaries in China and its neighbouring countries; *Extr. C, D, E*, to the bishops in the USA; *Extr. F*, to the

official approval.

⁴⁶ SARTORI, *Iuris missionarii elementa*, p. 73; CHYANO, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 22-23.

⁴⁷ VERMEERSCH, "De formulis facultatum," in *Periodica*, 21 (1923), p. 63; CHYANO, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, p. 23.

bishops of *Nova Scotia*; *Extr. P*, to the bishops in England; *Extr. Q*, to the bishops in The Netherlands; *Extr. R*, to the bishops in East Indies, *Extr. S*, to the bishops in Algeria, *Extr. T*, to the bishops in Canada; and *Extr. U*, to the bishops in Australia.⁴⁸

1.1.3.3 - The Third Period (1908-)

The third period dates from the promulgation of the Apostolic Constitution *Sapienii consilio* (1908) to the present. In this period, the Church, for the first time, promulgated a codified universal law which is known as the 1917 *Code of Canon Law*, which was revised later and promulgated as the 1983 *Code of Canon Law*. Missionary law in a strict sense, however, remains always outside the Code, despite a few canons dealing specifically with mission affairs.⁴⁹

According to the constitution *Inscrutabili* of Gregory XV, as previously stated, the *Propaganda*, in general, had exclusive competence in all missionary matters, and so

⁴⁸ VERMEERSCH, "De formulis facultatum," in *Periodica*, 21 (1923), pp. 67-68; A. KONIGS, *Commentarium in facultates apostolicas*, 5 ed., Neo-Eboraci, Benzinger Fratres, 1897, pp. 2-3; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 22-24.

⁴⁹ Several canons which directly refer to the missionary work can be found both in the 1917 and the 1983 Codes. For example: from the 1917 Code: c. 1322, # 2, deals with the right and duty of the Church to evangelize pagan nations, c. 1350, # 1, talks about the duty of parish priests and bishops to look after non-Catholics in their territories, c. 1351 forbids missionaries to use force in making conversions, and cc. 139-311 deal with the offices of vicars and prefects apostolic; from the 1983 Code: c. 784 defines missionaries, c. 786 defines missionary activity, c. 787 speaks of dialogue with non-Catholics, c. 790 speaks of the diocesan bishops' responsibility in mission, etc. See A. REUTER, "The Mission in the New Code of Canon Law," in *Bibliografia missionaria* (= *Bibliog. missio.*), 46 (1982), pp. 361-370; the same article was also published in *Indian Missiological Review*, 5 (1983), pp. 308-319 (see especially pp. 315-319 on "The elements of missionary law in the new Code: nova et vetera").

missionary law, to some extent, was viewed as a true exception to the existing common law. However, this caused some serious complications; for instance, the fact that the *Propaganda* was overloaded with tasks and responsibilities in all matters, some of which should have been the responsibilities of other dicasteries; the lack of expertise or professional knowledge on the part of the *Propaganda* officials in solving certain individual cases, e.g., questions regarding rites, doctrines, and indulgences which could be better solved by other Congregations which were learned and experienced in those fields; the desirable uniformity of the Church governance was not sufficiently guaranteed in connection with ecclesiastical jurisdiction and legislation, etc.³⁰ Therefore, Pope Pius X (1903-1914) in his Apostolic Constitution *Sapienti consilio* of 29 June 1908, restricted the competence of the Congregation to certain territories only, excluded matters of faith, ecclesiastical trials regarding marriage cases, and discipline of rites, but included religious as missionaries in the territories under its jurisdiction.³¹ The benefits of this

³⁰ GREENTUP, "Die rechtlichen Beziehungen der Missionsländer zur römischen Kurie in der Gegenwart," pp. 279-280; see SONG, *The Sacred Congregation for the Propagation of the Faith*, p. 34. The desired uniformity was pointed out by Pope Pius X as he said in his Apostolic Constitution *Sapienti consilio* of 29 June 1908 (in *AAS*, 1 (1909), I, 6, p. 12, no. 4: "Nihilimus, ut unitati regiminis consulatur, volumus ut Congregatio de Propaganda Fide ad peculiare alias Congregationes deferat quaecumque aut fidem attingunt, aut matrimonium aut sacrorum rituum disciplinam."

³¹ PIUS X, Apostolic Constitution *Sapienti consilio*, 29 June 1908, in *AAS*, 1 (1909), I, 6, pp. 12-13 reads as follows:

1. Sacrae huius Congregationis iurisdictio iis est circumscripta regionibus, ubi, sacra Hierarchia nondum constituta, status missionis perseverat. Verum, quia regiones nonnullae, etsi Hierarchia constituta, adhuc inchoatum aliquid praeseferunt, eas Congregationi de Propaganda Fide subiectas esse volumus.

2. Itaque a iurisditione Congregationis de Propaganda Fide exemptas et ad ius commune deductas decernimus - in *Europa* - ecclesiasticas provincias Anglicae, Scotiae,

reorganization were: (1) the workload of the Congregation was cut back substantially due to the reduction of its territorial, personal, and material competence, and (2) due to the exclusion of a large number of mission lands, the territories under the Congregation's jurisdiction became fewer and therefore became more uniform and harmonious regarding canonical discipline.³²

The competence of the Congregation as it evolved in recent years, can be found in c. 252 of the 1917 Code; AG, no. 29, the Apostolic Constitution *Regimini Ecclesiae universae*, IX, 81-91;³³ the Apostolic Constitution *Pastor bonus*, III, 85-92;³⁴ and generally in cc. 360, 371-373, 446 and 451 of the 1983 Code. However, the competence

Hiberniae, et Hollandiae, ac dioecesim Luxemburgensem; - in *America* - provincias ecclesiasticas domini Canadensis, Terrae Novae et Foedaratum Civitatum seu *Statuum Unitorum*. Negotia proinde quae ad haec referuntur, tractanda in posterum non erunt penes Congregationem de Propaganda Fide, sed pro varia earumdem natura, penes Congregationes ceteras.

3. Reliquae ecclesiasticae provinciae ac dioeceses, iurisdictioni Congregationis de Propaganda Fide hactenus subiectae, in eius iure ac potestate maneant. Pariter ad eam pertinere decernimus Vicariatus omnes Apostolicos, Praefecturas seu missiones quaslibet, eas quoque quae Congregationi a Negotiis ecclesiasticis extraordinariis modo subsunt.

4. Nihilominus, ut unitati regiminis consulatur, volumus ut Congregatio de Propaganda Fide ad peculiare alias Congregationes deferat quaecumque aut fidem attingunt, aut matrimonium aut sacrorum rituum disciplinam.

5. Quod vero spectat ad sodales religiosos, eadem Congregatio sibi vindicet quidquid religiosos qua missionarios, sive uti singulos, sive simul sumptos tangit. Quidquid vero religiosos qua tales, sive uti singulos, sive simul sumptos attingit, ad Congregationem religiosorum Negotiis praepositam remittat aut relinquat.

³² SONG, *The Sacred Congregation for the Propagation of the Faith*, p. 35; see also HOFFMAN, art. "Propagation of the Faith, Congregation for," p. 841.

³³ PAUL VI, Apostolic Constitution *Regimini Ecclesiae universae*, August 15, 1967, in *AAS*, 59 (1967), pp. 885-928.

³⁴ JOHN PAUL II, *Pastor bonus*, pp. 841-912.

indicated in these sources is almost the same as that established by Pius X in *Sapientii consilio*. Among other things, the Congregation enjoys competence with regard to (1) missionary countries assigned to it according to the constitution *Sapientii consilio*,⁵⁵ (2) the development and governance of pastoral life in the dioceses located in its territories, (3) seminaries founded exclusively for the Church's missions, (4) religious in their

⁵⁵ See R. P. MILLOT, *Missions in the World Today*, Twentieth Century Encyclopedia of Catholicism, vol. 100, translated from the French by J. Holland Smith, New York, Hawthorn Books, 1961, pp. 40-48; SONG, *The Sacred Congregation for the Propagation of the Faith*, pp. 81-84; HOFFMAN, art. "Propagation of the Faith, Congregation for the," p. 842.

The latest complete list of missionary countries subject to the present jurisdiction of the *Propaganda* is in *Guida delle missioni cattoliche 1989*, Roma, Congregazione per l'evangelizzazione dei popoli, 1989. The following is its summary:

1. The whole Africa, except Tunisia and Portuguese overseas possessions which are under the Congregation for Bishops; (but Angola and Mozambique were put under the *Propaganda* on 26 March 1975 after they became independent in 1975 [Sacred Congregation for the Propagation of the Faith, Prot. no. 1598/75, unpublished]), and Egypt, Eritrea, and Northern Ethiopia, which are subject to the Congregation for the Eastern Churches;

2. All Asia, except most of the Philippines and the Portuguese possessions which are under the Congregation for Bishops, and the Near East and Afghanistan, which are subject to the Congregation for the Eastern Churches;

3. All Oceania, except the Hawaiian Islands (part of the USA) which are under the Congregation for Bishops;

4. In America: the West Indies, the Diocese of Fairbanks in Alaska, Northern Canada, Greenland and certain parts of central America, namely, Colombia, Chile, Ecuador, Paraguay, Peru, Venezuela, etc;

5. In Europe: Gibraltar, parts of Albania and Yugoslavia. The Scandinavian countries (Denmark, Finland, Iceland, Norway, Sweden) were withdrawn in 1977 through the Apostolic Letter *Pro Nostra* of Paul VI dated 9 May 1977 [AAS, 69 (1977), p. 440].

capacity as missionaries,⁵⁶ and (5) erection of particular churches and appointment of bishops in those mission territories.⁵⁷

Some exceptions to the competence include matters of faith which are reserved to the Congregation for the Doctrine of the Faith, matters involving liturgy which are reserved to the Congregation for Divine Worship and the Discipline of Sacraments, matters involving ecclesiastical trials which are reserved to the Roman Rota, matters of internal forum which are reserved to the Apostolic Penitentiary, matters concerning universities which are reserved to the Congregation for Catholic Education, and matters of canonization, reserved to the Congregation for the Causes of Saints.⁵⁸ All these indicate that the *Propaganda* must exercise its power within the limits of the prescriptions of common (universal) law, namely, the canons in the *Code of Canon Law*. Thus, in

⁵⁶ See JOHN PAUL II, *Pastor bonus*, pp. 882-883, art. 90, # 1: "Quod vero attinet ad sodales Institutorum vitae consecratae, in territoriis missionum erectorum aut ibi laborantium, Congregatio competentia gaudet in iis, quae ipsos qua missionarios sive singulos sive simul sumptos attingunt, firmo praescripto art. 21, # 1. The *Propaganda* has competence in the matters which are related to those religious as missionaries either individually or collectively, with due regard for the prescription of art. 21 # 1. For a further explanation, see A. GUTIERRES, "Ioannis Paulus II, Const. Apost. Pastor Bonus de Curia Romana: Legislatio de Congregationibus pro IVC et SVA et pro Gentium Evangelizatione," in *Commentarium pro religiosis et missionariis*, 69 (1988), pp. 422-434, esp. pp. 428-431.

⁵⁷ PIUS X, *Sapienti consilio*, I, 6, pp. 12-13.

⁵⁸ JOHN PAUL II, *Pastor bonus*, II-IV, pp. 870-893.

missionary territories the Code also must, as far as possible, be followed regarding these matters.⁵⁹

With regard to faculties, Pope Benedict XV (1914-1922) wanted a revision of the five Formulas which had been promulgated by Pope Urban VIII (1623-1644) on 10 February 1637, because the 1917 Code had already incorporated (codified) several mission faculties. The *Propaganda* was assigned by the Pope to do the job. The result was a revision consisting of three Formulas and was approved *in audientia* by the Pontiff, on 6 February 1919, and effective on 1 January 1920. The three *Formulae* were called *Formula I*, *Formula II*, and *Formula III*, each of which had two forms, namely, *Formula I [II, III] maior* and *Formula I [II, III] minor*. The *Formulae maiores* were composed for Ordinaries who had the episcopal character, whereas the *Formulae minores* for those Ordinaries without the episcopal character. *Formula I maior* and *Formula I minor*,⁶⁰ which consisted of less extensive faculties, were designed for the Ordinaries who ruled over mission territories proximate to the Holy See and whose conditions approximated

⁵⁹ Ibid.; J. H. PROVOST, "The Roman Curia," in *CLSA Commentary*, pp. 297-298; SONO, *The Sacred Congregation for the Propagation of the Faith*, pp. 34-37; ABDO-HANNAN, *The Sacred Canons*, vol. 1, pp. 309-310.

⁶⁰ See the texts of these *Formulae* in *Sylloge praecipuorum documentorum recentium Summorum Pontificum et S. Congregationis de Propaganda Fide necnon aliarum SS. Congregationum Romanarum ad usum missionariorum (=Sylloge)*, Romae, Typis Polyglottis Vaticanis, 1939, no. 207, pp. 581-586, and no. 210, pp. 604-609. It must be noted, however, that from the beginning of its approval until 1932, the first Formula was a single Formula, simply called *Formula Prima*. The division into *Formula I maior* and *Formula I minor* took place in the early 1932 (see footnote 16 of Ch. 3). For more comments on the faculties in (single) Formula I, see VERMEERSCH, "Commentaria de Formulis facultatum," in *Periodica*, 11 (1923), pp. 81-112.

the ordinary dioceses, such as Sweden, Norway, Denmark, Smyrna, Constantinople, Jerusalem, Aleppo, Isfahan, Baghdad, Arabia, Egypt, Libya, and Morocco. *Formula II maior* and *Formula II minor*,⁶¹ which comprised more extensive faculties, were issued for local Ordinaries in the territories which were more distant from the Holy See, such as Tasmania, New Zealand, the dioceses of colonial French Africa, the dioceses of Central America, Martinique, and the British colonies in Africa. *Formula III maior* and *Formula III minor*,⁶² which comprised the most extensive faculties, were meant for local Ordinaries in China, Japan, Ocean Island, the Mariana Island, Indochina, Guam, Tahiti, Africa (except Libya, Egypt, and the dioceses of colonial French and British Africa), India, the Malay Peninsula, and the vicariates and prefectures in America.⁶³

The *Propaganda* itself later made another revision on those mission faculties (the three Formulas) and then issued two *Formulae*. The first was called *Maior* for bishops, and the second was called *Minor* for those who are not bishops, e.g., prelates, prefects apostolic, and other Ordinaries. These new *Formulae* went into effect on 1 January 1941.⁶⁴ They were granted to those Ordinaries for ten years only, but renewable. In

⁶¹ See the texts in *Sylloge*, no. 208, pp. 586-593, and no. 211, pp. 609-615. More Comments on each faculty, see VERMEERSCH, "Commentaria de Formulis facultatum," pp. 112-128.

⁶² See the texts in *Sylloge*, no. 209, pp. 593-603, and no. 212, pp. 616-625. For more comments on each faculty, see VERMEERSCH, "Commentaria de Formulis facultatum," pp. 128-144.

⁶³ A. AB UTRICHT, "De facultatibus missionalibus," in *Laurentianum*, 26 (1985), p. 116; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 55-57.

⁶⁴ UTRICHT, "De facultatibus missionalibus," pp. 117-118.

1951 the faculties were renewed for another ten years, from 1 January 1951 until 31 December 1960. Prior to the subsequent renewal, the *Propaganda* undertook a minor revision and shift, and therefore since 1 January 1961, the Congregation no longer issued two but only a single Formula for all Ordinaries, whether they be bishops or not, in mission territories. Thus, in 1961 the *Formula maior et Formula minor* was replaced by the *Formula facultatum decennialium* which had binding force until 31 December 1970.⁶⁵ In 1971, the Formula was renewed, though this time it was quite different from the previous formula in some ways, namely, some faculties were broader than the previous ones, some had been simplified, and some were even totally new, like faculties nos. 2, 20-23, and 31.⁶⁶ These faculties were effective from 1 January 1971 up to 31 December 1980 and had to be renewed later if still needed. The faculties in fact were still needed, but the renewal itself never took place, because prior to 31 December 1980, the Prefect of the *Propaganda*, Cardinal Agnelo Rossi, on behalf of the Congregation, through a

⁶⁵ UTRICHT, "De facultatibus missionalibus," p. 118; CHYANG, Decennial Faculties for Ordinaries in Quasi-Dioceses, pp. 57-60; TING PONG LEE, *Facultates Apostolicae S. C. de Prop. Fide et S.C. Consistorialis*, pp. 26-34; see F. TIMMERMANS, "The New Decennial Faculties Granted by the S.C.P.F.," in *The Clergy Monthly*, 24 (1960), pp. 361-386. The English version of the Faculties in T. L. BOUSCAREN and J. I. O'CONNOR, *The Canon Law Digest (=CLD)*, 5 (1958-1962), pp. 176-187 (see also pp. 187-190). For detailed commentaries on the faculties, see L. BUJIS, "Formula facultatum decennialium," in *Periodica*, 49 (1960), pp. 341-405.

⁶⁶ The *Formula* is reprinted in J. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae (=LE)*, 4 (1969-1972), cols. 5955-5959; *Bibliog. missio.*, 35 (1971), pp. 202-206; and in *Commentaria pro religiosis et missionaria*, 52 (1971), pp. 270-274. The English version is in *CLD*, 7 (1968-1972), pp. 82-87. For detailed comments on the faculties, see D. I. ZAMPETTI, "Commentarium in formulam facultatum decennialium," in *Bibliog. missio.*, 36 (1972), pp. 264-273; "Documents: Decennial Faculties for Mission Ordinaries," in *African Ecclesiastical Review*, 13 (1971), pp. 369-375.

letter dated 1 December 1980 (Prot. no. 6008/80), addressed to all mission Ordinaries, simply extended the faculties until the future new *Code of Canon Law* would be promulgated.⁶⁷ About two years later, on 25 January 1983, the new Code was promulgated by Pope John Paul II through his Apostolic Constitution *Sacrae disciplinae leges*.⁶⁸ Canonically speaking, the *Formula facultatum decennialium* lost its binding force on 27 November 1983, when the Code became effective.

However, the prescriptions of c. 6, especially # 1, no. 2, must be taken into consideration.⁶⁹ The canon points out that all universal and particular laws contrary to the Code are also abrogated, which implies, obviously, that those not contrary to the Code still remain and continue to bind. Hence, the question to be asked is: Is the Formula, as a particular law for missionary countries, contrary to the Code? One study indicates that this particular law is canonically not contrary to the Code, yet it is no longer called the *Formula facultatum decennialium* since after the coming into force of the new Code. The rationale is that, first of all, the contents of many of the faculties have

⁶⁷ UTRICHT, "De facultatibus missionalis," pp. 118-119. The prorogation Letter of Cardinal Rossi is in *LE*, 6 (1979-1985), no. 4814, col. 8081; also in *Bibliog. missio.*, 44 (1980), p. 343: "[...] fino a quando, sulla base del nuovo Codice di Diritto Canonico, si potrà attuare la revisione e l'aggiornamento [...]."

⁶⁸ JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges*, in *AAS*, 75 (1983), pp. VII-XIV.

⁶⁹ "Hoc Codice vim obtinente, abrogantur: [...] (2) aliae quoque leges, sive universales sive particulares, praescriptis huius Codicis contrariae, nisi de particularibus aliud expresse caveatur" ("When this Code goes into effect, the following are abrogated: [...] (2) other universal or particular laws contrary to the prescriptions of this Code, unless particular laws are otherwise expressly provided for").

been incorporated in the new Code which implies that the Formula as such no longer exists, but some individual faculties which are not incorporated might still be valid. Some examples: (1) the very first faculty, which was granted to some priests to administer the sacrament of confirmation when a bishop was impeded, clearly has been incorporated in cc. 883-884; (2) faculty 10, which stated that for a just reason, the Blessed Sacrament could be exposed with two lights of any kind, might still be a faculty (cf. c. 941 which speaks of the exposition); (3) faculty 15, which also talked about granting a dispensation from the impediments of mixed religion or of disparity of cult, is found in cc. 1124-1129.⁷⁰

⁷⁰ UTRECHT, "De facultatibus missionalibus," p. 119 and see especially pp. 121-160 re "Examen facultatum," in which every faculty is discussed and its whereabouts or its connection with certain canon(s) in the Code and/or in other documents shown.

The following is a short list which indicates in a very general manner the said connection (the faculty which is not covered or only partly covered by the Code or by any other ecclesiastical document that contains some universal *ius vigens*, might be still a *ius vigens* for missionary lands): Faculty (=F.) 1 is already integrated in cc. 883-884; F. 2 is covered by c. 883, no. 2; F. 3, by the *ius vigens* stated in *Ordo dedicationis ecclesiae et altaris*, ed. typica, Typis polyglottis Vaticanis, 1977, esp. ch. VIII, "Ordo benedictionis calicis et patenae," praenotanda no. 3; F. 4 might be still a *ius vigens* (cf. *Institutio generalis Missalis Romani*, ed. typica altera, nos. 48, 79, 81, 169, 211, 269, 288); F. 5 is found in *Ordo exsequiarum*, ed. typica, Typis polyglottis Vaticanis, 1969, no. 22, 6), p. 13; F. 6 is still a *ius vigens* (cf. cc. 838, # 4, 905, 919, # 2); F. 7 is covered by 905, # 2; F. 8, by c. 932, # 1; F. 9 is still a *ius vigens*; F. 10 is still a *ius vigens* (cf. c. 941, # 1); F. 11 is still a *ius vigens* (cf. c. 940); F. 12 is covered by c. 938, # 4; F. 13, by c. 934, # 2; F. 14, by c. 920, # 2; F. 15, by cc. 1078, 1079, 1086, 1124-1129; F. 16, by cc. 1161-1165; F. 17, by c. 1144, # 2; F. 18, by c. 1148; F. 19, by c. 1111; F. 20, by c. 1425; F. 21, by c. 1069; F. 22 is partly covered by c. 624, # 1, hence still a *ius vigens* in some respects; F. 23, by cc. 688, # 2, 692; F. 24, by cc. 1354-1356; F. 25, by c. 1196; F. 26, by the norms in *De benedictionibus*, ed. typica, Typis polyglottis Vaticanis, 1984; F. 27 is covered by c. 312, # 1, no. 3; F. 28, by the *ius vigens* in *De benedictionibus*, praenotanda generalia, no. 18 and praenotanda cap. XXXVII, no. 1164; F. 29 is covered by c. 285; F. 30, by cc. 1247, 87, 381; F. 31, by c. 1248, # 1; F. 32, by c. 1246; F. 33, by cc. 1226-1227, 1229, 934, # 1, no. 4; F. 34,

It might be worthwhile to say a word or two about dispensation, since it has been mentioned in the above examples. It is a key canonical term and will play a major role in this dissertation. According to the *Propaganda* in its Instruction *Cum dispensatio sit* dated 9 May 1877, which will be further discussed in ch. 2,⁷¹ dispensation is the relaxation of the common law made with knowledge by him who has the power. The 1983 Code says this about dispensation: "the relaxation of merely ecclesiastical law in a particular case, can be granted by those who enjoy executive power, within the limits of their competence, as well as by those to whom the power of dispensing has been given explicitly or implicitly either by the law itself or by lawful delegation."⁷² The Roman Pontiff and those who have the power to dispense can dispense in all matters subject to their legislation, but only in ecclesiastical and not in divine laws.⁷³

Secondly, c. 381 states that the diocesan bishops and those who are equivalent to them in law (unless it appears otherwise from the nature of the matter or from a prescription of the law) possess all the power necessary for the exercise of their ministry.

by the *ius vigens* as stated in Paul VI's Apostolic letter *Pontificalia insignia*, 21 June 1968, in *AAS*, 60 (1968), pp. 373-377.

⁷¹ See sect. 2.3.1.

⁷² C. 85: "Dispensatio, seu legis mere ecclesiasticae in casu particulari relaxatio, concedi potest ab iis qui potestate gaudent executiva intra limites suae competentiae, necnon ab illis quibus potestas dispensandi explicite vel implicite competit sive ipso iure sive vi legitimae delegationis." Cf. TAUNTON, *The Law of the Church*, pp. 294-296.

⁷³ For more comments, see BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 1, pp. 174-175; ARBO-HANNAN, *The Sacred Canons*, vol. 1, pp. 79-86; BESTE, *Introductio in codicem*, pp. 129-134.

It is clear, therefore, that by virtue of this canon, the former system of granting faculties for a limited time to those authorities has been replaced by a system of reservations to the Supreme authority of the Church or to some other supra episcopal authority through the law itself or a pontifical decree. The examples are in matters such as certain irregularities for orders (c. 1047), certain marriage impediments (c. 1078, # 2) and the adjudication of certain cases (c. 1405, # 1) which are reserved to the Roman Pontiff alone; certain trials which are reserved to the Roman Rota (c. 1405, # 2); and only with permission/authorization of the conference of bishops, the tenure of pastors may be limited (c. 522), one clerical judge may be allowed in first instance (c. 1425, # 4) and lay judges can be appointed (c. 1421, # 2) by the diocesan bishops.⁷⁴ Thus, what were formerly called decennial faculties, in one way or another, still exist, though most of them are no longer part of particular or missionary law, for, by the general law itself, they have been made a part of the power of the diocesan bishops and those equivalent to them in law.

1.1.4 - Characteristics of Missionary Law

Missionary law is basically enacted for the purpose of directing the activities of missionaries as well as fostering and strengthening the tender faith of the newly baptized

⁷⁴ T. J. GREEN, "Article 2: Diocesan Bishops (cc. 381-402)," in *CLSA Commentary*, pp. 324-325; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 472; see REUTER, "The Mission in the New Code of Canon Law," in *Indian Missiological Review*, 5 (1983), pp. 318-319.

in mission lands. This law therefore has its own characteristics which are usually closely connected with the particular times, places, and circumstances in which the missionaries work.⁷⁵

The unique characteristics are indicated as follows. First, missionary law by its nature is a *law of exception*, i.e., an exception to the common law. Due to difficult situations and the circumstances in mission territories such as the immense number of unbaptized persons who must still be evangelized, the physical and moral impossibility on the part of the newly converted to observe all the prescriptions of universal ecclesiastical law, a large territory entrusted to each missionary with difficult communication, various local customs of the people in those mission territories which very often create great difficulties in observing common law, and difficult access to the Holy See because of far distance, certain faculties, indults and privileges indeed must be granted by the competent ecclesiastical authority. Therefore, missionary law is usually, though not exclusively, composed of faculties, indults, and privileges.⁷⁶ For example, first, faculties are the various apostolic faculties, such as the decennial faculties, granted to mission Ordinaries to deal with the situation in the mission;⁷⁷ second, with regard to indults: between 1966 and 1970, numerous indults were granted to individual bishops and

⁷⁵ PAVENTI, *Breviarium iuris missionalis*, p. 15.

⁷⁶ PAVENTI, *Breviarium iuris missionalis*, p. 15; VROMANT, *Ius missionarium: introductio et normae generales*, pp. 14-19; TING PONG LEE, *Praelectiones iuris missionarii*, pp. 12-15.

⁷⁷ See DE REEFER, *A Missionary Companion*, pp. 18-170; TIMMERMANS, "The New Decennial Faculties Granted by S.C.P.F.," pp. 262-386; ZAMPETTI, in *Bibliog. missio.*, pp. 264-273.

even to the conferences of bishops, particularly in the missions, to activate the special ministers of the Eucharist;⁷⁸ third, pertaining to the privileges: Pope Urban VIII, through his Brief *Ad uberes* of 18 May 1638, granted "privileges of ordaining without dimissorial letters" to the College of the *Propaganda* as well as to other seminaries and colleges in the missions which depend on the *Propaganda*.⁷⁹

The second characteristic of missionary law is that it is *practical* for the place and the situation in question: it addresses certain difficulties with which the progress of the work of evangelization must deal.⁸⁰ For instance, due to the complicated situation in the mission as previously indicated such as the difficult communication, etc., Pope Pius XII in 1948 granted the power to all Ordinaries in the mission under the jurisdiction of the *Propaganda* to grant to all pastors and their associate pastors the faculty of administering validly the sacrament of confirmation both to adult and infant faithful in case of danger of death within their own territories; the same faculty could be exercised even in the place of residence of the bishop, provided that the bishop was legitimately impeded.⁸¹

⁷⁸ *CLD*, 7 (1975), pp. 648-652 (also pp. 645-648); see also J. M. HURLS, "Article I: The Minister of the Most Holy Eucharist [cc. 900-911]," in *CLSA Commentary*, pp. 649-650; A. MARZOA, Comments on c. 910 in *Code de droit canonique*, p. 533.

⁷⁹ VERMEERSCH, "S. Congr. Consistorialis," in *Periodica*, 10 (1922), p. 291; *CLD*, 1 (1934), p. 461. Canon 1015 of the 1983 Code requires dimissorial letters for lawfulness only. For further comments, see E. J. GILBERT, "The Celebration and Minister of Ordination [cc. 1010-1023]," in *CLSA Commentary*, p. 720; J. M. GONZÁLEZ DEL VALLE, comments on c. 1015 in *Code de droit canonique*, pp. 582-583.

⁸⁰ PAVENTI, *Breviarium iuris missionalis*, pp. 15-16.

⁸¹ *AAS*, 40 (1948), p. 41; DE REEPER, *A Missionary Companion*, pp. 25-26.

The third characteristic of missionary law is that it is *simple* and *expedient*. It is not inflexible and absolute (perfect), but *flexible* and *changeable*.⁸² The very clear example of this characteristic might be the fact that the faculties, such as the decennial faculties, were always revised by the *Propaganda* before the subsequent renewal in order to be more simple, expedient, and practical.⁸³

1.1.5 - Sources of Missionary law⁸⁴

Sources (*fontes*) are usually understood as those matters from which something else takes its origin(s). The sources from which missionary law takes its origins are generally the same as those of the universal law, though some are proper to it. They are summarized as follows:

I. Material Sources (*fontes materiales*), which are the legislators from whom the law emanates. These are subdivided into:

A. Universal sources which deal with all mission territories and consist of:

1. Divine law, as it appears in:

a. Natural law;

⁸² PAVENTI, *Breviarium iuris missionalis*, p. 16.

⁸³ See sect. 1.1.3.3, which also discusses the revision and renewal of the faculties.

⁸⁴ GREENTRUP, *Ius missionarium*, pp. 31-68; SARTORI, *Iuris missionarii elementa*, pp. 24-37; PAVENTI, *Breviarium iuris missionalis*, pp. 21-23; Cf. VROMANT, *Ius missionarium: introductio et normae generales*, pp. 31-50.

b. Sacred Scripture ;

c. Tradition;

2. The Roman Pontiff;

3. Ecumenical councils;

4. Roman Curia;

5. Custom.

B. Particular sources, which deal with specific parts of mission territories, and consist of:

1. Ordinaries in the mission with full jurisdiction, e.g., the diocesan bishops, vicars and prefects apostolic;

2. Provincial, regional, and national synods or councils;

3. Civil law, in so far as it is not contrary to divine law or canon law (e.g., cc. 22 and 1290 of the 1983 Code).

II. Formal Sources (*fontes formales*). These are the written memorials which reflect the law, and are subdivided into:

A. Universal sources which consist of:

1. *Codex iuris canonici* (1917 and 1983);

2. Collections of enactments of a pontifical nature outside the Code, or from Roman congregations, especially the *Propaganda*.

B. Particular sources:

1. Collections of the acts and decrees of those synods and councils held in the missions;

2. Collections of decrees and statutes outside the synods or councils, i.e., of the vicars and prefects apostolic, and of religious superiors in the missions;

3. Collections of civil enactments which deal with the status of both the Christian faithful and non-Christians.

1.2 - Background of the Establishment of the Sacred Congregation for the Propagation of the Faith

As an ecclesiastical entity, the *Propaganda* has its own historical background or development before its establishment. This section tries to investigate that background.

1.2.1 - The Development Before the Establishment

It is a disputed matter as to exactly when the concept emerged that there be, within the Roman Curia, a special congregation for the propagation of the faith. However, many hold that such an idea originated during the thirteenth century when Raymond Lull, a member of the Third Order of St. Francis, requested Popes Celestine V and later Boniface VIII to erect such a body.⁴⁵ This idea was promoted by Jean Vendville, who later became bishop of Tournai. In 1567, while still a layman, he unsuccessfully

⁴⁵ HOFFMAN, art. "Propagation of the Faith, Congregation for the," in *NCE*, vol. 11, p. 840; DEL RE, *La Curia romana*, p. 185.

petitioned Pope Pius V (1566-1572) to establish a missionary congregation and a seminary to train missionaries who would be sent and to work among non-Christians.⁸⁶

Ironically, one year later, on 23 July 1568, due to the urging of Francis Borgia, the general of the Society of Jesus at that time, rather than because of Jean Vendville's proposal, the same Pope established two temporary commissions, one for Protestant countries and the other for non-Christian territory, to care for the propagation of the faith.⁸⁷ Later, on 10 June 1573, Pope Gregory XIII, the successor to Pius V, established a congregation comprising three cardinals whose mission was to preserve the faith among Catholics of the Greek rite, to work for the conversion of pagans, and to unite heretics and schismatics with the Catholic Church.⁸⁸ The importance of this congregation was enhanced by Pope Clement VIII (1592-1605) who established a congregation on 11 August 1599 to take care of all missionary affairs. Unfortunately, the activity of the congregation did not last long. The last meeting was possibly conducted on 3 July 1600 or on 14 August in the same year.⁸⁹ However, according to some sources, the congregation still existed until 1604, though it was not very active; it even might still have continued to exist during the pontificate of Pope Paul V (1605-1621), the successor

⁸⁶ HOFFMAN, art. "Vendville, Jean," in *NCE*, vol. 14, p. 596.

⁸⁷ DEL RE, *La Curia romana*, pp. 185-186; SONG, *The Sacred Congregation for the Propagation of the Faith*, pp. 3-8.

⁸⁸ DEL RE, *La Curia Romana*, p. 186; SONG, *The Sacred Congregation of the Propagation of the Faith*, pp. 8-11.

⁸⁹ See SONG, *The Sacred Congregation for the Propagation of the Faith*, p. 14 with footnote 74.

to Clement VIII, for during that time, a Congregation called *de fide propaganda* existed, and moreover some former members of Clement VIII's Congregation were listed as members of this Congregation.⁹⁰

1.2.2 - The Moment of Establishment

Awareness of the need for a central missionary organization within the Roman Curia was clearly in the mind of Pope Gregory XV (1621-1623) whose relatively short pontificate well served the progress and spread of the Catholic Church.⁹¹ This became obvious immediately upon taking office in his various instructions to the apostolic nuncios, e.g., (1) in the instruction of 5 April 1621, to Alessandro di Sangro, the nuncio to Spain, the Pope expressed his great desire to see "the Catholic religion and the glory of God increased" in Europe, the Near East, and in both Indies; (2) in the instruction of 12 April 1621, which was addressed to Carlo Caraffa, the nuncio to Vienna, the Pope manifested again his same thought and included the preservation and the propagation of

⁹⁰ HOFFMAN, art. "Propagation of the Faith, Congregation for the," p. 840; DEL RE, *La Curia Romana*, pp. 186-187; SONG, *The Sacred Congregation for the Propagation of the Faith*, pp. 14-16.

⁹¹ J. METZLER, "Foundation of the Congregation 'de Propaganda Fide' by Gregory XV," in *Sacrae Congregationis de Propaganda Fide memoria rerum 1622-1972*, vol. 1, Roma, Freiburg, Wien, Herder, 1971, p. 81.

the faith among the principal objectives of his program, namely, (a) the leading back of the faithful who had fallen into Protestantism, and (b) the conversion of non-believers.⁹²

Eventually the development reached its culmination when Gregory XV on the feast of Epiphany, 6 January 1622, called the institution into existence, and confirmed it later on 22 June 1622, with the Apostolic constitution *Inscrutabili*.⁹³

1.3 - Summary and Analysis

The Church basically understands "missionary law" in three ways, i.e., in a broad sense, in a strict sense, and in a very strict sense.

In a **broad sense**, since the Church by its nature is missionary (c. 781), any law enacted by the competent ecclesiastical authority both for the universal Church and particular churches is of course missionary.

In a **strict sense**, missionary law entails all canonical norms enacted by the competent ecclesiastical authority for the purpose of regulating the work of mission in

⁹² Ibid.

⁹³ Ibid., p. 86 (p. 89: "As has already been said, Gregory XV knew that he had not created something entirely new when he established the *Congregation de Propaganda Fide*. His Congregation regarded itself as a successor of the Clementine Propaganda Congregation. Broadly speaking, both Congregations had the same aims and task and the new Congregation accepted the business methods of the former"); *Collectanea S. Congregationis de Propaganda Fide seu decreta, instructiones, rescripta pro apostolicis missionibus*, Romae, Ex Typographia Polyglotta, 1907 (= *Collect.* [1907], vol. 1, no. 1, pp. 1-2. HOFFMAN, art. "Propagation of the Faith, Congregation for the," p. 840; SONG, *The Sacred Congregation for the Propagation of the Faith*, pp. 17-19.

mission territories recognized as such by the Church. The competent ecclesiastical authority in this regard is the Roman Pontiff, the Secretariate of State, and certain Roman dicasteries, namely, the Congregation for the Doctrine of the Faith, the Congregation for the Propagation of the Faith, the Congregation on Divine Worship and Sacraments, the Apostolic Penitentiary, as well as the diocesan bishops, conferences of bishops and particular councils held in and/or for the territories under the *Propaganda's* jurisdiction. The involvement of the Roman Pontiff or other dicasteries was usually called for when the *Propaganda* had no jurisdiction to deal with certain cases or upon the request of the *Propaganda* when certain cases were difficult to be solved by the Congregation alone. Concerning the diocesan bishops - who are better informed about the mission situation - the law provides the power to make particular law for their own dioceses should it be necessary for the common good (cc. 381; 391; 466) even though those dioceses are part of mission territories under the *Propaganda's* jurisdiction. As far as the conference of bishops is concerned, the law says that general decrees can be issued by this conference only in accordance with the prescriptions of common law or a special mandate of the Apostolic See, which in this case is the *Propaganda*, and in order to have binding force, those decrees must be promulgated after having received the *recognitio* by the Apostolic See (c. 455). As far as the particular councils are concerned, the law states that such councils can be held only after obtaining the approval of the Apostolic See which in this case is the *Propaganda* (c. 439), and the decrees issued by the councils are not to be

promulgated until after having received the *recognitio* by the same office (c. 446).⁹⁴ Therefore, missionary law in a strict sense could be rephrased as: the entire canonical norms enacted by the competent ecclesiastical authorities for the purpose of regulating the work of mission in the territories under the *Propaganda's* jurisdiction.

In a very strict sense, missionary law refers only to the canonical norms enacted by the Congregation for the Propagation of the Faith, by which missionary work in the territories under its jurisdiction is regulated. Therefore, at times missionary law is also called the law of the *Propaganda (ius propagandae fidei)*.

Viewed from an historical perspective, missionary law is deeply rooted in the beginning of the Church's history, and it is currently adjusted and fine tuned by the *Propaganda*. History shows that, since the beginning, common (universal) law of the Church is truly missionary law, for the Church, as has been indicated before, by its nature is missionary and the world itself is truly a missionary land for the Apostles and other missionaries. History, however, also shows that, in its later development, common law and missionary law were no longer one. Missionary law developed separately from common law due to various situations and circumstances in mission territories where common law could not be applied or observed as wanted. This became obvious since the fourth century when many mission lands began forming their own particular law through

⁹⁴ If the particular councils are conducted for the particular churches in the territories under the jurisdiction of the Congregation for Bishops or the Congregation for the Eastern Churches, the approval must be obtained from either of them and the conciliar decrees should be reviewed by the congregation having given its approval to the holding of the council. See J. H. PROVOST, "Particular Councils (cc. 439-446)," in *CLSA Commentary*, pp. 357-358; 362.

various collections, compilations, etc., to solve their own needs. Progressing from the twelfth century on, an inevitable separation rapidly developed between common law and missionary law. This event was even endorsed by the Church itself when common law was officially enacted, which bound universally,⁹³ while at the same time the Church granted greater faculties, indulgences, and privileges to the missionaries to deal with the situations of mission territories.

The development of missionary law, as understood in the very strict sense, actually started after the establishment of the Sacred Congregation for the Propagation of the Faith in 1622. Since then, all missionary work has been centralized under the *Propaganda* and regulated primarily by norms enacted by the Congregation as the single supreme authority after the Roman Pontiff. As a consequence, the faculties, indulgences, and privileges which had been previously granted to orders and individual missionaries were abrogated. From that time on, missionary law was actually the law of the *Propaganda*. This development reached its climax when Pope Pius X, through *Sapienti consilio* (29 June 1908), reorganized the Congregation. Hence the power and the competence of the congregation over mission territories was no longer "lost" absolute, but was limited to some degree by the power and competence of other ecclesiastical authorities and agencies in dealing

⁹³ Following the *Decretum of Gratian* (ca. 1140), which formally always remained a private collection, the Church promulgated several official collections which were binding universally, namely, the *Decretales Gregorii IX* (5 September 1234) collected by Raymond of Penafort, the *Liber Sextus* (3 March 1298) commissioned by Pope Boniface VIII in 1296, and the *Clementinae* of Clement V (25 October 1317). See J. BRYS, *Juris Canonici Compendium*, vol. 1, Brugis, Desclée de Brower, 1947, pp. 34-38; BESTE, *Introductio in codicem*, pp. 27-29; BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 1, pp. 30-42.

with certain affairs. Thus, from 1908 to the present, missionary law has not been solely the law of the *Propaganda*, but also the law enacted by any competent ecclesiastical authority for the purpose of regulating the work of mission in missionary territories under the *Propaganda*'s jurisdiction.

The power of the *Propaganda* by its nature is ordinary but vicarious because it is exercised in the name of the Roman Pontiff (cc. 131, # 2; 360), and administrative and executive, not judicial, because the judicial power was attributed by Pius X through *Sapienti consilio* to the tribunals, and this has been the practice ever since.⁹⁶

⁹⁶ Pius X, *Sapienti consilio*, II, p. 15; *Fontes*, vol. 3, no. 682, II, 2, p. 733: "per sacras congregationes non amplius recipi nec agnosci causas contentiosas, tam civiles quam criminales, ordinem iudicarium cum processu et probationibus requirentes." The practice was later reinforced by Paul VI with *Regimini Ecclesiae universae* of August 15, 1967 (in *AAS*, 59 [1967], VI, pp. 921-922); then by John Paul II with *Pastor bonus* of June 28, 1988 (in *AAS*, 80 [1988], IV, pp. 890-893).

2 - THE DEVELOPMENT FROM 1622 TO THE END OF THE NINETEENTH CENTURY

By "mixed marriage" the Church means a marriage entered into by the parties one of whom is a Catholic and the other is either a baptized non-Catholic or non-baptized.¹ The impediment arising from mixed marriage of a Catholic and a baptized non-Catholic is called mixed religion. It is a merely prohibitive impediment that never renders a marriage null and void, though illicit if contracted without a dispensation. The impediment arising from mixed marriage of a Catholic and an unbaptized person is called disparity of cult. This impediment is a diriment impediment which can render a marriage null and void if entered into without a dispensation from a competent ecclesiastical authority.²

¹ PAUL VI, Litterae apostolicae *Matrimonia mixta*, 31 March 1970, in *AAS*, 62 (1970), p. 257: "Matrimonia mixta, id est matrimonia initia a parte catholica cum parte non catholica sive baptizata sive non baptizata." According to the CIC/1983, the term "mixed marriage" seems to refer only to a marriage between a Catholic and a baptized non-Catholic (c. 1124). Thus, it is different from what is contained in Paul VI's *Matrimonia mixta* of 31 March 1970. This dissertation, however, will follow Paul VI's definition, unless otherwise indicated.

² See cc. 1060-1061 and 1070 of the CIC/1917; cf. cc. 1086 and 1124 of the CIC/1983. Traditionally, mixed religion was an impediment, though prohibitive only; yet, the CIC/1983, as will be discussed later, does not seem to consider it as an impediment.

The Church, in the sixteenth century, particularly when its mission activities were extended to the non-Christians or so-called pagan lands, began to think very seriously of how to deal with the various problems and difficulties which it was facing. Taking these missionary conditions for granted, the Church then gave many faculties to the missionaries including the faculty to dispense from the impediments arising from mixed marriages, especially the impediment of disparity of cult.³

This "novus habitus mentis" of granting extensive faculties was realized by the Church, primarily by the *Propaganda* since its establishment (1622) by way of issuing decrees, instructions, and other documents.

However, due to the fact that missionary law, as has been previously described in ch. 1, refers not only to the norms enacted by the *Propaganda*, but also to the norms issued by other competent ecclesiastical authorities for the purpose of regulating the mission activities in the territories under the *Propaganda's* jurisdiction, this chapter will try to examine all the norms, rules, and regulations issued by all the competent ecclesiastical authorities for various mission lands with regard to mixed marriages. The study will be conducted chronologically from the establishment of the *Propaganda* until the end of the nineteenth century by which time mixed marriage legislation for mission lands was relatively stable. By so doing, the development of the legislation might be easily traced. As the conclusion, a summary and a thorough analysis will be offered.

³ See F. J. SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, Canon Law Studies, no. 51, Washington, DC, The Catholic University of America Press, 1929, p. 45.

Some noteworthy points to be kept in mind: first, that mission territories under the *Propaganda*'s jurisdiction during the period from the Congregation's establishment (1622) until the issuing of Pope Pius X's Apostolic Constitution *Sapienti consilio* (29 June 1908), were more numerous than in the subsequent period.⁴ Therefore, the territories which have been excluded since 1908 by the Constitution, will also be covered in the discussion as far as they were mission territories;⁵ second, that the study will be examining separately the enactments of each of the authorities both on mixed religion and dispar marriages; third, unless otherwise indicated, for at times the two kind of mixed marriages

⁴ It might be very significant if the mission territories before *Sapienti consilio* be summarized here (U. BENIGNI, art. "Propaganda, Sacred Congregation of," in *CE*, vol. 12, p. 457):

1. In Europe: Great Britain and Gibraltar, Sweden and Norway, Denmark, Germany (Saxony, Anhalt, Mecklenburg, Schaumburg, Oldenburg, Lauenburg, Hamburg, Bremen, Lübeck, Schleswig-Halstein), Holland, Luxemburg, some places in Switzerland (Mesalcina and Calanca in the Grisons, St. Maurice in the Canton of Valais), the Balkan Peninsula (Bosnia, Herzegovina, Greece);

2. In the New World: The United States, Canada, Lower California, the Lesser Antilles (British and Danish), Jamaica and Honduras, some mission in Peru, and Patagonia;

3. All Oceania, except the Philippines;

4. All Asia, except the Russian possession;

5. All Africa.

⁵ PIUS X, Apostolic Constitution *Sapienti consilio*, 29 June 1908, I, 6, # 2, in AAS, 1 (1909), p. 12: "Itaque a iurisdictione Congregationis de Propaganda Fide exemptas et ad ius commune deductas decernimus - in *Europa* - ecclesiasticas provincias Angliae, Scotiae, Hiberniae, et Hollandiae, ac dioecesim Luxemburgensem; - in *America* - provincias ecclesiasticas domini Canadensis, Terrae Novae et Foederatarum Civitatum seu *Statuum Unitorum*. Negotia proinde quae ad haec referuntur, tractanda in posterum non erunt penes Congregationem de Propaganda Fide, sed pro varia earumdem natura, penes Congregationes ceteras."

were treated together by those authorities on the same occasion, the study will try to organize the enactments on each in separate sections.

Nevertheless, in order to have a solid background in the study, some significant views of the Church pertaining to the development of mixed marriage legislation before the *Propaganda* will be highlighted beforehand, albeit briefly.

2.1 - A Brief Overview on the Legislation Before the *Propaganda*

This part will cover only the teachings of the Church Fathers - although those teachings by their nature are not the law, but accepted as a source of law - and also some conciliar legislation, for they are believed to manifest or represent the essentials of the Church's teaching and view on mixed marriages during the period before the *Propaganda*. In addition, since there were no specially designated missionary territories in the strict sense before the *Propaganda*'s establishment, it follows that the development of missionary law during this period is basically coextensive with the universal law of the Church. Hence, the following discussion cannot be said to deal specifically with the Fathers' teachings or the conciliar legislation for missionary lands in the strict sense.

2.1.1 - The Teachings of the Fathers

The Church in the first five centuries, according to the patristic writings, was obviously a missionary Church, for its missionary activity mainly dealt with the pagan

world. The consequence of this mission was that those who had been baptized had to live together with non-Christian neighbours. In such circumstances, unfortunately, mixed marriages also could not be avoided, though marriage for Christians at that time demanded a harmony of religious convictions and hence any mixed union was opposed.⁶ The Church Fathers, such as Ignatius of Antioch (+107), Tertulian (+ca. 223), Cyprian of Carthage (+258), Ambrose (+397), Zeno of Verona (+371), and Jerome (+420), very clearly expressed in their writings their strong opposition towards all marriages with non-Christians for at least three reasons: firstly, that such marriages stood in a different and even lower level than marriages "in the Lord"; secondly, those marriages could cause positive harm to the faith and to the Church by dividing a Christian household between service to God and pagan worldly lusts; and thirdly, such unions could cause profanation of the Church through idolatry on the part of non-baptized.⁷ Thus, in the early Church Fathers' view, mixed marriages were forbidden and intolerable.

Interestingly, some later Fathers, especially Augustine of Hippo (+430) and John Chrysostom (+407), seemed to have a more lenient view and attitude towards mixed marriages. The rationale was that, under the authority of Constantine the Great in the

⁶ V. J. DOYLE, *The Pre-nuptial Promises in Mixed Marriages: An Historical and Canonical Analysis*, Canon Law Studies, no. 461, Washington, DC, The Catholic University of America Press, 1968, pp. 1-2.

⁷ DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 2-9; G. H. JOYCE, *Christian Marriage: An Historical and Doctrinal Study*, London, Sheed and Ward, 1948, p. 189; J. TOMBO, *Matrimoni misti*, Napoli, Edizioni Dehoniane, 1971, pp. 39-41. See also R. G. WRSSELLMANN, "The Mixed Marriage Promises: Arguments for Retaining the 'Cautiones'," in *The Jurist*, 25 (1965), p. 103; B. O'HOGGINS, "Mixed Marriages: The 'Cautions'," in *The Irish Theological Quarterly*, 41 (1974), pp. 207-208.

fourth century,⁸ the Church for the first time, after a long period of persecution, enjoyed great freedom, and during this time of freedom, great numbers of pagans came to the Church and converted. Therefore, in these circumstances and provided that there was a certainty that the unbaptized was willing to be baptized after expressing a sincere promise, a mixed union could be tolerated.⁹

2.1.2 - Conciliar Legislation

The ecclesiastical legislation during the first five centuries did not seem to make any distinction between marriages of Catholics with heretics or schismatics and marriages of Catholics with non-baptized. All such marriages were put under the same prohibition; also there was no indication that any formal dispensation was ever given. The only way

⁸ With the "Edict of Milan", which is also known as the "Edict of Constantine" or "Pax Constantiniana", the Emperor Constantine the Great together with his brother-in-law, Augustinus Licinius, put an end to persecution of the Church and granted it freedom in the exercise of religion throughout the Roman empire. The Church also obtained its ecclesiastical immunity, freedom from taxation and compulsory military service, and also freedom from obligatory state services. For further details, see C. G. HEIBERMANN and G. GRUPP, art. "Constantine the Great," in *CE*, vol. 4, pp. 295-301; J. A. EGURRI, *De conditione iuridica missionarii*, Neapoli, M. D'Auria, 1962, pp. 31-32.

⁹ TOMKO, *Matrimoni misti*, pp. 41-42; B. HARDING, *Marriage in the Modern World*, Westminster, MD, The Newman Press, 1965, pp. 202-203; see also DOYLE, *The Prenuptial Promises in Mixed Marriages*, pp. 9-12.

to enter into such a marriage, though with great difficulty, was that the non-Catholic must agree to convert.¹⁰

The Spanish Council of Elvira (305-306) seemingly was the first council to enact a law regarding mixed marriages. This Council strongly opposed and severely condemned such a marriage, and stated that the law of the Church not only forbade, but also punished it.¹¹ This Council, however, made a slight distinction, to a certain extent, between marriages of Catholics with pagans and marriages of Catholics with heretics or schismatics in particular circumstances. Marriages with pagans, on the one hand, were forbidden, but not severely punished and could be tolerated. The reasons were, first of all, there was a great number of young Catholic women of marriageable age; secondly, the toleration might prevent those young women from committing adultery; thirdly, the faith of pagans in their religion was believed to be less deep and definite; and lastly, the danger to Catholic faith from such union was not as great as from that of the union with Jews or heretics.¹² On the other hand, marriages with Jews and with heretics or

¹⁰ SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 17-25.

¹¹ A. W. W. DALR, *The Synod of Elvira and Christian Life in the Fourth Century*, London, Macmillan, 1882, pp. 252-256; TOMKO, *Matrimoni misti*, pp. 42-43; see also O'HIGGINS, "Mixed Marriages: The 'Cautiones'," p. 208.

¹² J. D. MANSI, *Sacrorum conciliorum nova et amplissima collectio* (= MANSI), vol. 2, Paris & Leipzig, H. Welter, 1901, p. 8, c. 15: "Propter copiam puellarum, Gentilibus minimae in matrimonium dandae sunt virgines Christianae, ne aetas in florae tumens in adulterio animae resolvatur." But another version of c. 15 (p. 24) read: "Propter copiam puellarum gentilibus in matrimonium dandae sunt virgines, ne aetas in flore tumens in adulteriis lude resolvatur (f. luto resolvatur)." See also SCHENK, *The matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 20; DOYLE, *The Pre-nuptial*

schismatics were strongly opposed and severely punished, for such marriages could constitute a severe danger to Catholic faith. But such unions could also be tolerated, once the non-Catholics sincerely promised to convert.¹³

In 314 the French Council of Arles enacted a law which prohibited particularly young women who attempted mixed marriages with pagans from receiving communion. Unlike the Council of Elvira which put the punishment mainly on parents, this Council put it on the women in question.¹⁴ For the Church in the East, the Council of Laodicea, which was held between 343 and 381, strongly forbade entering into mixed marriages indiscriminately,¹⁵ but it also stated that marriages of Catholics and heretics could be allowed if the heretics promised to become Catholics in the future.¹⁶

Promises in Mixed Marriages, pp. 14-15; RAJNER, *Marriage in the Modern World*, p. 203.

¹³ MANSI, vol. 2, c. 16: "Haeretici si se transfere noluerint ad ecclesiam catholicam, nec ipsis catholicas dandas esse puellas: sed neque Judaeis, neque haeticis, dare placuit; eo quod nulla possit esse societas fidei cum infideli. Si contra interdictum fecerint parentes, abstineri per quinquennium placet." And the alternate c. 16 in p. 24 stated: "Haeretici si conversi fuerint filias si dederint Judaeis vel haeticis quinque annos poeniteant." See also SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 20; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 15-17.

¹⁴ MANSI, vol. 2, p. 472, c. 11: "De puellis fidelibus quae gentilibus junguntur, placuit ut aliquanto tempore a communione separentur."

¹⁵ MANSI, vol. 2, p. 565, c. 10: "Non oportere eos qui sunt ecclesiae, indiscriminatim suos filios haeticis matrimonio conjugere." See TOMKO, *Matrimoni misti*, pp. 43-44; O'HOGGINS, "Mixed Marriages: The 'Cautiones'," p. 209

¹⁶ MANSI, vol. 2, p. 570, c. 31: "Quod non oportet cum omni haetico matrimonium contrahere, vel dare filios aut filias: sed magis accipere, si se Christianos futuros profiteantur." See also SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 17-18; DOYLE, *The Pre-nuptial Promises in Mixed marriages*, pp. 17-18; RAJNER, *Marriage in the Modern World*, p. 204.

In Northern Africa, the Council of Hippo (393) prohibited interfaith marriages of the children of bishops and other clerics with non-Catholics.¹⁷ The same legislation was later repeated by the Third Council of Carthage (397).¹⁸

The Council of Chalcedon (451) was believed to be the first ecumenical council in the Church to deal directly with mixed marriage problems. This Council, without expressly speaking of mixed marriages among lay people, decreed that minor clerics (lectors and cantors) were not to marry heretical women, or to give their children in such a marriage, unless the non-Catholics promised to convert.¹⁹

The Church's opposition to mixed marriages with non-Catholics, especially with Jews, seems to be unshakeable and even more so during the period from the sixth century

¹⁷ MANSI, vol. 3, p. 921, c. 12: "Ut gentilibus, vel etiam haereticis, et schismaticis filii Episcoporum, vel quorumlibet clericorum matrimonio non jungantur."

¹⁸ MANSI, vol. 3, p. 882, c. 12: "Item placuit, ut filii vel filiae episcoporum, vel quorumlibet clericorum, gentibus, vel haereticis aut schismaticis matrimonio non jungantur."

¹⁹ MANSI, vol. 7, p. 388, c. 14: "Quia in quibusdam provinciis conceditur psalmistis & lectoribus uxores accipere; statuit sancta synodus, prorsus non licere cuiquam ex his alterius sectae accipere uxorem. Si quis vero praevenit, & habet jam de tali conjugio filios, si forte praevenierint eos jam apud haereticos baptizari, debent eos offere sanctae ecclesiae catholicae, ut ibi communicent. Qui vero adhuc baptizati non sunt, omnimodo non posse eos in haeretica ecclesia baptizari, nec in matrimonio jungi haeretico, Judaeo, vel pagano; nisi forte sponderit se venire ad orthodoxam fidem, dum conjugitur personae orthodoxae. Si quis vero hanc definitionem sanctae synodi praeterierit, regularum condemnationibus subjaceat." -- For the English translation and further comments on this canon, see H. J. SCHROEDER, *Disciplinary Decrees of the General Councils*, St. Louis, MO, Herder, 1937, pp. 105-107. See also TOMKO, *Matrimoni misti*, pp. 44-45; RAHNER, *Marriage in the Modern World*, p. 204; SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 22-24; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 19-20; O'HIGGINS, "Mixed Marriages: The 'Cautiones'," p. 211.

to the twelfth. Although the prohibition of the previous period remained a mere prohibition during this time, i.e., that the marriage, to use today's categories, was valid though illicit, the Church began to consider mixed marriage, in particular with Jews, as a diriment impediment. This attitude was clearly manifested in the legislations of several councils. In France, for instance, the Second Council of Orléans (533) decreed in c. 19 that marriages of Catholics and Jews were forbidden and illicit, and those Christians who entered into this union or refused to separate were to be excommunicated.²⁰ Some canonists interpreted the canon as an indication that the Church at this time started to view mixed marriages as invalid unions. The word illicit (*illicitas*) used in the canon had the force of invalidity, for the required separation under the penalty of excommunication frankly referred to the Church's refusal of the *ius coniugale* to the parties of the marriage in question. Thus, the concept of disparity of cult, though not in all places, as an impediment which invalidates a marriage in fact, started not later than the sixth century.²¹ The same strict regulation was later repeated and reinforced by the other French Councils of Auvergne (535)²² and Orléans III (538).²³

²⁰ MANSI, vol. 8, p. 838, c. 19: "Placuit ut nullus Christianus Judaeam, neque Judaeus Christianam in matrimonio ducat uxorem, quia inter huius modi personas illicitas nuptias esse censemus. Qui si commoniti a consortio hoc se separare distulerint, a communionis gratia sunt sine dubio submovendi."

²¹ Both SCHENK (*The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 29) and DOYLE (*The Pre-nuptial Promises in Mixed Marriages*, p. 29), in their studies, referred to the interpretation of A. J. BINTERIM, *Die vorzüglichsten Denkwürdigkeiten der Christ-Katholischen Kirche*, vol. 6, I, Mainz, S. Miller, 1840, pp. 441-442.

²² MANSI, vol. 8, p. 861, c. 6: "Si quis Judaicae pravitate jugali societate conjungitur, et seu Christiana Judaeo, seu Judaeus Christianae mulieri carnali consortio misceatur,

In Spain, the Third Council of Toledo (589) also strongly prohibited such marriages with non Christians, especially Jews,²⁴ and later the Fourth Council of Toledo (663) decreed that the converted Jewish wives must separate from their Jewish husbands, unless the husbands also convert, and the children must follow their newly Catholic mothers and be raised Catholics.²⁵

In the eighth century, the Council of Rome (743) decreed that those Christians who allowed their daughters to contract marriages with Jews were to be anathematized, unless

quicumque horum tantum nefas admisisse dignoscitur, a Christianorum coetu atque convivio, et communione ecclesiae, cuius sociatur hostibus segregetur." See also SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 29-30; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 29-30.

²⁴ *Mans.* vol 9, p. 15, c. 13: "[...] Christianis quoque omnibus interdicens, ne Judaeorum conjugis misceantur: quod si facerint, usque ad sequestrationem, quisque ille est, communione pellatur. Item Christianis convivia interdicens Judaeorum; in quibus si forte fuisse probantur, annuali excommunicationi pro huiusmodi contumacia subiacent." See also SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 30-31; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 30.

²⁵ *Mans.* vol 9, p. 996, c. 14: "Suggerente concilio, id gloriosissimus dominus noster constantibus inierendum praecipit, ut Judaeis non liceat Christianas habere uxores vel concubinas, neque mancipia Christiana comparare in usus proprios: sed & si qui filii ex tali conjugio nati sunt, assumendos esse ad baptismum. Nulla officia publica eos opus est agere, per quae in occasu tribuatur poenam Christianis inferre. Si qui vero Christiani ab in Iudaico ritu sunt maculati, vel etiam circumcisi, non reddito pretio, ad libertatem & religionem redeant Christianam."

²⁶ *Mans.* vol 10, p. 674, c. 63: "Iurati qui Christianas mulieres in conjugio habent, admonentur ab episcopo civitatis ipsius, ut si cum eis permanere cupiunt, Christiani efficiantur. Quod si admoniti noluerint, separentur: quia non potest infidelis in ejus permanere conjugio, quae jam in Christianam translata est fidem. Filii autem qui ex talibus nati erunt, fidem atque conditionem Matris sequantur. Similiter & hi qui procreati sunt de infidelibus mulieribus & infidelibus viris, Christianam sequantur religionem, non Iudaicam superstitionem."

the Jews agreed to convert. The same law also prohibited Christian widows and servants from marrying Jews, unless their Jewish partners promised to be baptized Catholics.²⁶

Later in the ninth century, the Council of Meaux (845) summarized the attitude of the Church towards mixed marriages at that time, which in fact had been the practice for centuries, and decreed that the Christian faithful were to refrain from any kind of association with Jews in order that the faith could not be jeopardized.²⁷

In the twelfth century, Gratian tried to treat canon law according to the dialectical method as a science distinct from general theology. He compiled a universal collection of laws in his *Concordia discordantium canonum*, which is generally called *Decretum Gratiani* (ca. 1140), to bring harmony and stability to the law in the Church.²⁸ In this work, he also treated the question of mixed marriages of Catholics and non-Catholics, namely, heretics, schismatics, pagans, and Jews, by reflecting the earlier centuries' strict legislation. In his view, however, at least implicitly stated in a *dictum*²⁹ which he wrote

²⁶ MANSI, vol. 12, p. 384, c. 10: "Si quis Christianus filiam suam Judaeo in conjugio copulare praesumpserit, nisi perfecte crediderit Christo, et baptizatus fuerit; vel servum aut ancillam eidem Judaeo Christianus venundare [sic] praesumpserit, et si vidua Christiana Judaeum duxerit virum, vel consentientibus ei, anathema sit."

²⁷ MANSI, vol. 14, c. 73, pp. 836-839.

²⁸ K. BOELMEYER and H. TOCHER, *Church History*, vol. 2, Westminster, MD, The Newman Press, 1963, p. 199; see also DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 37.

²⁹ *Decretum Gratiani emendatum notationibus illustratum una cum glossis cum privilegio Gregorii XIII Pont. Max. & aliorum principum*, Venetiis, Apud Magnam Societatem, una cum G. Ferrario & H. Franzino, 1584, cols. 2037-2038, C. XXVIII, q. 1, dictum ante c. 15: "[...] Item illud Ambrosii [non est putandum matrimonium quod extra Dei decretum factum est, sed cum cognoscitur, est emendandum] non ostendit coniugium non esse inter infideles. Nullo enim Domini praecepto gentiles prohibentur

to be the preamble of an excerpt from St. Ambrose's teaching,³⁰ baptism was the basis for a marriage to be considered valid. Hence, the marriage of a Christian and a pagan was invalid due to the fact that the pagan was unbaptized. Such a union was the same as that of those who were related by blood or affinity, hence they were to be separated. Yet Gratian was not really clear in the *dictum* as to whether or not he viewed the marriages of Catholics and heretics as valid unions. Some interpreters of the *dictum* said that Gratian must be in favour of the invalidity of those unions, for the heretics were included in those of infidels or alien to the faith. But other authors argued that Gratian did not mean to include heretics in the category of those who were alien to the faith. This

coniungi gentilibus. Nec ergo eorum coniugium extra Dei decretum est. Illa itaque auctoritate iubentur separari ab invicem qui contra Dei vel Ecclesiae decretum copulati sunt, ut pote infideles cum fidelibus, consanguinei cum consanguineis, vel affines cum affinibus. Hi omnes, si sibi invicem copulati fuerint, separandi sunt." See also some discussion in D. J. Boyle, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, Canon Law Studies, no. 150, Washington, DC, The Catholic University of America Press, 1942, p. 11.

³⁰ *Decretum Gratiani*, cols. 2037-2038, C. XXVIII, q. 1, c. 15, taken from AMBROSUS, *De Abraham*, Lib. I, cap. 9, no. 84, in *Corpus scriptorum ecclesiasticorum latinorum*, vol. 32, *S. Ambrosii opera*, pars I, Vindobonae, Hoelder-Pichler-Tempsky, 1897, pp. 555-556: "[...] cave, Christianae, gentili aut iudaeo filiam tuam tradere. Cave, inquam, gentilem aut iudaeam atque alienigenam, hoc est haeticam et omnem alienam a fide tua uxorem arcessas tibi. Prima conjugii fides castitatis gratia est. Si idola colat quorum praedicantur adulteria, si Christum neget qui praeceptor et remunerator est pudicitiae, quomodo potest diligere pudicitiam? Si Christiana sit, non est satis nisi ambo initiati sitis sacramento baptismatis. Simul ad orationem nocte vobis surgendum est, et conjunctis precibus obsecrandus Deus. [...]." The same text can be found in J. P. Migne, *Patrologia cursus completus*, tom. 14, Parisiis, Excudabat Migne, 1845, p. 451.

argument was based on the *glossa ordinaria* on the text of Gratian which stated that marriages of Catholics and heretics were prohibited but not invalid.³¹

Nevertheless, a great number of canonists, theologians, the Roman Pontiffs as well as some councils held during the period from the thirteenth century to the sixteenth, indisputably agreed on the difference between marriages of Catholics and infidels, and marriages of Catholics and heretics. Innocent III (1196-1216) was the first Pope in this time to think seriously about the difference, and hence he became the milestone in the further development of the Church's teaching regarding the distinction between the two impediments arising from mixed marriages.³² According to St. Bonaventure, the importance of baptism, which he referred to as the *sacrament of faith*, was the foundation and door to the entire sacramental life of the Church and the faithful.³³ And the

³¹ For some excellent treatment on this disputed matter, see BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 10-12; SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 38-39; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 38-40; A. J. CONNICK, "Canonical Doctrine Concerning Mixed Marriages Before Trent and During the Seventeenth and Early Eighteenth Centuries," in *The Jurist*, 20 (1960), pp. 296-298.

³² See DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 42-43.

³³ St. BONAVENTURA, *Opera theologica selecta*, iussu et auctoritate R.mi P. Pacifici M. Perantoni, editio minor, *Liber 4 sententiarum de sacramentis et novissimis*, editio minor, Ad Claras Aquas, Florentiae, 1949, pp. 820-821, Dist. XXXIX, art. 1, q. 1: "[...] In Novo Testamento alio modo est, quia infidelis est dupliciter: aut quia caret fide aut quia caret fidei sacramento. Si quia fide tantum, sic talis disparitas, ubi nota est, impedit Matrimonium, sed non dirimit iam contractum, ut si catholicus contrahat cum haeretica baptizata. Si autem sit infidelis, cuius caret fidei sacramento, utputa Baptismo, quia sacramentorum ecclesiasticorum et fidelium ianua et fundamentum est Baptismus, fidelis, qui contrahere habet secundum sacramenta Ecclesiae, si cum tali contrahat, nihil facit, etiam si sit fidelis, dum tamen non habeat Baptismum; unde dirimit iam contractum."

supplement to St. Thomas' *Summa theologiae* pointed out the legal aspect of baptism, stating that baptism was the basic requirement for a marriage to be considered valid and sacramental at the same time, despite the fact that marriages of Catholics and heretics were illicit and sinful:

Matrimony is a sacrament: and therefore so far as the sacramental essentials are concerned, it requires purity with regard to the sacrament of faith, namely, Baptism, rather than with regard to interior faith. For which reason also this impediment is not called disparity of faith, but disparity of worship which concerns outward service, as stated above (III, Sent. D. 9, q. 1, a. 1, qu. 1). Consequently if a believer marry a baptized heretic, the marriage is valid, although he sins by marrying her if he knows her to be a heretic: even so he would sin were he to marry an excommunicated woman, and yet the marriage would not be void: whereas on the other hand if a catechumen having right faith but not having been baptized were to marry a baptized believer, the marriage would not be valid.³⁴

In the middle of the thirteenth century, Pope Innocent IV (1243-1254) through a decree, which was contained in the *Liber sextus* of Boniface VIII, ordered that the dowry was to be confiscated if a Catholic woman knowingly contracted a marriage with a

³⁴ T. AQUINAS, *Summa theologiae*, Suppl., q. 59, art. 1, ad 5, pp. 2246b-2247a: "Dicendum quod matrimonium est sacramentum, et ideo quantum pertinet ad necessitatem sacramenti, requirit paritatem quantum ad sacramentum fidei, scilicet baptismum, magis quam quantum interiorem fidem. Unde etiam hoc impedimentum non dicitur disparitas fidei, sed disparitas cultus, qui respicit exterius servitium, ut in III libro dictum est. Et propter hoc si aliquis fidelis cum haeretica baptizata matrimonium contrahat, verum est matrimonium. Quamvis peccet contrahendo, si scit eam haeticam, sicut peccaret si eum excommunicata contraheret. Non tamen propter hoc matrimonium dirimentum. Et e converso si aliquis catechumenus, habens rectam fidem sed nondum baptizatus, cum aliqua fidei baptizata contraheret, non est verum matrimonium." -- The above English translation from T. AQUINAS, *Summa theologica*, First Complete American Edition in Three Volumes, literally translated by Fathers of the English Dominican Province, vol. 3, New York, NY, Benzinger, 1948, p. 2783.

heretic.³⁵ The Pope in the decree implicitly recognized the difference between disparity of cult as an invalidating impediment and mixed religion as a merely prohibitive impediment, because, instead of attacking the validity of marriages of Catholics and heretics, he ordered the confiscation of the dowry, which was clearly intended as a punishment only.³⁶

In 1309, the Council of Pressburg (Bratislava, Slovakia) decreed that mixed marriages contracted between Catholics and heretics were forbidden. Archbishops and bishops in their dioceses were to see to it that those who violated this law were to be punished.³⁷ The same law was later confirmed by Pope Clement VI in September 1346.³⁸

³⁵ BONIFACIUS VIII, *Liber sextus*, cap. 14 *de haereticis*: "Decrevit felicis recordationis Innocentius Papa IV quod propter haeresim maritorum, uxorum catholicarum dotes non debeant confiscari. Quod intelligendum fore censemus, nisi forte mulieres ipsae cum viris matrimonia contraxissent, quos haereticos tunc sciebant." See also H. FREYR, *Dissertatio canonica de matrimoniis mixtis*, Lovanii, Vanlinthout et Vandenzande, 1847, pp. 8-9.

³⁶ CONNICK, *Canonical Doctrine Concerning Mixed Marriages*, pp. 299-300; BOYLER, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 13; SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 39-40; DOYLE, *The Pre-nuptial Promises in Mixed marriages*, pp. 45-46.

³⁷ MANSI, vol. 25, p. 222, c. 8: "[...] Volumus autem, et in virtute obedientiae districte praecipimus archiepiscopo vel episcopo, in cujus dioecesi contemptor hujusmodi moram trahit, quod eum excommunicatum denunciaret, et ab omnibus evitandum. [...]"

³⁸ "Capitula praedicta rata et grata habentes, illa auctoritate Apostolica ex certa scientia confirmamus, et praesentis scripti patrocinio communimus." FREYR, *De matrimoniis mixtis*, p. 9; See also F. X. WEDER, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, tom. 4, *ius matrimoniale Eccles. catholicae*, pars secunda, Prati, Giachetti, 1912, no. 576.

The Council of Trent (1545-1563), as clear in the Decree *Tametsi*, did not deal directly with mixed marriages. However, the Council indirectly forbade such marriages since it demanded under pain of nullity that marriages, particularly in the places (parishes) where the decree had been promulgated, were to be celebrated before the proper pastor or a delegate and at least two witnesses.³⁹ By so doing the Council established a form which truly affected the very validity of all marriages in the places where the decree was promulgated.⁴⁰

Albeit the Council of Trent did not deal directly with mixed marriages, several provincial councils conducted afterwards did reinforce the legislations of the early centuries.⁴¹ The Second Provincial Council of Milan (1569), for instance, decreed that a bishop was not to give testimonials of free status for one of his Catholic subjects who intended to contract a marriage in a heretic territory, unless the subject in question

³⁹ CONCILIIUM TRIDENTINUM, *Canones et decreta sacro sancti oecumenici Concilii Tridentini*, editio novissima, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1904, p. 172, session XXIV, cap. 1: "Matrimonii solemniter contrahendi forma in Concilio Lateranensi praescripta innovatur: quoad proclamationes dispensare possit episcopus. Qui aliter, quam praesentibus parochi et duobus vel tribus testibus contrahit, nihil agit. [...] Qui aliter quam praesente parochi, vel alio sacerdote, de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta synodus ad sic contrahendum omnino inhabiles reddit: et huius modi contractus irritos, et nullos esse decernit, prout eos praesenti decreto irritos facit et annullat. [...]" The same text can be found in MANSI, vol. 33, pp. 152-153, c. 1. -- For the English translation, see H. J. SCHROEDER, *Canons and Decrees of the Council of Trent*, St. Louis, MO, B. Herder, 1937, pp. 183-185. See also FEYER, *De Matrimoniis Mixtis*, pp. 94-121.

⁴⁰ See ARBO-HANNAN, *The Sacred Canons*, p. 335 with footnote 8.

⁴¹ For a detailed description, see BOYLE, *The Juridic Effects of Moral Certitude on Pre-nuptial Guarantees*, pp. 16-18; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 53-55.

promised not to marry a heretic.⁴² The Provincial Council of Cambrai held in 1586 strongly stated that the only way for a mixed marriage to be tolerated was the abjuration of heresy and the profession of faith by the heretic.⁴³ The Council of Bordeaux (1583) urged the pastors to remind their faithful to be aware of the downfall of faith caused by mixed unions.⁴⁴ Some particular synods conducted in the early seventeenth century, shortly before the establishment of the *Propaganda* (1622), again, simply repeated the legislation, prohibitions, warnings, etc., of the previous centuries.⁴⁵

2.2 - Pontifical Legislation

Canonically speaking, the Roman Pontiff is the supreme legislator of the Church, and hence he can do what he feels is appropriate for the common good of the faithful.

⁴² MANSI, vol. 34, p. 113, tit. 1, decr. 25: "Quam facultatem episcopus ne det, nisi prius de fide catholica illius hominis cognoverit, qui ea loca incolit, aut nisi item sibi omnino exploratum sit, matrimonium eiusmodi non contrahi cum haereticis."

⁴³ MANSI, vol. 34, p. 1240, tit. 11, c. 7: "Propter pericula salutis animarum, innovandam duxit haec synodus prohibitionem antiquorum canonum, ne fideles cum haereticis nuptias contrahant. Quare pastores non minorem rationem habeant hujus inquisitionis in faciendis proclamationibus, quam reliquorum impedimentorum. Et si alterum conjugendorum haeresi infectum aut non temere suspectum inveniant, eos non conjugant nisi parati sint haeresim objurare, & fidei professionem facere."

⁴⁴ MANSI, vol. 34, p. 763, tit. 15: "[...] Moneantur quam saepissime fideles Christiani a suis parochis, ne haereticis, & hominibus a fide & religione catholica alienis, filios & filias suas in matrimonium collocent: talibus enim conjugis (quod dolentes referimus) permulti naufragium fidei facerunt."

⁴⁵ See BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 17-18; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 54-55.

In dealing with missionary activities in mission territories, a Roman Pontiff acted customarily through certain Roman dicasteries, particularly the *Propaganda*, yet at times he intervened directly when the situation demanded.

In this part, unless otherwise indicated, the important and relevant enactments and teachings of all the Roman Pontiffs on mixed marriages for missionary lands during the above indicated period will be examined one by one. It will start with the enactments on mixed religion, followed by those related to disparity of cult.

2.2.1 - On Mixed Religion

All the Roman Pontiffs who dealt directly and indirectly with the impediment of mixed religion will be mentioned, and their views and positions will be examined.

2.2.1.1 - Pope Urban VIII (1623-1644)

Urban VIII continued to maintain the Church's opposition to mixed marriages of Catholics and heretics, and even strongly urged that those unions were to be prevented and to be kept far from the Catholic Church. This was obvious in his Apostolic Letter *Domus Dei* dated 30 December 1624, through which he granted, yet with great difficulty, a dispensation for the marriage of Charles I of England and Henriette Marie of France,

the sister of Louis XIII. However, a *causa publica* (public cause)⁴⁶ was required besides the *causa gravis* (grave cause).⁴⁷ Also the non-Catholic prince had to give a written document to guarantee that he would carry out faithfully the thirty *cautiones* required by the Pope, which mainly referred to the freedom of the princess in practising her Catholic faith.⁴⁸ In 1633, the Pope granted a dispensation through the Supreme Sacred

⁴⁶ A *causa* (cause) can be either public or private. A cause for a dispensation is called public if the whole community or the Church can benefit from the dispensation. Otherwise it is private. When dealing with the noble families, the Church always considered whether the relaxation of the law in question would redound to the public good of the community or the Church. Some examples of public cause are: early promise of conversion, abjuration of heresy, Catholic education of the children, free exercise of religion on the part of the Catholic party, etc. These causes are in fact the forerunners of the *cautiones* today. -- R. J. WHITE, *Canonical Ante-nuptial Promises and the Civil Law: An Historical Synopsis and Commentary*, Canon Law Studies, no. 91, Washington, DC, The Catholic University of America Press, 1934, pp. 10-11; E. M. REILLY, *The General Norms of Dispensation: An Historical Synopsis and Commentary*, Canon Law Studies, no. 119, Washington, DC, The Catholic University of America Press, 1939, pp. 106-107.

⁴⁷ The *causa gravis* (grave cause) is always required. The reasons are: (1) the Church always severely prohibits and condemns any mixed marriage; and (2) the experience proves that such unions have frequently caused apostasy, heresy, indifferentism to religion on the part of the Catholic party, improper education of the children, etc. The *causa gravis* is required for both the validity and the liceity of dispensation. Some examples of this cause are: the predominance of non-Catholics in the region in question, the avoidance of scandal, danger of apostasy, danger of a marriage before a civil or non-Catholic minister if a dispensation is denied, etc. The *Propaganda* listed sixteen canonical causes as will be discussed later (sect. 2.3.1). -- J. J. DONOVAN, *The Pastor's Obligation in Pre-Nuptial Investigation: An Historical Synopsis and Commentary*, Canon Law Studies, no. 115, Washington, DC, The Catholic University of America Press, pp. 239-242; REILLY, *The General Norms of Dispensation*, pp. 106-107; BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 124-127; WHITE, *Canonical Ante-nuptial Promises*, pp. 10-11.

⁴⁸ F. ALBERTUS, *De inconstantia in iure admittenda, vel non, opus in varios tractatus divisum, De inconstantia in fide*, tractatus primus, Amstelaedami, I. A. Huguetan, 1863, cap. XXXVI, no. 218, pp. 478-479: "[...] Idque ob maximas, et gravissimas causas

Congregation of the Holy Office to the marriage of Wolfgang Wilhelm, Duke of Neuberg, and Catherine Charlotte, an heretical daughter of John II, Count Palatine of Zweibrücken. The dispensation was granted on the basis of a hope that Catherine would convert. Nevertheless, a contract - which contained the agreement to safeguard the faith of the Catholic party, to grant freedom of religious practice to the Catholic party, to raise the children in the Catholic faith, and to provide for the conversion of Catherine - was demanded before the grant of dispensation.⁴⁹

It might be a good idea if, before this discussion moves further, an advance clarification pertaining to the difference between the *cautiones* (promises) and the *conditiones* (conditions) is presented. The reason is that, apart from the fact that these two canonical terms will be repeatedly mentioned, at times they were used interchangeably, despite the big difference, even also in some official statements of the Church. This causes some serious confusion, even also among canonists, when the two

universae Christianae Reipublicae bonum, et Catholicae fidei propagationem concernentes notas exponere Nobis propterea, etc. Idcirco Nos, etc. licet probe teneamus, Catholicorum cum Haereticis Matrimonia omnino fugienda esse, et quantum in Nobis est a Catholica ecclesia procul arcere intendamus. Tamen cum grande verae fidei, et animarum plurimarum bonum speretur: negotium prius accuratissime examinatum cum pluribus gravibus viris, ac Doctrina, et prudentia praestantibus Venerabilibus Fratribus Nostris Sanctae Romanae Ecclesiae Cardinalibus mandavimus, qui post longam rei consultationem, videri sibi huiusmodi Matrimonium permittendum Nobis retulerunt [...].” See also SCHNEK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 55, footnote 29, also pp. 46-47 with footnote 6; FEYB, *De matrimoniis mixtis*, p. 10; D. S. LOURDUSAMY, *Pre-nuptial Guarantees According to the Jurisprudence of the Holy Office*, Pondicherry, Mission Press, 1959, pp. 26-27.

⁴⁹ FEYB, *De matrimoniis mixtis*, p. 11; BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 24.

terms are employed. To be clear, *cautio* comes from the Latin verb *caveo, cavere*, which means to be on one's guard, to take care for, to provide, to make one's self secure, etc. *Cautio* itself means precaution, caution, that by which one places himself or another in safety, an obligation, security, warranty, etc.⁵⁰ The term *cautio* in canon law, especially in marriage law, stands for security or promise given in guarantee.⁵¹ Hence, the Holy Office, in a response of 30 June 1842, to a German bishop's question, as will also be discussed later, defined the *cautio* as a promise which, as the moral foundation for the sincerity of its fulfilment, must be drawn up into a pact, so that the fulfilment could be prudently expected.⁵² Thus, the matrimonial *cautiones* can be understood as "promises given in security and drawn up into a pact by the parties to a mixed or dispar marriage to assure the Church of the obligations imposed by the divine law."⁵³ The obligations imposed by the divine law refer to what is called the conditions which are always strongly maintained by the Roman Pontiff, the *Propaganda*, the Holy Office, etc., and repeatedly stated in their enactments to be safeguarded. The important conditions are the Catholic baptism and education of the children of both sexes to be born of the marriage, and the removal of the danger of breakaway from the Catholic faith on the part of the Catholic

⁵⁰ LEWIS and SHORT, *A Latin Dictionary*, s. vv. 'cautio' and 'caveo'.

⁵¹ For a detailed description, see LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 2-8.

⁵² *Collect.* (1907), vol. 1, no. 951: "Talem promissionem, que in pactum deducta praebeat morale fundamentum de veritate executionis, ita ut prudenter eius modi executio expectari possit."

⁵³ LOURDUSAMY, *Pre-Nuptial Guarantees*, p. 11.

party. Thus, in short, the conditions are the obligations imposed by the divine law to be fulfilled by the parties in a mixed or dispar marriage from which one cannot dispense; whereas the *cautiones* are the means given by the parties to assure the Church that the above conditions (obligations) will be duly fulfilled.⁵⁴

2.2.1.2 - Pope Clement XI (1700-1721)

Pope Clement XI, during his pontificate, always insisted that marriages of Catholics and heretics were to be abhorred and that the rules regarding mixed marriages were not to be violated, unless the good of the entire Christian commonwealth demands it.⁵⁵ He said that the Church indeed abhors those mixed marriages which present great deformity and no little spiritual danger. For a dispensation to be granted, the Pope demanded that the heretics were to renounce the heresy and embrace the orthodox truth of belief.⁵⁶

⁵⁴ For some excellent treatment on this matter, see F. TER HAAR, *Mixed Marriages and Their Remedies*, translated from the Latin by A. WALTER, New York, Cincinnati, F. Pustet, 1933, pp. 78-79; LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 13-23. Cf. *Collect.* (1907), vol. 2, no. 1696, # 5: "[...] Has autem cautiones ius naturalem ac divinum cum postulet, nulla unquam humana auctoritate mixtae nuptiae sine ipsis permitti possunt."

⁵⁵ "Nos itaque, etsi pro magnitudine spiritualis huiusmodi periculi, quod tamen, propitio Deo, averti posse confidimus, intime commoveamur, majoris tamen momenti esse existimamus *Ecclesiae Dei, Apostolicae Sedis, praedecessorum nostrorum ac sacrorum canonum* a catholicorum cum haereticis conjugio abhorrentium *regulas*, nisi id totius christianae reipublicae bonum exposcat, non transgredi, ac propterea petitioni huiusmodi... nequaquam assentiendum esse duximus." -- FEVE, *De matrimoniis mixtis*, p. 12.

⁵⁶ "Cum dispensatio huiusmodi, quam a nobis expetis, ad effectum contrahendi matrimonium cum principissa haereticorum sectae addicta, difficultates in se maximas et ineluctabiles, quoad eam partem, quae religionem respicit, manifeste contineat (*Ecclesia* siquidem ab huiusmodi conjugiiis, quae plurimum deformitatis, nec parum spiritualis

Based on this conviction, on 22 September 1708, he refused to grant a dispensation for Duke Gustave Leopold von Zweibrücken, who was about to contract a mixed marriage with his second cousin, Princess Dorothea von Veldenz (a Protestant), due to the absence of a *causa gravis* and the unwillingness of Dorothea to embrace the Catholic faith.³⁷

Then on 16 June 1710, in a meeting of the Supreme Sacred Congregation of the Holy Office conducted in his presence, the Pope ordered that it be forbidden by a letter to the Archbishop of Malines to grant any licences or dispensations for marriages with heretics, unless the abjuration of heresy preceded; the theologians who held the contrary opinion were to be rebuked.³⁸

2.2.1.3 - Pope Benedict XIV (1740-1758)

The pontificate of this Pope marked somewhat of a development or at least a change in the mind of the Church concerning mixed marriage by exempting The Netherlands and Belgium from the Tridentine form. This is obvious in the Pope's Constitution *Matrimonia* dated 4 November 1741, which is commonly known as the *Benedictine Declaration*. In this Constitution, he declared that mixed marriages both in The Netherlands and Belgium

periculi prae se ferunt, abhorret), credimus, te quo studio es in catholicam fidem, probe intellecturum, nos paterne tecum agere, qui praefatam dispensationem nequaquam concedendam esse statuimus, nisi eadem principissa, haeresi prius ejurata, orthodoxam veritatem ex animo complectatur." -- FEYB, *De matrimoniis mixtis*, p. 13.

³⁷ FEYB, *De matrimoniis mixtis*, p. 13; BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 24.

³⁸ FEYB, *De matrimoniis mixtis*, pp. 13-14.

were considered valid although they were celebrated according to civil law and even without observing the Tridentine prescriptions. However, the Pope continued saying that:

His Holiness, deeply lamenting that there are among Catholic persons who shamefully demented by an insane love, do not from their hearts abstain and are not led entirely to abstain from these detestable marriages which Holy Mother Church has unceasingly condemned and proscribed and praising very much the zeal of those Prelates who strive by their severe punishments enacted by the Church to prevent Catholics from uniting themselves in a sacrilegious band with heretics, seriously and earnestly exhorts and admonishes all Bishops, Vicars Apostolic, pastors, missionaries, and all other faithful ministers of God and the Church, to prevent in far as they are able, Catholics of both sexes from contracting such marriages to the ruin of their own souls, and by every suitable means to break off and hinder the same."

The Holy Father in the same declaration, urged the Catholic spouse, whether the husband or wife, to do penance for the very grave crime arising from mixed marriage

"Cicely" (1905) no. 1166. | | dolens impetrans quoniam maxime Sanctitas Sua cum non esset Catholicus qui nullo modo autem nuptias detestabiles committit quae Sancta Mater Ecclesia perpetuo damnatae atque interdictae, et animo non abdicato et proinde ubi abstinendum non dicitur, lenienter magisquam actum illorum committit qui conversionem proponunt spiritualibus partem, Catholicos coercere student, et nuptias hoc vitio et hereticis compungant Principum omnes, Vicarios apostolicos, Praefatos, Missionarios et alios quoscumque Dei et Ecclesiae fideles obsequium in in partibus dignitate utroque gravissimum hortatur et movet, ut Catholicos abnuptias etiam ab impedimento nuptiarum, et propter animarum periculum vitandis, quantum potest abstinere, omninoque nuptias intervertere atque efficaciter impedire nitantur." See also M. Channon, *The Catholic Church and the Anglican Communion* (London: Burns and Oates, 1973), pp. 500-501. The English version is from A. L. Jones, *Mixed Marriages: Their Origin and Their Remedy*, (New York: New Maria Press, 1973) p. 26. For other English versions, see M. J. Channon, *Pope's Teaching: Marriages (—Pope's Teaching)*, (Boston: Mary St Paul Editors, 1963) p. 64; O. M. Jones, *Marriage with a Protestant and Catholic*, (New York: Paulist Press, 1963) p. 22.

already contracted, ask forgiveness from God, and strive to draw the non-Catholic party to the bosom of the Catholic Church.⁶⁰

In the Encyclical Letter *Magnae Nobis* dated 29 June 1748, which was addressed to the bishops of Poland, and was probably the most comprehensive document at that time regarding marriage impediments and dispensations, the Pope stated among other things:

These concessions were, in the first place, very rare, and the majority of them for contracting marriages between princes, and were not granted except for the most urgent reasons, and these pertaining to the public good. [...] Finally, from what has been said it is evident that in all cases in which permission or dispensation is asked from the Apostolic See for contracting marriage by a Catholic with a heretic, the same Apostolic See, as we have said above, always disapproved and condemned, and now also abominates and detests such nuptials, unless abjuration of heresy precedes.⁶¹

With this letter, the Pope wanted to correct some misunderstanding in Poland, i.e., that the Holy See had been granting dispensations from the impediment of mixed religion

⁶⁰ *Collect.* (1905), no. 1366: "[...] Id vero debere sibi potissime in animum inducere conjugem catholicum, sive virum, sive feminam, ut, pro gravissimo scelere quod admisit, poenitentiam agat ac veniam a Deo precetur, coneturque pro viribus alterum conjugem a vera fide decerrantem ad gremium Catholicae Ecclesiae pertrahere, ejusque animam lucrari, quod porro ad veniam de peccato crimine impetrandam opportunissimum foret, sciem de caetero se istius matrimonii vinculo perpetuo ligatum iri." See also *Demaree*, *Enchiridion*, p. 501

⁶¹ *Fonnes*, vol. 2, no. 387, # 5 "[...] rariissimas primum omnium dicitur huius modi concessiones fuisse, et quidem plerumque earum pro Matrimonio inter Supremos Principes contrahendis, nec non gravissima urgente causa, cujus ad publicum bonum pertineret [...] Denique ex hactenus dictis aperte constat, in omnibus casibus, quibus facultates, aut dispensationes ab Apostolica Sede petantur pro Matrimonio a Catholico viro, aut Muliere, cum Haeretico fornicario, aut Viro contrahendis, eandem Apostolicam Sedem, ut supra diximus, huiusmodi Matrimonia, non Haereticis abjuratio praecedat." The English translation from *Demaree*, *Mixed Marriages*, p. 27, other English version is in *Papal Teaching*, pp. 46-47

without requiring the abjuration of heresy. The Pope insisted that dispensation from the impediment of mixed religion could be granted, provided that the abjuration of heresy preceded it. Some dispensations, however, were granted without the customary abjuration of heresy, but this happened only when the Church dealt with the marriage of those of princely rank, for an urgent case and a very serious reason affecting the public good, and if there would be no danger of the Catholic party falling away from the faith, if the children were raised in the Catholic faith, and if the Catholic party was willing to strive for the conversion of the non-Catholic party.⁴²

In the Encyclical Letter *Ad tuas manus* of 8 August 1748, again addressed to the primate, archbishops, and bishops of Poland, the Pope reiterated the position of the Church that a dispensation from the impediment of mixed religion could be granted only after the abjuration of heresy.⁴³

⁴² See *Fontes*, vol. 2, no. 387, # 5; see also P. GASPARI, *Tractatus canonicus de matrimonio*, vol. 1, Romae, Typis Polyglottis, 1932, no. 445; SCHÖN, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 46-48; THO HAAR, *Mixed Marriages and Their Remedies*, pp. 4-7; J. M. MAROTTA, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, J.C.D. Diss., Ottawa, Saint Paul University, 1978, pp. 6-7.

⁴³ *Fontes*, vol. 2, no. 389, # 6 ¶ 1; Tolerat quidem in aliquibus locis Apostolica Sedes Matrimonium inter Catholicum, et Haereticum, vel Haereticum, et Catholicam, cum nequeat impedire, et Ecclesiastica quadam prudentia, ne maxima mala enascantur, accumulata, ac tacet. At, quod Apostolicae Sedis auctoritate gratuita in huius Matrimonii dispensatione super gradu, aut alio impedimento conceditur, fieri nunquam potest, nisi praecedat haereticus abjunctio, iuxta eandem Sedis Apostolicae disciplinam a Nobis in praecedenti Epistola expostam, et iuxta recentia concessae facultatis verba *

2.2.1.4 - Pope Clement XIII (1758-1769)

Pope Clement XIII, in his Apostolic letter *Quantopere* dated 16 November 1763, to Cardinal Louis-Constantin de Rohan, the bishop of Strasbourg, was very much concerned about the children born of mixed marriages as to whether or not they could be raised in the Catholic faith, especially in the situation in which the Catholic party had died while the children were still in their childhood with their single heretic parent. He wrote:

How much the Catholic Church abhors marriages between Catholics and heretics, and deeply solicitous for the eternal welfare of her children, as always, has deterred them from joining wedlock with heretics, beloved son, you are assuredly not unaware. But now we find that this happens, that hereafter it will be licit to contract such marriages in Alsace, which seems to be to the advantage of the Catholic religion, if they be permitted only on that condition, that the children born thereof be educated in the Apostolic Roman faith: they say that in this way it will not be long before we shall thank God, that the entire people of this region is led to the true religion. [...] To this it is to be added, that if either of the spouses who is Catholic, dying, leaves the children in early childhood, it will be left to the other spouse to infect the children with the poisoned opinion of his sect. You see, therefore, beloved son, what the Catholic religion can promise itself concerning the children born of these marriages and whether it be much to be feared lest, while they intend to propagate the Catholic faith by these marriages, the heresy be more widely propagated; and what is worst of all, indifference to any kind of religion gains greater strength, by which as a rule the door to impiety is opened.⁴⁴

⁴⁴ *Fonnes*, vol. 2, no. 460, ## 1 and 4; *Collect.* (1905), no. 1368: "Quantopere a connubiis inter Catholicos, et Haereticos abhorreat Catholica Ecclesia, et de aeterna filiorum suorum salute vehementer sollicita, ut semper eos absterruerit, ne cum Haereticis Matrimonii vinculum iungant, dilecte fili Noster, profecto non ignoras. Nunc autem id agi comperimus, ut in posterum in Alsatia licitum sit talia conjugia contrahere, quae videtur in rem fore Catholicae Religionis, si ea tantummodo conditione permittantur, ut suscepta inde scholes in Apostolica Romana fide educatur: hac ratione non longe abesse aunt, cum Deo gratulabimur, populum istius regionis universum ad veram religionem esse tractum

2.2.1.5 - Pope Pius VI (1775-1799)

It seems quite clear that a more tolerant discipline indicating a further development of mixed marriage legislation, started with the pontificate of Pope Pius VI. Unlike his predecessors, the Pope, in his Letter *Exequendo nunc* of 13 July 1782 to Cardinal Johann Heinrich von Frankenberg, archbishop of Malines, no longer demanded the abjuration of heresy before the granting of a dispensation. However, he insisted that some major requirements were to be observed: (1) that such a marriage was not to be witnessed by the pastors in sacred places and that the pastors were not to wear any vestment indicating a sacred rite, nor recite the ritual prayers over the contractants and by no means bless them. This act was commonly known as passive assistance or material presence of a pastor; (2) that the heretic party had to submit a written declaration under oath in the presence of two witnesses that the Catholic party would freely practice his or her religion, and that the children born of this union would be raised in the Catholic faith; (3) that the Catholic party also had to give a written declaration under oath in the presence of two witnesses, that not only would he or she not be falling away from the Catholic faith, but

[...] Huc accedit, quod si alteruter Coniugum, qui Catholicus sit, vita functus, liberos in prima aetate reliquerit, alteri Coniugi Haeretico, liberum erit venenatis sectae suae sensibus, filios suos, inficere. Vides igitur, dilecte filii Noster, quid de prole ex his coniugiis suscepta polliceri sibi possit Catholica Religio, et num vehementer timendum sit, ne cum per haec connubia propagare intendunt Catholicam Fidem, latius propagetur haeresis; et quod omnium deterrimum, maiores in dies vires capiat Religionis cuiuscumque indifferentia, qua plerumque ad impietatem aditus aperitur." -- The English translation from M^o M^o, *Marriage with a Baptized non-Catholic*, pp. 35-38; for another English version, see *Papal Teaching*, pp. 51-53. See also T^o H^o, *Mixed Marriages and Their Remedies*, p. 8.

also would educate the children in the same faith and strive for the conversion of the non-Catholic party.⁶⁵

It is quite obvious that through the above rescript the practice of the *cautiones* for common people was established for the first time in the history of the Church. The *cautiones* about this time began to be simplified, and the number, as will be seen in a later discussion, was gradually restricted.⁶⁶

2.2.1.6 - Pope Pius VII (1800-1823)

Pope Pius VII, on 10 January 1802, granted the power to the bishop of the mission of the Coromandel Coast (Southeast India) to care for the Catholics with regard to mixed

⁶⁵ *Fontes*, vol. 2, no. 471, # 4: Transeundo nunc ad aliud punctum de imperata Parochorum assistentia in matrimoniis mixtis, dicimus, quod si praemissa supra nominata admonitione ad advocandam partem catholicam ab illicito matrimonio, ipsa nihilominus in voluntate illud contrahendi persitat, et matrimonium infallibiliter secuturum praevideatur, poterit tunc parochus catholicus *materialem suam exhibere praesentiam*, sic tamen, ut sequentes observare teneatur cautelas.

Primo, ut non assistat tali matrimonio in loco sacro, nec aliqua veste ritum sacrum praeferente indutus, neque recitabit super contrahentes preces aliquas ecclesiasticas, et nullo modo ipsis benedicet.

Secundo, ut exigat et recipiat a contrahente haeretico *declarationem in scriptis*, qua cum *iuramento*, praesentibus duobus testibus, qui debebunt et ipsi subscribere, *obliget se ad permittendum comparti usum liberum religionis catholicae et ad educandum in eadem omnes liberos nascituros sine ulla sexus distinctione*; [...]

Tertio, ut et ipse contrahens catholicus *declarationem* edat a se et duobus testibus subscriptam, in qua cum *iuramento* promittat, non tantum se nunquam apostataturum a religione sua catholica, sed educaturum in ipsa omnem prolem nascituram, et procuraturum se efficaciter conversionem alterius contrahentis acatholici."

⁶⁶ See LOURDURANN, *Pre-nuptial Guarantees*, p. 27; F. M. CAPPALLO, *Tractatus canonico-moralis de sacramentis*, vol. 5, *De matrimonio*, Romae, Marietti, 1961, no. 309; DONA, *The Prenuptial Promises in Mixed Marriages*, pp. 75-77.

marriages with heretics. Such unions could be contracted licitly, provided that there was no danger of falling away from faith within that union; that the non-Catholic spouse had to promise under oath that the children of both sexes born of this marriage would be baptized, reared and educated in the Catholic faith; and that the Catholic party was to be obliged to strive for the conversion of the non-Catholic partner, and to educate the children in the Catholic religion.⁶⁷

In the Apostolic Letter *Etsi fraternitatis* of 8 October 1803, to Joseph Ludwig Colmar, the archbishop of Mainz, the Pontiff stated among other things that the Church always interdicted and reprobated marriages of Catholics with heretics as illicit, pernicious, and detestable, which could be proved by innumerable decrees of Councils and Supreme Pontiffs. To avoid greater evils, however, some mixed marriages happened to be tolerated in certain places, on account of the difficulties of the places and times.⁶⁸

⁶⁷ *Collect.* (1905), no. 1369: "[...] potestam concessit indulgendi Catholicis suae Missionis, ut matrimonia licite contrahere possint cum Schismaticis [...] Dummodo tamen periculum perversionis partis catholicae exhujusmodi conjunctionibus non sit prudenter timendum, et conjux acatholicus promiserit cum juramento nullum impedimentum se illaturum quod proles utriusque sexus, sacro Baptismatis lavacro prius regenerata, in catholicae fidei professione ac praeceptorum Ecclesiae, ejusque disciplinae observantia libere sit educanda: monita insuper parte catholica de obligatione curandi pro viribus conversionem conjugis acatholici, etiam educandi prolem utriusque sexus in catholica Religione."

⁶⁸ *Fontes*, vol. 2, no. 477, # 5: "Atque horum primum est, Catholicorum cum haereticis connubia Ecclesiam Catholicam tamquam illicita, perniciose et detestabilia perpetuo interdixisse et reprobasse, quod innumeris possemus Conciliorum, Summorumque Pontificum decretis demonstrare, [...] Et licet in quibusdam regionibus propter locorum et temporum difficultatem eadem connubia tolerari contingat, id quidem ad eam referendum est aequanimitatem, quae nulla ratione approbationis et consensus cuiuspiam loco habenda sit, sed merae patientiae, quam ad maiora vitanda mala affert necessitas, non voluntas, [...]."

2.2.1.7 - Pope Pius VIII (1829-1830)

In the matter of mixed marriages, the bishops of the province of Cologne faced some great difficulties caused by Prussian civil law. The law prescribed that in mixed marriages the children of either sex were to be educated in the father's religion or according to the father's will. The priests were forbidden to demand any promise from the parties in question especially with regard to the religious education of the children to be born. Pope Pius VIII, in his Apostolic Letter *Litteris altero* of 25 March 1830, addressed to these bishops, clearly stood behind the Church's position in maintaining the *cautiones*, and hence declared that those marriages were indeed unlawful. However, the passive assistance of pastors was permitted simply for avoiding greater evils. The Pontiff wrote among other things:

Therefore, it is not unknown to you, that the Church abhors such marriages which entail no little irregularity and spiritual danger, and consequently this Apostolic See has always with the greatest and most constant study taken care that the canonical laws prohibiting the same marriages should be kept. And if the Roman Pontiffs have sometimes been found to dispense from the most sacred interdict of the canons, they have done so because of grave reasons certainly, and with difficulty indeed, and have been wont to add to their dispensations the express condition that before the marriage opportune *cautiones* be given; not only that the Catholic spouse could not be perverted by the non-Catholic, but rather that the Catholic should know that he was bound to withdraw with all his power the other from error, but also that the children of either sex born of this same marriage should by all means be educated in the sanctity of the Catholic religion. You know, moreover, Venerable Brethren, that all the *cautiones* tend to this that the natural and divine laws be kept and observed in this matter, since it is known that Catholics, whether men or women, who thus contract marriages with non-Catholics, so that they rashly commit themselves and their future offspring to the danger of perversion, do not only violate the canonical sanctions, but directly and most gravely sin also against the natural and divine law. Hence you understand already, that we too should be guilty of a very grave crime

before God and the Church if, with regard to such marriages to be contracted in those regions, we permitted that to be done by you or by the pastors of your dioceses by which if not in words, in deeds at least, they would be indiscriminately approved.⁶⁹

2.2.1.8 - Pope Gregory XVI (1831-1846)

On 17 July 1831, Pope Gregory XVI granted the faculty to the mission superior in Coromandel Coast (Southeast India) to make use of the Benedictine Declaration in the

⁶⁹ *Fontes*, vol. 2, no. 482; *Collectanea S. Congregationis de Propaganda Fide seu decreta, instructiones, rescripta pro apostolicis missionibus*, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1893 (*Collect.* [1893]), no. 1426: "[...] Ergo ignotum Vobis non est, Ecclesiam ipsam a connubiis huiusmodi, quae non parum deformitatis, et spiritualis periculi praeseferunt, abhorretere, atque idcirco Apostolicam hanc Sedem summo semper constantique studio curasse ut canonicae leges matrimonia eadem prohibentes religiose custodirentur. Quodsi Romani Pontifices a sanctissimo illo canonum interdicto nonnunquam dispensasse inveniuntur, id profecto graves ob causas, et aegre admodum fecerunt, suisque dispensationibus adiicere consueverunt conditionem expressam de praemittendis matrimonio opportunis cautionibus, non modo ut coniux catholicus ab acatholico perverti non posset, quin potius ille teneri se sciret ad hunc pro viribus ab errore retrahendum, sed etiam, ut proles utriusque sexus ex eodem matrimonio procreanda in catholicae religionis sanctitate omnino educaretur. Nostis autem, Venerabiles Fratres, ipsas omnes cautiones eo spectare, ut hac in re naturales divinaeque leges sartae tectae habeantur, quandoquidem exploratum est, catholicas personas seu viros, seu mulieres, quae nuptias cum acatholicis ita contrahunt, ut se aut futuram sobolem periculo perversionis temere committant, non modo canonicas violare sanctiones, sed directe etiam, gravissimeque in naturalem ac divinam legem peccare. Atque exinde iam intelligitis, Nos quoque gravissimo coram Deo et Ecclesia criminis reos fore, si circa nuptias huiusmodi istis in regionibus contrahendas, illa a Vobis aut a parochis Vestrarum dioecesium fieri assentiremur per quae, si non verbis, factis tamen ipsae indiscriminatim approbarentur." -- The English translation from MARTEN, *Marriage with a Baptized non-Catholic*, pp. 46-47; cf. *Papal Teaching*, pp. 84-85. For more comments, see BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 37; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 77-78; TER HAAR, *Mixed Marriages and Their Remedies*, pp. 9-10; MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 9-10.

places under his jurisdiction in order to avoid clandestine marriages between Catholics and heretics.⁷⁰

Then, because of the civil enactment in Bavaria which ordered the priests to witness such unions without requiring the *cautiones* and threatened the pastors with the withdrawal of any subsidy if they did not comply, the Pope, in his famous Encyclical Letter *Summo iugiter* of 27 May 1832 to the bishops of Bavaria, reacted very strongly and urged them to maintain the law on mixed marriages with regard to the *cautiones* and the *causa gravis*, for these were required for the fulfilment of the divine law mandates. The bishops were also asked to tell their priests that their duty was not only to abstain from honouring the marriage itself with their presence, but also from announcing the marriage and from granting dismissorial letters (*dimissorialibus litteris*).⁷¹

Later, at the request of some bishops of that area (Bavaria), the Pope, through the Secretariate of State, did permit on 12 September 1834 the merely passive assistance of the priests at such marriages, lest the marriages would be witnessed by the Protestant ministers. But the Catholic parties had to promise that the children would be brought up as Catholics and that an effort must be made for the conversion of the heretics.⁷²

⁷⁰ *Collect.* (1905), no. 1373.

⁷¹ *Fontes*, vol. 2, no. 484, ## 1-2, 7; see MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 10-11; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 78-79.

⁷² *Fontes*, vol. 8, no. 6452; see also BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 38-39.

When, on 21 January 1834, the Congress of Baden (near Zürich) in Switzerland enacted a law, called the Baden Articles, regarding the celebration of mixed marriages - a law which also attributed the dispensing power to the civil authority and ordered the Catholic ministers to witness those marriages without considering the difference of religion between the parties - the Pope, through his Encyclical Letter *Commissum divinitus* of 17 May 1835, to the clergy of Switzerland, strongly condemned such act. He said among other things:

"You know", said our Predecessor, Gelasius, in his letter to the Emperor Anastasius, "you know, most devoted son, that notwithstanding the dignity which grants you authority over the people, you are subject in all divine matters to the religious authority and must entrust yourself to it for everything that regards your salvation. When it is a matter of administering the heavenly sacraments and of the just rules referring to them, realize that the order of religion assigns you a position which is subordinate and not supreme. Know therefore that in all these things you are subject to the judgement of this religious authority and not to your own". Nonetheless, although it be so incredible and monstrous, the Congress of Baden's authority has gone so far as to concern itself with the rules that regulate the administration of the sacraments and to confer rights and powers in this domain on the civil power. Thus, there are found articles wherein the members of the Congress rashly and boldly have exercised authority over matrimony; this sacrament which is so great in its relation to Christ and the Church. Thus, they are clearly seen to have placed mixed marriages in a favourable light, while an obligation is placed upon Catholic priests to bless such marital unions, and not to concern themselves about the disparity of cult between the contracting parties, and most severe punishments are established against those who do not conform to such regulations.⁷³

⁷³ *Fontes*, vol. 2, no. 490, # 4: "... *Nosti*, inquiebat S. Gelasius Praedecessor Noster, in sua ad Anastasium imperatorem epistola, *nosti, fili clementissime, quod licet praesideas humano generi dignitate, rerum tamen praesulibus divinarum devotus colla submittis, atque ab eis causas tuae salutis expectis: inque sumendis coelestibus sacramentis, eis que ut competit disponendis, subdi te debere cognoscis religionis ordine potius quam praeesse. Nosti itaque inter haec ex illorum te pendere iudicio, non illos ad tuam velle redigi*

In his Letter *Dolorem* of 30 November 1839, to the archbishop of Freiburg, the Pontiff urged the bishop to prevent and to oppose such marriages in his diocese, also not to do anything in the case of some Catholics who wanted to enter into such a union without first obtaining a permission or having given the *cautiones* beforehand. The Pope stated:

That we should grant you, Venerable Brother, the faculty (of dispensing regarding the closer degrees of relationship), this especially induces Us, that in the aforesaid prayers, it seemed to be indicated that in this way you might the more easily be able to turn the Catholics of your diocese away from joining in the bond of marriage with non-Catholics with spiritual harm to themselves and to their children. And we are sustained by a good hope that it will come about that you will steadfastly keep the sound doctrine and observance of the canons and statutes of this Holy See regarding those same mixed marriages. But especially if any Catholic man or woman should wish to contract such marriages, without obtaining the permission of the Church or without having given beforehand the proper *cautiones*, by which the observance of their religious obligations, and especially the Catholic education of all the children of either sex is safeguarded; in this case remember it is by all means your duty to oppose with all your might such a marriage, and do nothing at all yourself, nor permit anything to be done by your clergy, whereby you appear to approve it.⁷⁴

potestatem. Attamen, quod incredibile prorsus ac portenti loco esse videtur, eo usque in Badensi conventu progressum est, ut vel in ipsam sacramenta dispensandi rationem saeculari auctoritati ius et officium fuerit attributum. Huc sane spectant, qui ibidem de magno in Christo et Ecclesia matrimonii sacramento temerario ausu conscripti sunt, articuli: huc favor apertissime decretus mixtis nuptiis contrahendis: huc necessitas parochis catholicis imposita iisdem nuptiis benedicendi, omni religionis inter coniuges discrimine prorsus neglecto; huc demum severae poenarum comminationes adversus eos adhibitae, qui id facere detrectaverint." -- The English translation from *Papal Teaching*, pp. 97-98.

⁷⁴ *Fontes*, vol. 2, no. 493, # 2: "[...] Quam facultatem ut tibi, ven. frater, concederemus, id Nos potissimum induxit, quod memoratis in precibus indicare visus, facilius inde futurum ut catholicos tuae dioeceseos avertere valeas a nuptiarum foedere in suam ac nasciturae prolis spiritualem perniciem cum acatholicis coniungendo. Ac

However, according to the Pope, a mixed marriage could be celebrated validly and licitly without requesting the *cautiones* in certain and unusual circumstances. This indicates another significant progress of mixed marriage legislation at about this time. The Pope, in his Apostolic Letter *Quas vestro* dated 30 April 1841, to the bishops of Hungary, stated that the divine law obligations could be satisfied without requesting the *cautiones* in unusual circumstances, namely, the marriage could not be avoided without greater evil and danger of scandal, harm to Catholic religion, and if the marriage might be celebrated before a non-Catholic minister because the Church refused to grant a dispensation from the impediment. However, the Pontiff only allowed a merely passive assistance of pastors and demanded that any religious rite must be excluded. The Pope said:

If, therefore, Venerable Brethren, it arises in the dioceses of this Kingdom from the condition of times, places, and persons, that the marriage of a non-Catholic man with a Catholic woman, and vice versa, though the *cautiones* prescribed by the Church are lacking, cannot in any way be averted without a greater evil and danger of scandal with harm to religion, and at the same time (we use the words of Pius VII of glorious memory in his aforesaid letter to the Archbishop of Mainz) it is recognized that it can turn to the use and common good of the Church if such nuptials, though forbidden and illicit, be celebrated before the Catholic pastor rather than before the heretical minister to whom the parties would

bonam equidem spe sustentamur fore ut circa mixta eadem connubia sanam doctrinam et custodiam canonum et institutorum Sanctae huius Sedis firmiter tuearis. Praesertim vero si quis vir aut mulier Catholica nuptias huiusmodi contrahere velit, non impetrata Ecclesiae venia, aut non adhibitis antea idoneis cautionibus, quibus observatio religiosarum suarum obligationum, ac nominatim educatio catholica omnium filiorum utriusque sexus in tuto ponatur; hoc in casu tuum omnino esse memineris, ut eidem matrimonio totis viribus te opponas, et nihil prorsus vel ipse facias, vel a clero tuo fieri permittas, quo illud probare videamini." -- The English translation from MARTIN, *Marriage with a Baptized non-Catholic*, p. 53.

certainly fly; then the Catholic pastor or another priest taking his place will be able to be present at these nuptials with a merely material presence, excluding any ecclesiastical rite, just as if he acted in the capacity of a mere qualified or authorized witness, as they say, so that having heard the consent of both parties, then, in accordance with his office, he may be able to note in the book of marriages that the act was validly performed.⁷⁵

The Pope also demanded that after the celebration of a mixed marriage, both the bishop and the pastor were to see to it that the danger of drifting away from faith be removed from the Catholic party, the children of both sexes be raised and educated in the Catholic religion in whatever manner that would be right, and that the Catholic party be seriously admonished regarding the obligation of caring for the conversion of the non-Catholic partner.⁷⁶

⁷⁵ *Fontes*, vol. 2, no. 497, # 6; *Collect.* (1893), no. 1428, # 3: "Siquidem igitur, Venerabiles Fratres, in Regni istius dioecibus ex temporum, locorum, ac personarum conditione quandoque contingat, ut matrimonium acatholici viri cum catholica muliere et vicissim, deficientibus licet cautionibus ab Ecclesia praescriptis, absque maioris mali scandalique periculo, in religionis perniciem interverti omnino non possit, simulque (verbis utimur gloriosae memoriae Pii VII in supranunciata epistola ad Archiep. Monguntinum) in Ecclesiae utilitatem et commune bonum vergere posse dignoscatur, si huiusmodi nuptiae quantumlibet vetitae et illicitae, coram catholico parochi potius quam coram ministro haeretico, ad quem partes facile confugerent, celebrentur: tunc parochus catholicus aliisque sacerdos eius vice fugens poterit iisdem nuptiis materiali tantum praesentia, excluso quovis ecclesiastico ritu, ad esse, perinde ac si partes unice ageret meri *testis*, ut aiunt, *qualificati*, seu *auctorizabilis*, ita scilicet, ut utriusque coniugis audito consensu, deinceps pro suo officio actum valide gestum in matrimoniorum librum referre queat." -- The English translation from MARTIN, *Marriage with a Baptized non-Catholic*, pp. 57-58. See also MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 12-13; DOYLE, *The Pre-nuptia! Promises in Mixed Marriages*, pp. 79-80; BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 39-40.

⁷⁶ *Collect.* (1893), no. 1428, # 3: "[...] His autem in circumstantiis, uti idem Decessor Noster apposite commendabat, haud impari, imo maiori etiam conatu et studio per Episcopos et parochos elaborandum est, ut a catholica parte perversionis periculum

To the bishop of Freiburg who reported to the Pope of the frequency of mixed marriages in those regions and the civil interference in those cases, the Pope, in his Letter *Non sine gravi* of 23 May 1846, again emphasized the importance of the required guarantees that must be given by the parties, and the necessary dispensation which must be obtained from the Church before the celebration of any mixed marriage. The Pontiff stated that even if the *cautiones* had been given and the dispensation had been obtained, those marriages were still only tolerated by the Church. Therefore, the blessing of mixed marriages could never be accepted if there were no *cautiones* given by the parties and no dispensation granted by the Church.⁷⁷

2.2.1.9 - Pope Pius IX (1846-1878)

Pope Pius IX in all cases strongly insisted on the *cautiones*. He said:

quoad fieri poterit, amoveatur, ut prolis utriusque sexus educationi in religione catholica, quo meliori modo fas erit, cautum sit, atque ut coniux catholicae fidei adhaerens serio admoneatur de obligatione, qua tenetur, curandi pro viribus acatholici coniugis conversionem, [...]"

⁷⁷ *Fontes*, vol. 2, no. 503, # 2: "Et quidem, quod ad benedictionem attinet, eam, veluti optime noscitis, haec Apostolica Sedes prohibere consuevit in illis quoque matrimoniis, quae inter catholicos et acatholicos ineuntur, impetrata eiusdem Sedis venia atque adhibitis cautionibus ab illa praescriptis. Atque etsi deinde tolerari poterit, ut mos in nonnullis regionibus inductus servaretur, benedicendi matrimoniis mixtis inquit cum Ecclesiae venia et praedictis cautionibus, numquam tamen toleranda est eadem benedictio in iis casibus, in quibus, nulla accedente Ecclesiae venia, nec praeviis necessariis cautionibus, manifestum idemque gravissimum admittitur crimen in ipso matrimonii foedere ineundo. Numquam enim tolerari debet, ut sacrilegis hisce contractibus sacri ritus admisceantur, et sacerdotes Dei videantur suo facto probare, quod ore illicitum esse edocent et praedicant."

It has been the constant habit to add to the dispensations granted, the express condition of requiring, previous to the marriage, necessary guarantees - (1) not only to preserve the Catholic party from being perverted by the non-Catholic, (2) the former being, on the other hand, required to use every effort to withdraw the other from error; (3) but also that the children of both sexes, to issue from the union, *should be brought up exclusively in the sanctity of the Catholic religion.*⁷⁸

The most important document that marked the pontificate of this Pope with regard to mixed marriages was probably the Instruction *Etsi sanctissimus* of 15 November 1858, which was later known as *Instructio Antonelliana*. This instruction was issued by the papal Secretary of State, Cardinal Antonelli, upon the Pope's order, and was addressed to all archbishops, bishops, and other Ordinaries in the world. The instruction basically emphasized the unchanged position of the Church regarding the entire questions of mixed marriages, by summarizing the teachings of the Pope's predecessors since Benedict XIV. It stated among other things:

The Supreme Pontiff, very greatly solicitous for the welfare of the entire flock of the Lord committed divinely to him, in accord with his Apostolic ministry cannot but inculcate very deeply in all archbishops, bishops, and other Ordinaries, that the most sacred documents of the Catholic Church on these marriages be kept fully, inviolately, and with the greatest care. For all know what the Catholic Church herself has constantly felt on these nuptials between Catholics and non-Catholics, since she has always disapproved of them and has held them as illicit and plainly pernicious, both on account of wrongful communion in divine things, and on account of the improper education of the children [...]. But our Holy Father does not at all doubt that all bishops in accord with their recognized observance, piety and duty in the pastoral office will continue with more flaming zeal to turn the catholics entrusted to their care away

⁷⁸ LAMBING, *Mixed marriages*, pp. 27-28. See also BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 42-45; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 81-82.

from these mixed marriages, and accurately to teach them the doctrine of the Catholic Church and the laws pertaining to the same marriages.⁷⁹

Regarding the *cautiones*, the instruction simply restated the above mentioned requirements which were previously pointed out by the Pope, that (1) the Catholic party was not to be perverted by the non-Catholic partner, (2) the Catholic party had an obligation to strive for the withdrawal of the non-Catholic partner from error, and (3) all the children of both sexes born of this mixed marriage were to be educated in the sanctity of the Catholic religion.⁸⁰

⁷⁹ *Collect.* (1905), no. 1378: "[...] Summus Pontifex, de universi Dominici gregis salute sibi divinitus commissa vel maxime sollicitus, pro Apostolici ministerii sui munere, non potest non summopere inculcare omnibus Archiepiscopis, Episcopis, aliisque locorum ordinariis, ut sanctissima Catholicae Ecclesiae de hisce conjugiiis documenta integra et inviolata religiosissime serventur.

Omnes enim norunt quid ipsa Catholica Ecclesia de hujusmodi Catholicos inter et Aatholicos nuptiis constanter senserit, cum illas semper improbaverit, ac tanquam illicitas planeque perniciosas habuerit, tum ob flagitiosam in Divinis communionem, tum ob impendens catholico conjugii perversionis periculum, tum ob pravam sobolis institutionem. [...]

Nihil vero dubitat SSmus D.N. quin omnes Sacrorum Antistites, ob spectatam eorum religionem, pietatem, et pastoralis muneris officium, pergant flagrantiori usque zelo Catholicos sibi concreditos a mixtis hisce conjugiiis avertere, eosque accurate edocere Catholicae Ecclesiae doctrinam legesque ad eadem conjugia pertinentes." -- The English translation from MARTIN, *Marriage with a Baptized non-Catholic*, p. 62.

⁸⁰ *Collect.* (1905), no. 1378: "[...]: et nonnisi sub expressa semper conditione de praemittendis necessariis opportunisque cautionibus, ut scilicet, non solum catholicus conjux ab acatholico perverti non posset, quin imo catholicus ipse conjux teneri se sciret ad acatholicum pro viribus ab errore retrahendum, verum etiam, ut universa utriusque sexus proles, ex mixtis hisce matrimoniis procreanda, in sanctitae catholicae religionis educari omnino deberet."

2.2.1.10 - Pope Leo XIII (1878-1903)

Due to a very deep concern about the family unity which very often was attacked by mixed marriages, Pope Leo XIII, in his Encyclical Letter *Arcanum* dated 10 February 1880, very briefly instructed the Church by reiterating the past legislation on such a union as follows:

That also is to be avoided, lest, namely, marriages be easily desired with those alien to the Catholic name; for souls separated on the teaching of religion can hardly be hoped to agree as to the rest. Nay, from this especially it is perceived that such marriages should be abhorred, since they offer the occasion for a forbidden association and communion of sacred things; they create a danger to the religion of the Catholic spouse, are an impediment to the proper education of the children and very often impel their minds to grow accustomed to having an equal regard for all religions, when the distinction between truth and falsehood has been removed.⁸¹

The contents of the above letter were basically repeated in the Pope's Encyclical Letter *Constanti Hungarorum* dated 2 September 1893, addressed to the bishops of Hungary with the emphasis on the Catholic education of the children, despite the local civil law enactments. The Pope very strongly said among other things:

⁸¹ *Fontes*, vol. 3, no. 580, # 26: "Illud etiam cavendum est, ne scilicet coniugia facile appetantur cum alienis a catholico nomine; animos enim de disciplina religionis dissidentes vix separari potest futuros esse cetera concordēs. Quin imo ab eiusmodi coniugiis ex eo maxime perpicitur esse abhorrendum, quod occasionem praebent vetitae societati et communicationi rerum sacrarum, periculum religioni creant coniugis catholici, impedimento sunt bonae institutioni liberorum, et persaepe animos impellunt, ut cunctarum religionum aequam habere rationem assuescant, sublato veri fasique discrimine." -- The English translation from MARTIN, *Marriage with a Baptized non-Catholic*, p. 63. For other English versions, see *Papal Teaching*, p. 164; A. WERTH and C. S. MIHANOVICH, *Papal Pronouncements on Marriage and the Family from Leo XIII to Pius XII (1878-1954)*(= *Papal Pronouncements*), Milwaukee, WI, Bruce Pub., 1955, pp. 32-33. See also DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 83.

For the rest, it is of very great importance, to break the force of very many evils, that those who have the care of souls never desist from admonishing the people, that as far as possible they abstain from entering marriage with those alien to the Catholic name. Let the faithful rightly understand and have clear in their minds, that this especially they should abhor, i.e., those marriages the Church has always detested, as We ourselves said in another place, 'that they offer the occasion for a forbidden association and communion of sacred things, they create a danger to the religion of the Catholic, are an impediment to the proper education of the children and very often impel minds to grow accustomed to have an equal esteem for all religions, when distinction between truth and falsehood has been removed.'⁸²

2.2.2 - On Disparity of Cult

As has been pointed out before that soon after the missionary activities of the Church reached many territories in the Orient such as the East Indies as well as the newly discovered lands in the West such as America in the sixteenth century, the same difficult experiences of the Church with regard to mixed marriages contracted by Catholics and infidels or non-baptized as those in earlier centuries suddenly reappeared. Hence, the

⁸² *Fontes*, vol. 3, no. 620, # 3: "[...] Ceterum ad prohibendam plurimorum malorum vim, permagni ponderis est, ut animarum curatores nunquam desistant multitudinem commonere, ut ab ineundis cum alienis a catholico nomine coniugiis, quantum fieri possit, abstineant. Probe intelligant fideles, notatumque animis habeant, ab eiusmodi coniugiis, quae semper Ecclesia detestata est, ex eo maxime esse abhorrendum, uti Nos ipso alio loco ediximus, 'quod occasionem praebent vetitae societati et communicationi rerum sacrarum; periculum religioni creant coniugis catholici; impedimento sunt bonae institutioni liberorum, et persaepe animos impellunt, ut cunctarum religionum aequam habere rationem assuescant, sublato veri falsique discrimine'." -- The English translation from MARTIN, *Marriage with a Baptized non-Catholic*, pp. 63-64; another English version is in *Papal Teaching*, pp. 187-188. See also DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 83.

Church began to mitigate the early policy and discipline - more extensively after the establishment of the *Propaganda* - by granting dispensations if such marriages could not be avoided in any way, and provided that the conditions required by divine law were fulfilled. Therefore, the need for necessary faculties to deal with such a problem became very important for the missionaries.⁴³ The following are the enactments of several Pontiffs in response to the above needs.

2.2.2.1 - Pope Clement IX (1667-1669)

On 23 January 1669, Clement IX granted the faculty to Bishop François Pallu, titular bishop of Heliopolis, vicar apostolic of Tonkin and the adjacent territories in China and Laos, to dispense from the impediment of disparity of cult. But the following conditions had to be fulfilled: (1) there must be some grave causes, (2) dispensation must be given in single cases, (3) only in the places where the infidels outnumbered the Catholics, (4) there be no insult to the Creator, and (5) the children would be raised in the Catholic faith.⁴⁴

⁴³ LOURDUSAMY, *Pre-nuptial Guarantees*, p. 89; SCHENK, *The Impediments of Mixed Religion and the Disparity of Cult*, p. 45.

⁴⁴ I. PERRONE, *De matrimonio christiano*, t. 2, Romae, Typis S. Congregationis de Prop. Fide, 1858, p. 334; *Collect.* (1905), no. 1340: "Clemens IX concessit Episcopo Heliopolitano, Vicario Ap. in Regno Sinarum, facultatem, ad annos quindecim proxime futuros, dispensandi super impedimento disparitas cultus, gravibus tamen ex causis, in singulis casibus in quibus dispensandum erit, et in locis tantum ubi sunt plures Infideles quam Christiani; it ut in eo matrimonio postmodum (quatenus absque contumelia Creatoris fieri possit), contrahentes remanere libere et licite valeant, prolesque exinde suscipiendas legitimas docernendi; super quibus ejusdem Vicarii conscientia oneratur. Et Praedictae dispensationes concedantur gratis." See also SCHENK, *The Matrimonial*

2.2.2.2 - Pope Benedict XIV (1740-1758)

Pope Benedict XIV, on 15 February 1756, granted the bishops and vicars apostolic in missionary lands the faculty to dispense from the impediment of disparity of cult for the period of two years. The faculty, however, could only be used in the following cases:

(1) if the marriage had been contracted by two unbaptized, one of whom later embraced the faith, but under two conditions: (a) that the two parties would live together without offending the Creator, and (b) the children would be raised in the Catholic religion;

(2) if the marriage would be contracted by a Catholic and an unbaptized, provided that: (a) the parties would live together without offense to the Creator, (b) the children would be raised in the Catholic faith, and (c) only in the places where the unbaptized outnumbered the Catholics;

(3) if the marriage was contracted invalidly by a Catholic and a non baptized, provided that the two conditions mentioned in the above first case would be fulfilled. By so doing, the marriage would become lawfully contracted and the children already born of the previous unlawful union be declared legitimate.⁴⁵

Impediments of Mixed Religion and Disparity of Cult, pp. 45-46.

⁴⁵ FERRONE, *De matrimonio christiano*, tom. 2, pp. 334-335: "[...]: Si agatur de matrimonio iam *contracto* inter duos infideles, quorum unus tantum ad fidem convertitur, illi dari potest dispensatio, ut cum parte infideli remaneat, modo ista sine contumelia Creatoris cohabitare consentiat; et proles instituatur in religione catholica. Si agatur de matrimonio *contrahendo* inter fidelem et infidelem, ut possit dari dispensatio, praeter duas modo dictas conditiones, requiritur ut contrahentes sint in locis ubi infideles sint plures, quam christiani. Demum si agatur de matrimoniis invalide contractis inter fidelem et infidelem primo erit monendus fidelis quale commiserit peccatum, deinde ad tempus

2.2.2.3 - Pope Clement XIII (1758-1769)

Concerned about the many grave difficulties faced by the missionaries in China, Pope Clement XIII, on 18 January 1767, extended the use of the indult granted to the bishops and vicars apostolic in that nation to one or two of their respective missionaries for two years. The indult in question was the faculty to dispense from the impediment of disparity of cult. In other words, the faculty which was customarily granted to mission Ordinaries could be granted also to some of the priest missionaries should it be necessary, though in extraordinary circumstances only.*

Some other provisions were also made by the Pope in connection with the manner of exercising the faculty to dispense. This was evident when he ordered the Congregation of the Roman and Universal Inquisition (Holy Office) to transmit to the vicar apostolic of Setzchuan the Instruction *Ut dubiis* of 12 January 1769, which contained some regulations to be followed. The said regulations were: (1) the faculty could be exercised only in the places where the Catholics were outnumbered by the non-Catholics; (2) a dispensation could be granted for a grave reason such as the risk of separation but only to true Catholics whose infidel spouses refused to be baptized; (3) there must be no danger of abandoning the faith on the part of the Catholic party; (4) the children would be raised in the Catholic faith; (5) the Catholic party would strive for the conversion of

separabuntur, si sine tumultu fieri possit, iniungeturque poenitentia salutaris interim peragenda, qua persoluta, si adsint duae conditiones in primo casu requisitae, poterit concedi dispensatio, ut legitime contrahant, et proles inde nata legitima declarabitur." See also Boyle, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 32-33.

* *Collect.* (1905), no. 1345.

the non-Catholic; (6) both parties were to be instructed in the necessity of renewing their marriage consent, which could be done even by the parties themselves without witnesses in order to avoid any persecutions and scandal.¹⁷

2.2.2.4 - Pope Pius VI (1775-1799)

Through the Congregation of the Holy Office, Pius VI, on 15 February 1780, addressed an instruction to the vicar apostolic of Setzchuan saying that the faculties granted to him by the Holy See to dispense from mixed marriage impediments were not to be exercised until some conditions had been fulfilled. The conditions contained in the instruction are: the non-Catholic showed sign of conversion, the parties would live together without offence to the Creator and harm to the Christian name, and the children of both sexes would be educated in the sanctity of the Catholic religion.¹⁸

¹⁷ *Collect.* (1905), no. 1347; PERRONE, *De matrimonio christiano*, pp. 336-337; J. J. C. PETROVITS, *The New Church Law on Matrimony*, Philadelphia, PA, J. J. McVey, 1921, p. 174.

¹⁸ *Fontes*, vol. 4, no. 840; *Collect.* (1907), vol. 1, no. 542: "[...], dispensandi super disparitate cultus, iis tantum prudentibus ac piis in sua Missione laborantibus sacerdotibus subdelegare, qui neminem fidelium permittant matrimonium contrahere cum infideli, ni viderint antea graves illas causas concurrere in singulis plane casibus expetendas, quas accurate inspicere iubet Apostolica Sedes, atque illud maxime caverint quod pars infidelis, nisi spem suae conversionis praeberit, saltem sine contumelia creatoris et Christiani nominis iniuria sit cum parte fidei cohabitura, nec ullatenus impeditura educationem proli utriusque sexus in sancta religione." See also BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 33-34. This instruction seems to apply for both mixed religion and disparity of cult.

2.2.2.5 - Pope Pius VII (1800-1823)

Despite his long pontificate, Pope Pius VII, compared to his involvement in the matter of mixed religion marriages, did not seem to deal too much with disparity marriages. Perhaps the only recorded event indicating his involvement is that on 22 February 1801, he granted faculties to the Dominican missionaries in the Fokien region of China to dispense from the impediment of disparity of cult in the case of very dangerous illness.⁸⁹

2.2.2.6 - Pope Gregory XVI (1831-1846)

On 18 March 1838, Gregory XVI agreed to the petition of the vicar apostolic of Pondichery to sanate eight marriages already contracted without dispensation from the impediment of disparity of cult.⁹⁰

2.3 - The Enactments of the Sacred Congregation for the Propagation of the faith or the *Propaganda*

After the establishment of the *Propaganda* (1622), all mission territories recognized as such by the Church were put under its jurisdiction, and hence the Congregation became a single supreme authority after the Roman Pontiff over those territories in all matters, except the papally reserved cases. By so doing, the *Propaganda* became the base or central command for the missionaries, so to speak, in managing all missionary

⁸⁹ *Collect.* (1905), no. 1354.

⁹⁰ *Collect.* (1905), no. 1359.

activities as well as the return of the missionaries in the case they found or had difficulties, problems, questions, and doubts. This part will try to trace the action and reaction of the Congregation concerning mixed marriages.

2.3.1 - On Mixed Religion

Mixed religion was regulated by the *Propaganda* in various pertinent documents as will be seen clearly in the following discussion.

1. In its Instruction of 1638, the *Propaganda* pointed out the necessity of the abjuration of heresy before a marriage with a heretic was permitted. However, in territories where heresy was flourishing, and if the practice of Catholic faith was not permitted, marriages with heretics were to be prevented by way of exhortations rather than through censures.⁹¹

2. When the authority of the Church in Sweden was strongly challenged by both the influence of Lutheranism on the one hand, and civil law legislation which required all or at least some of the children born of mixed marriages to be brought up and educated in the religion of the father on the other hand, the vicar apostolic of the above place asked the Congregation whether the pastors could be allowed to assist at such a union and to

⁹¹ "In terris haereticorum, ubi haereses impune grassantur maxime, si ibi Catholicae fidei cultus non permittatur, matrimonia cum haereticis per exhortationes potius quam per censuras prohibenda." -- The text is quoted in *BOYLE, The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 29, footnote 4, from A. ROSKOVÁNY, *De Matrimoniis mixtis inter catholicos et protestantes*, vol. 2, Pestini et Nitriae, 1842, p. 9.

impart the nuptial blessing. The Congregation, in its instruction to the vicar dated 6 September 1785, stated among other things that when the vicar was morally certain that there would be no danger of perversion for the Catholic party, and that all the children, not only some, would be raised in the Catholic religion, the simple and material presence of pastors could be allowed, but without imparting the nuptial blessings and no recitation of the sacred nuptial prayers over the spouses.⁹² In this instruction, the Congregation for the first time - though not the first authority to do so - demanded an additional promise which must be given by the Catholic party, i.e., to procure or to strive for the conversion of the non-Catholic party.⁹³

3. In 1822, the vicar apostolic of Siam (now Thailand) presented to the *Propaganda* a difficult situation with regard to some marriages contracted by Catholic women and heretic men before a non-Catholic minister (*coram ministello*) without dispensation from the impediment of mixed religion. The vicar said that those women in fact did not lose

⁹² *Collect.* (1893), no. 1423; *Collect.* (1907), vol. 1, no. 579; *Fontes*, vol. 7, no. 4606: "[...] A riflesso dunque di queste circostanze non è possibile che un sacerdote cattolico concorra nè tampoco colla sua presenza ad approvare nozze sì empie e sacrileghe, dalle quali tanto pregiudizio deriva alla cattolica religione.

Ma quando pur mai avvenisse il caso, in cui potesse il Vicario Apostolico assicurarsi con morale certezza, che in uno di questi tali matrimonii fosse escluso il pericolo della perversione del coniuge cattolico, e si fosse coi precedenti patti assicurata l'educazione cattolica di tutta la prole, potrebbe pur allora tollerarsi, che egli vi assistesse, ma non giammai che benedicesse queste nozze, e recitasse sopra dei coniugi le sacre nuziali preghiere." See also ΜΑΚΟΤΗΑΚΑΤ, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 7-8.

⁹³ *Ibid.*, see also B. O'HOGGINS, "Mixed Marriages: The 'Cautiones'," *The Irish Theological Quarterly*, 41 (1974), p. 215. This 'cautio' was demanded three years before by Pius VI in a Rescript dated July 13, 1782, addressed to the archbishops of Malines (see *Fontes*, vol. 2, no. 471).

their faith and often times they came to the Church asking for the sacrament of reconciliation. Their children, however, were not perfectly raised in the Catholic faith, for they were drawn to follow their fathers as they grew older. Wherefore, to deal accurately with those cases, the vicar then asked the Congregation to give him some instruction. In reply to that request, the Congregation, on 9 December 1822, sent the vicar an instruction containing some important points to be taken into account. The summary of which is the following:

First, the Decree *Tametsi* of the Council of Trent, which regulated the form of marriage celebration, in fact, had been in force in Siam since 1818. Therefore, in Siam as in other places where the decree had been promulgated, a marriage, for its validity, had to be celebrated according to the Tridentine form, i.e., must be conducted before the proper pastor, or a missionary, or a legitimately designated priest and two or three witnesses.

Second, in the same above mentioned places, marriages could be celebrated validly even only in front of two witnesses, provided that the presence of any proper sacred minister was impeded. However, the contractants were obliged to present themselves later on before the pastor or a missionary to receive the blessing, though not for validity.

Third, pertaining to marriages of the Catholic women and the heretic men contracted *coram ministello* without dispensation from the impediment of mixed religion before the promulgation of the Tridentine decree, the Congregation considered them as not invalid, though extremely illicit. Therefore, those women could be welcomed to celebrate the sacrament of reconciliation and be granted the absolution of the Church.

Fourth, due to the clandestine marriage instruction which was made known in Siam by the Congregation since the beginning of 1821, to celebrate a marriage validly in the places where the Tridentine decree had been promulgated, the form must be observed either fully (*integrum*) or almost fully (*ferè integrum*) depending on the condition of the places and the persons in question. Wherefore, the Congregation would consider any union as invalid, if entered into by Catholic women, who were in fact bound by the Tridentine legislation, with heretics *coram ministello*.

Fifth, the *sanatio in radice* could be granted, if there was a doubt about whether the Tridentine decree had been promulgated in certain places where similar marriages might have been contracted and a prudent doubt arose as to the validity of those unions.⁹⁴

4. Double religious celebration of mixed marriages is always opposed by the Church. Therefore, when the Catholic parties of mixed marriages were forced to renew their consent before the non-Catholic ministers in England, the *Propaganda*, in a letter dated 13 July 1864, passed the following resolution of the cardinal inquisitors general to the archbishop of Westminster:

This abuse which is being discussed must be eradicated, especially because of the scandal which arises from it; the faithful are to be suitably taught, as and when the occasion presents itself, about the sin that is committed and of the censures that are incurred by renewing their matrimonial consent before a heretical minister who assumes a sacred role.

As for particular cases, let the instruction given on Wednesday,

⁹⁴ *Collect.* (1905), no. 1371; *Collect.* (1907), vol. 1, no. 779.

February 17, 1864, to the bishops of Hanoverian Kingdom, be conveyed to the bishops of England.⁹⁵

5. Later, after some dispensations were granted in some places of England without just and grave causes, the *Propaganda* issued the Encyclical Letter *Post editam* on 11 March 1868, addressed to all the archbishops, bishops, and other local ordinaries, to clarify and re-emphasize the teaching of Pope Pius IX contained in the *Instructio Antonelliana* of 15 November 1858, which among other things stated that the Catholic Church always disapproved of marriages between Catholics and non-Catholics, and considered them as illicit and pernicious on the bases of unseemly *communicatio in sacris* and the unsuitable education of the children. Such a marriage could be tolerated, however, only if there were just and grave causes. Without just and grave causes, there would be no dispensations. The Congregation stated among other things:

It by no means suffices for allowing a mixed marriage that the parties are ready to agree to the precautions alluded to above as well as to the other *clausulae* accustomed to be used in the rescripts of the Apostolic See; but just and grave causes are altogether necessary, that the faculty of

⁹⁵ *Collect.* (1905), no. 1382: "Tollendum esse abusum de quo est sermo, praesertim ob scandalum quod inde oritur; opportune instruendos esse Fideles, quando se offert occasio, de peccato quod committitur et de censuris quae contrahuntur, ob renovationem consensus coram ministro haeretico ut Sacris addicto.

Pro casibus vero particularibus, communicetur Episcopis Angliae Instructio data sub Fer. IV, die 17 Februar. hujus anni, Episcopis regni Hannoveriani" (see *Ibid.*, no. 1381) -- The above English translation from J. D'MELLO, *The Dual Religious Celebration in India*, J.C.D. diss., Ottawa, Saint Paul University, 1985, p. 95. Notice that *Collect.* (1907), vol. 1, no. 1255, and *Fontes*, vol. 7, no. 4861 indicate the date of the response letter as of 13 June 1864.

dispensing from the impediment of mixed communion may be lawfully put into execution.⁹⁶

Besides the above mentioned just and grave causes, the *cautiones* were to be exacted always for they were required by natural and divine laws. The *cautiones* in question were: (1) that the Catholic spouses were not to be perverted from the Catholic faith, (2) they (the Catholics) were to strive for the conversion of the non-Catholics, and (3) all the children of both sexes born of such a union would be raised and educated in the Catholic faith.⁹⁷

6. On 9 May 1877, the *Propaganda* issued the Instruction *Cum dispensatio sit*, proposing sixteen canonical causes for matrimonial dispensations to be taken seriously into consideration when seeking a dispensation.⁹⁸ In this Instruction, the Congregation in the first place defined dispensation as a relaxation of the common law made with a knowledge of the cause by him who has the power. Hence, it demanded that dispensations from matrimonial impediments were not to be granted, unless a legitimate and grave cause should intervene. The gravity of the cause, according to the

⁹⁶ *Collect.* (1905), no. 1384; *Collect.* (1907), vol. 2, no. 1324: "[...] Poro quemadmodum probe cognoscis, ad matrimonium mixtum permittendum minime sufficit ut sponsi cautiones, de quibus supra, admittere parati sint, nec non ceteras clausulas in rescriptis Apostolicae Sedis adhiberi solitas, sed omnino iustae gravesque requiruntur causae, ut facultas dispensandi super mixtae communionis impedimento licite executioni mandetur." -- The English translation from E. L. TAUNTON, *The Law of The Church: A Cyclopaedia of Canon Law for English Speaking Countries*, London, K. Paul, 1906, p. 440 (Taunton wrongly indicated the date as 25 March 1868).

⁹⁷ *Collect.* (1905), no. 1384; *Collect.* (1907), vol. 2, no. 1324.

⁹⁸ *Collect.* (1907), vol. 2, no. 1470.

Congregation, indeed must be in accordance with the gravity of the impediment which prevented a valid marriage. The following are the canonical causes appeared in the Instruction:

(1) The narrowness of place (*angustia loci*). Usually, this cause was used in favour of the woman. But two conditions were to be verified before asking a dispensation on the basis of the *angustia loci*, namely, the first is that if a woman, in the place where she lived, could not find a husband equal to her in social standing except among her relatives; and the second is that if it was difficult for her to leave the place for a more populated place where she could find a suitable husband. The Congregation remarked:

Smallness of place, either absolute or relative (as regards the female petitioner alone), seeing that in the place of her birth or even domicile a woman's relationship is so spread that she is unable to meet with anyone to be married to of an equal position with her own, save a relative by blood or by marriage, and to leave her country would be a hardship to her.⁹⁹

It is obvious from the wording of the instruction that the cause of *angustia loci* only could be applied when one sought a dispensation from the impediments of consanguinity and affinity. Some canonists, however, were wondering whether the above cause could also be used with reference to the impediments of mixed religion and disparity of cult. They asked, if the cause of *angustia loci* could be admitted to free a woman from an

⁹⁹ *Collect.* (1907), vol. 2, no. 1470, # 1: "*Angustia loci* sive absoluta sive relativa (ratione tantum oratricis), cum scilicet in loco originis, vel etiam domicilii cognatio feminae ita sit propagata, ut alium paris conditionis, cui nubat, in venire nequeat nisi consanguineum vel affinem, patriam vero deserere sit ei durum." -- The English translation of the sixteen canonical causes quoted here is from TAUNTON, *The Law of the Church*, pp. 417-419.

impediment such as consanguinity or affinity, why the same cause could not be used, at least cumulatively, to free someone from the impediments of mixed religion and disparity of cult?¹⁰⁰

(2) The advancing age of a woman (*aetas feminae superadulta*). If a woman, after the age of twenty-four, had not found an appropriate man whom she might marry, then the cause of advancing age had been fulfilled. This cause, however, could not be utilized in the case of a widow who wanted to enter another marriage. The Congregation said:

The advancing age of a woman if, for instance, she is over twenty-four and has not hitherto met with anyone of her own position to whom she may be married. But this reason does not hold good in the case of a widow who wishes to marry again.¹⁰¹

(3) Deficiency or insufficiency of dowry (*deficientia aut incompetentia dotis*). This cause was verified when a woman, due to lack of a proper dowry, could not marry a man who was unrelated to her either by consanguinity or affinity. It would be more forceful if the woman totally lacked the dowry and at the same time a relative of hers either by consanguinity or affinity wanted to marry her with a very suitable dowry. The Congregation said:

Deficiency or incompetency of dowry: if a woman has not actually a dowry large enough to enable her to marry another of her own position,

¹⁰⁰ For more comments on this case, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 78-85.

¹⁰¹ *Collect.* (1907), vol. 2, no. 1470, # 2: "Aetas feminae superadulta: si scilicet vigesimumquartum aetatis annum iam egressa, hactenus virum paris conditionis, cui nubere possit, non invenit. Haec vero causa haud suffragatur viduae quae ad alias nuptias convolare cupiat." For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 85-91.

unconnected by blood or marriage, in her own place of abode. And this reason becomes all the more weighty when the woman has no dowry at all, and a relative by blood or by marriage is ready to marry her or even to dower her *ex integro* as is possible.¹⁰²

The wording of the instruction indicated that the cause could only be used to dispense a woman from the impediment of consanguinity in a certain degrees and of affinity. Nevertheless, some authors said that it could also be extended to other impediments such as mixed religion and disparity of cult.¹⁰³

(4) A lawsuit already began over the inheritance of the properties, or grave or imminent danger of such lawsuit (*Lites super successione bonorum iam exortae, vel earumdem grave aut imminens periculum*). This cause was verified if a woman was engaged in a lawsuit with regard to the succession of goods, yet nobody was prepared to take the matter in hand and to cover the expenses, except the man who wished to marry her. In this case, it was customary to grant a dispensation, in order that the litigations be forgotten for the sake of the public interest. Similar to this was the 'legally contested dowry, when a woman had nobody to assist her to recover her property. But this cause, according to the instruction, only sufficed for the remote degrees. The Congregation stated:

¹⁰² *Collect.* (1907), vol. 2, no. 1470, # 3: "*Deficientia aut incompetencia dotis, si nempe femina non habeat actu tantam dotem, ut extraneo aequalis conditionis, qui neque consanguineus neque affinis sit, nubere possit in proprio loco, in quo commoratur. Quae causa magis urget, si mulier penitus indotata existat, et consanguineus vel affinis eam in uxorem ducere, aut etiam convenienter ex integro dotare paratus sit.*"

¹⁰³ See O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 91-97.

Contentions already arisen about inheritance of property, or serious or imminent danger of the same. If a woman has on hand an important suit in reference to her inheriting wealth of great moment, and there be no one else to undertake a contention of this kind and carry it on at his own expense, save him who wishes to marry her, a dispensation is usually granted; for it benefits the commonwealth that contentions should be ended. Closely allied to this is another reason, viz., that the dowry is in litigation, and the woman has no other through whose assistance she will be able to recover her property. A reason of this kind, however, suffices only in cases of the more remote degrees.¹⁰⁴

(5) Poverty of a widow (*paupertas viduae*). This cause was verified when a widow was burdened with a number of children, and a man promised to support her. In this case, a dispensation could be granted. But sometimes a widow could be dispensed from an impediment simply because she was still young and was in danger of incontinence. The Congregation stated: "Poverty of a widow with numerous family when some man promises to support her. But at times a widow obtains the remedy of a dispensation only on account of her youth and that she is in danger of incontinence."¹⁰⁵

(6) The good of peace (*bonum pacis*). The expression "bonum pacis" used here referred not only to the treaties between kingdoms (states) and between princes, but also

¹⁰⁴ *Collect.* (1907), vol. 2, # 4: "*Lites super successione bonorum iam exortae, vel earundem grave aut imminens periculum. Si mulier gravem litem super successione bonorum magni momenti sustineat, neque adest alius, qui litem huiusmodi in se suscipiat, propriisque expensis prosequatur, praeter illum qui ipsam in uxorem ducere cupit, dispensatio concedi solet; interest enim reipublicae, ut lites extinguantur. Huic proxime accedit alia causa, scilicet Dos litibus involuta, cuius ope bona sua recuperare valeat. Verum huiusmodi causa nonnisi pro remotioribus gradibus sufficit.*" For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 97-99.

¹⁰⁵ *Collect.* (1907), vol. 2, # 5: "*Paupertas viduae, quae numerosa prole sit onerata, et vir eam alere polliceatur. Sed quandoque remedio dispensationis succurritur viduae ea tantum de causa, quod iunior sit, atque in periculo incontinentiae versetur.*" For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 99-103.

to the extinction of grave enmities, disputes, and hatred among the ordinary people (citizens). This cause could be verified in two instances, to wit, firstly, when there were grave enmities between the relatives of the contractants, and there was a certainty that the marriage celebration could appease (settle) the situation entirely; secondly, whenever the grave hostilities between the relatives of the contractants were strong, and, even if the peace between them had been initiated, the celebration of a marriage was viewed to be necessary to make the peace between them stronger and more permanent than ever. The remark of the Congregation is as follows:

The blessing of peace: under which head come not only treaties between realms and princes, but also the extinction of serious enmities, disturbances, and ill-will between citizens. This reason is brought forward either to extinguish serious enmities that have sprung up between the blood relatives or the connections of the contracting parties, and would be completely put an end to by the celebration of the marriage, or when serious quarrels have existed between the relatives and connections of the contracting parties; and, though a beginning of amity has been made, yet the celebration of the nuptials would conduce greatly to the confirmation of the peace itself.¹⁶

¹⁰⁶ *Collect.* (1907), vol. 2, # 6: "*Bonum pacis*, quo nomine veniunt nedum foedera inter Regna, et Principes, sed etiam extinctio gravium inimicitiarum, rixarum et odiorum civilium. Haec causa adducitur vel ad extinguendas graves inimicitias, quae inter contrahentium consanguineos vel affines ortae sint quaeque matrimonii celebratione omnino componerentur; vel quando inter contrahentium consanguineos et affines inimicitiae graves viguerint, et, licet pax inter ipsos inita iam sit, celebratio tamen matrimonii ad ipsius pacis firmationem maxime conduceret." See also O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 103-106.

(7) Excessive familiarity (*nimia, suspecta, periculosa familiaritas*). This canonical cause arose when there was an excessive, suspected, dangerous familiarity, and a cohabitation under the same roof, which could not be easily prevented.¹⁰⁷

(8) *Copula*. This cause was invoked when there was a "copula" (previous sexual relationship) between two persons who were related to each other either through blood relationship or affinity, or were bound by any other impediment. Although the "copula" was basically sufficient for seeking a dispensation, the pregnancy could render the cause even more urgent. In this event, a dispensation, which made a marriage possible, could both save the reputation of the woman and legitimize the children already born or who might be born. The cause of "copula" was said to be one of the most urgent, and hence it was customary to grant a dispensation to any couple, provided that the "copula" was not performed under the expectation of getting an easy dispensation. If this was the case, then it must be mentioned in the petition. To be clearer, the following is the Congregation's remark:

Previous connection with a relative by blood, or marriage, or with another labouring under an impediment, and pregnancy, with consequent legitimation of the offspring, in order to provide the well-being of the offspring and the good name of the mother, who would otherwise remain unmarried. This indeed is one of the more urgent causes on account of which dispensation is accustomed to be granted even to the plebeians, provided that the connection did not take place under the hope of a more

¹⁰⁷ *Collect.* (1907), vol. 2, no. 1470, # 7: "*Nimia, suspecta, periculosa familiaritas nec non cohabitatio sub eodem tecto, quae facile impedi non possit.*" For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 106-109.

easy dispensation, which circumstance must be expressed in the petition.¹⁰⁸

(9) Infamy of a woman (*infamia mulieris*). This cause arose from a suspicion of an excessive familiarity between a woman and one of her relatives. Even if the suspicion rested on a false basis, the woman would be gravely defamed, or remained unmarried, unless the marriage was contracted, or she might be forced to be married to a man of lower status, or be exposed to grave damage. The Congregation remarked:

Infamy of the woman, arising from a suspicion that through over-familiarity with a relative or connection she had been seduced by him, though the suspicion should be false, in a case when a serious injury would ensue or grave losses arise if a woman, seriously defamed, must either remain unmarried or marry beneath her.¹⁰⁹

This cause could only be used when seeking a dispensation from the impediment of consanguinity or affinity. Like the cause of "copula", this cause was also designed for the purpose of safeguarding a woman's reputation and the removal of scandal.¹¹⁰

¹⁰⁸ *Collect.* (1907), vol. 2, no. 1470, # 8: "*Copula cum consanguinea vel affini, vel alia persona impedimento laborante praehabita, et praegnantia, ideoque legitimatio prolis, ut nempe consulatur bono prolis ipsius, et honori mulieris, quae secus innupta maneret. Haec profecto una est ex urgentioribus causis, ob quam etiam plebeiis dari solet dispensatio, dummodo copula patrata non fuerit sub spe facilioris dispensationis; quae circumstantia in supplicatione foret exprimenda.*" For a detailed comment, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 109-112.

¹⁰⁹ *Collect.* (1907), vol. 2, no. 1470, # 9: "*Infamia mulieris, ex suspitione orta, quod illa suo consanguineo aut affini nimis familiaris, cognita sit ab eodem, licet suspicio sit falsa, cum nempe, nisi matrimonium contrahatur, mulier graviter diffamata, vel innupta remaneret, vel disparis conditionis viro nubere deberet, aut gravia damna orientur.*"

¹¹⁰ See O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 112-113.

(10) Revalidation of a marriage (*revalidatio matrimonii*). This cause could be verified if a marriage entered into by the parties with good faith and publicly according to the Tridentine form, but without realizing any invalidating impediments. In this case, a dispensation was readily granted, for a dissolution of such a marriage could barely take place without public scandal and grave damage especially to the woman. However, if the marriage was contracted in bad faith, the contractants, according to the prescriptions of the Council of Trent, did not deserve the favour of a dispensation. The Congregation stated as follows:

Revalidation of a marriage which has been contracted in good faith and publicly, in the way prescribed by the Council of Trent: because its dissolution could hardly be brought about without public scandal and heavy loss, especially on the woman's part. But if the parties have got married in bad faith, they by no means deserve the favour of a dispensation, as the Council of Trent regulates.¹¹¹

(11) Danger of a mixed marriage or celebration of the marriage *coram acatholico ministro*. This cause could be invoked, first of all, when two Catholics who wished to marry each other, even of a near degree, by ignoring the authority of the Church, would go and contract a marriage before a non-Catholic minister if a dispensation was denied. In such a case, dispensation was granted to avoid the scandal that might be given to the faithful, and also to prevent the danger of falling away or defecting from faith on the part

¹¹¹ *Collect.* (1907), vol. 2, no. 1470, # 10: "*Revalidatio matrimonii, quod bona fide et publice, servata Tridentini forma, contractum est: quia eius dissolutio vix fieri potest sine publico scandalo, et gravi damno, praesertim foeminae. At si mala fide sponsi nuptias inierunt, gratiam dispensationis minime merentur, sic disponente Conc. Trid. Sess. XXIV cap. V. de Reform. Matrim.*" For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 113-116.

of the parties, especially in the regions where the heresy was flourishing. Secondly, the cause also could be verified when there was a fear that one or both parties would marry a non-Catholic if a dispensation was denied. The complete statement of the *Propaganda* is as follows:

When there be danger that those wishing to contract marriage in one of the closer degrees, may go before a non-Catholic minister for the marriage in defiance of the authority of the Church, by reason of the refusal of a dispensation, there are just grounds for dispensing; for there is imminent danger, not only of a most serious scandal to the faithful, but also of perversion and loss of faith on the part of those so doing, and disregarding the impediments to matrimony, especially in countries where heresy flourishes unchecked. This was the teaching of this Sacred Congregation in an Instruction of 17 April 1820, sent to the Archbishop of Quebec. Likewise, when the Vicar Apostolic of Bosnia had asked whether he could grant a dispensation to such Catholics as had no other grounds but a poisonous love, when it is foreseen that if the dispensation be refused they will contract marriage before an unbelieving judge, the Sacred Congregation of the Holy Office on Feria IV., 14 April, 1822, decreed: "The answer to be given to the petitioner must be that in such case let him use the faculties granted to him in Formula II, as he shall judge expedient in the Lord". The same must be said in the case of Catholic woman who ventures upon marriage with a non-Catholic man.¹¹²

¹¹² *Collect.* (1907), vol. 2, no. 1470, # 11: "*Periculum matrimonii mixti, vel coram acatholico ministro celebrandi.* Quando periculum adest, quod volentes matrimonium in aliquo etiam ex maioribus gradibus contrahere, ex denegatione dispensationis ad ministrum acatholicum accedant pro nuptiis celebrandis, sprete Ecclesiae auctoritate, iusta invenitur dispensandi causa, quia adest non modo gravissimum fidelium scandalum, sed etiam timor perversionis, et defectionis a fide taliter agentium, et matrimonii impedimenta contemnentium, maxime in regionibus, ubi haereses impune grassantur. Id docuit haec S. Congregatio in Instructione die 17 April, 1820 ad Archiepiscopum Quebecensem data. Pariter cum Vicarius Apostolicus Bosniae postulasset utrum dispensationem elargiri posset iis catholicis, qui nullum aliud praetexunt motivum, quam vesanum amorem, et simul praevideatur, dispensatione denegata, eos coram iudice infideli coniugium fore inituros, S. Congregatio S. Officii in Fer. IV 14 Aug. 1822 decrevit: 'Respondendum Oratori, quod in exposito casu utatur facultatibus sibi in Formula II commissis, prout in Domino expedire iudicaverit'. Tantumdem dicendum de periculo, quod pars catholica cum acatholico matrimonium celebrare audeat." For more comments, see O'MARA, *Canonical*

(12) Danger of incestuous concubinage (*periculum incestuosi concubinatus*). This canonical cause could be verified when there was a certainty that the denial of a dispensation might cause the danger of concubinage between two relatives. According to the Congregation, this cause was admitted by the Church to deter the public scandal and the evident danger for the parties' eternal salvation. It stated: "From the above mentioned Instruction of 1820, it is clear that the remedy of a dispensation must be had recourse to for preventing anyone continuing to live in concubinage, to the public scandal and manifest danger of eternal salvation."¹¹³

(13) Danger of a civil marriage (*periculum matrimonii civilis*). This canonical cause was used when there was a certainty that, by denying a dispensation, the parties would go and contract the marriage civilly. The Congregation said: "From what has been said it follows that probable danger of those who are petitioning for the dispensation having what is called only a civil marriage, if they cannot get one, is a lawful reason for dispensing."¹¹⁴

Causes for Matrimonial Dispensations, pp. 116-121.

¹¹³ *Collect.* (1907), vol. 2, no. 1470, # 12: "Periculum incestuosi concubinatus. Ex superius memorata Instructione an. 1820 elucet, dispensationis remedium, ne quis in concubinatu insordescat cum publico scandalo, atque evidenti aeternae salutis discrimine, adhibendum esse." Notice that Taunton wrongly wrote the date of the Instruction as 1822. For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 121-122.

¹¹⁴ *Collect.* (1907), vol. 2, no. 1470, # 13: "*Periculum matrimonii civilis*. Ex dictis consequitur, probabile periculum quod illi, qui dispensationem petunt, ea non obtenta, matrimonium dumtaxat civile, ut aiunt, celebraturi sint, esse legitimam dispensandi causam." For more comments, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 122-126.

(14) The removal of grave scandals (*remotio gravium scandalorum*).¹¹⁵ Unfortunately the Congregation mentioned this canonical cause in a very general way without any further comments. However, it can be understood that if, by granting a dispensation from an impediment, a grave scandal could be removed, then the canonical cause is already constituted. In practice, this canonical cause might be superfluous, for most of the so-called infamous causes such as excessive familiarity, "copula", and the danger of mixed marriages that might be contracted civilly or before a non-Catholic minister were invoked for the purpose of removing grave scandals. Nonetheless, this general cause might refer to any other condition, occasion, or situation that would be construed as the object of the canonical cause of the removal of grave scandal.¹¹⁶

(15) The cessation of a public concubinage (*cessatio publici concubinatus*).¹¹⁷ This canonical cause was also mentioned by the *Propaganda* without any comments. Nevertheless, it is very obvious that this cause could be verified when the parties seeking dispensation were living in the state of public concubinage, and that by granting a dispensation, such a notorious state might cease.¹¹⁸

(16) Distinction of merits (*excellencia meritorum*). This canonical cause was confirmed when someone seeking a dispensation from an impediment had contributed

¹¹⁵ *Collect.* (1907), vol. 2, no. 1470, # 14.

¹¹⁶ See O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 126-127.

¹¹⁷ *Collect.* (1907), vol. 2, no. 1470, # 15.

¹¹⁸ See O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 127-128.

some distinguished or remarkable services to the Church either by one's struggle against the foes of the Church, or by generosity towards the Church, or by one's knowledge, virtue, etc. The Congregation stated: "Excellence of merits: when one who, by resisting the enemies of the Catholic faith, or by generosity towards the Church, or by learning, virtue, or some other means has deserved well of religion."¹¹⁹ Those are the canonical causes which should be considered when a dispensation is sought. The following are some other matters which were dealt with by the *Propaganda*.

7. In 1879, the bishop of Ottawa in Canada reported to the Congregation the difficulties arising from the local civil laws which seemed to disregard the prescriptions of ecclesiastical law on mixed marriages. He asked the Congregation what must be done. In a letter dated 17 April 1879, the *Propaganda* replied that the written *cautiones* were to be obtained always before granting a dispensation from the impediment of mixed marriages, despite the contrary prescriptions of the civil law. However, such a dispensation was not to be granted, unless there was a certainty that the written *cautiones* had been made sincerely.¹²⁰

¹¹⁹ *Collect.* (1907), vol. 2, no. 1470, # 16: "*Excellentia meritorum, cum aliquis aut contra fidei catholicae hostes dimicatione, aut liberalitate erga Ecclesiam, aut doctrina, virtute, aliove modo, de religione sit optime meritus.*" For more comments on this cause, see O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 128-130.

¹²⁰ *Fontes*, vol. 7, no. 4894; *Collect.* (1905), no. 1388; *Collect.* (1907), vol. 2, no. 1517: "Gli Eminentissimi inquisitori Generali hanno risoluto che malgrado le disposizioni della legge civile, i Vescovi di cotesto domino debbon procurare di ottenere che (nei matrimonii misti) le consuete cauzioni si diano sempre in iscritto, come già si pratica, e quante volte in qualche caso particolare siano convinti che le medesime non fossero prestate con sincerità di animo, non concedano la dispensa." (Gaspari wrongly refers to this document as from the Holy Office, -- see GASPARI, *De matrimonio*, vol. 1, p. 268.)

8. On 25 June 1884, the Propaganda instructed the archbishop of Baltimore to see to it that after a mixed marriage celebration, the promises were to be observed by the parties.¹²¹

2.3.2 - On Disparity of Cult

The *Propaganda's* enactments with regard to dispar marriages are obvious in the following discussion.

1. A few years after its establishment (1622), the *Propaganda*, as has been described in the first chapter, in cooperation with the Roman and Universal Inquisition (Holy Office), upon the 1633 order of Pope Urban VIII (1623-1644), published on 10 February 1637 five different *Formulas* of faculties, called *Quinque typicae facultatum formulae*, for various mission territories. Through these *Formulae*, the missionaries were granted broader faculties, including the faculty to dispense from the impediments arising from mixed marriages. The latter were indicated, though very general, in faculty 11 of Formula I granted to the bishops of Asia, Africa, and America,¹²² in faculty 11 of

See also MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 18-19.

¹²¹ *Collect.* (1893), no. 1442, # 1; *Collect.* (1907), vol. 2, no. 1621, # 1; *Fontes*, vol. 7, no. 4904, # 1: "Post celebratas mixtas nuptias, parochi gravi conscientiae onere se gravari sciunt invigilandi ut promissae a coniugibus conditiones observentur, et effectum sortiantur."

¹²² "11. Dispensandi cum gentilibus et infidelibus plures uxores habentibus, ut post conversionem et baptismum, quam ex illis maluerint, si etiam ipsa fidelis fiat, retinere

Formula II granted to the European bishops in areas ruled by infidels and far from the Holy See, faculty 9 of Formula IV conceded to mission prefects, and faculty 14 of Formula V which was given to other mission superiors and ordinary missionaries.¹²³ With the exception of Formula V, all the Formulas had binding force until 31 December 1919, almost in their original forms.¹²⁴

2. In an instruction dated 13 September 1760, addressed to the vicar apostolic of Fokien, the *Propaganda* emphasized the importance of giving the *cautiones* by the parties before granting a dispensation from the impediment of disparity of cult. The *cautiones* in question were, firstly, that the probable danger of the downfall of the faith had to be removed to safeguard the faith of the Catholic party; secondly, that the children were to be educated in the Catholic faith; and thirdly, that there should be some hope that the non-baptized party would convert. Besides the *cautiones*, the following conditions should also be taken into account: (1) the seriousness of the causes, in particular cases, based on which a dispensation would be granted; (2) the places where the non-baptized outnumbered the Catholics; (3) future cohabitation would be without contempt of the Creator. Moreover, the Congregation laid down some principles to be considered: (1) not to grant dispensation for those Catholic women who wished to marry non-baptized men,

possint, nisi prima voluerint converti." -- As printed in VERMEERSCH, "De formulis facultatum, in *Periodica*, 11 (1923), p. 48.

¹²³ The formulation of faculties 11 of Formula (=F.) II, 9 of F. IV, and 14 of F. V is exactly the same as of faculty 11 of F. I (see *Ibid.*, pp. 51, 56-57, 60).

¹²⁴ See footnote 44 of Ch. 1.

except in extraordinary and rare cases, because the danger of falling away from faith would not cease; (2) a dispensation could be granted to Catholic men who wished to contract marriages with non-baptized women, providing that (a) there was a certainty that the danger of the downfall of the faith had been removed from the Catholic party, (b) there was a well founded hope that the unbaptized would convert, and (c) the children born of those marriages would be educated in the Catholic religion.¹²⁵

3. Prior to 1796, the vicar apostolic of Setzchuan posed two questions to the Congregation: (1) Whether the missionaries could dispense from the impediment of disparity of cult in the case of abduction of a Catholic woman who never returned to a safe place, provided that she consented to marriage freely; (2) whether the faculty petitioned by missionaries was to be granted to them for the purpose of convalidating marriages which were contracted by Catholic women and apostates, either through force, or after abduction, before they were returned to safety. On 31 January 1796, the *Propaganda* replied, first of all, with regard to the first question, that in such a case, a dispensation could be granted, provided that the gravity of the cause in single cases must be considered, the woman's free consent to marriage was not constituted under the power of the abductor, and the non-Catholic party must agree to live together without contempt of the Creator, and moreover no other diriment impediments stood in the way. Pertaining to the second question, the Congregation stated that such a dispensation could be given, provided that the faith of the women was still intact, their consent was given freely, and

¹²⁵ *Collect.* (1905), no. 1344; PERRONE, *De matrimonio christiano*, vol. 2, pp. 337-338.

if the cohabitation would be without insult to the Creator. After a dispensation was granted, however, the pastors were to advise diligently those women of their serious obligation to strive for the conversion of their apostate husbands and to educate their children in the Catholic religion.¹²⁶

4. It had been a common practice for years that a dispensation from the impediment of disparity of cult could not be granted by the Church, unless the marriage in question was contracted in the places where Catholics were outnumbered by non-Catholics. Nonetheless, this requirement was quite modified by the *Propaganda* when it granted a special indult through a decree dated 14 January 1806, to the missionaries in China and in the East Indies. The Congregation stated that the above requirement was already fulfilled even in a village (*pagus*) where the Catholics outnumbered the non-Catholics, provided that the *pagus* was a part of a district (*toparchia*) in which the Catholics were the minority.¹²⁷

5. In 1828 the vicar apostolic of East Tonkin asked the Congregation whether or not a dispensation could be granted to a Catholic: (1) who had previously lived together with a non-Christian with offense to the Creator, but then wished to be dispensed from the impediment of disparity of cult, when there was a hope that the non-Christian would convert to the Catholic faith; (2) who hoped to be able to cohabit with a non-baptized without offending the Creator as far as the little children and the future children were

¹²⁶ *Collect.* (1905), no. 1351; PERRONE. *De matrimonio christiano*, pp. 338-339

¹²⁷ *Collect.* (1893), no. 1270; *Collect.* (1905), no. 1355. For more comments, see PЕТРОВИЧ, *The New Church Law on Matrimony*, pp. 166-168.

concerned, although the adult children would not be converted to the faith; (3) whose non-Christian spouse consented to everything, except the Catholic education of the first male already born or would be born, or at least the first born, especially in a most urgent necessity such as the Catholic party was in danger of death? The replies of the Congregation to the first and the second question were in the affirmative. To the third question, the reply was also in the affirmative, but with the provision that even when the Catholic party was at the point of death, it was necessary to enact a promise that in the case of recovery, he or she would strive for the conversion of the non-Catholic spouse and educate the children in the Catholic religion.¹²⁸

6. About ten years after the issuance of the *Instructio Antonelliana* (15 November 1858) to all the bishops with regard to the impediment of mixed religion, the *Propaganda*, on 11 March 1868, issued the Encyclical Letter *Post editam* in which the basic concern of the *Instructio Antonelliana* was repeated, with reference not only to mixed religion as has been previously discussed (sect. 2.3.1, no. 5), but also to disparity of cult. For the purpose of this study, the important part of the Congregation's statement can be reiterated here:

Besides the verification of the conditions, there are absolutely required just and weighty reasons, in order that the power of dispensing from the impediment of mixed religion may be lawfully exercised. The guarantees are required by the natural and divine law, and must be demanded in order to remove the dangers which are intrinsic to mixed marriages; but before the faithful are allowed to expose themselves to these grave dangers to faith and to morals, even when the proper

¹²⁸ *Collect.* (1893), no. 1273, *Collect.* (1905), no. 1358. For more comments, see PETROVITS, *The New Church Law on Matrimony*, p. 173.

guarantees have been given, there must be some serious disadvantage which cannot be avoided save by this marriage.¹²⁹

2.4 - The Enactments of the Supreme Sacred Congregation of the Holy Office

Many times, certain matters, questions, and doubts with regard to mixed marriages were presented to the Holy Office either by the *Propaganda* itself or by the Ordinaries in mission fields who could not solve those problems by themselves. The Holy Office in turn had tried very hard to help and to answer those needs as will be highlighted in the following enactments.

2.4.1 - On Mixed Religion

The enactments of the Holy Office dealing with mixed religion are found in the following documents.

¹²⁹ *Collect.* (1905), no. 1384; *Collect.* (1907), vol. 2, no. 1324: " [...] Porro quemadmodum probe cognoscis, ad matrimonium mixtum permittendum minime sufficit ut sponsi cautiones, de quibus supra, admittere parati sint, nec non ceteras clausulas in rescriptis Apostolicae Sedis adhiberi solitas, sed omnino *iustae gravesque* requiruntur causae, ut facultas dispensandi super mixtae communionis impedimento licite executioni mandetur. Cautiones enim illae ideo naturali divinoque jure exiguntur atque exigi debent, ut pericula intrinseca quae mixtis insunt matrimoniis removeantur; ad vero, ut gravibus fidei ac morum periculis etiam sub opportunitis cautionibus Fideles se exponere permittantur, grave aliquod incommodum ceteroquin haud devitandum immineat necesse est." -- The English translation from TER HAAR, *Mixed Marriages and Their Remedies*, pp. 60-61. The "just and grave causes" (canonical causes) proposed by the Propaganda (*Collect.* [1907], vol 2, no. 1470) have largely been discussed under sect. 2.3.1.

1. On 20 June 1626, the Congregation of the Holy Office issued a statement regarding marriages of Catholics and schismatics saying that such a union was not to be admitted, unless the abjuration of schism and the profession of Catholic faith preceded.¹³⁰

2. In 1824 the archbishop of Quebec presented several doubts to the Congregation; one of which was about the petition of a non-baptized woman, who was married to a baptized non-Catholic, to be baptized Catholic. On 16 September 1824, the Congregation replied that the woman could be baptized provided that she had to be informed beforehand by a missionary that her marriage was invalid due to the impediment of disparity of cult. If the woman, after baptism, chose to remain married to the heretic man, then she could be dispensed from the impediment of mixed religion. The practice of the Holy See, however, with regard to such a marriage had to be observed as usual. The practice in question was regarding the manner of the marriage celebration itself, namely, that it had to be conducted before the pastor and witnesses, but outside the church without nuptial blessing and all other sacred rites. Also the promises should be made particularly with regard to the obligation of the Catholic party to strive for the conversion of the non-Catholic partner and to work, even under oath, for the Catholic education of the children of both sexes.¹³¹

¹³⁰ "Matrimonia inter catholicos et schismaticos admittenda non esse, nisi praecesserit abjuratio schismatis et professio catholicae fidei." -- FRYE, *De matrimoniis mixtis*, p. 27.

¹³¹ *Collect.* (1905), no. 1372. See also MAKOTHARAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, p. 8; BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 34; D'MELLO, *The Dual Religious*

3. The *cautiones*, as has been repeatedly pointed out before, were always required in order to fulfil the natural and divine law obligations. But at times, in particular and extraordinary circumstances, the bishop could decide not to require the *cautiones* in certain cases if there was moral certitude in the mind of the bishop that the content of the *cautiones* would nevertheless be implemented. This significant development was made by the Holy Office in a reply dated 30 June 1842, to the question of a German bishop, by defining the *cautio* as a promise which, as the moral basis for its sincere fulfilment, must be drawn up into a pact, so that the fulfilment could be prudently expected.¹³² With this definition, the Congregation for the first time established a criterion to be considered by those who sought a dispensation. This implies, if no formal *cautiones* were required from the parties, certain means should be employed in order that the authority could obtain moral certitude before granting dispensation.¹³³

4. By the year 1850, the number of the *cautiones* seems to have been restricted to only three, although in some places a fourth *cautio*, i.e., the parties had to promise not to go before a heretical minister to give or to renew their consent either before or after

Marriage Celebration in India, pp. 83-85.

¹³² *Collect.* (1907), vol. 1, no. 951: "Quid accurate et strictissime sumpta significat cautio opportuna? - Resp. Talem promissionem, quae in pactum deducta praebeat morale fundamentum de veritate executionis, ita ut prudenter eius modi executio expectari possit.- SSmus approbavit." For more comments, see LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 8-11.

¹³³ BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 40-41.

the mixed marriage celebration *coram Ecclesia catholica*, was still in force.¹³⁴ The three *cautiones* were very clearly expressed in a reply of the Holy Office dated 11 December 1850, to the vicar apostolic of the Sandwich Islands (now the Hawaiian Islands) in connection with the three conditions, namely, (1) the education of all the children in the Catholic faith, (2) the free exercise of Catholic religion for the Catholic party, (3) the Catholic party is to strive for the conversion of the non-Catholic party.¹³⁵ The same three promises of faithfully executing these same conditions were reiterated by the Congregation, though in a slightly different formulation and order, in its Instruction *In collatione sacramentorum* of 3 January 1871, to the archbishop of Corfù, Spiridon Maddalena, namely, that (1) the danger of drifting away from the Catholic faith was to be removed from the Catholic party, (2) all the children of both sexes were to be educated in the Catholic religion, and (3) the Catholic party had an obligation to work for the conversion of the non-Catholic party to the true faith.¹³⁶

¹³⁴ See S. C. S. Off. (Helvetiae), 21 January 1863, in *Fontes*, vol. 4, no. 973, # 4. In this letter, the Holy Office also instructed the bishops of Switzerland not to grant dispensations from mixed marriage impediments, unless there was a moral certitude that the Catholic party was willing to carry out the obligations contained in the *cautiones*.

¹³⁵ *Collect.* (1905), no. 1376: "Ad 5. Quoad quaesiti partem primam, viderit S. Cong. de Prop. Fide., utrum Orator cum suis Missionariis fruatur revera facultate dispensandi super mixtae religionis impedimentis et disparitatis cultus. In mentem tamen eiusdem Vicarii apostolici hic opportune revocetur, matrimonia hujus generis semper esse detestanda, nunquam a Sacerdote catholico benedicenda, et contrahenda extra fores ecclesiae, praemissis prius tribus solitis conditionibus, quae sunt nimirum: educatio totius prolis in catholica veritate, liberum exercitium Religionis catholicae, et studium catholicae partis pertrahendi scilicet alteram ad verae fidei professionem."

¹³⁶ *Collect.* (1907), vol. 2, no. 1362, # 3: "[...] ut in tuto positae omnino sint conditiones, quae in iisdem connubiis iure naturali ac divino requiruntur, nempe ut

5. Regarding the ceremony of mixed marriages, the question, which was asked again and again, was whether, after the marriage celebration according to the law of the Church, the parties could present themselves again before a non-Catholic minister. In a letter dated 7 May 1860, the response of the Holy Office to the question of the prefect apostolic of Hongkong was in the negative.¹³⁷ Later, in the Decree *Non latet* of 17 February 1864 to the bishop of Osnabrück (Germany), the Congregation made the following very clear:

It is known that in some places an heretical minister occupies the position of a mere civil magistrate, and that spouses are accustomed, and indeed obliged, to present themselves before him for a political end, namely, that they may be regarded as lawfully married, and their offspring deemed legitimate. Now, if heretics are pressing in the matter or the civil law binding, there is no objection solely for the purpose of supplying the legal duty, to the Catholic party accompanying the heretical party before the minister addicted to heresy either before or after the marriage is contracted according to the form prescribed by the Council of Trent. For the Sacred Congregation answered *affirmative* to the question, some time ago laid before it: whether a Catholic who is contracting marriage with a heretic in the presence of his Catholic parish priest may lawfully, at the instance of heretics, ratify this marriage before an heretical minister if there be no show or use of heretical rites, and that the action of heretical minister be, and is considered to be, for the civil and legal satisfaction of the parties.

But whenever the heretical minister is held to be in a sacred character, and discharging, as it were, the duty of a parish priest, it is unlawful for the Catholic party to renew his consent to marriage with a heretic before such a ministry, because it would be made use of as a kind of complement to the religious ceremony; and the Catholic party would be joining in an heretical rite, and hence there would

exclusum sit a parte fideli quodlibet perversionis periculum, et universa proles utriusque sexus in sancta religione educetur, et suscipiatur a parte catholica onus curandi ut alteram acatholicam partem ad veram fidem unitatemque catholicam perducat."

¹³⁷ *Collect.* (1905), no. 1379; see also D'MELLO, *The Dual Religious Marriage Celebration in India*, pp. 87-88.

be an implicit yielding to heresy and altogether unlawful communion with heretics *in divinis*. Wherefore, although this evil custom has grown so strong that it can be hardly put down by the clergy, nevertheless every effort of earnestness and zeal must be made to extirpate it. [...]

Let, therefore, parish priests and missionaries be instructed in good time by you to teach the faithful both at public catechetical instructions in the Church and in private, concerning the constant doctrine and practice of the Church; so that they may wholesomely keep as far as possible from mixed marriages, or, at any rate, may altogether be opposed to celebrating marriage before an heretical minister in his sacred capacity; for this is altogether unlawful and sacrilegious. [...]¹³⁸

¹³⁸ *Collect.* (1905), no. 1381: "Non latet, quibusdam in locis haereticum ministrum agere personam magistratus mere civilis, coram quo se sistere solent conjuges aut etiam debent, ob finem politicum, nempe ut habeantur civiliter honesti conjuges, prolesque censeatur legitima. Tunc vero, urgentibus Haereticis, aut lege civili imperante, non improbat, quod pars catholica una cum haeretica se sistant, ante vel post contractum ad formam Tridentini matrimonium, etiam coram ministro haeresi addicto, ad actum civilem dumtaxat implendum.

Etenim ad dubium olim sic expressum: *Utrum Catholicus, coram proprio catholico Parocho cum Haeretico contrahens, licite possit, urgentibus Haereticis, matrimonium hoc ratificare coram ministro haeretico, si nulla hinc ritus haeretici professio habeatur aut colligatur, et quidquid minister haereticus in casu agit, civilis dumtaxat et politica postulatio sit et censeatur?* per hanc S. Cong. responsum fuit: *Affirmative* (see no. 1367) [italics in the original].

Verum enim vero, quotiescumque minister haereticus censeatur veluti Sacris addictus, et quasi Parochi munere fungens, non licet catholicae parti una cum haeretica matrimonialem consensum coram tali ministello praestare, eo quia adhiberetur ad quamdam religiosam caeremoniam complendam, et pars catholica ritui haeretico se consociaret; unde oriretur quaedam implicita haeresi adhaesio, ac proinde illicita omnino haberetur cum Haereticis in divinis communicatio. [...]

Opportune itaque a te instructi et commoniti Parochi ac Missionarii, edoceant Fideles, qua publicis in ecclesiis catechesibus, qua privatis instructionibus, circa constantem Ecclesiae doctrinam et praxim, ita ut mixtis contrahendis nuptiis, quoad fieri possit, salubriter avertantur; sin autem, abhoreant prorsus a celebrando matrimonio coram haeretico ministro Sacris addicto, id quod omnimode illicitum et sacrilegum est. [...]" -- The English translation from TAUNTON, *The Law of the Church*, pp. 441-442; see also D'MELLO, *The Dual Religious Marriage Celebration in India*, pp. 93-94.

6. An interesting point made by the Holy Office during this period is that at times the *cautiones* were also required in the case of marriage between a Catholic party and a baptized Catholic who had left the Catholic faith, even without joining a non-Catholic sect and the like. This was obvious in a response to the bishop of Liège (Belgium) dated 30 January 1867, according to which a pastor was obliged to prevent the faithful from such a union. Nonetheless, if such a union could not be deterred, then the Ordinary must be consulted. The Ordinary, after considering all of the circumstances, and provided that there be a grave reason and the required safeguards had been taken to have moral certitude, he might permit a merely passive assistance of the pastor at the marriage.¹³⁹

A similar situation happened in Brazil, and therefore a similar answer was given to the Brazilian Ordinaries in the Instruction *Pestis massonismi* of 5 July 1878.¹⁴⁰

¹³⁹ *Fontes*, vol. 4, no. 998; *Collect.* (1907), vol. 2, no. 1300: "Ad 1. Quoties si agatur de matrimonio inter unam partem catholicam et alteram quae fidem abiecit, at nulli falsae religioni, vel haereticae sectae sese adscripsit, quando parochus nullo modo potest huiusmodi matrimonia impedire (ad quod totis viribus incumbere tenetur), et prudenter timet ne ex denegata matrimonio assistentia grave scandalum, vel damnum oriatur, rem deferendam esse ad R. P. D. Episcopum qui, sicut ei opportuna nun facultas tribuitur, inspectis omnibus casus adiunctis, permittere poterit ut parochus matrimonio passive intersit tamquam testis autorizabilis, dummodo cautum omnino sit catholicae educationi universae proles, aliisque similibus conditionibus.

Ad 2. Dandum esse decretum diei 28 Iunii 1865 (see *Collect.* [1907], vol. 1, no. 1273): quoad matrimonia in quibus una contrahentium pars clandestinis aggregationibus per pontificias Constitutionis damnatis adhaeret, dummodo absit scandalum, Ordinarius, habita circumstantiarum ratione pro casibus particularibus, ea decernat quae magis expedire iudicaverit." See also LOURDUSAMY, *Pre-Nuptial Guarantees*, p. 62.

¹⁴⁰ *Fontes*, vol. 4, no. 1056; *Collect.* (1907), vol. 2, no. 1495: "[...] Potius si quis matrimonio coniugi postulat, qui noscitur sectae massonicae adscriptus esse, parochus totis viribus ad id incumbere tenetur ut illi sectae renuntiet; quod si renuerit, sedulo curandum est ut sponsa ac parentes eius, opportunis exhortationibus a tali coniugo deterreantur. Quando vero parochus nullo modo potest huiusmodi matrimonium impedire,

7. The Church is always considering the *cautiones* as an uncompromising means to be given in ordinary circumstances, and even also in most of the extraordinary circumstances such as in danger of death. The position of the Church is that there would be no dispensation from both the impediments of disparity of cult and mixed religion, unless the *cautiones* preceded. This point of view was repeatedly communicated by the Congregation through various pronouncements both to the mission and non-mission countries.¹⁴¹ Two of these are, firstly, a letter dated 17 February 1875 to the bishop of St. Germain of Rimouski (Canada), in which the Holy Office stated that the promises were essential to reach moral certitude, although in certain cases the requirement of an oath by the non-Catholic to support such promises might be omitted;¹⁴² secondly, a

et prudenter timet, ne ex denegata matrimonio assistentia grave scandalum vel damnum oriatur, res deferenda est ad Ordinarium, qui, sicut ei opportuna nunc facultas tribuitur, inspectis omnibus casus adiunctis, permittere poterit, ut parochus matrimonio passive intersit tamquam testis autorizabilis, dummodo cautum omnino sit catholicae educationi universae prolis, aliisque similibus conditionibus."

¹⁴¹ For a list of the Holy Office's Pronouncements in this regard, see LOURDUSAMY, *Pre-Nuptial Guarantees*, p. 92, footnote 37.

¹⁴² GASPARI, *De matrimonio*, vol. 1, p. 267, footnote 3: "Conditio iuramenti (praestandi in matrimoniis mixtis a parte heterodoxa in promittendis consuetis cautionibus) est praescriptio mere ecclesiastica a qua aliquando abstinere licet, si circumstantiae id concedant; quia, ut dispensatio locum habeat in matrimoniis mixtis, sola est essentialis promissio consuetarum cautionum, quae it seria debet esse, ut episcopus valeat sibi comparare moralem certitudinem, quoad ab heterodoxo coniuge fideliter observabitur atque implebitur: et quando ipse sive ob subiecti qualitates sive ob alias circumstantias talem certitudinem acquirere non valet, iure potest exigere ut iureiurando promissio firmetur." For the Italian (original) text, see *Fontes*, vol. 4, no. 1039; or *Collect.* (1907), vol. 2, no. 1433. See also MAKOTHARAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, p. 18; LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 91-92.

response to the bishop of Orléans (France) dated 6 June 1879, in which the Congregation answered a question regarding the manner of exacting the *cautiones* as follows:

(1) the *cautiones* must be made, signed, and attested under oath in the presence of an official of the diocesan curia;

(2) if the *cautiones* are impossible for the parties to be made in the curia, the same can be made in the presence of the pastor after obtaining a permission from the diocesan bishop;

(3) however, dispensation is not to be granted - in the case of no. 2 - before the document of the *cautiones* is received in the curia;

(4) in all cases, dispensation is not to be granted, unless there is moral certitude that the *cautiones* will be faithfully fulfilled by the parties.¹⁴³

8. At times, the pastors or the missionaries were doubtful whether to give the sacraments to the Catholic parties of illicit and/or invalid marriages with heretics, although the scandal had been removed. This question was proposed to the Holy Office, which, on 23 August 1877, offered the following answer:

¹⁴³ *Fontes*, vol. 4, no. 1064; *Collect.* (1907), vol. 2, no. 1521: " [...] nempe contrahentes curiam episcopalem adire debere ut coram officiale iuratum subscribant promissionem de praefatis conditionibus ab ecclesia praescriptis pro sua quisque parte omnino servandis. Si vero curiam adire absolute nequeant, licentia Ordinarii seu officialis prius obtenta, coram parochio supradictam promissionem subscribant; ita tamen ut non antea dispensatio concedatur quam documentum promissionum seu cautionum a parochio assumptum ad curiam episcopalem perventum fuerit. Ceterum praeprimis cavendum ne cum iis dispensetur qui moralem non praebent certitudinem se datas promissiones fideliter esse observaturos." See also MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to Recent Legislation*, pp. 19-20; BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 45-46; TER HAAR, *Mixed Marriages and Their Remedies*, pp. 84-85.

(1) with regard to valid but illicit mixed marriages, the Catholic parties could be allowed to receive the sacraments without renewing the marriage consent beforehand, but they should be discouraged from receiving them until they showed signs of repentance and made the promises concerning the effort for the conversion of the heretic party and for the Catholic education of the children already born and to be born of such a marriage; they also could be absolved from the censure incurred from the fact that - if this was the case - the illicit marriage was contracted in the presence of a non-Catholic minister;¹⁴⁴

(2) with regard to invalid mixed marriages, the Congregation stated that the Catholic parties were not to be admitted to receive the sacraments, unless they promised to execute faithfully all the conditions required for the granting of a dispensation from the impediment of mixed religion, and renewed their consent in the presence of the pastor and two witnesses. They also could be absolved from the censure incurred in the case the invalid marriage was contracted in the presence of a non-Catholic minister.¹⁴⁵

¹⁴⁴ *Collect.* (1893), no. 1438: "Quoad matrimonia valida, ad Sacramenta percipienda posse admitti sine praevia renovatione consensus, sed ab iisdem percipiendis arcendos, donec vera dederint resipiscentiae signa, et promiserint se curaturos totis viribus tam conversionem partis haereticae, quam educationem in religione catholica proles universae natae et forsitan nasciturae; et tandem donec obtinuerint absolutionem a censuris incursis una cum poenitentiis salutaribus, casu quo contraxerint coram ministro haeretico."

¹⁴⁵ *Collect.* (1893), no. 1438: "[...] Quoad vero matrimonia invalida, cum sit nullum eorum matrimonium vitio clandestinitatis, non esse admittendos ad receptionem Sacramentorum nisi prius promiserint post impetratam dispensationem super impedimento mixtae religionis, se fideliter executuros eas omnes condiciones, quae exiguntur in praefata dispensatione, et dein nisi consensum renovaverint coram catholico parochi et duobus testibus, et tandem nisi obtinuerint prius absolutionem a censuris incursis una cum poenitentiis salutaribus, casu quo matrimonium attentaverint coram ministro acatholico."

2.4.2 - On Disparity of Cult

Facing the problems of dispar marriages in mission territories, especially when a dispensation of the impediment was involved, the Holy Office, like any other authority, usually demanded certain conditions before the grant such as there had to be grave reasons, the marriage had to take place in places where the Catholics were outnumbered by the non-baptized, the danger of falling away from faith was to be removed from the Catholic party, all the children had to be educated in the Catholic faith, etc. This stand was clear in the following documents.

1. On 19 September 1671, the Holy Office instructed the vicars apostolic of Albania that, first of all, the Christian spouses, who had contracted marriages with non Christians and were willing to remain with them, were not to be admitted to the sacraments if such a marriage was contracted without a dispensation from the impediment of disparity of cult. If a marriage took place prior to the conversion of a spouse, then they could be absolved, hence the Christian party was not to be forced to leave the non-baptized unless the danger of loss of faith was present. Secondly, the Catholic spouses could remain with their non-Catholic partners, but also could live separately from them if the danger of falling away from faith and contempt of the Creator were present. If the latter was the case, the sacraments could be given to them.¹⁴⁶

¹⁴⁶ *Collect.* (1893), no. 1257: "1. Coniuges christiani cum infidelibus coniuncti, et cum iisdem permanere volentes, non sunt admittendi ad Sacramenta si matrimonium contractum sit in statu impeditenti disparitatis cultus, et lex huiusmodi impedimentum inducens non fuit invincibiliter ignorata. Si vero agatur de matrimonio contracto ante

2. In a reply to the question of the vicar apostolic of Eastern Tonkin dated 5 September 1736, the Holy Office stated that the salvation of souls of those who lived without contempt of the Creator in a dispar marriage already contracted for a long time - especially if they already had children and it was hard to be separated from the unbaptized party - could be a grave and sufficient cause of granting a dispensation from the impediment of disparity of cult.¹⁴⁷

3. In an instruction dated 12 January 1769, which was addressed to the vicar apostolic of Setzchuan upon the order of Clement XIII, the Holy Office also made it very clear that the Church basically preferred marriages among Catholics, even with a dispensation from the impediment of consanguinity or affinity, to marriages between Catholics and unbaptized, even though all the conditions had been fulfilled for granting a dispensation. The reason was that the danger always threatened the spiritual welfare of

conversionem alterius coniugis, possunt absolvi, nec cogendus est christianus deserere infidelem, nisi adsit periculum perversionis.

2. Coniuges catholici possunt permanere cum infideli apostata, vel se ab ipso separare, prout periculum perversionis et contumelia Creatoris, iudicio prudentis confessarii, exegerint; et his possunt Sacramenta administrari." The same position was later reiterated in some of the Congregation's pronouncements, among other things, the Response of 18 November 1745 (*Fontes*, vol. 4, no. 796); Instruction to the bishop of Shkodrë in Albania dated 9 July 1750 (*Collect.* [1893], no. 1259); Instruction of 12 January 1769, to the vicar apostolic of Setzchuan (*Collect.* [1893], no. 1264).

¹⁴⁷ *Collect.* (1893), no. 1258; *Collect.* (1905), no. 1341: "Utrum, per haec verba *gravibus tamen de causis*, intelligi possit, tanquam causa gravis et sufficiens, salus animae illorum qui in tali matrimonio jamdiu contracto absque contumelia Creatoris vixerunt, praesertim si filios genuerint, vel iisdem difficilimum sit ab infideli conjuge separari? Resp.- Causam expositam in quaesito esse gravem et sufficientem, ad impertiendam dispensationem de qua agitur."

the Catholic party.¹⁴⁸ The danger for the spiritual good of the Catholic party, and specifically for the Catholic woman, was later pointed out again in another instruction of the Holy Office dated 15 February 1780, to the vicar apostolic of Setzchuan. The Congregation stated that dispensation from the impediment of disparity of cult was very rarely granted to Catholic women who were willing to contract marriages based on the fact that in such a case the danger of the downfall of the faith very rarely ceased. In other words, most of the Catholic women left the Catholic faith after the marriage celebration. But to Catholic men, dispensation could be more readily granted. It is because the observation showed that from every one hundred pagan women who contracted marriages with Catholic men, ninety of them later became Christians, but not the reverse. Therefore, the Congregation said that the faculty to dispense from the impediment was not to be exercised unless there were grave causes in single cases, there was a hope that the non-Catholic would convert, the future cohabitation would be without contempt of the Creator and damage to the Christian name, also there would be no hindrance for the Catholic education of the children of both sexes.¹⁴⁹

¹⁴⁸ *Collect.* (1905), no. 1347: "[...] Animadvertendum tamen est quod, cum Missionarius habeat etiam facultatem dispensandi super impedimentis consanguinitatis et affinitatis, faciliorem se praebere debeat in hujusmodi dispensationibus concedendis, si hac ratione matrimonia inter Catholicos jungi possunt, potius quam in dandis dispensationibus super disparitate cultus, ad effectum ut Catholici cum Infidelibus matrimonia contrahant." See also PESTROVITS, *The New Church Law on Matrimony*, p. 175.

¹⁴⁹ *Collect.* (1893), no. 1266; *Collect.* (1905), no. 1348: "Raro dispensatur mulier fidelis ad effectum nubendi cum viro gentili; sed difficultas longe minor est christianum fidelem dispensandi, ut matrimonium cum infideli muliere contrahat. [...] Praeterea observarunt quod, ex centum mulieribus paganis quae viris fidelibus nubunt, nonaginta sint quae fiunt christianae; [...] Erit proinde e munere ipsius Vicarii Ap. facultatem, quae sibi

4. Interestingly, more than one hundred years later, the same point of view regarding the difference in granting the dispensations to Catholic women and men who were willing to marry non Christians was reiterated in a response of the Holy Office to the vicar apostolic of Peking dated 29 April 1891.¹⁵⁰ In this letter, the Holy Office also answered a proposed doubt as to whether the parties - in this case, a non-baptized girl who was (inevitably) to be baptized before her marriage to a non-baptized, and hence pave the way for a dispar marriage - could give the *cautiones* by proxy (e.g., her parents), according to the Oriental tradition in which the parents usually were the ones to arrange marriages for their children. The Congregation stated very clearly that the *cautiones* must be given also by the future parties personally, and not only by the parents.¹⁵¹

5. In the Instruction *Unam ex facultatibus* of August 1819, to the prefect apostolic of Suriname, the Congregation stated that the convalidation of an invalid marriage

adesse ac perdurare supponitur, dispensandi super disparitate cultus, [...], ni viderint antea graves illas causas concurrere in singulis plane casibus expetendas, [...], nisi spem suae conversionis praebuerit, saltem sine contumelia Creatoris et christiani nominis iniuria sit cum parte fideli cohabitatura, nec ullatenus impeditura educationem prolis utriusque sexus in sancta religione."

¹⁵⁰ *Collect.* (1893), no. 1279; *Collect.* (1905), no. 1364: "Cum viris christianis his in regionibus, ut mulieres infideles ducant, dispensatur quotiescumque affulget aliqua spes quod servabuntur conditiones requisitae, quia rarum est et non servuntur. At cum mulieribus christianis, ut viros infideles accipiant, rarissime datur dispensatio propter periculum imminens perversionis, et contumeliam Creatoris."

¹⁵¹ *Collect.* (1893), no. 1279; *Collect.* (1905), no. 1365: "Ad 2. Modum, de quo in dubio, non improbari, nisi Baptismi necessitas urgeat, aut nisi Baptismus sit diutius differendus, et nisi etiam cautiones datae fuerint non solum a parentibus, sed etiam a futuro coniuge; quo in casu, praevia dispensatione, matrimonium permitti poterit." See also some comments in LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 74-75.

contracted by a Catholic and a non-baptized required certain conditions, namely, that there must be a hope for: (a) the good of religion, (b) the Catholic education of the children to be born, and (c) the conversion of the non-baptized party.¹⁵² Some authors indicated that this Instruction did not speak of the *cautiones*, but simply of a well-founded hope for the authority to grant a dispensation.¹⁵³

6. At times and only in certain circumstances, according to the Holy Office in its decree to the vicar apostolic of Manchuria dated 4 June 1851, the impediment of disparity of cult could be considered to have ceased. This could happen if in such circumstances the Catholics were hindered both morally and physically either to petition a dispensation from the impediment of disparity of cult or to marry other Catholics. The example of these particular circumstances as happened in Manchuria was: (a) during the time of persecution; (b) the parties were located far away from the missionaries and communication was difficult, hence it was impossible for them to approach the missionaries to petition a dispensation; (c) there were no other suitable Christians available; and (d) it was difficult to move to Christian territories. Thus, in a special situation of this kind, again, the impediment ceased.¹⁵⁴ The same prescription could be

¹⁵² *Collect.* (1905), no. 1357: : [...], vult ut dispensaturus consideret utrum ex matrimonio, de quo agitur, sperari probabiliter possit Religionis bonum, christiana educatio sobolis nasciturae, et partis infidelis conversio."

¹⁵³ See LOURDUSAMY, *Pre-Nuptial Guarantees*, p. 41.

¹⁵⁴ *Collect.* (1893), no. 1275; *Collect.* (1905), no. 1360: "In his difficilimis dissitisque regionibus, saepius occurrunt Christiani, qui, sive persecutionis vitandae causa, sive propter pecuniae necessitatem, sive etiam propter aliam causam, satis incauti, ut sunt plerumque Sinenses, e locis Christianorum ubi habitant ipsi sive nati sunt, ad loca

applied in the case of Christians who moved to the islands, which were in the same condition as the above Chinese places where the only parties to marry were the non Christians. In these circumstances, provided that they were in good conscience and there was no danger of falling away from the Catholic faith, the impediment of disparity of cult was considered to have ceased. Accordingly, a marriage in such circumstances could be validly and licitly celebrated.¹⁵⁵

7. On 8 May 1872, the vicar apostolic of Central Oceania presented to the Holy Office several doubts, one of which was about a prospective marriage of a newly baptized man and an unbaptized woman who refused to convert. The answer to the proposed doubt was clear in the Congregation's Instruction to the vicar dated 18 December 1872, which stated that a dispensation from the impediment of disparity of cult could be granted by the vicar, provided that some conditions must be fulfilled, namely, that the newly baptized must strive for the conversion of the woman, and that the woman was to promise under oath that the children would be educated in the Catholic religion, and that the

longinqua proficiscuntur, ad 40 vel 50 et amplius dies itineris, simul cum uxore et filiis; in quibus locis non sunt Christiani, nec invenire possunt, nec ullus fuit unquam rumor de Religione christiana per circuitum.

Grandiores facti filii et filiae, nubunt cum Paganis sine dispensatione possibili. Pro moribus gentis, filiae praesertim, et saepissimae etiam filii, sunt in impossibilitate absoluta transmigrandi ad loca Christianorum, sicque debent omnino vel nubere cum Paganis, vel manere inuuptae aut caelibes. [...]

S. C. S. Offic.- In propositis circumstantiis non esse inquietandos, facto verbo cum SSmo.- SSmus approbavit."

¹⁵⁵ PETROVITS, *The New Church Law on Matrimony*, pp. 165-166.

religious practice of both the newly baptized and the children would never be impeded.¹⁵⁶

8. The *cautiones* were considered necessary not only for the purpose of protecting the spiritual welfare of the Catholic party, etc., but also for the validity of a dispensation. Therefore, in whatever circumstances, even in an extraordinary one such as in danger of death, as has been discussed earlier, the *cautiones* were to be given. This was also indicated in an encyclical letter of the Holy Office dated 20 February 1888, which spoke of the faculty of the Ordinaries to dispense from matrimonial impediments in the case of danger of death.¹⁵⁷ It was also clearly stated in a response of the Holy Office to the archbishop of Lemberg (Luov, Ukraine) dated 18 March 1891,¹⁵⁸ and later in another response letter of 6 July 1898.¹⁵⁹

¹⁵⁶ *Fontes*, vol. 4, no. 1024: "[...] quatenus vero converti renuat, [dispensat] ab impedimento disparitatis cultus, sub hisce tamen in hoc altero casu conditionibus eidem neophyto imponendis, ut omni studio curet conversionem mulieris a se electae, et interim promissionem iuratum ab ea exigat, se curaturam, ut proles educetur in religione catholica, neque ullum unquam illaturam esse impedimentum sive sibi, hoc est ipso neophyto, sive proli in religionis christianae exercito." See also ΜΑΚΟΘΑΚΑΤ, *The Sincerity of the Mixed Marriage Promises According to Recent Legislation*, p. 17.

¹⁵⁷ See *Collect.* (1907), vol. 2, no. 1885.

¹⁵⁸ *Collect.* (1893), no. 2188; *Collect.* (1907), vol. 2, no. 1750: "Cautiones etiam in articulo mortis esse exigendas; disparitatem cultus utpote impedimentum dirimens in encyclica S. Officii 20 Februarii 1888 comprehendi: mixtam vero religionem, uti impedimentum impediens, non comprehendi."

¹⁵⁹ *Collect.* (1907), vol. 2, no. 2007: "Ad 3. Episcopus vel parochus in casu uti poterit facultate Ordinariis concessa sub die 20 Febr. 1888, renovato consensu et datis cautionibus.

Ad 4. Si possibilis spes affulgeat fore ut huiusmodi pueri possint suo tempore in vera religione institui, tunc, datis cautionibus, baptizentur. Quod si nulla via possit huiusmodi

2.5 - Some Particular Legislation in the Missions

Missionary law in its strict sense, as previously described in the first chapter, also includes all the particular norms or legislation enacted by the competent ecclesiastical authority in the mission. Hence, this part will try to investigate some of those particular enactments established by some local councils for their respective territories.

The study will be undertaken chronologically regardless of the nature of the gatherings (plenary or provincial council, diocesan synod).

2.5.1 - Diocesan Synod of Baltimore (1791)

The synod was in fact at that time a national one, for the jurisdiction of the bishop of Baltimore extended from the Atlantic seaboard to the Mississippi River and from Canada to Florida, i.e., a territory covering twenty-five of the present fifty states of the United States of America.

The position of the Church which had opposed mixed marriages for centuries was also manifested in this diocesan synod. The synod in principle strongly urged the pastors of souls to discourage and to prevent Catholics from entering such a union with heretics.

spes moralis haberi, tunc, nisi pueri in mortis articulo inveniantur, ab iis baptizandis abstineatur; et ad mentem; Mens est, quod parochus curare non omittat, ut, datis cautionibus, liberi baptizari, et in catholica religione educari possint, cum Ecclesia iis hoc ius iam habeat. - A moribundo catholico vero, si iam est compos sui, cautiones exquirantur ut praedicta valeant obtineri." See also some comments in LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 112-114; PETROVITS, *The New Church Law on Matrimony*, pp. 175-176.

However, if those marriages could not be avoided, especially in the places where Catholics were very few, then the following rules must be observed:

(1) Catholics should be warned of the grave consequences that frequently followed upon such unions and they should be exhorted to show Christian fortitude in restraining themselves from entering the marital state with those not of their own faith; (2) if the pastors saw that their admonitions were not heeded, every care should be taken to surround the Catholic party with safeguards for the preservation of his or her faith; (3) the non-Catholic party should be required to promise before God and several witnesses that there would be no opposition to the education of the children in the Catholic faith; (4) pastors should proceed cautiously in their attempt to dissuade the Catholic party from such a marriage lest the same take place before a non Catholic minister; (5) where such a risk is present, the pastor was permitted to proceed with the marriage providing no impediment was present; (6) no mixed marriage, however, was to be blessed with the blessing as prescribed in the Mass *pro sponso et sponsa*.¹⁶⁰

2.5.2 - Provincial Councils of Baltimore (1829-1845)

There were seven provincial councils conducted during the above mentioned period of time, some of which did speak of mixed marriages. The Fourth Provincial Council (1840), for instance, in its first decree, laid down several regulations to be observed: (1) the bishop or priest was not to wear any sacred vestment in a mixed marriage ceremony; (2) no sacred rites were to be used; (3) the celebration should be outside the church; (4) the faithful were to be reminded of all the grave evils that arose so often from those unions such as the domestic disagreement and the downfall of the faith of the Catholic

¹⁶⁰ P. GULDAY, *A History of the Councils of Baltimore (1791-1884)*, New York, NY, Macmillan, 1932, p. 67; the Latin text is in *Concilia provincialia Baltimorensia, Baltimori habita ab anno 1829 usque ad annum 1849*, editio altera, Baltimori, J. Murphy, 1851, pp. 18-19.

party and the children; (5) security and freedom had to be guaranteed for the exercise of the religion of the Catholic party; (6) the children of both sexes had to be baptized and educated in the Catholic faith, pertaining to which solemn promises before God were to be given by the non-Catholic party.¹⁶¹ Later, the Sixth Provincial Council of Baltimore (1846) decreed that the bans should be announced before the celebration of marriage, to which the *Propaganda* was not only favourable but also extended such a practice to mixed marriages.¹⁶²

2.5.3 - Provincial Council of Cologne (1860)

Mixed marriages were discussed briefly in ch. XVII, title II, part 2 of the Council's decree.¹⁶³ The Council, in the first place by citing the Benedictine Declaration of 4 November 1741, stated that the Church always condemned and forbade any mixed marriage.¹⁶⁴ Furthermore, it spoke of the possibility of granting dispensation by the

¹⁶¹ *Concilia provincialia Baltimorensia*, pp. 169-170: "Quod si rerum adjuncta aliquando suadeant ex auctoritate Apostolica ea esse permittenda, imprimis curandum erit ut conscientiae securitati et libero religionis exercitio a Catholica parte consulatur, sicut et prolis utriusque sexus in fide Catholica educationi, solemnii coram Deo promissione iis de rebus emissa: secus nullatenus licebit sacerdoti iis connubiis adstare. Meminerint insuper sacerdotes pluribus SS. Pontificium decretis vetari ne ullus sacer ritus fiat, vel vestis sacra adhibeatur, dum foedera hujusmodi ineantur, quae neque intra Ecclesiam ineunda sunt." See also GUILDAY, *A History of the Councils of Baltimore*, pp. 124-125.

¹⁶² GUILDAY, *A History of the Council of Baltimore*, pp. 149-150.

¹⁶³ See *Acta et decreta concilii provinciae Coloniensis (1860)*, Coloniae, Ex Officina Typographia Ioannis Petri Bachemii, 1862, pp. 117-119.

¹⁶⁴ *Ibid.*, p. 117; see also *Collect.* (1905), no. 1366.

Church by saying that a dispensation from mixed marriage impediments could be granted if there was a guarantee that the conditions, i.e., the safe practice of religion for the Catholic party and the Catholic education of all the children required by natural and divine laws, would be faithfully observed.¹⁶⁵

2.5.4 - Second Plenary Council of Baltimore (1866)

The Council, in its decree regarding mixed marriages, strongly condemned those unions more than any other preceding council or synod. Moreover, the celebration of such a marriage before a non-Catholic minister was severely condemned. Some important points of the decree are as follows: (1) marriages of Catholics and heretics were detested by the Church; (2) the pastors of souls were to teach the faithful to prevent and to stay away from mixed marriages; (3) celebration of mixed marriages before a non-Catholic minister was strongly forbidden; and (4) by referring to the statement of the Fourth Provincial Council of Baltimore (1840) regarding mixed marriage promises,¹⁶⁶ the

¹⁶⁵ Ibid., pp. 117-118: "[...] Doceant porro gravissimeque moneant, non aliter Ecclesiam hac in lege, quod aegre tantum facit, dispensare, nisi ad graves dispensandi causas cautiones accedant et conditiones, quibus tum parti catholicae religionis exercitium praestetur salvum, tum catholica prolis universae educatio in tuto collocetur, atque ita ratio illa, ob quam lege naturali et divina adeo improbantur, quantum fieri potest, tollatur."

¹⁶⁶ See sect. 2.5.2.

Council urged the pastors of souls to see to it that all those promises be faithfully fulfilled after a mixed marriage celebration.¹⁶⁷

2.5.5 - Plenary Synod of Ireland (1875)

The Synod, in its decree 17 *De matrimonio*, declared that marriages of Catholics and non-Catholics were prohibited, for such unions very often caused very serious problems such as domestic disagreements and the falling away from the Catholic faith on the part of both the Catholic party and the children.

Pertaining to other mixed marriage regulations, interestingly, the Synod simply followed or adapted what had been laid down by the Fourth Provincial Council of Baltimore (1840), among other things, that only passive assistance of the sacred minister (pastor) was allowed, the celebration had to be outside the sacred places, and the *cautiones* should be given by the parties.¹⁶⁸

2.5.6 - Third Plenary Council of Baltimore (1884)

In general, the Council taught that Catholics were to know that, first of all, a valid marriage could not be dissolved by any human authority on earth; the second, those who attempted marriage before a non-Catholic minister incurred the penalty of

¹⁶⁷ *Concilii plenarii Baltimorensis II (1866), acta et decreta*, Baltimore, J. Murphy, 1880, pp. 174-176.

¹⁶⁸ *Acta et decreta Synodi plenariae episcoporum Hiberniae habitae apud Maynutiam an. 1875*, Dublini, Browne et Nolan, 1877, pp. 91-92; see also footnote 236.

excommunication reserved to the bishop; and the third, disparity of cult was a diriment impediment or an impediment which invalidated the marriage between a baptized and a non-baptized; whereas mixed religion was an impeding impediment which simply prohibited, but did not invalidate, a marriage of two baptized people one of whom was a Catholic and the other was a baptized non-Catholic.¹⁶⁹

Following the teaching of the *Instructio Antonelliana*,¹⁷⁰ the Council moreover stated that the Church always repulsed and condemned marriages of Catholics and non-Catholics on the bases of unseemly *communicatio in sacris*, serious danger of losing the faith by the Catholic party, and the improper education of the eventual children. Therefore, a dispensation would not be granted by the Church unless there was a grave cause and the *cautiones* had been given.¹⁷¹

For the purpose of reducing the number of mixed marriages to the minimum, the Council also set up some useful means to be employed, i. e., (1) frequent instruction by the pastors through which the faithful were taught about the Church's negative view on mixed marriages; (2) uniform practice of those pastors to prevent such marriages not by rebuking, but by encouragement and persuasion; (3) thorough examination on the canonical and grave causes required for the granting of a dispensation from the

¹⁶⁹ GULDAY, *A History of the Councils of Baltimore*, p. 236.

¹⁷⁰ See *Collect.* (1905), no. 1378.

¹⁷¹ *Acta et decreta concilii plenarii Baltimorensis tertii (1884)*, Baltimore, J. Murphy, 1886, p. 66.

impediment of mixed communion; (4) after the mixed marriage celebration, the pastors were to see to it that all the promises be faithfully fulfilled by the spouses.¹⁷²

2.5.7 - First Plenary Council of Scotland (1886)

Having taken into account the teaching of the *Instructio Antonelliana*, the Council of Scotland briefly stated that mixed marriages were always disapproved by the Church. And therefore such a union could not be contracted, unless grave cause existed on the part of the Catholic party, and promises be given that (1) the children to be born of the marriage would be baptized and educated in the Catholic religion, (2) the non-Catholic party would not impede or put any obstacle to the religious practice of the Catholic party, and (3) the Catholic party would strive for the conversion of the non-Catholic to embrace the true faith.¹⁷³

2.5.8 - Plenary Council of Latin America (1899)

Practically speaking, this Council also simply applied or implemented the *Instructio Antonelliana* of 15 November 1858 in its jurisdiction. It is obvious from its decree that the Church's position on mixed marriages was strongly maintained and even reinforced

¹⁷² *Ibid.*, p. 67.

¹⁷³ *Acta et decreta concilii Scotiae plenarii primi post reāintegratam hierarchiam*, Edinburgi, (s.n.), 1888, pp. 24-25.

by the Council. Hence, for instance, a dispensation would not be given unless the *cautiones* were made and the canonical causes were present.¹⁷⁴

2.6 - Summary and Analysis

The following is a summary and analysis of what has been extensively discussed. The main point is to see how mixed marriage legislation developed prior to the establishment of the *Propaganda* in 1622 and especially during the period from the establishment of the *Propaganda* until the end of the nineteenth century. The development can be divided into four periods:

(1) The period before the *Propaganda* (1622)

From the early Middle Ages until the twelfth century, mixed marriages were strongly opposed and condemned by the Church. There were no formal *cautiones* and dispensations as currently known. There was also no distinction between marriages of Catholics and non-baptized (disparity of cult), and marriages of Catholics and baptized non-Catholics (mixed religion). All were known simply as mixed marriages and hence were put under one prohibition. Accordingly, such a union could not be entered into unless the non-baptized promised to convert or the so-called heretic agreed to abjure the heresy and embrace the Catholic faith. Both the Church Fathers in their teachings and the various councils of that time demanded in their decrees the conversion of the non-

¹⁷⁴ *Acta et decreta concilii plenarii Americae Latinae in urbe celebrati anno Domini 1899*, Romae, Typis Vaticanis, 1902, pp. 257-259; see also *Collect.* (1905), no. 1384.

Catholic or the abjuration of heresy before a marriage celebration, yet it is not quite clear whether the act of conversion or the abjuration had to take place before or after the marriage. If the conversion or the abjuration of heresy, followed by the act of embracing the Catholic religion, had to take place before the marriage celebration, then, canonically speaking, a mixed marriage never took place during this time.

There is a clue, however, that in the sixth century the Church began to see mixed marriage with non-Catholics, especially with Jews, as a diriment impediment.¹⁷⁵ Yet, again, there is no strong and explicit distinction between mixed religion and disparity of cult.

A further step occurred in the twelfth century, when Gratian in his *Concordia discordantium canonum* - based on the teaching of St. Ambrose (+397) - began to see baptism as an essential element for a marriage, as he stated that lack of baptism rendered a marriage invalid. Consequently, a marriage entered into by a Catholic and an infidel was invalid due to the fact that the infidel was unbaptized.¹⁷⁶ This point of view seems to pave the way for the explicit distinction between dispar marriage and mixed religion, although it was still unclear. The obvious distinction between the two impediments

¹⁷⁵ See MANSI, vol. 8, p. 838, c. 19; BONTERRI, *Die vorzüglichsten Denkwürdigkeiten der Christ-Katholischen Kirche*, pp. 441-442; SCHENK, *Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 29; DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 29.

¹⁷⁶ See footnotes 29 and 30 of this chapter. See also DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, pp. 38-40; BOYLE, *The Juridic Effects of Moral Certitude on Pre-nuptial Guarantees*, pp. 10-12; SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 38-39.

occurred only after the twelfth century onward, i.e., the period from the thirteenth century to the beginning of the sixteenth century. During this period, the Roman Pontiffs, the canonists, and the theologians had the same opinion of the difference between marriages of Catholics with infidels and marriages of Catholics with heretics. This difference, as pointed out by St. Thomas, was based solely on baptism and its canonical consequences.¹⁷⁷

However, although the clear distinction had been made between the two matrimonial impediments, the Church during this time still, in an equal way, prohibited, opposed, and condemned all mixed marriages, and even reinforced the strict legislation of the preceding centuries. There were also no formal *cautiones* that had to be given by the parties to satisfy the divine law mandates, no conditions expressly posed by divine law, and no dispensation from mixed marriage impediments was ever granted by the Church. Hence, the only way to enter into a mixed marriage or that a mixed marriage could be tolerated was that the non-Catholic had to sincerely promise to convert or if the abjuration of heresy preceded and embraced the Catholic faith.

(2) The Period from the *Propaganda* (1622)
to Benedict XIV (1740-1758)

¹⁷⁷ See T. AQUINAS, *Summa theologiae*, Q. 59, art. 1, ad. 5 (footnote 34). The concept of the diriment impediment of disparity of cult started in the sixth century (see sect. 2.1.2), but was universally recognized only a few centuries later. However, there is no universal agreement as to when exactly that was. Some authors say the beginning of thirteenth century, others pick up the twelfth century, whereas others are in favour of some time between the seventh and twelfth centuries. See also DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 43, footnote 51.

The question of dispensation from the impediments regarding mixed marriages, especially the impediment of disparity of cult, actually became a major issue since the sixteenth century when the Church extended its missionary activity to the Eastern world and to the Western hemisphere such as America. The complicated problems and difficulties which were faced by the missionaries forced the Church to grant those missionaries many faculties including the faculty to dispense from the impediment of disparity of cult.¹⁷⁸

The issue of granting the faculty to dispense from the impediment of disparity of cult became more important after the establishment of the *Propaganda* (1622) under whose jurisdiction all mission territories were put. The enactments of the Roman Pontiffs, the *Propaganda*, and the Holy Office during this period indicated that such a dispensation could be granted if: (1) there be at least a grave cause, (2) in single cases, (3) in the places where the infidels outnumbered the Catholics, (4) the cohabitation would be without offence to the Creator, (5) the children to be born would be baptized and educated in the Catholic religion, and (6) there would be no danger of loss of faith for the Catholic party.

With regard to mixed religion, the scenario is quite different. For about a century and a half, roughly from 1600 to 1750, primarily in Europe, such a dispensation was

¹⁷⁸ Some examples might be the special faculties granted by Pope Leo X (1513-1521) to the Franciscan missionaries going to Mexico in 1521; later by Paul III (1534-1549) in 1537, Pius V (1566-1572) in 1571, and Gregory XIII (1572-1585) in 1585 to all religious superiors of missionaries whose members were in the missions anywhere in the world (see footnotes 32 and 33 of Ch. 1).

granted only to those of noble families, and not to common people unless the abjuration of heresy preceded.¹⁷⁹ However, there had to be a public cause besides the grave cause, and certain number of the *cautiones* had to be given to satisfy the divine law mandates.¹⁸⁰

(3) The Period from Benedict XIV (1740-1758)
to Pius VII (1800-1823)

Since the Council of Trent, marriages in the places where the Decree *Tametsi* had been promulgated could not be validly contracted without observing the canonical form. Yet in 1741 Benedict XIV exempted mixed marriages with heretics in The Netherlands and Belgium from the Tridentine form through his Declaration *Matrimonia* of 4 November 1741. It was known as the Benedictine Declaration, and was later extended to some other countries such as Germany, Hungary, the United States of America, and

¹⁷⁹ See BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 25. Again, it is unclear whether the abjuration of heresy had to take place before the marriage, or it was merely a promise to abandon the heresy for the purpose of obtaining a dispensation and then to embrace the faith after the marriage. If, however, the act of abjuring the heresy and embracing the Catholic religion had to take place at the same time before the marriage, canonically speaking, there would be no mixed marriage and hence no dispensation was needed.

¹⁸⁰ The number of the *cautiones* at this time varied from case to case, e.g., thirty *cautiones* were demanded by Urban VIII before granting a dispensation for the marriage of Charles I of England and Henriette Marie of France in 1624. The same Pope in 1633 granted a dispensation for the marriage of Wolfgang Wilhelm of Neuberg and Catherine Charlotte of Zweibrücken after demanding a contract which contained eleven points of agreement (*cautiones*) mainly to safeguard the faith and religious practice of the Catholic party and the children, also to work for the conversion of the non-Catholic party (see sect. 2.2.1.1).

Canada.¹⁸¹ However, speaking very broadly, during the reign of this Pope and his successor Clement XII (1758-1769), some enactments of the Pontiffs and of the *Propaganda* indicated that the abjuration of heresy was still required apart from the *cautiones*. In addition, a merely passive assistance of pastors was allowed at the marriage celebration, i.e., a merely material presence without nuptial blessing or any other prayers over the spouses, a celebration which had to be outside sacred places, and without any vestment worn by the pastors indicating their sacred functions.

A further development was made later on by Pius VI (1775-1799), namely, that from his pontificate onward, the abjuration of heresy was no longer required, though the *cautiones* still had to be given. This more tolerant discipline was expressed in his letter *Exequendo nunc* of 13 July 1782 to the archbishop of Malines. It is most likely that this letter was the first ecclesiastical document to establish the practice of the *cautiones* for the common or ordinary people. About three years later (1785), the *Propaganda* endorsed the additional *cautio* which was previously demanded by Pius VI, namely, that the Catholic party must promise to strive for the conversion of the non-Catholic partner to

¹⁸¹ *Sanctissimi Domini Nostri Benedicti Papae Bullarium*, t. I, Romae, Typis Sacrae Congregationis de Propaganda Fide, 1746, pp. 87-89; see also SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 56, footnote 34. The Benedictine Declaration was extended to Canada by Pope Clement XIII on 22 November 1764. See F. DESHAYES, *Questions pratiques de droit et de morale sur le mariage*, Paris, P. Lethielleux, 1898, p. 264, note 1; *Fontes*, vol. 4, no. 866, R. ad 5; *Collect.* (1907), vol. 1, no. 784; *Ibid.*, no. 842; *Mandements lettres pastorales et circulaires des évêques de Québec*, 3 (1806-1850), p. 360, note a.

embrace the Catholic faith.¹⁸² Nevertheless, the *cautiones* about this time began to be simplified and their number was gradually reduced.¹⁸³

Pertaining to dispar marriages, the practice of granting mission Ordinaries the faculty to dispense from the impediment continued to be undertaken by the Holy See. The *cautiones*, however, had to be always undertaken before the granting of dispensation. The *cautiones* in question were concerning: (1) the removal of the danger of the loss of faith by the Catholic party; (2) the Catholic baptism and education of children of both sexes; and (3) hope and work toward the conversion of the non-baptized party. Besides the *cautiones*, there had to be some grave causes in particular cases. Nonetheless, the faculty to dispense could be exercised only in the places where the Catholics were outnumbered by the non-baptized, and in addition, the missionaries had to be certain that the future cohabitation would be without contempt for the Creator.¹⁸⁴

(4) The Period from Pius VII (1800-1823)
to the End of the Pontificate of Leo XIII (1878-1903)

Until the nineteenth century, despite the mitigation of the rules or regulations concerning mixed marriages, the Church's opposition continued to be strong and unchanged. To obtain a dispensation from any impediment, the *cautiones* were required and the *causa gravis* had to be verified. In practice, the *causa gravis* had to be one of the

¹⁸² See *Collect.* (1893), no. 1423.

¹⁸³ See sect. 2.2.1.5.

¹⁸⁴ See *Collect.* (1905), no. 1344.

sixteen canonical causes proposed by the *Propaganda* in its Instruction *Cum dispensatio* of 9 May 1877.

Relative to the celebration of mixed marriages with heretics, the enactments of the Popes and of the Congregations involved continued to allow the merely passive assistance of pastors. But a significant change must be noted in this regard: in extraordinary circumstances (e.g., the marriage could not be avoided without greater evils and danger of scandal, there would be harm to Catholic religion and the marriage would be celebrated before a non-Catholic minister if a dispensation was denied), a dispensation from the impediment of mixed religion could be granted without exacting the *cautiones* before the marriage celebration. This concession was made by Gregory XVI through his Apostolic letter *Quas vestro* dated 30 April 1841, to the bishops of Hungary. But the Pope insisted that what had been always the content of the *cautiones* had to be fulfilled after the marriage. In other words, the conditions required by divine law mandates had to be implemented regardless if the *cautiones* were given or not.¹⁸⁵ The same exception was also made by the Holy Office in 1842, but it demanded that certain means be employed to produce moral certitude in the mind of the one who had the power to grant the dispensation, that the divine law mandates would be faithfully fulfilled.¹⁸⁶

In connection with disparity of cult, the *Propaganda* in 1806 made a slight modification pertaining to the required places in which the Catholics had to be fewer than

¹⁸⁵ See *Collect.* (1893), no. 1428; or *Fontes*, vol. 2, no. 496.

¹⁸⁶ See *Collect.* (1907), vol. 1, no. 951.

the non-baptized in order to be granted a dispensation from the impediment. This had been a common practice for a long time. But the Congregation stated that the requirement could be considered already fulfilled even in a village where the Catholics outnumbered the non-baptized, provided that the village was a part of a district in which the non-baptized outnumbered the Catholics.¹⁸⁷

The Holy Office also made a significant development with regard to dispar marriages. It stated very clearly in its decree to the vicar apostolic of Manchuria of 4 June 1851 that the impediment of disparity of cult could cease in particular and extraordinary circumstances, provided that in these circumstances the Catholics were impeded both morally and physically in such a way that they were unable either to seek a dispensation from the impediment or to marry other Catholics. An example of these particular circumstances is the location, e.g., in Manchuria, whose hamlets and villages were far away from the missionaries so that it was impossible for the parties to approach those missionaries to petition a dispensation from the impediment because of difficult communication, war, and persecution. Meanwhile there were no other suitable Christians and it was difficult to move to Christian territories. Therefore, the parties could validly and licitly contract the marriage without a dispensation.¹⁸⁸

Now the question to be asked is: What does the phrase "the impediment of disparity of cult ceases in particular and extraordinary circumstances" mean? No author seems to

¹⁸⁷ See *Collect.* (1905), no. 1355.

¹⁸⁸ See *Collect.* (1905), no. 1360.

have ever tried to discuss or to answer this question. Yet, two points can be pointed out: (1) it is very likely that the phrase refers to a certain situation wherein the law, which requires the parties to seek a dispensation for the purpose of contracting a valid marriage, did not bind and hence a marriage could be celebrated validly and licitly without dispensation; (2) since there was no dispensation, it is still unclear whether the *cautiones*, which were normally required to be given before granting a dispensation and also necessary for the validity of the same, had to be given by the parties. But, as it is true that the divine law mandates in mixed marriages cannot be dispensed from, it is certain that there should be at least moral certitude that these divine law mandates would be faithfully implemented.

During the second half of the nineteenth century, the *cautiones* had been reduced to only three for any mixed marriage, i.e., (1) the promise of the non-Catholic party to remove dangers from the faith of the Catholic party, (2) the promise of both parties to baptize and to educate all the children of both sexes in the Catholic religion, and (3) the promise of the Catholic party to strive for the conversion of the non-Catholic partner.¹⁸⁹ A fourth *cautio*, i.e., the parties had to promise to go neither before nor after the marriage celebration in the Catholic Church to a non-Catholic minister to give or to renew their consent, was dropped by 1850 despite it still being required in one or two places.¹⁹⁰ That reduction was verified by legislation enacted by particular Councils held

¹⁸⁹ See *Collect.* (1907), vol. 2, no. 1362, 3; *Fontes*, vol. 4, no. 1024.

¹⁹⁰ See *Fontes*, vol. 4, no. 973, ad 4; WESSELLMANN, "The Mixed Marriage Promises: Arguments for Retaining the Cautiones," p. 96.

during this time such as the Fourth Provincial Council of Baltimore, the Provincial Council of Cologne, etc.¹⁹¹

Thus, by the end of the nineteenth century, mixed marriages were still prohibited by the Church. The pastors were urged to instruct the faithful to prevent and to stay away from such dangerous unions. Therefore, one could not enter into such a union, unless some prescriptions had to be observed beforehand, namely:

First, the parties had to obtain a dispensation from the impediment. For this, two points were required for its validity: (1) the three *cautiones*, and (2) some just and grave cause or causes.¹⁹² However, in certain and extraordinary circumstances: (1) an Ordinary could dispense from the *cautiones*, provided that certain means be employed to reach moral certitude that the conditions posed by natural and divine laws would be faithfully fulfilled; (2) the impediment of disparity of cult could cease, hence there would be no need for seeking a dispensation, but some other means might still be required from the parties to prove that the divine law mandates would be fulfilled.

Second, the canonical form had to be observed for the validity of the celebration, except in the places where the Benedictine Declaration was in force.

Third, in connection with mixed religion, merely passive assistance of the ministers was permitted. This refers to a very simple assistance of a minister, i.e., the only

¹⁹¹ See sect. 2.5, for a detailed description.

¹⁹² The public cause, which was normally required in connection with the dispensation from the impediment of mixed religion, had been dropped since dispensations began to be granted also to common people by 1750.

material presence without any vestment and rites. Perhaps the only thing to be done by the minister was asking and accepting the consent of the parties. Furthermore the celebration should be undertaken outside the sacred places. And in addition, the parties were forbidden to go before a non-Catholic minister to give or to renew their consent. Such a provision, however, did not apply or at least was not indicated at all with reference to dispar marriages.

Concerning the three *cautiones*, some comments on each are in order:

(1) A promise to remove the danger of loss of faith on the part of the Catholic party. This promise is quite ancient in origin.¹⁹³ It had to be given usually in writing by the non-Catholic party. The purpose of this promise is to assure the Church that the Catholic party would have full freedom in his or her religious practice, and that there would be no obstacle be placed in the way of such a practice or there would be no influence exerted on the Catholic party to abandon the Catholic faith.¹⁹⁴

(2) A promise to baptize and to educate all the children of both sexes in the Catholic religion.¹⁹⁵ This promise is also of ancient origin.¹⁹⁶ It must be given usually under

¹⁹³ See LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 30-32.

¹⁹⁴ SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 235-236; TER HAAR, *Mixed Marriages and Their Remedies*, pp. 17-18; BOYLE, *The Juridic Effects of Moral Certitude on Pre-nuptial Guarantees*, pp. 127-128; LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 33-34.

¹⁹⁵ See the following documents which speak of "all the children of both sexes" in *Collect.* (1907), vol. 2, no. 1362, ad. 3 (Holy Office [to the archbishop of Corfu], 3 January 1871); *Fontes*, vol. 2, no. 471, # 4 (Pius VI, rescript to the Cardinal archbishop of Malines, 13 July, 1782); *Collect.* (1905), no. 1378 (Secretariate of State, Instruction, 15 November 1858); *Collect.* (1907), vol. 2, no. 1324 (*Propaganda*, Encyclical letter,

oath by the non-Catholic party. The Catholic party is not required, though expected, to give the promise because the Catholic baptism and education of children are presumed to be one's obligation based on the very fact that he or she is a Catholic. The phrase "universa proles" seems to mean only the children born of the union, not adopted.¹⁹⁷ Yet the question to be asked is: Does the phrase "universa proles" refer only to the future children, or also to the past? There is still an uncertainty whether the children already born to both parties or to one of both parties, especially the Catholic, with a different spouse, or to each of both parties with different spouses, are also included in the *cautio*.¹⁹⁸ Until the end of the nineteenth century, no answer could be found in any enactment of either the Roman Pontiffs or the Congregations. However, one may conclude that the above phrase, first of all, undoubtedly refers to the future offspring born of the valid mixed union; but, secondly, it is very possible that the children already

11 March 1868).

¹⁹⁶ See LOURDUSAMY, *Pre-Nuptial Guarantees*, pp.35-37.

¹⁹⁷ In the context of mixed marriages, there does not seem to be any pronouncement dealing with legally adopted children. Hence the question to be asked: Does the above *cautio* include also those children who have not yet been baptized previous to the adoption? It must be noted that in some of the Oriental cultures, legally adopted children are considered the same as biological children. Once they are legally adopted, they become part of the family and enjoy the same rights and obligations as any other children such as inheriting the family name and the property, to take care of the family and to protect the same.

¹⁹⁸ LOURDUSAMY, *Pre-Nuptial Guarantees*, p. 41.

born especially to both parties, or at least to the Catholic party with a different spouse, might not be excluded from the *cautio*.¹⁹⁹

(3) A promise of the Catholic party to do all in his or her power for the conversion of the non-Catholic partner.²⁰⁰ The pastors were urged to remind the faithful of this obligation before and after a mixed union was celebrated. The reason for requesting this promise was the concern of the Church with regard to the spiritual welfare of both the Catholic party and the children, the harmony of a Christian household, and the theological conviction that there can be "no salvation outside the Church".²⁰¹

¹⁹⁹ See also some comments in LOURDUSAMY, *Pre-Nuptial Guarantees*, pp. 41-43; SCHINK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 238-241.

²⁰⁰ See these documents, e.g., *Propaganda*, Encyclical letter, 11 March 1868 (*Collect.* [1905], no. 1384; or *Collect.* [1907], vol. 2, no. 1324); Holy Office, instruction to archbishop of Curfu, 3 January 1871, ad 3 (*Collect.* [1907], vol. 2, no. 1362); Apostolic letter *Quas vestro* of Gregory XVI, 30 April 1841 (*Collect.* [1893], no. 1428, # 2); *Propaganda*, instruction to the vicar apostolic of Sweden, 6 September 1785 (*Collect.* [1893], no. 1423; or *Collect.* [1907], vol. 1, no. 579).

²⁰¹ See BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, pp. 116-118; TER HAAR, *Mixed Marriages and Their Remedies*, pp. 13-31.

3 - THE DEVELOPMENT FROM THE EARLY TWENTIETH CENTURY TO THE PRESENT

This chapter will try to investigate the further development of mixed marriage legislation through missionary law from the beginning of this century up to the present. The investigation will be treated in four major parts: the first, the development before the 1917 *Code of Canon Law*; the second, the development between the 1917 Code and the Second Vatican Council; the third, postconciliar development up to the 1983 *Code of Canon Law*; and the fourth, the development after the 1983 Code. The study will conclude with a summary and an analysis.

Moreover, unlike the previous chapter, this chapter will be organized in a slightly different manner. The two kinds of mixed marriages will not be studied separately, yet the chronological approach will be still maintained.

3.1 - The Development Before the 1917 *Code of Canon Law*

The pronouncements of the Holy See during this short period of time, though very few, indicated that the relatively stable legislation on mixed marriage from the second half of the last century remained in effect and continued to have binding force without

any major development.¹ In a decree dated 10 December 1902, for instance, the Holy Office pointed out three major points. Firstly, if the non-Catholic party refused to sign or to give the *cautiones* either by oath or simple promise, the request for a dispensation from the impediment of mixed religion would be denied. This answer was clearly based on the teaching of the *Instructio Antonelliana* of 15 November 1858.² Secondly, in reference to the possibility of obtaining a dispensation based solely on a given assertion of the Catholic party under oath that the non-Catholic party had promised to fulfil all the conditions, a dispensation might be granted provided that the bishop, in his conscience and on the basis of his prudent judgement, could reach moral certitude regarding the sincerity of the given promises for the present and their fulfilment in the future.³ And thirdly, in connection with the question whether the dual ceremony of a mixed marriage could be permitted, the Holy Office's reply was in the negative, even when the Catholic party had given a written declaration that such an act was merely passive and there was

¹ See DOYLE, *The Pre-nuptial Promises in Mixed Marriages*, p. 84; BOYLE, *The Juridic Effect of Moral Certitude on Pre-Nuptial Guarantees*, p. 47.

² *Fontes*, vol. 4, no. 1262; or *Collect.* (1907), vol. 2, no. 2155: "1. An ab impedimento mixtae religionis dispensari possint, si pars acatholica (quaecumque est) cautiones requisitas per literas reversales, sive per iuramentum, sive per promissionem saltem omnimode recuset. -- R. ad 1. Negative, et detur Instructio 15 Novembris 1858."

³ *Ibid.*: "2. An sufficiat assertio partis catholicae sub iuramento data, partem acatholicam de conditionibus implendis sibi fidem praestitisse. -- R. Ad. 2. Per se et generatim negative, et ad mentem. Mens est: Quod si in aliquo casu extraordinario talia concurrant adiuncta, ut Episcopus valeat sibi comparare moralem certitudinem tam de huiusmodi cautionum sinceritate pro praesenti, quam de earum adimplemento pro futuro, specialesque omnino adsint rationes impediennes ne consueto modo cautiones praestentur, ipsius conscientiae et prudentiae."

no intention whatsoever to adhere to the Protestant rite. In this reply, the Congregation also referred those who asked this question to its Instruction of 17 February 1864, which dealt with the same problem.⁴

Perhaps the only significant development which occurred during this time was brought about by the Apostolic Letter *Provida* of Pius X (1903-1914) dated 18 January 1906 and especially the Decree *Ne temere* of 2 August 1907 issued by the Sacred Congregation of the Council.

Through the Apostolic Letter *Provida* which took effect on Easter Sunday, 15 April 1906, the Pope, besides establishing the Tridentine form as a uniform discipline for Germany, also still expressed the Church's long time prohibition of mixed marriages with heretics or schismatics. Such marriages would not be allowed, unless there were just and grave causes and the parties had given the *cautiones*. Unfortunately, the impediment of disparity of cult was not dealt with by the *Provida*.

The important point of the above Apostolic Letter is that mixed marriages, both already contracted and to be contracted, were not to be subject to the Tridentine form for

⁴ Ibid.,: "3. An permitti possit, ut ante vel post matrimonium pars catholica etiam coram ministro acatholico ad praestandum consensum matrimoniale se sistat, si pars catholica in scriptis declaraverit mere passive se gerere et nullo modo ritui protestantico adhaerere velle. -- R. ad 3. Negative, et detur Instructio 17 Februarii 1864. SSmus approbavit." -- For more information, a reader may consult also the following pronouncements: (1) from the *Propaganda*, (a) a reply dated 28 May 1900, in *Collect.* (1905), no. 2283; (b) an enactment of 29 August 1910, which spoke of mixed marriage after the decree *Ne temere*, in *Sylloge*, p. 52; (2) from the Holy Office, a reply of 21 June 1912 (regarding the nullity of dispensations from the impediment of disparity of cult if the usual *cautiones* were lacking), in *Fontes*, vol. 4, no. 1293, or in *AAS*, 4 (1912), p. 443; (b) a declaration dated 5 August 1916, in *AAS*, 8 (1916), p. 316. The Instruction of 17 February 1864 has been discussed in ch. 2, sect. 2.3.1., no. 4.

their validity, provided no diriment impediment was present nor a nullity sentence had been given on the basis of the impediment of clandestinity before the Apostolic Letter took effect.⁵ Hence, (1) for marriages already contracted, *Provida* came as a *sanatio in radice*; (2) for marriages that would be contracted in the places where the Benedictine Declaration had been extended, *Provida* came merely as a declaration or confirmation for the Benedictine Declaration; (3) for those unions that would be contracted in the places where the Benedictine Declaration had never been extended, it came as a dispensation.⁶ This concession was later extended to Hungary through the Sacred Congregation for Sacraments on 23 February 1909.⁷

The most direct influence for missionary law on mixed marriage legislation came from the Decree *Ne temere*, which took effect on 19 April 1908. This decree established the Tridentine form for all Catholics anywhere in the world, even when they contracted marriages with non-Catholics. The important articles of the decree are the following:

⁵ Clandestinity at that time was considered a diriment impediment. It was established by the Council of Trent to preserve the sanctity of marriage. The Council stated that those who attempted to contract marriages not in the presence of the proper pastor or the Ordinary or a priest delegated by them, and before two or three witnesses, were incapable of contracting, and such marriages were declared null and void. In other words, the canonical form had to be observed in order to contract a marriage validly; otherwise the impediment of clandestinity would arise. -- CONCILIIUM TRIDENTINUM, *Canones et decreta*, session XXIV, cap. 1; see also TAUNTON, *The Law of the Church*, pp. 191-193.

⁶ *Fontes*, vol. 3, no. 670; C. J. CROWN, *The New Matrimonial Legislation, A Commentary on the Decree of the Sacred Congregation of the Council, Ne temere*, London, Washbourne, 1908, pp. 277-283.

⁷ See SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 69 with footnote 87; BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p.48.

First, article no. III saying:

Only those marriages are valid that are contracted before the parish priest, or the local Ordinary, or a priest delegated by either of these, and at least two witnesses, according to the rules laid down in the following articles, and subject to the exceptions mentioned below, n. VII and VIII.⁸

Second, article no. XI which states:

1. The above laws are binding on all persons baptized in the Catholic Church and on all converts from heresy and schism (even though either the latter or the former have fallen away afterwards from the Church), whenever they become engaged or marry among themselves.

2. They bind also the same Catholics as above, if they become engaged to or marry non-Catholics, whether baptized or unbaptized, even after a dispensation has been obtained from the impediment *mixtae religionis* or *disparitatis cultus*; unless the Holy See has ordained otherwise for some particular place or country.⁹

Thus, two important elements were pointed out by the Decree regarding mixed marriages. First, all marriages of Catholics and baptized non-Catholics anywhere were subject to the Tridentine form, except Germany which was declared as such by the Sacred Congregation of the Council. But it stated that the impediment of mixed religion still remained in force. Hence a dispensation had to be obtained for every case before the marriage celebration. Second, *Provida*, as previously indicated, did not deal with marriages of Catholics and unbaptized persons at all. Therefore, it is clear that the

⁸ The English translation from CROMBIE, *The New Matrimonial Legislation*, p. 13 (Latin text in pp. 4-5). In the extraordinary situation such as in danger of death, a marriage could be contracted validly and licitly before any priest and two witnesses, if the proper minister could not be had (no. VII), or in the places where the proper minister could not be had and if this condition had lasted for a month, a marriage could be validly and licitly contracted before two witnesses alone (no. VIII).

⁹ The English translation from *Ibid.*, p. 17 (Latin text in pp. 6-7).

document contained neither a dispensation from the law of clandestinity for dispar marriages in Germany, nor an exception to the same. Thus, according to the decree *Ne temere*, all marriages of the Catholics and the unbaptized anywhere in the world including Germany were, under pain of nullity, subject to the Tridentine form.¹⁰

Another significant point expressed by the above articles is that active assistance of pastors from that time on was required for the valid celebration of any marriage. In other words, since the decree *Ne temere* took effect, the merely passive assistance demanded by the Church in the past for mixed marriages of Catholics and baptized non-Catholics was omitted. Yet, some exception was still made later on by the Holy Office to avoid greater evils, particularly when the parties persistently refused to give the *cautiones* and a dispensation from the impediment had not been granted. The exception was granted only to certain places where the said Congregation had permitted passive assistance of

¹⁰ Ibid., pp. 297-299; see also BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 48; SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 68-69.

pastors before the Decree *Ne temere* came into effect.¹¹ Ironically, passive assistance was never required for the marriage of a Catholic with an unbaptized.

To sum up, the relatively stable mixed marriage legislation for mission lands from the second half of the nineteenth century still continued to have binding force, though some little changes occurred, to wit, (1) the passive assistance of pastors at marriages of Catholics and baptized non-Catholics was revoked, except in a few places which were exempted by the Holy See to avoid greater evils; (2) as the consequences of no. 1, except in the places indicated by the Holy Office, (a) the sacred ministers were no longer prohibited from wearing any vestment at the marriage celebration, (b) the ceremony could be conducted inside the church, and (c) nuptial prayers and blessings were no longer forbidden. Other prescriptions, such as the *cautiones* which had to be given to safeguard the divine law mandates (*conditiones*), remained intact until they were codified or incorporated in the 1917 *Code of Canon Law* as parts of the universal law of the

¹¹ Declaration of the Holy Office of 5 August 1916, in *AAS*, 8 (1916), p. 316: "Cum dubia varia orta fuerint circa decretum latum ab hac Suprema Congregatione S. Officii die 21 maii 1912 circa adsistentiam passivam Parochorum in celebratione matrimonii mixti, haec eadem S. Congregatio sui muneris esse duxit declarare praefatam adsistentiam passivam tolerari solummodo in illis regionibus, quibus ante decretum *Ne temere*, concessionem specialem factam ac instructiones datae fuerant a S. Sede, et tantum in casibus et sub conditionibus ibidem expressis, atque proinde matrimonia extra praedictas regiones sic contracta (idest cum adsistentia Parochi passiva) esse non tantum illicita, sed etiam omnino invalida. See also BOYLE, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees*, p. 48; SCHENK, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, p. 69.

Church.¹² The Code also incorporated many of the apostolic faculties formerly granted to the missionaries. Wherefore, after the promulgation of the 1917 Code, missionary law on mixed marriage legislation entered a new era of development.

3.2 - The Development From the 1917 *Code of Canon Law* to the Second Vatican Council

The most pertinent dicasteries for the development of mixed marriage legislation during this period were the *Propaganda* and the Holy Office. For this reason, the study will be focused only on the enactments of these two Congregations. Furthermore, some particular legislation enacted in the missions will also be discussed.

The pontifical legislation enacted during this period does not seem to have played a significant role. All the Pontiffs during this period, namely, Benedict XV (1914-1922), Pius XI (1922-1939), Pius XII (1939-1958), and John XXIII (1958-1963), largely spoke

¹² Compare the missionary law prescriptions with cc. 1060-1064 (on mixed religion) and cc. 1070-1071 (on disparity of cult) of the 1917 *Code of Canon Law*. For the excellent comments on these canons, see F. X. WERNZ, *Ius canonicum ad codicis normam exactum opera P. Petri Vidal, S. I., t. V, ius matrimoniale*, Romae, Apud Aedas Universitas Gregoriana, 1946, pp. 205-217, 322-343; F. M. CAPELLO, *Tractatus canonico moralis de sacramentis, vol. V, de matrimonio*, Romae, Marietti, 1961, pp. 290-306; 372-385; S. Woywod, *A Practical Commentary on the Code of Canon Law*, vol. 1, New York, NY, J. F. Wagner 1926, pp. 613-618; 624-630; BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 141-154, 179-186; T. L. BOUSCAREN, A. C. ELLIS, and F. N. KORTH, *Canon Law A Text and Commentary*, 4th rev. ed., Milwaukee, Wis, The Bruce Pub. Co., 1966, pp. 525-531, 544-547. The most significant changes found in the 1917 Code legislation are: (1) the "cautiones" are no longer three but two; (2) the third *cautio*, i.e., the promise of the Catholic party to work for the conversion of the non-Catholic partner, becomes c. 1062, yet it is no longer a promise but simply an obligation.

of marriage and many other issues related to it, yet almost nothing on mixed marriage appears. Benedict XV ordered a revision of the former mission faculties after the 1917 Code, yet they were not his own in the strict sense. Perhaps the only Pope who once briefly mentioned mixed marriage was Pius XI. This is obvious in his Encyclical Letter *Casti connubii* of 31 December 1930 on Christian marriage, but technically it was not a pronouncement for missionary lands as such.¹³

3.2.1 - The Enactments of the Sacred Congregation for the Propagation of the Faith or the *Propaganda*

The most important work done by the Congregation for the Propagation of the Faith or the *Propaganda* during this period was the concession of the apostolic faculties to mission Ordinaries. Therefore, this section will try to deal only with those apostolic faculties.

3.2.1.1 - The Three Formulas

After the promulgation of the 1917 Code, Pope Benedict XV (1914-1922), as previously discussed in the first chapter, deemed it necessary to revise all mission

¹³ See Pius XI, Apostolic Letter *Casti connubii*, 31 December 1930, in *AAS*, 22 (1930), pp. 539-592, esp. pp. 570-571. The remark of the Pope in this document is not new. He simply reiterated the basic concern of the Church with regard to the dangers that might arise from such a marriage such as falling away from faith, unhappiness in the family, and defection of offspring from religion or at least they fall into religious negligence or indifferentism.

faculties, including the *Quinque typicae facultatum formulae* promulgated by his predecessor Urban VIII (1623-1644) on 10 February 1637, and effective for nearly three centuries.¹⁴ The revision was published by the *Propaganda* on 6 February 1919, and came into effect on 1 January 1920. By this very fact, the former apostolic faculties were abrogated.¹⁵

These new faculties were composed in three different *Formulae* (I, II, III), each of which was subdivided into a *maior* and a *minor*.¹⁶ *Formula (=F.) I maior* consists of (=) 29 faculties, *F. I minor* = 29 faculties; *F. II maior* = 38 faculties, *F. II minor* = 37 faculties; *F. III maior* = 50 faculties, and *F. III minor* = 49 faculties.¹⁷

With regard to mixed marriages, the apostolic faculties dealt with two major points: first, dispensation from the impediments; second, the *sanatio in radice*.

¹⁴ See footnote 44 of ch. 1.

¹⁵ UTRICHT, "De facultatibus missionalibus," p. 116.

¹⁶ See *Sylloge*, nos. 207-212; see also CHYANO, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 55-57 (but he misquotes Michiels as reference [see G. MICHIELS, *Normae generales iuris canonici, commentarius libri I iuris canonici*, vol. 2, Parisiiis-Tornaci-Romae, Typis Societatis S. Joannis Evangelistae, Desclée et Socii, 1949, p. 661]). Notice that the writings of authors such as Vermeersch (in *Periodica*, vol. 11, p. 81), Utrecht (in *Laurentianum*, vol. 26 [1985], pp. 116-117), Michiels (as stated above), Timmermans (in *The Clergy Monthly*, vol. 24 [1960], p. 361), indicated that the first *Formula* at the beginning was a single *Formula* only. The division into *maior* and *minor* took place in the early months of 1932. The first concession of *Formula I maior* was on 21 May 1932, to vicars apostolic of Sweden, Finland, etc. (*Sylloge*, no. 166, p. 433); the second concession was on 24 May 1932, to vicars apostolic of Rabat, Morocco, etc. (*Sylloge*, no. 167, p. 434); then on 18 June 1932, the *Formula I minor* was conceded to the superiors of the ecclesiastical district in the Northern and Central Norway, etc. (*Sylloge*, no. 168, p. 345). The upcoming discussion will follow this division.

¹⁷ *Sylloge*, pp. 581-625.

(I) Dispensation

Norms for dispensation from mixed marriage impediments are found in six faculties:

(1) faculty 8 of *F. I maior*; (2) faculty 9 of *F. I minor*; (3) faculty 15 of *F. II maior*; (4) faculty 14 of *F. II minor*; (5) faculty 21 of *F. III maior*; and (6) faculty 20 of *F. III minor*. These faculties can be subdelegated (*subdelegabilis*). Texts of the faculties and some comments are in order:

1) Texts:

a) Faculty 8 of *F. I maior* (= faculty 9 of *F. I minor*¹⁸):

To dispense, when the canonical causes exist, from marriage impediments of minor degree (c. 1042), whether public or occult, even multiple; also from the impediments of mixed religion and disparity of cult. But in granting these dispensations, an Ordinary is to bear in mind the norms of cc. 1035-1080 of the Code in respect to the impediments in general and in particular; and, with regard to the impediments of mixed religion and disparity of cult, the conditions prescribed by the Church are to be observed, i.e., to remove from the Catholic party the danger of falling away from the faith, and all the children of both sexes are to be baptized and educated in the sanctity of the Catholic religion; the Catholic party is to be warned of the obligation to strive prudently for the conversion of the non-Catholic party; also both parties neither before nor after the marriage entered into before the Church may approach a minister of a false rite to give or to renew the marriage consent. In the case of marriages with Jews or Muslims, it is required that the free status of the non-baptized party be ascertained for the purpose of removing the danger of polygamy; danger of circumcision of children is to be absent; if a civil act has to be performed, it must be merely a civil ceremony without the invocation of Mohammed or any other kind of superstitious rite.¹⁹

¹⁸ Ibid., p. 605.

¹⁹ Ibid., p. 582: "Dispensandi, canonicis existentibus causis, super impedimentis matrimonialibus minoris gradus (c. 1042), tam publicis quam occultis, etiam multiplicibus, necnon super impedimentis mixtae religionis et disparitatis cultus.

b) Faculty 15 of *F. II maior* (= faculty 14 in *F. II minor*, faculty 21 in *F. III maior*, and faculty 20 in *F. III minor*²⁰):

To dispense, when the canonical causes exist, from marriage impediments of minor or major degree (c. 1042), whether public or occult, even multiple, but of the merely ecclesiastical law, except the impediments arising from the sacred order of priesthood, from defect of the prescribed age, and from the affinity in the direct line when the marriage has been consummated. But in granting these dispensations, [...] [the same as faculty 8 of *F. I maior*].²¹

2) Comments:

It must be noticed that the universal law, as pointed out in cc. 1043-1047 of the CIC/1917, only granted to the Ordinaries, pastors, delegated priests (c. 1095, # 2), and confessors, extraordinary powers to dispense from matrimonial impediments. But these

Concedendo tamen has dispensationes, Ordinarius prae oculis habeat regulas statutas in Codice, a can. 1035 ad can. 1080, circa impedimenta in genere et in specie; et, in impedimentis mixtae religionis et disparitatis cultus, servatis conditionibus ab Ecclesia praescriptis: videlicet de amovendo a catholico coniuge perversionis periculo, ac de universa prole utriusque sexus in catholicae religionis sanctitae baptizanda et educanda; monita parte catholica de obligatione, qua tenetur, conversionem coniugis acatholici prudenter curandi; eaque lege ut, neque ante neque post matrimonium coram Ecclesia initum, partes adeant ministrum falsi cultus ad matrimonialem consensum praestandum vel renovandum. Si agatur vero de matrimoniis cum hebraeis vel mahumetanis, peculiari ratione oportet ut: constet de status libertate partis infidelis, ad removendum periculum polygamiae; absit circumcisionis prolis; et si civilis actus sit ineundus, sit tantum caeremonia civilis, nullaque Mahumetis invocatio aut aliud superstitionis genus interveniat." (Unless indicated, the English translation from the author).

²⁰ Ibid., pp. 611, 596, 619.

²¹ Ibid., pp. 588-589: "Dispensandi, canonicis existentibus causis, super *impedimentis matrimonialibus* sive minoris sive maioris gradus (c. 1042), tamen publicis quam occultis, etiam multiplicibus, iuris tamen ecclesiastici: exceptis impedimentis provenientibus ex sacro Presbyteratus ordine, ex defectu praescriptae aetatis et ex affinitate in linea recta, consummato matrimonio.

Concedendo tamen has dispensationes, etc., [the same as faculty 8 of *F. I maior*]."

powers could be exercised only in the following circumstances: (1) in case of danger of death (cc. 1043-1044); (2) outside danger of death (c. 1045), when everything was ready (*omnia parata*) and the marriage cannot be deferred, or an urgent convalidation of a marriage already contracted cannot be delayed without probable danger of serious evil. Mission conditions, however, rendered the universal law prescriptions impossible to be followed. Hence, greater dispensing power was given to missionaries by way of granting them the faculties.²²

Faculty 8 of *F. I maior* (= faculty 9 of *F. I minor*) indicates that the Ordinaries whether they be bishops or not in the mission territories less far from the Holy See and whose conditions approximated the ordinary dioceses, were granted the power to dispense only from the impediments of minor grade described in c. 1042, # 2, of the CIC/1917, whether they be public or occult (c. 1037):

Impediments of a lower degree are the following:

1. Consanguinity in the third degree of collateral line (c. 1076);
2. Affinity of the second degree of collateral line (cc. 97 and 1077);
3. Public decency in the second degree (c. 1078);
4. Spiritual relationship (cc. 1079 and 768);
5. The impediment of crime arising from adultery with a promise of, or attempt at, marriage, even by a merely civil contract (c. 1075, n. 1).²³

²² See G. VROMANT, *Ius missionariorum, facultates apostolicae quas Sacra Congregatio de Propaganda Fide delegata solet ordinariis missionum, commentaria in Formulam tertiam*, Bruxelles, L'Édition universelle, 1938, pp. 55-58; Id., *Ius missionarium de matrimonio*, t. V, Louvain, Museum Lessianum, 1931, pp. 108-110; G. PAYEN, *De matrimonio in missionibus ac potissimum in Sinis tractatus practicus et casus*, Zi-Ka-Wei, In Typographia T'ou-Sè-Wè, 1929, vol. 1, pp. 454-460.

²³ The English translation from BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, p. 93. See also VROMANT, *Facultates apostolicae*, pp. 57-58.

Nevertheless, according to the two faculties, the mission Ordinaries could dispense also from the impediments of mixed religion and disparity of cult, which in law were parts of the impediments of major grade.²⁴

The other faculties (faculty 15 of *F. II maior*, etc.) indicate that other mission Ordinaries in the territories far away from the Holy See were given larger and greater power to dispense both from the impediments of minor grade (c. 1042, # 2) as well as of major grade (c. 1042, # 3), whether they be public or occult. The dispensable impediments of major grade are: (1) disparity of cult (cc. 1070-1071) and mixed religion (cc. 1060-1064);²⁵ (2) sacred Orders, except the priesthood (c. 1072); (3) solemn vows (c. 1073); (4) abduction (c. 1074); (5) crime (c. 1075); (6) consanguinity of the second and the third degree of collateral line (c. 1076, # 2); (7) affinity in the whole direct line and first degree of collateral line (c. 1077); (8) public honesty in the first degree (c. 1078); and (9) legal relationship arising from adoption (cc. 1059; 1080).²⁶ Three

²⁴ Before the division of the *Facultates formulae primae* into *Formula I maior* and *Formula I minor*, dispensation from the impediments of mixed religion and disparity of cult was not part of the said Ordinaries' power, for those impediments were of major grade. This is obvious in faculty 8 of *Formula prima* before the division: "Dispensandi canonicis existentibus causis, super impedimentis matrimonialibus minoris gradus [c. 1042] tam publicis quam occultis, etiam multiplicibus. Concedendo tamen has dispensationes, Ordinarius prae oculis habeat regulas statutas in Codice a c. 1035 ad c. 1080, circa impedimenta in genere et in specie."

²⁵ Mixed religion is simply a prohibitive impediment, yet is listed as an impediment of major grade. The Code in c. 1071 seems to justify this classification. -- BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, p. 94.

²⁶ See VROMANT, *Facultates apostolicae*, p. 57; *Id.*, *De matrimonio*, pp. 108-110; A. IGLESIAS, *Brevis commentarius in facultates quas S. C. de Propaganda Fide dare solet missionariis*, Taurini, Romae, Marietti, 1924, p. 68; BACHOFEN, *A Commentary on the New*

impediments were excluded from the dispensing power of those mission Ordinaries: (1) the impediment arising from the order of priesthood; (2) the affinity in the direct line when the marriage has been consummated; (3) defect of the required age, i.e., sixteen for males and fourteen for females.²⁷ The first two exceptions were made by the universal law which are clearly expressed in c. 1043, whereas the third exception (c. 1067) was added by the faculties.²⁸

All of the faculties, however, spoke of the necessity of the presence of the canonical causes when a dispensation was petitioned lest a dispensation would be invalidly granted. The causes commonly recognized should be at least one of the sixteen canonical causes proposed by the *Propaganda* through its Instruction *Cum dispensatio sit* of 9 May 1877.²⁹ In reference to dispensation from the impediments of mixed religion and disparity of cult, the canonical causes had to be just and grave.³⁰ Some of the

Code of Canon Law, vol. 5, p. 94; F. J. WINSLOW, *Vicars and Prefects Apostolic*, Canon Law Studies, no. 24, Washington, DC, The Catholic University of America, 1924, p. 104

²⁷ For more comments, see IGLESIAS, *Brevis commentarius in facultates*, p. 69; WINSLOW, *Vicars and Prefects Apostolic*, p. 103; VROMANT, *De matrimonio*, pp. 111-113.

²⁸ See VROMANT, *Facultates apostolicae*, pp. 58-59; WINSLOW, *Vicars and Prefects Apostolic*, p. 103.

²⁹ This Instruction has been discussed in ch. 2, sect. 2.3.1. See also IGLESIAS, *Brevis commentarius in facultates*, p. 70; VROMANT, *Facultates apostolice*, p. 61; VERMEERSCH, "Commentaria de formulis facultatum," p. 69; PAYEN, *De matrimonio in missionibus*, vol. 1, p. 467; WINSLOW, *Vicars and Prefects Apostolic*, p. 105.

³⁰ See the *Propaganda's* Encyclical Letter *Post editam* of 11 March 1868, in *Collect.* (1905), no. 1384; or *Collect.* (1907), vol. 1, no. 1324 (the latter has been discussed in ch. 2, sect. 2.3.1, no. 4); and cc. 1061 and 1071 of the CIC/1917.

Propaganda's proposed canonical causes were generally considered not sufficient singly, yet several of which might be considered just and grave causes, if occurred cumulatively in the same case.³¹ There are also some other justifying causes which should be taken into consideration:

(1) the predominance of heretics or schismatics in the given region; (2) the predominance of infidels in certain countries; (3) a written promise made by the heretics to embrace the Catholic faith after marriage; (4) the desire to avoid scandal, concubinage, defamation, or an attempt at marriage; (5) the fact that such a marriage is the only means whereby the children of a former marriage can be educated in the Catholic faith.³²

Besides the required just and serious causes, the Church, through those faculties, still required the *cautiones* to be made at least orally, though preferably in writing. These *cautiones* were: (1) the non-Catholic party promises that the danger of falling away from faith will be removed from the Catholic party; (2) both parties promise that all the children of both sexes will be baptized and educated in the Catholic religion. In addition, the Church obliged the Catholic party to work for the conversion of the non-Catholic party (prior to the CIC/1917, this obligation was a *cautio*) and demanded that both parties were to go neither before nor after the marriage celebration in front of a non-Catholic minister to give or to renew their marital consent.³³

³¹ VROMANT, *Facultates apostolicae*, p. 63; WINSLOW, *Vicars and Prefects Apostolic*, p. 106.

³² WINSLOW, *Vicars and Prefects Apostolic*, pp. 105-106.

³³ See cc. 1060-1063, 1070-1071 of the CIC/1917; VROMANT, *Facultates apostolicae*, pp. 63, 68-69; IGLESIAS, *Brevis commentarius in facultates*, p. 72; WINSLOW, *Vicars and Prefects Apostolic*, p. 106.

Regarding the marriages of Catholics with Jews or Muslims, the faculties required that: (1) the free status to contract a marriage of the non-Catholic parties be ascertained to avoid the danger of polygamy; (2) there be no danger of circumcision of the children as part of a religious rite (reference is not made to the circumcision for a medical reason); (3) if a civil function should be performed (c. 1063, # 3), it had to be merely a civil ceremony without the invocation of Mohammed or using any other superstitious rite.³⁴

(II) The *sanatio in radice*

The prescriptions for the *sanatio in radice* are found in the following faculties:

1) Texts:

a) Faculty 9 of *F. I maior* (= faculty 10 in *F. I minor*):

To radically sanate the marriages, which were contracted invalidly due to some impediment mentioned in faculty 8 [= faculty 9 in *F. I minor*], according to the norms of cc. 1133-1141 of the Code. Pertaining to mixed marriages attempted before a civil magistrate or a non-Catholic minister, the radical sanation is not to be conceded, unless there be moral certitude that the non-Catholic party will not prevent the Catholic education of all the children already born and to be born. With regard to the legitimation of the children, an Ordinary must bear in mind the prescriptions of c. 1051.³⁵

³⁴ See also IGLESIAS, *Brevis commentarius in facultates*, p. 73; VROMANT, *Facultates apostolicae*, p. 69.

³⁵ "Sanandi in radice, iuxta regulas in codice a can. 1133 ad can. 1141 statutas, matrimonia ob aliquod impedimentum, de quo supra N. 8, nulliter contracta. In matrimoniis vero mixtis attentatis coram magistratu civili vel ministro acatholico sanatio in radice ne concedatur, nisi moraliter certum sit partem acatholicam universae prolis tam natae quam nasciturae catholicam educationem non esse impedituram. Quod autem attinet ad prolis legitimationem, Ordinarius prae oculis habeat canonem 1051." -- *Sylloge*, pp. 582-583; 606.

b) Faculty 16 of *F. II maior* (= faculty 15 of *F. II minor*, 22 of *F. III maior*, 21 of *F. III minor*):

To radically sanate, according to the rules of cc. 1133-1141 laid down in the Code, marriages which were invalidly contracted because of an impediment mentioned in faculty 15 of this Formula. The Ordinary must bear in mind c. 1051 with regard to the legitimation of the children.³⁶

c) Faculty 17 of *F. II maior* (= faculty 16 of *F. II minor*, 23 of *F. III maior*, 22 of *F. III minor*):

To radically sanate as well mixed marriages attempted before a civil magistrate or a non-Catholic minister, provided there be moral certitude that the non-Catholic party will not impede the Catholic education of all the children already born and will be born.³⁷

2) Comments:

The 1917 Code described the *sanatio in radice* of a marriage in c. 1138 as follows:

1. The *sanatio in radice* of a marriage is a validation that entails, besides a dispensation from or a cessation of an impediment, a dispensation from the law of renewing the consent, and has also by a fiction of law a retroactive force which gives the marriage the same canonical effects as though it had been valid from the beginning.

2. The validation of the marriage takes place at the moment of the granting of the favour; the retroactive effect, however, is to be understood to reach back to the beginning of the marriage, unless it is expressly stated otherwise in the rescript.

³⁶ "*Sanandi in radice*, iuxta regulas in Codice a can. 1133 ad can. 1141 statutas, matrimonia ob aliquod impedimentum, de quo supra N. 15 nulliter contracta. Quod vero attinet ad prolis legitimationem, Ordinarius prae oculis habeat can. 1051." -- Ibid., pp. 589, 612, 597, 619.

³⁷ "*Sanandi pariter in radice matrimonia mixta attentata coram magistratu civili vel ministro acatholico, dummodo moraliter certum sit partem acatholicam universae prolis tam natae quam nasciturae catholicam educationem non esse impedituram.*" -- Ibid., pp. 589, 612, 597, 619-620.

3. This dispensation from the law of renewing the consent can be given even without the knowledge of one party or of both.³⁸

The ecclesiastical authority who had the power to grant a *sanatio in radice* of a marriage was the Apostolic See, as pointed out in c. 1141: "A *sanatio in radice* may be granted only by the Apostolic See."³⁹ The reason(s) for this reservation was that the *sanatio in radice* usually contained a dispensation from the required canonical form and a diriment impediment. In practice, however, the power to sanate could be delegated to the bishops, and the bishops in turn could subdelegate that power to the pastors in individual cases. But the bishops and those pastors could not sanate a marriage if they found in it a diriment impediment from which they had no power to dispense.⁴⁰

Nevertheless, mission Ordinaries were granted greater power to sanate marriages *in radice* by virtue of the above faculties. With those faculties, though attention should be paid also to cc. 1133-1141, those Ordinaries could sanate *in radice* all marriages invalidly

³⁸ "# 1. Matrimonii in radice sanatio est eiusdem convalidatio, secumferens, praeter dispensationem vel cessationem impedimenti, dispensationem a lege de renovando consensu, et retroactionem, per fictionem iuris, circa effectus canonicos, ad praeteritum.

2. Convalidatio fit a momento concessionis gratiae; retroactio vero intelligitur facta ad matrimonii initium, nisi aliud expresse caveatur.

3. Dispensatio a lege de renovando consensu concedi etiam potest vel una tantum vel utraque parte inscia." -- The above English translation from WOYWOOD, *A Practical Commentary on the New Code of Canon Law*, vol. 1, p. 729. For more comments, see BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 389-392; PAYEN, *De matrimonio in missionibus*, vol. 2, pp. 878-887; BOJSCAREN-ELLIS-KORTH, *Canon Law A Text and Commentary*, pp. 645-646. Cf. c. 1161 of the CIC/1983.

³⁹ "Sanatio in radice concedi unice potest ab Apostolica Sede." -- The English translation from BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, p. 396.

⁴⁰ WOYWOOD, *A Practical Commentary on the New Code of Canon Law*, vol. 1, p. 732; BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, p. 396.

contracted on account of the presence of some impediment mentioned in the foregoing faculties. The only exceptions were the impediments arising from the order of the priesthood, from the affinity in the direct line when the marriage has been consummated, and from defect of the required age.⁴¹

The conditions to be observed by a mission Ordinary in exercising his faculty to radically sanate a marriage were: (1) the impediments should be of ecclesiastical law only, and not of natural or divine law, even when the impediment had ceased to exist (c. 1139, # 2); (2) the consent of both parties still persevered (c. 1140); (3) there should be a *causa gravis*, e.g., at the time of marriage, one or both parties ignored an impediment which could not be revealed without serious inconvenience; (4) in the case of mixed marriages, the *cautiones* also had to be given according to the norms of c. 1061.⁴²

The above analysis deals with the radical sanation of marriages, including mixed marriages, contracted with the prescribed canonical form yet null and void due to one or more invalidating impediments which were not dispensed.⁴³ Yet, some faculties (e.g., faculty 17 etc.) were concerned with mixed marriages invalidly contracted because of

⁴¹ IGLESIAS, *Brevis commentarius in facultates*, pp. 74-75; VROMANT, *Facultates apostolicae*, pp. 70-71; WINSLOW, *Vicars and Prefects Apostolic*, pp. 108-109.

⁴² IGLESIAS, *Brevis commentarius in facultates*, p. 75; VROMANT, *Facultates apostolicae*, p. 71; *Id.*, *De matrimonio*, p. 209; WINSLOW, *Vicars and Prefects Apostolic*, pp. 108-109; VERMEERSCH, "Commentaria de formulis facultatum," p. 91.

⁴³ Since mixed religion is simply a prohibitive impediment, a mixed marriage properly contracted with the prescribed form is valid, though illicit. Hence, such a marriage, unless there exists also a diriment impediment, cannot be sanated solely because of lack of a dispensation from the impediment of mixed religion.

defect or lack of form. Such a marriage was usually attempted either before a civil magistrate or a non-Catholic minister. The missionaries, therefore, were given exclusive power to sanate *in radice* those marriages, provided that: (1) the *cautiones* be given by the parties; (2) there be moral certitude that those promises would be faithfully carried out; (3) an absolution from the censure, i.e., the excommunication *latae sententiae* reserved to the Ordinary (c. 2319, # 1) had to be obtained beforehand if the marriage was attempted by a Catholic and a baptized non-Catholic before a non-Catholic minister; (4) if the non-Catholic refused to give the *cautiones*, a new faculty to dispense from such cases must be obtained from the Apostolic See.⁴⁴

A question to be asked is: What if a mixed marriage was attempted before a civil magistrate or a non-Catholic minister without a dispensation from both the canonical form and the impediment of mixed religion or disparity of cult? The answer is that such a marriage was indeed null and void, yet it could be sanated by the missionaries, for they had been empowered with the above faculties both to dispense from the impediments and to radically sanate such a marriage.

⁴⁴ VROMANT, *De matrimonio*, pp. 212-214; ID., *Facultates apostolicae*, pp. 73-75; IGLESIAS, *Brevis commentarius in facultates*, pp. 76-78; WINSLOW, *Vicars and Prefects Apostolic*, pp. 109-110. Notice that c. 2319, # 1 was later abrogated by the Sacred Congregation for the Doctrine of the Faith through its Instruction *Matrimonii sacramentum* of 18 March 1966.

3.2.1.2 - The Two Formulas of Decennial Faculties

A major change within the Formulas of the apostolic faculties occurred when the *Propaganda* undertook a revision on the preceding faculties. The result was issued in two Formulas only, simply called *Formula maior* (= FM) and *Formula minor* (= Fm). These new Formulas were basically the same as the former *Formula III maior* and *Formula III minor*, despite some changes here and there. The FM was granted to mission Ordinaries with episcopal character, whereas the Fm was conceded to those Ordinaries without episcopal character. These faculties were granted for ten years, renewable, and effective from 1 January 1941 to 31 December 1950.⁴⁵

FM consisted of 53 faculties, seven of which (faculties 22-28) were concerned with matrimonial dispensation, the radical sanation, and the nuptial blessings. Fm also comprises 53 faculties. Also seven (faculties 21-27), which are exactly the same as faculties 22-28 in FM, deal with the same matters.⁴⁶

Only three faculties of each Formula were concerned with mixed and dispar marriages, namely, (1) faculty 22 of FM (= faculty 21 of Fm) on matrimonial dispensation; (2) faculty 23 of FM (= faculty 22 of Fm) on the *sanatio in radice*; and (3) faculty 24 of FM (= faculty 23 of Fm) on the *sanatio in radice* of mixed marriages

⁴⁵ UTRECHT, "De facultatibus missionalibus," pp. 117-118; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 57-58.

⁴⁶ See the texts of these faculties of both Formulas in H. PEETERS, *Facultates quas Ordinarii et missionarii habere solent cum brevi commentario*, editio altera, Mechliniae, Typographia S. Francisci, 1950, pp. 11-13

contracted before a civil magistrate or non-Catholic minister. The following are the texts and some comments.

1) Text and comments of faculty 22 of FM (= faculty 21 of Fm) on matrimonial dispensation:

a. Text:

To dispense, when the canonical causes exist, from matrimonial impediments of minor or major grade (can. 1042), public as well as occult, even multiple, but of ecclesiastical law, except those arising from the sacred Order of the priesthood, from affinity in the direct line when the marriage was consummated, and from the lack of the prescribed age when the parties have not yet reached the age prescribed by the former law (that is, 14 years complete for the male, 12 complete for the female).

In granting these dispensations, however, the Ordinary must bear in mind the rules laid down in the Code, in canons 1035 to 1080, regarding impediments in general and in particular, and in the case of the impediments of mixed religion and disparity of cult, observing the conditions prescribed by the Church: namely, as to removing the danger of perversion from the Catholic party and baptizing and educating all the children of both sexes only in the sanctity of the Catholic religion, warning the Catholic party of the obligation to strive prudently to convert the non-Catholic party: it being understood that neither before nor after the marriage contracted before the Church may the parties appear before a minister of a false cult to express or renew matrimonial consent. If there is question of marriage with Jews or Mohammedans, it is especially required that: the free status of the infidel party be certain, so as to remove the danger of polygamy; that there be no danger of circumcision of children; and that if there is a civil act to be performed it be merely a civil ceremony without any invocation of Mohammed or any other kind of superstition. (May be subdelegated).⁴⁷

⁴⁷ "Dispensandi, canonicis existentibus causis, super *impedimentis matrimonialibus* sive minoris sive maioris gradus (can. 1042) tam publicis quam occultis, etiam multiplicibus, iuris tamen ecclesiastici, exceptis impedimentis provenientibus ex sacro Presbyteratus ordine, ex affinitate in linea recta, consummato matrimonio, et ex defectu praescriptae aetatis, quando sponsi ad aetatem ab antiquo iure praefixam nondum pervenerint (ides: ad annum 14 completum pro viris et ad 12 completum pro mulieribus).

b. Comments:

This faculty is not entirely new. It is simply a further development of the already discussed faculties in the former three Formulas. An example of the development is that it terminated the difference between the power enjoyed by mission Ordinaries in the territories less far from the Holy See and the power enjoyed by those who were very far distant from the Holy See.

To understand fully this faculty, a further analysis on the dispensing power granted by the universal law (cc. 1043-1045 of the CIC/1917; see also c. 1046) to the Ordinaries, the pastors or quasi-pastors, delegated priests, and the confessors, is in order:

- (1) By virtue of c. 1043,⁴⁸ in case of danger of death, an Ordinary can dispense his

Concedendo tamen has dispensationes, Ordinarius prae oculis habeat regulas status in codice, a can. 1035 ad can. 1080, circa impedimenta in genere et in specie et, in impedimentis mixtae religionis et disparitatis cultus, servatis conditionibus ab Ecclesia praescriptis: videlicet de amovendo a catholico coniuge perversionis periculo, ac de universa prole utriusque sexus in catholicae religionis sanctitate tantum baptizanda et educanda, monita parte catholica de obligatione qua tenetur, conversionem coniugis acatholici prudenter curandi; eaque lege ut, neque ante neque post matrimonium coram Ecclesia initum, partes adeant ministrum falsi cultus ad matrimonialem consensum praestandum vel renovandum. Si agatur vero de matrimoniis cum hebraeis vel mahumetanis, peculiare ratione oportet ut: constet de status liberte partis infidelis, ad removendum periculum polygamiae; absit periculum circumcissionis prolis; et si civilis actus sit ineundus, sit tantum caeremonia civilis nullaue Mahumetis invocatio aut aliud superstitionis genus interveniat (subdelegabilis). -- The English translation from CLD, 5 (1958-1962), p. 179.

⁴⁸ "In danger of death, Ordinaries may for the relief of conscience and, if the case demands, for the legitimation of children, dispense their own subjects, wherever they may be, and all other persons actually residing in their territory, from the form of marriage, and from all impediments of the ecclesiastica: law, diriment and impeding, public and occult, simple and multiplex, including clandestinity, but not the impediment of priestly orders and affinity in the direct line, arising from consummated marriage. In granting these dispensations, all danger of scandal should be removed, and in the case of disparity

own subjects everywhere and those who are not his subjects yet actually living in his own territory from the canonical form and all impediments, except two, i.e., the impediments arising from the priesthood and affinity in the direct line when the marriage has been consummated. But certain conditions are to be observed: (a) that a dispensation is intended for the relief of conscience and legitimation of children if there are any; and (b) the promises must be given by the parties in the case of mixed marriages.⁴⁹

(2) By virtue of c. 1044,⁵⁰ in case of danger of death, (a) a pastor or a quasi-pastor enjoys the same faculty as the Ordinary to dispense his own subjects everywhere and those actually present in his territory from form and all the impediments, except the two, under the same conditions as for the Ordinary, but only in the cases in which the Ordinary cannot be reached; (b) a delegated priest (c. 1098) also enjoys the same faculty as the Ordinary to dispense those, at whose marriages he is delegated to assist, from the

of worship and mixed religion, the usual conditions should be imposed." -- The English translation from BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, p. 96.

⁴⁹ For detailed comments, see BACHOFEN, *A Commentary on the New Code of Canon Law*, pp. 96-102; WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 72-76; WOYWOD, *A Practical Commentary on the Code of Canon Law*, vol. 1, pp. 590-594; ABBO-HANNAN, *The Sacred Canons*, vol. 2, pp. 1042-1044; PETROVITS, *The New Church Law on Matrimony*, pp. 84-91; H. A. AYRDNAC, *Marriage Legislation In the New Code of Canon Law*, revised and enlarged by P. J. LYDON, revised ed., New York, NY, Benzinger Bros., 1939, pp. 66-70.

⁵⁰ "In the same circumstances as those described in c. 1043, but only in cases in which not even the local ordinary can be reached, the same faculty of dispensing is enjoyed by a pastor, a priest who assists at the marriage in conformity with canon 1098, n. 2, and a confessor, but the latter enjoys it only for the internal forum, in the course of the sacramental confession." -- The English translation from ABBO-HANNAN, *The Sacred Canons*, vol. 2, p. 1044.

canonical form and the same impediments, except the two, under the same conditions as for the pastor; (c) a confessor enjoys the same faculty as the Ordinary to dispense his penitents from the same matters, but only in the internal sacramental forum, and under the same conditions as for the pastor.⁵¹

(3) By virtue of c. 1045,⁵² outside danger of death, (a) an Ordinary can dispense all persons mentioned in c. 1043 from all the impediments mentioned in the same canon, except the two and the canonical form, and only in the following conditions: when *omnia parata sunt ad nuptias* (everything is ready for the marriage), probable danger of inconvenience if the marriage be delayed until a dispensation could be obtained from the Holy See, removal of scandal, the *cautiones* be obtained from the parties in the case of mixed marriages; (b) a pastor or a quasi-pastor enjoys the same faculties as for the Ordinaries to dispense all persons mentioned in c. 1044 from all impediments, except the

⁵¹ For more comments, see BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 102-105; ABBO-HANNAN, *The Sacred Canons*, vol. 2, pp. 221-222; AYRINHAC-LYDON, *Marriage Legislation*, pp. 70-73; WOYWOD, *A Practical Commentary on the Code of Canon Law*, pp. 590-594; PETROVITS, *The New Church Law on Matrimony*, pp. 92-94.

⁵² "# 1. Ordinaries can, under the conditions laid down at the end of can. 1043, dispense from all the impediments mentioned in the same canon, every time an impediment is discovered when everything is ready for the wedding, and the marriage cannot, without probable danger of grave inconvenience, be delayed until a dispensation could be obtained from the Holy See.

2. The same faculties hold good for the revalidation of a marriage already contracted, if there is the same danger in delay and there is no time to have recourse to the Holy See.

3. In the same circumstances, the same faculties are enjoyed by all those mentioned in can. 1044, but only for the occult cases in which it would not be possible to have recourse even to the Ordinary of the place, or it could not be done without danger of violating the secret." -- The English translation from AYRINHAC-LYDON, *Marriage Legislation*, p. 74.

two, but only in the occult cases, and can be in the external forum, but under the same conditions as for the Ordinary and if a recourse to the Ordinary is impossible; (c) a delegated priest (c. 1098) enjoys the same faculties as for the pastor to dispense all persons, at whose marriages he is delegated to assist according to c. 1098, n. 2, from the same impediments, but only in occult cases, and under the same conditions as for the pastor; (d) a confessor possesses the same dispensing power as for the pastor, but only in the internal sacramental confession and in occult cases under the same conditions as for the pastor and the priest delegated.⁵³

The following is the analysis of the dispensing power granted to mission Ordinaries by virtue of the above faculty. The analysis, however, is basically a further refinement of the previous analysis of the faculties present in the former Three Formulas.

(1) The faculty spoke of the canonical causes of dispensation. As usual, a dispensation was not to be granted unless there existed at least a canonical cause. Unlike the Code which prescribes that the dispensing power could be exercised only in *periculum mortis* (cc. 1043-1044) and in certain specific cases (c. 1045), this faculty simply stated that *canonicis existentibus causis* (when canonical causes exist), a dispensation could be granted. It did not require any particular situation or circumstances. In other words, it

⁵³ For more comments, see WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 77-89; BACHOFEN, *A Commentary on the New Code of Canon Law*, pp. 105-109; ABBO-HANNAN, *The Sacred Canons*, vol. 2, pp. 222-224; AYRDHAC-LYDON, *Marriage Legislation*, pp. 74-77; WOYWOD, *A Practical Commentary on the Code of Canon Law*, vol. 1, pp. 594-598; PETROVITS, *The New Church Law on Matrimony*, pp. 94-97.

spoke of a normal situation. Thus, mission Ordinaries truly enjoyed greater power than those who were not mission Ordinaries.

Customarily, there had to be at least one of the sixteen canonical causes proposed by the *Propaganda* in its Instruction *Cum dispensatio sit* of 9 May 1877.⁵⁴ Most of these canonical causes were considered sufficient singly to constitute a *causa motiva*. A *causa motiva* is the primary or motivating reason that moves the authority to grant a dispensation, at least from a minor impediment.

There were also some other canonical causes which were important, yet considered as merely secondary, for they were impelling only (*causa impulsiva*) and not singly or individually constituted the motivating cause. These causes could strengthen the motivating cause to move the competent authority to grant dispensation. However, the combination of some impelling causes might constitute a motivating cause.⁵⁵ The examples of these secondary canonical causes are: (a) secret intercourse; (b) suspect intimacy with cohabitation under the same roof; (c) the loss of the woman's reputation because of falsely suspected intercourse with one related by blood or marriage; (d) the "excellencia meritorum" (excellent service) to the Church by the petitioner.⁵⁶

⁵⁴ See Ch. 2, sect. 2.3.1. For more comments, see VROMANT, *De matrimonio*, pp. 122-130; WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 86-94; O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 72-130; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 227-228.

⁵⁵ ARBO-HANNAN, *The Sacred Canons*, vol. 2, p. 233; WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 84-85; O'MARA, *Canonical Causes for Matrimonial Dispensations*, pp. 43-46; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 224-227.

⁵⁶ ARBO-HANNAN, *The Sacred Canons*, vol. 2, p. 237.

In addition to the primary and secondary canonical causes, there were some other causes which were non-canonical, yet could also be alleged to make the petition forceful, such as:

A. On the part of the woman: (1) the loss of one or both parents; (2) her illegitimate birth; (3) her illness or physical inadequacy; (4) the loss of her virginity through the actions of another man.

B. On the part of the man: (1) his illness or physical inadequacy; (2) the burden of rearing children born of a former marriage.

C. On the part of both: (1) their good reputation; (2) their generosity towards public institutions; (3) mutual aid in advanced years (i.e., beyond the age of fifty).

D. On the part of marriage: (1) the imminence of the date of the marriage for which all things are in readiness; (2) the divulgence of the intention of the parties to marry; (3) the pertinacity of the parties in their intention; (4) great benefits resulting from the marriage; (5) the aid for needy parents which only the marriage can provide.⁵⁷

In reference to dispensation from the impediments of mixed religion and disparity of cult, the canonical causes which were sufficient of themselves are the following:

1. A grave scandal arising from defamation, pregnancy, or from some other source, that cannot be prevented except through a mixed or dispar marriage.

2. The predominance of heretics or schismatics (or infidels) in a given region, provided that Catholics are secure and free in professing their religion.

3. If a mixed or dispar marriage is the only means whereby children born of another mixed or dispar marriage will be educated in the Catholic faith.

4. Danger of apostasy of the Catholic party if the dispensation is denied.

5. Danger of a civil marriage, or of contracting the union before a non-Catholic minister.

⁵⁷ ARBO-HANNAN, *The Sacred Canons*, vol. 2, pp. 237-238; see also VROMANT, *De matrimonio*, pp. 130-131; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 229-230.

6. The cause of conversion: (1) a probable hope that a favourably disposed non-Catholic family will come into the Church together as the result of a mixed or dispar marriage; (b) a written promise, or an oral promise before witnesses made by the non-Catholic party to embrace the Catholic faith after the marriage; (c) hope of the conversion of the non-Catholic party.⁵⁸

Vromant has a different list of the canonical causes as follows: (1) excellence of merits; (2) danger of a civil marriage; (3) removal of serious scandals; (4) cessation of public concubinage; (5) hope of the conversion of the family or of the non-Catholic party; (6) in the region where Catholics are smaller in number, yet are given freedom to practice their faith; (7) if mixed marriage is the only way to procure Catholic education for the children born of the previous marriage; (8) suspected familiarity; (9) *copula* (previous sexual relationship) or pregnancy which is going to be publicly known; (10) social condition of family; (11) smallness of the place; (12) advanced age; (13) lack of a proper dowry.⁵⁹ (2) The faculty spoke of the kinds of impediments from which a mission Ordinary could or could not dispense. This is the scope of the faculty which is nearly the same as of c. 1043. There are only two differences. First, the faculty is without the phrase "tum super forma in matrimonii celebranda servanda" as found in the canon. This indicates that mission Ordinaries could not dispense from the canonical form by reason of this faculty, though they could dispense from the same by reason of c. 1043 in "mortis periculo". Secondly, c. 1043 only excluded two impediments from the

⁵⁸ CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 230-231.

⁵⁹ VROMANT, *De matrimonio*, p. 132. The Vromant's list (in Latin) can be found in WINSLOW, *A Commentary on the Apostolic Faculties*, p. 101; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Diocese*, p. 231.

dispensing power in "mortis periculo", namely, (a) the impediment arising from the order of priesthood, and (b) the impediment arising from the affinity in the direct line when the marriage had been consummated. The above faculty, in addition to the two, added another exception, namely, lack of the required age when the parties had not yet reached the age prescribed by the former law (fourteen years completed for the male and twelve years completed for the female). This additional exception indicated that, in normal circumstances, mission Ordinaries enjoyed the power to dispense from the age required by c. 1067 (sixteen for male and fourteen for female), provided that both parties had reached the age of fourteen and twelve respectively, but not below.

Hence, by virtue of the said faculty, mission Ordinaries could dispense from all matrimonial impediments of ecclesiastical law, but not of divine (natural or positive) law,⁶⁰ whether they be prohibitive or diriment, major or minor degree, even multiple, public or occult, except the above mentioned three impediments. The following is a list of the impediments as cited in Winslow:⁶¹

A. Prohibitive impediments:

1. Private vows of virginity, of perfect chastity, of not marrying, of taking sacred orders, and of embracing the religious state. The simple vow of chastity made in a religious institute is also included insofar as it prevents lawful marriage; however, the other two religious vows, of poverty and obedience, would have to be dispensed from by the proper ecclesiastical authority.

⁶⁰ The impediments arising from the divine law are: (1) impotency (c. 1068); (2) *ligamen* (c. 1069); (3) consanguinity in all degrees of the direct line and in the first degree of the collateral line, i.e., between brothers and sisters [1917 Code system of calculation] (c. 1076).

⁶¹ WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 80-81.

2. Legal adoption in those regions where it is a prohibitive impediment in the civil law.
3. Mixed religion.

B. Diriment impediments:

1. Age, as before the Code; that is, under fourteen years complete for the male, under twelve years complete for the female.
2. Disparity of worship.
3. Sacred orders (subdeacon and deacon only).
4. Solemn vows.
5. Abduction.
6. Crime.
7. Consanguinity in the second and third degrees of the collateral line.
8. Affinity in the collateral line; in the direct line, only if the marriage was not consummated.
9. Public honesty.
10. Spiritual relationship.
11. Legal relationship in those places where the civil law considers it an impediment to valid marriage.

C. Kinds of impediments (c. 1042):

1. The impediments of minor grade: (a) Collateral consanguinity in the third degree; (b) Collateral affinity in the second degree; (c) Public honesty in the second degree; (d) Spiritual relationship; (e) Crime arising from adultery with a promise to marry or adultery with an attempt to contract marriage even civilly.
2. The impediments of major grade: all other impediments mentioned above are of major degree.⁶²

(3) The faculty was concerned with the rules to be observed by the missionaries in granting dispensations. It stated that in granting these dispensations, the Ordinary must bear in mind the prescriptions of cc. 1035-1080. Since the missionaries were given special favour to exercise the dispensing power in normal circumstances, the rules or

⁶² For other lists, see CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*,

norms contained in cc. 1035-1080 were to be respected and followed as far as possible.⁶³ Of the said canons, cc. 1035-1057 treated the general rules for matrimonial dispensation,⁶⁴ whereas the rest (cc. 1058-1080) treated the special rules for both individual prohibitive impediments (cc. 1058-1066) and diriment impediments (cc. 1067-1080).⁶⁵

(4) The faculty, moreover, called special attention of the missionaries when dealing with mixed or dispar marriages. This special attention must be paid to:

a) The two *cautiones* which had to be given, namely, (a) the promise of the non-Catholic party to remove the danger of falling away from the faith on the part of the Catholic party;⁶⁶ (b) the promise of both parties to baptize and educate all the children

⁶³ See WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 110-117; CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 234-236.

⁶⁴ See comments of these canons in BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 82-134; BOUSCAREN-ELLIS, *Canon Law A Text and Commentary*, pp. 473-500; ABBO-HANNAN, *The Sacred Canons*, pp. 210-238; AYRINHAC-LYDON, *Marriage Legislation*, pp. 52-94; L. J. NAU, *Manual on the Marriage Laws of the Code of Canon Law*, 2nd rev. ed., New York-Cincinnati, F. Pustet, 1934, pp. 53-63; S. WOYWOOD, *A Practical Commentary on the New Code of Canon Law*, revised by C. SMITH, vol. 1, New York, NY, J. F. Wagner, 1948, pp. 670-694.

⁶⁵ For more comments on these canons, see WOYWOOD-SMITH, *A Practical Commentary on the New Code of Canon Law*, pp. 694-740; BACHOFEN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 135-221; ABBO-HANNAN, *The sacred Canons*, pp. 238-300; BOUSCAREN-ELLIS, *Canon Law A Text and Commentary*, pp. 502-540; NAU, *Manual on the Marriage Laws*, pp. 64-120; AYRINHAC-LYDON, *Marriage Legislation*, pp. 95-189.

⁶⁶ The phrase "danger of falling away from the faith" refers to any danger which might weaken or destroy the religion of the Catholic party throughout their marriage; whereas the term "religion" in this regard contains not only the Catholic party's religious belief, but also his or her morals, religious practices, the standards and duties of a Catholic believer, and indeed of a married Catholic as defined by the tradition and

of both sexes in the Catholic religion. The phrase "all children of both sexes" stated in this faculty is not really clear whether it includes the children already born to the parties from the previous putative or invalid marriage, or to either of the parties or even to each of them from previous marriages with different spouses.⁶⁷

b) The two warnings: (a) the Catholic party had to be warned of his or her obligation to strive for the conversion of the non-Catholic party; (b) both parties were to be reminded that neither before nor after the marriage in the Catholic Church may they go before a non-Catholic minister to give or to renew their marriage consent. The obligation of the Catholic party to work for the conversion of the non-Catholic partner must be done prudently and based on charity, for the faith is a free gift of God. Hence there must be no force or threat. The ways of undertaking this obligation, among others, are: "to give good example, to pray and, by introducing Catholic literature into the home, to do all that is prudent to enlighten and impress the non-Catholic, whose ideas are often inherited and based on lack of knowledge."⁶⁸ The prohibition of the parties to go before a non-Catholic minister, either before or after the marriage before the Catholic Church

authoritative statements of the Church. -- CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 236-237; see also WINSLOW, *A Commentary on the Apostolic Faculties*, p. 117.

⁶⁷ CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, p.237. It will be discussed in the next part that this long disputed matter was eventually solved by a response of the Holy Office on 16 January 1942 (see *AAS*, 34 [1942], p. 22).

⁶⁸ AYRINHAC-LYDON, *Marriage Legislation*, p. 111 (comments on c. 1062); see also BACHOFFEN, *A Commentary on the New Code of Canon Law*, vol. 5, p. 149; WOYWOOD-SMITH, *A Practical Commentary on the New Code of Canon Law*, vol. 1, pp. 699-704.

to give or to renew their marital consent, was based on two reasons: (a) the divine law itself forbade the Catholics to participate in any way in a non-Catholic religious ceremony, for such an act was sinful; (b) by going before a non-Catholic minister to give or to renew the marriage consent, the Catholic party at least indirectly acknowledged the minister as a lawful minister of Christ, and would approve, participate, and even also profess the heretical rite.⁶⁹

c) Special precautions that had to be taken when a dispar marriage was to be contracted by a Catholic with a Jew or a Muslim: (a) the free status of the non-Catholic should be ascertained to avoid the danger of polygamy; (b) there be no danger of circumcision of children be performed to fulfil a religious obligation; and (c) if a civil act has to be performed, it should be restricted to merely a civil ceremony without any invocation of Mohammed or any other superstitious rite.⁷⁰ The free status of the non-Catholic had to be thoroughly investigated according to the norms of c. 1031 which states:

- # 1. If a doubt arises about the existence of an impediment:
 1. The pastor shall investigate the matter more carefully, interrogating, under oath, at least two trustworthy witnesses, provided the impediment

⁶⁹ See the Holy Office's Instruction of 17 February 1864, which has been discussed in ch. 2, sect. 2.4.1, regarding this matter (*Collect.* [1905], no. 1381); c. 1063 and comments on it in BACHOPIN, *A Commentary on the New Code of Canon Law*, vol. 5, pp. 149-153; AYRIGNAC-LYDON, *Marriage Legislation*, pp. 111-115; WOYWOOD-SMITH, *A Practical Commentary on the New Code of Canon Law*, pp. 704-705; ARBO-HANNAN, *The Sacred Canons*, vol. 2, pp. 246-249.

⁷⁰ See also CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 243-244; WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 116-117; VROMANT, *De matrimonio*, pp. 121-122; PAVENTI, *Brevis commentarius in facultates*, p. 37.

be not one of those which cannot become known without injury to the reputation of the parties; if necessary, he may interrogate the parties themselves.

2. He may proceed to the publications or complete them if the doubt arises before they were begun or completed.

3. He shall not assist at the marriage, without consulting the Ordinary, as long as a prudent doubt remains.

2. When it is discovered that an impediment is certainly present:

1. If the impediment is occult, the pastor shall continue or complete the publications, and refer the matter, without mentioning names, to the Ordinary of the place or to the Sacred Penitentiary.

2. If the impediment is public and comes to light before the publications were begun, the pastor shall not go further till the impediment is removed, even if dispensation from it had, to his knowledge, been obtained for the internal forum alone; if that impediment is discovered after the first or second publication, the pastor shall complete the publications and refer the case to the Ordinary.

3. Finally, if no impediment is discovered, either doubtful or certain, the pastor must, once the publications are completed, admit the parties to the celebration of marriage.⁷¹

Pertaining to the circumcision of children, again, it was prohibited as far as the act was part of a religious ceremony. It was not forbidden, however, if such an act had to be done for a medical reason. The reason for this prohibition seems to be the same as that of a mixed marriage couple going to present themselves in front of a non-Catholic minister either before or after the marriage celebration in the Catholic Church to give or to renew their marital consent. Such an act would be interpreted as an active *communicatio in sacris* and approval of the non-Catholic rites. The same reason applies to the third precaution relative to a required civil ceremony. A civil ceremony which must

⁷¹ The English translation from AYRINHAC-LYDON, *Marriage Legislation*, pp. 45-46. For more comments on this canon, see *Ibid.*, pp. 46-47; BACHOFEN, *A Commentary on the New Code of Canon Law*, pp. 71-76; WOYWOOD-SMITH, *A Practical Commentary on the Code of Canon Law*, pp. 665-667.

be performed with the invocation of Mohammed or using any other kind of superstitious rite was strongly forbidden. Yet, it was not forbidden if the act was merely a civil ceremony according to the civil law of the place or country, as c. 1063, # 3, puts it: "It is not, however, forbidden for the parties, when the civil law demands it, to present themselves before a non-Catholic minister, acting as a civil magistrate, solely to comply with a civil formality, for the sake of civil effects."⁷²

2) Text and comments of faculty 23 of FM (= faculty 22 of Fm) on the radical sanation of invalid marriages.

a. Text:

To radically sanate, according to the norms of cc. 1138-1141 set up in the Code, marriages which are invalidly contracted due to some impediment mentioned in the above faculty (22 of FM = 21 of Fm). With regard to the legitimation of children, the Ordinary must bear in mind cc. 1051 and 1158.

The faculty to radically sanate is not extended to the cases in which one or both parties have become insane. Accordingly, recourse to the Holy See is to be made in each of these cases.⁷³

b. Comments:

First of all, the faculty required that the radical sanation be made according to the norms of cc. 1138-1141. Canon 1138, as has been previously discussed, spoke of the

⁷² The English translation from AYRIGNAC-LYDON, *Marriage legislation*, p. 112; more comments in pp. 113-114.

⁷³ "Sanandi in radice, iuxta regulas in Codice a Can. 1138 ad Can. 1141 statutas, matrimonia ob aliquod impedimentum, de quo supra (n. 22), nuliter contracta. Quod vero attinet ad prolis legitimationem, Ordinarius prae oculis habeat canones 1051, 1138.

Facultas sanandi in radice non extenditur ad casus in quibus supervenerit amentia unius vel utriusque partis. In singulis hisce casibus igitur ad S. Sedem recurrendum erit." -- PETERS, *Facultates quas Ordinarii et missionarii habere solent*, p. 12.

nature of the radical sanation. It is a revalidation of the invalid marriages which implies a dispensation from the impediments, a dispensation from the renewing of consent, and retroactive effects to the moment of the invalid marriage in question, unless otherwise indicated. Canons 1139-1140 spoke of the conditions based on which the sanation could or could not be granted. The conditions based on which the sanation could be conceded were: (1) the marriage should have been null and void on account of some ecclesiastical impediment or defect of form, provided that the marital consent still persevered;⁷⁴ (2) even at the time of marriage the marital consent was lacking, but was given afterwards, provided that it still persevered.⁷⁵ The circumstances wherein the radical sanation was impossible to be granted were: (1) when a marriage was null and void because of the impediment of natural or divine law, even when the impediment had ceased to exist;⁷⁶

⁷⁴ C. 1139, # 1: "Any marriage contracted on both sides with a consent naturally sufficient but juridically ineffective because of a diriment impediment of the ecclesiastical law, or for want of the required form, can be revalidated *in radice*, provided the consent perseveres." --The English translation from AYRINHAC-LYDON, *Marriage Legislation*, pp. 344-345.

⁷⁵ C. 1140, # 2: "If the consent was wanting in the beginning, but given later, the revalidation can be granted from the moment the consent was given." -- The English translation from *Ibid.*, p. 346.

⁷⁶ C. 1139, # 2: "But a marriage contracted with an impediment of the natural or divine law, even if the impediment afterwards disappears, the Church does not revalidate *in radice*, not even from the moment the impediment has ceased." -- The English translation from *Ibid.*, p. 345. To avoid a misunderstanding on this canon, two points are to be pointed out: (1) the Church has no power at all to grant a radical sanation to a marriage which was invalidly contracted because of an impediment of divine or natural law, even if the impediment has ceased to exist (in terms of a full sanation, whose canonical effect reaches back the beginning of the marriage); (2) as a general rule the Church is usually unwilling to sanate, but she does have the power to sanate the marriage once the said impediment has ceased to exist, though the effect (retroactivity) of the

(2) when the consent was lacking either from the beginning or from the moment it was withdrawn.⁷⁷ The last norm was indicated in c. 1141 which stated that the Holy See alone had the power to grant the radical sanation. However, in virtue of the above faculty, mission Ordinaries enjoyed the same power to sanate marriages *in radice*. Indeed, there had to be a just and reasonable cause, lest the radical sanation would be illicitly and invalidly granted. The examples of the causes are: (1) when the parties refused to renew their consent in the prescribed form; (2) danger of scandal in revealing the nullity of the marriage caused by, for instance, the failure of the Ordinary or the pastor to observe the proper form, or when a priest lacked the proper jurisdiction; (3) when the nullity of a marriage known to a party, and if made known to the other party, would cause serious scandal and danger of divorce.⁷⁸

Second, the faculty only allowed the radical sanation for invalid marriages due to the impediments mentioned in faculty 22 of FM (= faculty 21 of Fm). Those impediments had to be of ecclesiastical law only, whether they be minor or major, public or occult, even multiple, except the impediments arising from the order of priesthood,

sanation only reaches back the moment the impediment ceases (partial sanation, not full/radical sanation). -- See AYRINHAC-LYDON, *Marriage Legislation*, pp. 347-348; WOODSMITH, *A Practical Commentary on the Code of Canon Law*, pp. 827-828.

⁷⁷ C. 1140, # 1: "If the consent of both or of either party be wanting, the marriage cannot be revalidated *in radice*, whether the consent was wanting from the beginning, or whether it was given in the beginning and afterwards withdrawn." -- The English translation from AYRINHAC-LYDON, *Marriage Legislation*, p. 346.

⁷⁸ PAYEN, *De matrimonio*, vol. 2, pp. 892-893; WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 135-136; HARRIGAN, *The Radical Sanation of Invalid Marriages*, pp. 107-111.

affinity in the direct line when the marriage in question has been consummated, and lack of the required age prescribed by the former law. With reference to the radical sanation of marriages invalidly contracted because of the impediment of disparity of cult, the *cautiones* must always be given.⁷⁹

It is not clear whether in normal circumstances those marriages invalidly contracted because of defect of the canonical form could be sanated by virtue of this faculty. There is no doubt that those mission Ordinaries, by means of c. 1044, could radically sanate such a marriage in urgent danger of death (for they could dispense also from form in the same situation). Yet, in Payen's opinion, which was then followed by Harrigan⁸⁰ and Winslow,⁸¹ a marriage invalidly contracted due to a dispensable diriment impediment which was not excluded from the faculty and also because of defect of form, could be radically sanated by mission Ordinaries.⁸²

Third, pertaining to the legitimation of children, the faculty called attention to the norms of cc. 1051 and 1138. Canon 1138, as previously discussed, spoke of the nature of the radical sanation. The bottom line of the canon in this regard is that it implied a retroactive legitimation of offspring along with the retroactive validity of the marriage

⁷⁹ PAVENTI, *Brevis commentarius in facultates*, pp. 38-39; WINSLOW, *A Commentary on the Apostolic Faculties*, p. 134.

⁸⁰ See, HARRIGAN, *The Radical Sanation of Invalid Marriages*, pp. 161-162.

⁸¹ See WINSLOW, *A Commentary on the Apostolic Faculties*, p. 134.

⁸² PAVEN, *De matrimonio in missionibus*, vol. 2, pp. 896-897.

when it was radically sanated. Canon 1051 talked about the legitimation of children along with the granting of a dispensation for a marriage from a diriment impediment. It states:

By a dispensation from a diriment impediment, granted in virtue of ordinary power or of power delegated by general indult, not by rescript given for particular cases, is granted at the same time the legitimation of the offspring if any was conceived or born to the dispensed parties, provided it be not adulterine or sacrilegious.⁴³

Thus, through the radical sanation whose canonical effect reached back the moment of the marriage (retroactive validation), the children, as the aftermath of the retroactive validation, were legitimized from the start of the marriage in question (retroactive legitimation). Only the adulterous and sacrilegious children were excluded from the *sanatio in radice*.⁴⁴ The law did not provide automatic legitimation for these children through the radical sanation. The only way to legitimize these children was through a rescript of the Roman Pontiff, which had to be requested.⁴⁵

⁴³ C. 1051: "Per dispensationem super impedimento dirimente concessam sive ex potestate ordinaria, sive ex potestate delegata per indultum generale, non vero per rescriptum in casibus particularibus, conceditur quoque eo ipso legitimatio proles, si qua ex iis cum quibus dispensatur iam nata vel concepta fuerit, excepta tamen adulterina et sacrilega." --The above English translation from AYRINHAC-LYDON, *Marriage Legislation*, p. 83.

⁴⁴ So-called adulterous children are those born of parents who are still bound by the impediment of *ligamen*; whereas the sacrilegious ones are those born of parents who, having made solemn religious profession, or received sacred orders, are forbidden to use the marriage contracted before (c. 1114). See BACHOFEN, *A Commentary on the New Code of Canon Law*, pp. 331-333; AYRINHAC-LYDON, *Marriage Legislation*, pp. 295-296; PAYEN, *De matrimonio*, vol. 1, pp. 511-512.

⁴⁵ For an excellent treatment regarding the legitimation of children, see HARRIGAN, *The Radical Sanation of Invalid marriages*, pp. 50-72.

Fourth, the faculty did not provide the mission Ordinaries with the power to radically sanate a marriage in which one or both parties had become insane. The only way to solve this problem was to have a recourse to the Holy See. Some authors said that if the insanity was perpetual without lucid intervals, the radical sanation was impossible to be granted. But, if the insanity was only temporary with lucid intervals, the radical sanation could be granted by the Holy See during the lucid intervals.⁶⁶

3) Text and comments of faculty 24 of FM (= faculty 23 of Fm) on the radical sanation of marriages attempted before a civil magistrate or a non-Catholic minister:

a. Text:

To radically sanate as well (*pariter*) mixed marriages attempted before a civil magistrate or a non-Catholic minister, provided that there be moral certitude that the non-Catholic party will not impede the Catholic education of all the children already born and will be born (*can be subdelegated*).⁶⁷

b. Comments:

This faculty is exactly the same as the already discussed faculties 17 in *F. II maior*, 16 in *F. II minor*, 23 in *F. III maior*, and 22 in *F. III minor*, therefore there is no need for detailed comments. Yet some points are to be added for clarification: (1) the phrase 'mixed marriages', which at times refers only to marriages of Catholics and baptized non-

⁶⁶ GASPARRI, *De matrimonio*, vol. 2, p. 1222; see also WINSLOW, *A Commentary on the Apostolic Faculties*, p. 135.

⁶⁷ "24. *Sanandi pariter in radice matrimonia mixta attentata coram magistratu civili vel ministro acatholico, dummodo moraliter certum sit partem acatholicam universae prolis tam natae quam nasciturae catholicam educationem non esse impedituram.*" -- PRYTHUIS, *Facultates quas ordinarii et missionarii habere solent*, p. 12. The phrase "tam natae quam" in the faculty was later abolished (see sect. 3.2.1.3).

Catholics, in this case is to be broadly understood to the extent that it refers to all mixed marriages with non-Catholics, whether these be baptized or not; (2) mixed marriages attempted before a civil magistrate or a non-Catholic minister were the marriages celebrated before a heretical minister, a schismatical minister, a Jewish rabbi, a Muslim imam, an authorized civil official, or according to the custom of the country if no civil ceremony was required; (3) the word *pariter* used in the faculty seems to indicate that all the norms, rules, and conditions required for the use of the preceding faculty (faculty 23) are also to be observed here; (4) with regard to the baptism and education of the children, there should be moral certitude that the non-Catholic party would not put any obstacle in the process.⁸⁸

3.2.1.3 - The Renewed Two Formulas of Decennial Faculties

On 1 January 1951, the mission faculties in the two Formulas were renewed for the first time and were made effective until 31 December 1960. It was simply a renewal with very little changes. Therefore, detailed comments seem to be superfluous.⁸⁹

The only changes are: (1) the phrase "tam natae quam" in the former faculty 24 of FM (= faculty 23 of Fm) was omitted when the faculty was renewed; (2) faculty 52 in

⁸⁸ CHYANG, *Decennial Faculties for Ordinaries in Quasi-Dioceses*, pp. 266-273; WINSLOW, *A Commentary on the Apostolic Faculties*, pp. 136-140; VROMANT, *De matrimonio*, vol. 5, pp. 212-214; PAVENTI, *Brevis commentarius in facultates*, p. 40.

⁸⁹ However, one might want to see some contemporary comments on faculties 22-28 of FM (= faculties 21-27 of Fm) in DE REEPER, *A Missionary Companion*, pp. 64-81.

the former *Fm* was excluded entirely. These changes were communicated by the *Propaganda* to all mission Ordinaries through a letter dated 15 August 1947.⁹⁰

The omission of the phrase "tam natae quam" from the faculty was undoubtedly based on a decree of the Holy Office dated 16 January 1942. In this decree the Congregation indicated that the promise to have all the children baptized and educated in the Catholic Church only covered the children to be born. The children already born to the parties were excluded from the *cautio*. However, the parties were to be warned of their serious obligation under divine law to see to it that the children already born to them had to be educated also in the Catholic Church. The following is the decree:

The Holy Office was asked:

1. Whether the promises which must be given according to c. 1061, to have all children baptized and educated only in the Catholic Church, include only children to be born, or also children already born before the marriage.

Reply: in the affirmative to the first part, in the negative to the second.

2. What is to be thought of marriages celebrated with promises only as to future children without mention of children already born?

Reply: This provided for in the reply to the first question.

Et ad mentem: the mind of the S. C. is this: although *per se* according to the canon cited, promises are not required as regards children already born before the celebration of the marriage, yet the parties to the marriage are by all means to be warned of their grave obligation under the divine law to see to the Catholic education also of children who are already born.

⁹⁰ UTRICHT, *De facultatibus missionalibus*, pp. 117-118; SARTORI, *Iuris missionarii elementa*, p. 114.

In the audience of 15 Jan., 1942, His Holiness Pius XII approved and confirmed this reply and ordered that it be published. From Rome, 16 Jan. 1942.⁹¹

3.2.1.4 - *Formula facultatum decennialium*

Prior to the renewal of the two Formulas (1961), the *Propaganda* undertook a major revision. The result of this was a single Formula called the *Formula facultatum decennialium* or commonly known as decennial faculties for mission countries. These faculties were granted to all mission Ordinaries whether they be bishops or not. The only indication which differentiates the two kinds of Ordinaries, so to speak, is that when a faculty had to be exercised only by the Ordinaries with episcopal character, it was stated

⁹¹ AAS, 34 (1942), p. 22: "Quaesitum est ab hac Suprema S. Congregatione:

1) utrum cautiones quae ad normam can. 1061 praestari debent de universa prole catholice tantum baptizanda et educanda comprehendant solummodo prolem nascituram, an etiam prolem ante matrimonii celebrationem forte iam natam;

2) quid sentiendum de matrimoniis celebratis cum cautionibus de prole nascitura, neglecta prole forte iam nata.

E.mi ac Rev.mi Patres, rebus fidei ac morum tutandis praepositi, in consessu plenario feriae IV diei 10 Decembris 1941, praefatis dubiis responderunt:

ad 1um: *Affirmative* ad primam parte; *Negative* ad secundam;

ad 2um: Provisum in primo.

Et ad mentem; mens autem haec est: quamvis per se, ad normam praefati canonis, cautiones non exigantur de prole forte iam nata ante matrimonii celebrationem, omnino monendos esse nupturientes de gravi obligatione iuris divini curandi catholicam educationem etiam dictae prolis forte iam natae.

Et feria V, die 15 Ianuarii 1942, Ss.mus D. N. Pius, Divina Providentia Papa XII, in solita audientia Exc.mo ac Rev.mo Domino Adessori S. Officii impertita, relatam Sibi E.morum Patrum resolutionem adprobavit, confirmavit et publicari iussit.

Datum Romae, die 16 Ianuarii 1942." -- The English translation from *CLD*, 2 (1933-1942), p. 286.

in the faculty itself: "si sit Episcopus". Hence, the system of dividing the faculties into *formula maior* for bishops and *formula minor* for other Ordinaries was abolished.⁹²

The new Formula consisted of 68 faculties and was effective from 1 January 1961 until 31 December 1970. Later, some of these faculties were modified.⁹³

Of these new decennial faculties, only three spoke of mixed marriages: (1) faculty 29 which dealt with dispensation from marriage impediments; (2) faculty 30 which spoke of the radical sanation; and (3) faculty 31 which talked about the radical sanation of marriages contracted before a non-Catholic minister or a civil magistrate. These three faculties were basically a renewal of the former faculties: (1) faculty 22 of FM (= faculty 21 of Fm) became faculty 29; (2) faculty 23 of FM (= faculty 21 of Fm), with an important addition: "vel ob defectum formae", became faculty 30;⁹⁴ (3) faculty 24 of FM (= faculty 23 of Fm) appeared as faculty 31.

Further analysis of these faculties is superfluous; yet a short comment on the important addition "vel ob defectum formae" in faculty 30 is necessary. Unlike the former faculty which empowered mission Ordinaries to sanate radically only marriages invalidly contracted due to a diriment impediment, this new faculty extended that power

⁹² See TIMMERMANS, "The New Decennial Faculties Granted by the S.C.P.F.," p. 361.

⁹³ See *CLD*, 5 (1958-1962), pp. 187-188.

⁹⁴ Faculty 30: "Sanandi in radice, iuxta regulas in Codice a can. 1138 ad can. 1141 statutas, matrimonia ob aliquod impedimentum, de quo supra (n. 29) vel ob defectum formae, nulliter contracta. Quoad vero [...]"

to sanate also the marriages invalid because of defect of form, such as lack of the proper delegation on the part of the assisting priest.⁹⁵

3.2.2 - The Enactments of the Supreme Sacred Congregation of the Holy Office

The contribution of the Holy Office to the development of mixed marriage legislation in the missions during this period was very significant. This is obvious in the following discussions:

1. Following the decree of the Holy Office dated 12 June 1912 which stated that a dispensation from the impediment of disparity of cult would be invalidly granted unless the usual *cautiones* had been given,⁹⁶ mission Ordinaries of China informed the Congregation that the decree was very difficult to be executed because of the special and extraordinary conditions in China. The Ordinaries described their conditions as follows: (1) marriage between Catholics and non-baptized, particularly between Catholic men and non-baptized women, often could not be avoided because of the special circumstances of that place; (2) demanding the *cautiones* from the non-baptized women was at times

⁹⁵ TIMMERMANS, "The New Decennial Faculties Granted by the S.C.P.F.," pp. 374-375; I. TING PONG LEE, *Facultates apostolicae S. C. de Prop. Fide et S. C. Consistorialis*, Roma, Commentaria Pro Religiosis, 1962, pp. 262-266; L. BUUS, *Facultates decennales quas Sacra Congregatio de Propaganda Fide concedit ordinariis missionum ad decennium quod decurrit a die 1 mensis ianuarii 1961 ad diem 31 mensis decembris 1970*, Romae, Apud Aedes Universitatis Gregoriana, 1961, pp. 105-107.

⁹⁶ See *Fontes*, vol. 4, no. 1293; or *AAS*, 4 (1912), p. 443.

impossible, most often very difficult, and frequently harmful; (3) only the *cautiones* given by men by reason of the customs of that region were truly firm and hence could produce moral certitude for their fulfilment in the future.⁹⁷

Based on these particular conditions, the Holy Office, just before the coming into force of the 1917 Code, through its decree dated 5 April 1918, granted some special concession on the manner of requiring the *cautiones*. It stated in the first place that the decree of 12 June 1912 had to be faithfully observed as far as possible. If the written *cautiones* from the unbaptized woman could not be obtained, they could be made orally. If the oral *cautiones* also could not be obtained, then it was left to the prudence and conscience of the mission Ordinaries to judge in single cases whether the *cautiones* were contained *aequipollenter* (equivalently) either in a serious promise of the woman to embrace the Catholic faith, or in her enrolment among the catechumens, or in the laws or customs which gave great authority solely to the husband to care for the religious education of the children. In all cases, however, the obligation of the Catholic party to exact the *cautiones* was still firm and unchanged. But to grant a dispensation, there should be moral certitude regarding the future fulfilment of the already given promises.

⁹⁷ "[...]: 1) Matrimonia inter catholicos et infideles, ac praesertim inter catholicos et mulieres infideles, ob ipsas loci condiciones, vitari saepe non posse; 2) Exquisitionem cautionum a muliere infideli interdum impossibilem, saepissime perdifficilem, non raro autem cum aliquo periculo damni esse coniunctam; 3) Cautiones a viris tantummodo praestitas regionis moribus adeo obfirmari, ut ipsarum implementum moraliter certum sit." --Holy Office, Decree, 5 April 1918, in *Commentarium pro religiosis et missionariis* (= *CPR*), 19 (1938), p. 103.

The decree was concluded with the grant of the radical sanation for marriages invalidly contracted due to some defect in the norms of the *cautiones*.⁹⁸

Some commentators said that this indult was granted only for the missions in China. Thus, it was not a general legislation for all mission territories. Moreover, the indult was granted only in the cases involving unbaptized women and not the unbaptized men. This is different from the case of Japan, as will be seen, where the indult seems to be intended only for the cases involving the unbaptized men and not the unbaptized women.⁹⁹

2. Despite some relaxation of the rules made in extraordinary situations, the Holy Office always firmly maintained the necessity of the *cautiones* in ordinary circumstances, regardless the place where the mixed marriage might be. The Congregation stated that for the validity of a dispensation, the *cautiones* had to be obtained beforehand from both parties. A priest could not validly or at least licitly officiate at a mixed marriage if there was no dispensation from the impediment in question. This was expressed very clearly

⁹⁸ "[...]: Memoratum decretum feria IV. 12 iunii 1912, quantum fieri poterit, fideliter servetur, ita tamen ut, si cautiones a muliere infideli scripto exigere nequeant, viva autem voce exigantur.

Siquidem vero neque hoc obtineri queat, remittitur prudentiae et conscientiae uniuscuiusque Vestrum, iudicare, in singulis casibus, an cautiones ipsae *aequipollenter* contineantur sive in seria mulieris promissione amplectendi Catholicam Fidem, sive in eius adscriptione inter catechumenas, sive demum in legibus vel moribus populi, qui nullam concedunt mulieri potestatem circa religiosam proles educationem, sed haec sola a viri voluntate dependet: firma tamen, omnibus hisce in casibus, obligatione exigendi cautiones a parte catholica, et non concedendi dispensationem nisi moralis habeatur certitudo de ipsarum implemento.

Quod vero attinet ad matrimonia, ob defectum regularium cautionum, iam forte invalide contracta, eadem Sanctissimus D. N. Benedictus Papa XV utpote in radice sanata habenda esse decrevit." -- Ibid., pp. 103-104.

⁹⁹ *CPR*, 19 (1938), p. 105.

in the Holy Office's replies to (1) the archbishop of Prague dated 26 November 1919;¹⁰⁰ (2) the archbishop of Zagreb dated 6 July 1928;¹⁰¹ (3) the prefect apostolic of Pyongyang dated 8 June 1932.¹⁰²

3. In September 1934, the Ordinaries in Nigeria and Cameroon asked the Holy Office whether the decree of 14 January 1932, which required the *cautiones* to be made

¹⁰⁰ C. SARTORI and B. I. BELLUCCO, *Enchiridion canonicum seu Sanctae Sedis responsiones post editum Codicem I. C. datae*, ed. XI (1917-1968), Romae, Pontificium Athenaeum Antonianum, 1963, p. 295: "In omnibus servandas esse praescriptiones CIC. Hinc sacerdos his matrimoniis assistere nequit nisi, praestitis cautionibus, obtenta fuerit dispensatio super impedimento mixtae religionis aut disparitatis cultus ad normam can. 1060 et 1061; consensum vero requirendum ad normam can. 1102 et 1195. Contrariae indulta per ipsum CIC abrogata sunt."

¹⁰¹ Ibid., p. 296: "Utrum in territorio, quod respicit breve Gregorii XVI *Quas vestro* diei apr. 1841, parrocho post CIC in celebratione matrimonii mixti non dispensati licitum sit, omisso omni ritu ecclesiastico seu sacro, requirere et accipere contrahentium consensum; an vero eidem quaelibet assistentia prohibita sit.

Resp. Negative ad primam partem; affirmative ad secundam, seu standum decisioni a S. Officio datae 26 nov. 1919."

¹⁰² "[...] il Prefetto Apostolico di Peng Yang formulava i seguenti dubbi:

1) Utrum dispensatio super impedimento disparitatis cultus ab habente a S. Sede potestatem, ab una tantum parte ac ea quidem catholica, non requisitis vel denegatis cautionibus impertita, valida sit?

2) Quatenus negativa, utrum matrimonii ex hoc capite nullitatem per se ipse Ordinarius ad normam Can. 1990 I. C. declarare valeat?

Questa Suprema S. Congregazione, esaminati i suddetti dubbi nella feria IV, 8 giugno 1932, ha ordinato di rispondere:

Ad primum: *Negative*.

Ad secundum: *Affirmative*, dummodo, ad mentem Canonis 1990, ex certo et authentico documento quod nulli contradictioni vel exceptioni obnoxium sit, omnino constet de non requisitis aut *de denegatis praescriptis* cautionibus." -- *Sylloge*, no. 172, pp. 442-443.

before a mixed marriage celebration,¹⁰³ had to be applied in their regions where the English law was in force. The Congregation, in its reply dated 9 November 1934, stated that since the decree did not concern the territories under their jurisdiction, these Ordinaries, after obtaining the *cautiones* from the contractants according to the norm of c. 1061, could grant dispensation as usual.¹⁰⁴

4. As has been repeatedly mentioned, the position of the Church concerning the law on mixed marriages was, up to that point, unchanged. The formal *cautiones*, for instance, must be given by the parties, at least implicitly, for they are necessary for a valid dispensation from the impediments. But at times those *cautiones* were impossible to be required in some missionary countries because of some peculiar customs and conditions of the countries in question. Therefore, the Church made some special provision for these countries. In such provision only the *cautiones aequipollentes* (equivalent guarantees)

¹⁰³ Holy Office, Decree, 14 January 1932, in *Sylloge*, no. 163, pp. 429-4230; or in *AAS*, 24 (1932), p. 25: "Contingit aliquando mixta, quae vocant, matrimonia inter catholicum et a catholicum sive baptizatum sive non baptizatum contrahi, praestitis quidem requisitis cautionibus, eo tamen modo ac forma ut earum observantia, praesertim quod spectat ad catholicam prolis utriusque sexus educationem, aliquibus in regionibus, adversantibus legibus civilibus, efficaciter urgeri non possit, imo tum a locali auctoritate laica tum a ministro haeretico invitis quoque parentibus, facile queat impediri. [...]."

¹⁰⁴ *Sylloge*, no. 186, pp. 462-463: "Revmi Ordinarii territoriorum Nigeriae et de Cameroun mense septembri a. c. a Suprema S. C. S. Officii directe exposulaverunt an Decretum S. Officii "de cautionibus in mixtis nuptiis praestandis", die 14 ianuarii 1932 datum, applicari debeat in eorum territoriis ubi lex anglica viget.

Eadem Suprema litteris nuper datis circa propositum dubium sequens responsum dedit: Praedictos Ordinarios, servatis de iure servandis, postquam a contrahentibus cautiones ad normam can. 1061 obtinuerint, posse, ut antea, concedere dispensationem in matrimoniis mixtis, cum memoratum decretum non respiciat territoria in quibus ipsi iurisdictionem exercent."

were required.¹⁰⁵ These were the guarantees or promises which had equal force as the formal guarantees in so far as they could produce moral certitude in the mind of the Church that the divine law mandates would be faithfully fulfilled. Those promises, again, only could be made when the customs and conditions made it impossible to obtain the formal guarantees and the Catholic party sincerely pledged that he or she would do all in one's power to get all the children baptized and educated in the Catholic faith. In the formal *cautiones*, the fulfilment of the divine law obligation was always required from both parties or both parties were required to be involved.¹⁰⁶

5. The equivalent *cautiones* were further discussed in the following documents:

- 1) A reply dated 19 February 1938 to the vicar apostolic of the Islands of Sunda Minor (now part of modern Indonesia)

The vicar apostolic of the Island of Sunda Minor proposed the following doubts to the Congregation of the Holy Office: (a) Whether the missionaries could unite in marriage the Catholics, who, according to their custom, must hand over some of their future children to the parents or guardians, who are unbaptized or even Muslims, who foreseeably will impede the Catholic education of those children; (b) Whether a dispensation from the impediment of disparity of cult could be validly granted to those parties who have lost their power over the adult children; or, according to the local customs some of the future children have to be handed over to the unbaptized parents or tutors, who foreseeably will prevent the Catholic education of those children, and hence

¹⁰⁵ LOURDUSAMY, *Pre-nuptial Guarantees*, p. 118.

¹⁰⁶ See *Ibid.*, pp. 20-21.

the parties will be impeded to give and to carry out the promise pertaining to the Catholic education of all the children.

The reply of the Holy Office to these two doubts was in the affirmative, although with the condition that the parties were to be always prepared to do all in their power for the Catholic education of all the children.¹⁰⁷ In other words, the parties were required to have at least a sincere and good intention, and ready to do their best for the fulfilment of the divine law obligation regardless the result.

In addition to the above reply, the Congregation added a long *nota explicativa* mainly concerning dispensations. By way of summary, the Congregation stated in the notes the following points:

a) The Church always demands that the divine law mandate pertaining to the Catholic baptism and education of all the children be safeguarded in mixed marriages by the parties. Therefore its fulfilment in the future must be morally certain. Nonetheless,

¹⁰⁷ *Sylloge*, pp. 562-563: "[...] 2. Utrum missionarii in matrimonium coniungere possint catholicos, qui iuxta mores terrae unam aut aliam prolem nascituram parentibus aut tutoribus paganis necnon mahumetanis tradere tenentur, qui educationem catholicam impedire praevidentur;

3. Utrum valide dispensari possit super impedimento disparitatis cultus cum iis qui super maiores natu potestatem amiserunt aut qui iuxta mores terrae unam aliamve prolem nascituram parentibus aut tutoribus paganis necnon mahumetanis tradere tenentur, qui educationem catholicam universae proles promittere non possunt.

Ai suesposti dubbi la medesima S. Congregazione ha dato le seguenti risposte:

Ad [...] secundam, AFFIRMATIVE, dummodo partes paratae sint facere quod in se est ad fovendam conversionem et obtinendam catholicam educationem universae proles;

Ad tertium, AFFIRMATIVE quoad primam partem (seu quoad casus in quibus proles acatholica iam est natu maior); quoad secundam partem (seu in aliis casibus) AFFIRMATIVE dummodo partes paratae sint facere quod in se est ad obtinendam catholicam educationem universae proles."

the Church recognizes that there must be no heavier burden put on the faithful or catechumens (future Catholics) than what has been put on them by natural divine law.

b) If the obligation to educate all the children in the Catholic religion is not fulfilled because of the fault of the baptized party or the catechumens, the sacraments are not to be administered to them and a dispensation from a mixed marriage impediment is not to be granted.

c) If it is discovered that the Catholic education of the children is impossible, yet the Catholics or the catechumens are in no way the cause of the impossibility, and if there is no choice for other marriages, then they are not to be denied the sacraments and a dispensation may be granted, provided that the Catholics or the catechumens concerned are always prepared to do everything in their power to have all the children baptized and educated in the Catholic faith. Once everything has been sincerely done to one's ability, the obligation is considered already fulfilled regardless the result, for no one is bound by the law to be responsible for the impossible.

d) The divine and natural laws pertaining to Catholic baptism and education of all the children do not hinder one's natural right given by the same laws to contract a marriage and to have children, even though the children might not be brought up in the Catholic faith. Therefore, a marriage should be permitted, and a dispensation from the

impediment of disparity of cult can be granted validly, provided that the equivalent promises be given by at least the Catholic party.¹⁰⁸

2) A reply dated 21 April 1938 to the apostolic delegate of Japan

On behalf of all the Japanese Ordinaries, the apostolic delegate of Japan reported to the *Propaganda* that the peculiar conditions of that mission territory had made it impossible to require the formal *cautiones*. Hence he asked for a solution. The report was later handed over by the *Propaganda* to the Holy Office for a solution. On 30 March 1938, after examining the seriousness of the problem both from the legal aspect and the real circumstances in Japan, the Holy Office proposed the doubt whether the Ordinaries of Japan, having considered the particular conditions of that country, could dispense from the impediment of mixed religion or disparity of cult after obtaining the equivalent *cautiones*, if the formal *cautiones* could not be obtained or if it is useless to require them. The doubt was answered by the Holy Office itself in the affirmative, provided that (*dummodo*) the Catholic party was truly prepared to do all in his or her power to have all the children baptized and educated in the Catholic religion. The local Ordinaries were also strongly reminded to be aware of their grave obligation in such matters.¹⁰⁹ The

¹⁰⁸ Ibid., pp. 563-566. See also Dr. REEPER, *A Missionary Companion*, pp. 184-189; LOURDUSAMY, *Pre-nuptial Guarantees*, pp. 119-120; MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 67-70.

¹⁰⁹ *Sylloge*, pp. 561-562: "[...] Esaminata la grave questione tanto sotto l'aspetto giuridico come di fronte alle circostanze di fatto che si verificano nel Giappone, questa Suprema S. Congregazione nella Feria IV, 30 marzo 1938, propostasi il dubbio:

'Utrum Ordinarii Iaponiae, attentis condicionibus particularibus illius regionis, in concedenda dispensatione super impedimentis mixtae religionis aut disparis cultus contenti

word *dummodo* used in this reply indicates that the equivalent promises made by the Catholic party were necessary for a valid dispensation. This reply was approved by the Holy Father in the audience of 1 April 1938, and was sent to Japan through the *Propaganda* on 21 April 1938. Along with the reply, the Holy Office enclosed a copy of the reply (and its explanatory note) to similar questions proposed by the vicar apostolic of the Islands of Sunda Minor. The purpose was to show the Ordinaries some directions in the cases where the special circumstances impeded the Catholic baptism and education of the children.¹¹⁰

3) A reply dated 27 January 1949 to the bishop of Kingsien (China)

There are in fact two important documents of the Holy Office addressed to mission Ordinaries in China, which spoke of the equivalent *cautiones*. The first is the above mentioned Decree of 5 April 1918 (sect. 3.2.2, no. 1), and the second is the reply of 27 January 1949. In July 1948, Leopold Brellinger, the bishop of Kingsien referred the following doubts to the Holy Office: (a) whether the faithful in regions of China under Communist occupation were bound by the impediments established by the Church,

esse possint cautionibus aequipollentibus, si cautiones formales haberi non possint, aut non expediat eas exigere',

ha dato la seguente decisione: '*affirmative*, graviter onerata conscientia Ordinariorum localium, et dummodo pars catholica sincere parata sit praestare quod potest ut proles catholice baptizetur et educetur'.

Nella udienza del 1 aprile 1938 il S. Padre ha approvato la presente decisione."

¹¹⁰ Ibid., p. 562. See also some comments in MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to Recent Legislation*, pp. 70-75; LOURDUSAMY, *Pre-nuptial Guarantees*, pp. 120-122.

especially of age and disparity of cult, if they could not seek a dispensation without grave inconvenience nor refrain from contracting the marriage or delaying it; (b) whether the faithful were bound by the impediment of disparity of cult when the *cautiones* were not given due to ignorance, forgetfulness, and other inculpable causes, or were refused by the non-Catholic party. In its reply of 27 January 1949 the Holy Office stated, as a response to the first question, that in the exposed circumstances, marriages celebrated without the canonical form and still bound by an impediment from which the Church was accustomed to dispense, were considered valid. With regard to the second question, the Congregation directed the bishop to its provision granted to the Ordinaries of Japan and urged him to make use of the equivalent promises.¹¹¹

¹¹¹ "Documents: De impedimentis matrimonialibus," in *China Missionary Bulletin*, 2 (April 1949), p. 417, reprinted in *ibid.*, 2 (May 1949), p. 540: "[...]:

1) an fideles in terra Sinarum a Communistis occupata, impedimentis ab Ecclesia statutis, imprimis aetatis et cultus disparitatis, teneantur, si debitam dispensationem vel omnino non, vel non nisi cum gravissimo incommodo petere, neque a matrimonio contrahendo abstinere vel illud differre possint;

2) an teneantur impedimento disparitatis cultus in casu in quo requisitae cautiones ob ignorantiam, oblivionem, aliamve causam inculpabilem non dantur, aut a parte non catholica.

Suprema Sacra Congregatio, die 27 januarii 1949, sic dignata est respondere:

Rerum adjunctis attente consideratis, Supreme haec Sacra Congregatio, in plenario conventu Feria IV die 26 hujus mensis habito, praefatis dubiis respondendum censuit:

1) In expositis circumstantiis, matrimonia celebrata sine forma canonica et cum quovis impedimento juris ecclesiastici a quo Ecclesia dispensare solet, habende esse uti valida.

2) Matrimoniis quibus obstat impedimentum disparitatis cultus applicanda esse ea quae a S. Officio statuta fuerunt quoad cautiones aequipollentes (cf. Sylloge S. C. de Propaganda Fide a 1939, pag. 561-566).

Quam decisionem Sanctissimus in Audentia diei 27.ae currentis mensis benigne adprobare dignatus est."

Moreover, upon the order of the cardinal secretary and the assessor of the Holy Office, a consultor of the same Supreme Congregation, Fr. Francis Hürth, explained the above reply in these words:

(I) The phrase "in expositis circumstantiis" signifies the circumstances which endured, or the lasting condition of the circumstances.

(II) The "cautiones aequipollentes", according to the Holy Office's reply given to Japan, obtain when the Catholic party sincerely manifests a firm intention to do everything in his or her power to have all the children baptized and educated in the Catholic faith. Even if the Catholic party is reluctant to express the same intention, the *cautiones aequipollentes*, according to the reply, are not considered to be inexistent.

(III) The faithful are not only released from the impediments of age and disparity of cult, but also from all the impediments of ecclesiastical law as well as from the ordinary and extraordinary canonical form. Yet the impediments arising from the sacred order of priesthood and the affinity in the direct line when the marriage has been consummated remain intact and forceful, even *in expositis circumstantiis*.¹¹²

¹¹² Ibid., pp. 417-418: "[...]: I. Verba 'in expositis circumstantiis' significant 'his circumstantiis perdurantibus', seu 'perdurante hac circumstantiarum conditione'.

II. 'Cautionibus aequipollentes' secundum aliquod S. Officii Responsum, datum pro Japonia, habentur, quando pars *catholica* sicere manifestat firmum propositum faciendi ex sua parte quod facere potest, ut universa proies in fide catholica baptizetur et educetur. Quodsi pars catholica recusat, idem propositum concipere et manifestare, 'cautiones aequipollentes' secundum allegatum Responsum eo non destruuntur.

III. Liberantur fideles non solum ab impedimentis aetatis et disparitatis cultus, sed ab omnibus juris ecclesiastici impedimentis necnon ab omni (tum ordinaria tum extraordinaria) forma canonica. At impedimentum sacri ordinis presbyteratus necnon impedimentum affinitatis in linea recta, consummato matrimonio, non suspenduntur, set etiam 'in expositis circumstantiis' in pleno vigore manent."

4) A declaration dated 21 February 1949
to the bishop of Kingshien

This declaration was sent to the bishop of Kingshien as a supplement to the previous reply of the Holy Office dated 27 January 1949 to the same. In that declaration, the consultor of the Holy Office, Fr. Hürth, offered a further explanation on the equivalent *cautiones* by stating that the equivalent *cautiones* are to be considered already sufficient for a marriage entered into by a Catholic with an unbaptized or a baptized non-Catholic, if, after considering the conditions in single cases, there is moral certitude that the sincerely manifested will of the Catholic party to have all the children baptized and educated in the Catholic religion will be fulfilled.¹¹³ This supplement was later sent to all Ordinaries in China by the apostolic internuncio in China through a letter dated 28 March 1949. The moral certitude mentioned in the explanation was a new element in the equivalent *cautiones*, yet, according to Fr. Hürth, it was required.¹¹⁴

5) A decree dated 22 December 1949 to the apostolic internuncio
in China

This decree was issued as the result of the *dubia* (doubts) caused by various interpretations on the equivalent *cautiones* in many parts of China. These *dubia* were

¹¹³ "Documents: De cautiones aequipollentes," in *ibid.*, p. 541: "'Cautiones aequipollentes' tunc tantum sufficientes habendae sunt ad matrimonium cum parte pagana aut cum parte baptizata acatholica ineundum, si, consideratis singulorum casuum condicionibus, moraliter certo constat: manifestatam sinceram partis catholicae voluntatem de universa prole catholice baptizanda et educanda, etiam *effectum habituram esse.*"

¹¹⁴ See F. HÜRTH, "Adnotationes," *Periodica*, 38 (1949), pp. 193-194; see also MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to Recent Legislation*, pp. 78-81.

proposed to the Holy Office by mission Ordinaries in China seeking some clarification.¹¹⁵ The reply to the proposed doubts was decreed by the Congregation on 21 December 1949 and then approved by Pius XII on the next day, 22 December 1949. In this reply, first of all, the Congregation stated that the above mentioned decree of the Holy Office dated 27 January 1949 was a declarative interpretation. Hence, it had retroactive effect and could it be applied in other territories as far as the prescriptions of positive law could not be observed. However, this decree (22 December 1949) contained a positive disposition of law which had no retroactive effect nor could be applied in the territories not mentioned in the decree. Second of all, this decree pointed out that from this time (22 December 1949) onwards, as long as the peculiar conditions in China continued to exist, the equivalent *cautiones* were required only for the liceity of the marriage and not for the validity. But the grave obligation imposed by natural and positive divine laws to the Catholic party to care for the Catholic baptism and education

¹¹⁵ "Documents: Suprema Sacra Congregatio Sancti Officii," in *China Missionary Bulletin*, 2 (March 1950), p. 223: "[...] (1) 'Utrum S. Officii Decretum datum die 27 Januarii 1949 de cessantibus impedimentis matrimonialibus, in Decreto allegatis, necnon de cessante obligatione formae non sit nisi authentica legis jam latae interpretatio declarativa ita ut Decretum (secundum ordinaria iuris normas) valeat etiam retrorsum et applicari possit ad quaelibet territoria etiam extra Sinam, in quibus eadem circumstantiae vigent vel vigeant; an sit aliqua Responsio dispositiva, quae vim non habeat nisi ex ipso Decreto, ideoque nec possit retraheri nec ad alia territoria extendi?'

(2) 'Utrum quoad cautiones spectat, ne, attentis praesentibus circumstantiis, condicio fidelium gravior et difficilior reddatur quam ante allegatum Decretum fuit, obligatio fidelium quoad cautiones (non obstante Supplemento de die 21 Februarii 1949) restringi possit ad gravem juris naturalis et legi divinae positivae obligationem procurandi, pro posse, universae proles baptismum et educationem in religione catholica, idque tantummodo ad liceitatem, non ad valorem matrimonii cum parte non catholica ineundi?'

of all the children always remained firm and intact.¹¹⁶ It is clear that this concession was intended only for dispar marriages contracted after 22 December 1949 in China. It had no retroactive force, for it was a positive disposition of law and not a declarative interpretation. Its observance was simply for the liceity and not for the validity of the marriage, yet its valid use should exist under two conditions: (a) that the parties were impeded both physically and morally to seek dispensation, and (b) that the celebration of marriage was unavoidable or could not be delayed.¹¹⁷

6) Two replies to the bishop of Fukuoka (Japan), Dominic Senyemon Fukahori, dated 27 April 1961 and 7 January 1965 respectively

First, on 15 December 1959, Bishop Fukahori wrote to the Cardinal Prefect of the *Propaganda*, Grégoire Pierre XV Agagianian, requesting some clarification concerning the equivalent *cautiones* and the manner of dispensation from mixed marriage

¹¹⁶ Ibid., p. 224: "[...], in plenario conventu Feria IV die 21 Decembris 1949 habito, respondendum decreverunt:

ad 1. Decretum S. Officii datum die 27 Januarii 1949 eatenus tantummodo habere indolem interpretationis declarativae et ideo retraheri et ad alia territoria applicari posse, quatenus versatur circa juris positivi praescripta, quae, consideratis circumstantiis extraordinariis territorii, observari non possunt; quoad reliqua autem habere indolem dispositionis positivae, quae non valeat retrorsum neque applicari possit ad territoria, in Decreto non nominata.

ad 2. Quod attinet ad praestandas cautiones, de quibus tum in Decreto tum in Supplemento, eas abhinc, durantibus iisdem condicionibus, requiri ad solam liceitatem, non ad validitatem matrimonii cum parte acatholica contrahendi, firma semper et integra manente gravi legis naturalis et positivae divinae obligatione catholice baptizandi et educandi universam utriusque sexus prolem.

Sequente Feria V, die 22 Decembris 1949 in Audientia Exc.mo ac Rev.mo D.no Adessori S. Officii impertita, SS.mus D.N.D Pius divina Providentia Papa XII praefatum Decretum adprobare dignatus est."

¹¹⁷ See LOURDUSAMY, *Pre-nuptial Guarantees*, pp. 128-129; MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises According to the Recent Legislation*, pp. 81-82.

impediments. The reason for seeking this clarification was the peculiar circumstances of his own diocese and some doubts caused by various interpretations of many authors on the equivalent *cautiones*.¹¹⁸ The solution to the bishop's problem was given not by the *Propaganda*, but by the Holy Office in a letter dated 27 April 1961 indicating that since the matter was still very disputable among the authors, the bishop could follow in conscience the opinion of an acceptable author of whatever side. Along with this letter, the Holy Office enclosed two replies which dealt with the equivalent *cautiones*, respectively to the apostolic delegate of Japan (21 April 1938) and to the vicar apostolic of the Islands of Sunda Minor (19 February 1938), to be used as guidelines.¹¹⁹

¹¹⁸ J.- P. LABELLE, "Les cautions équipollentes concédées au Japon," in *Revue de droit canonique*, 16 (1966), p. 193: [...] Unacum his litteris, mitto ad Em.mam Vestram Rev.mam duo adnexa documenta in quibus exponuntur cum omnibus peculiaribus circumstantiis variae de re matrimoniali difficultates in Mea dioecesi occurrentes, et quas ultimis his diebus notas habui.

Doc. 1mum: De modo dispensandi.

Doc. 2dum: De cautionibus praesertim aequipollentibus.

Simul varia dubia ad solvendum propono, humiliter postulans ut, quatenus fieri possit ac Em.mae Vestrae Rev.mae opportunum videatur, Mihi aptas solutiones communicet.

Si necesse est ad omnes difficultates solvendas, precor etiam sive ut alia dubia proponantur et solventur a Dicasteriis Romanis competentibus, sive ut documentum speciale mentem Sanctae Sedis explicans responsis adnectetur, sive ut exemplar relationis Exc.mi Delegati Apostolici Japoniae ad Sanctam Sedem anno 1937 transmissae relate ad cautiones aequipollentes Mihi mittetur cum nullum exemplar hujus documenti maximi momenti in Curiae dioecesanæ archivo invenire queam."

¹¹⁹ Ibid., p. 199: "[...] Litteris die decembris 1959 datis, Excellentia Tua Rev.ma quasdam questiones matrimoniales proposuit solvendas.

Cum agatur in casu de re disputata inter auctores, Excellentia Tua Rev.ma tuta conscientia, poterit unam alteramve sequi sententiam probati auctoris.

Hisce adnectuntur exemplar litterarum quae datae fuerunt Delegato apostolico Japoniae anno 1938, relate ad cautiones aequipollentes, et decreta lata super eandem rem pro Insulis Sundaë Minoris, anno 1936."

Second, in a letter of 18 August 1964 addressed to the cardinal secretary of the Holy Office, Bishop Fukahori reported an intended marriage case involving a newly baptized girl, Mary, and a non-baptized man. The bishop wrote that Mary, newly converted to the Catholic faith, was the only Catholic in her family. She was introduced to the unbaptized young man by her unbaptized parents for a future marriage. The young man had a positive view on the Catholic religion and was prepared to allow the children born of the marriage to be educated in the Catholic religion. Yet, he refused to give the formal *cautiones* because of his non-Catholic parents' unwillingness. Also another thing to be kept in mind was that after the marriage Mary would be obliged to live with her parents. This would make the Catholic education of the children impossible, for the parents were usually very influential in the domestic affairs. However, Mary, a fervent Catholic, had promised to do everything in her power to have all the children baptized and educated in the Catholic religion. The bishop then asked whether this marriage could be permitted by making use of the equivalent *cautiones*.¹²⁰ In its reply of 7 January 1965, the Holy Office stated that dispensation from the impediment of disparity of cult could be granted

¹²⁰ Ibid., pp. 201-202: "Maria, neo-conversa ad fidem catholicam, est unica catholica in familia sua; vivit extra magnam civitatem, et praesentatur juveni infideli, a parentibus suis paganis, pro matrimonio. Hic juvenis infidelis est bene dispositus erga religionem catholicam, quapropter paratus est permittere ut pueri nati e matrimonio in religione catholica educentur. Attamen, de facto, nolit cautiones formales praestare quia parentes sui infideles non volunt. Notandum est quod, post matrimonium, Maria vivere tenetur cum parentibus mariti sui, i.e., in eadem domo. Ex eo quod scimus, parentes mariti non sunt bene dispositi erga religionem catholicam, et volunt ut proles 'more patrio' educetur. Quia parentes magnum influxum habent in re domestica, timetur ne, de facto, proles non educetur catholice. Maria tamen est fervens catholica et promittit se facere quod potest ut proles catholice educetur. [...] *Quaeritur: Matrimonium permitti potestne cum usu cautionum aequipollentium?*"

on the basis of the already given equivalent *cautiones* after advising the girl of her religious obligations towards the children and herself.¹²¹

3.2.3 - Some Particular Legislation in the Missions

Various norms were enacted in many mission territories during this period of time, yet only some are considered necessary to be discussed.

3.2.3.1 - The Third Plenary Council of Australia (1905)

In principle, the teaching of the Third Plenary Council of Australia simply emphasized what had been the teaching of the Church. In its decree *De matrimonio*, the Council expressed the Church's view on mixed marriages as follows:

1) Mixed marriages of Catholics and non-Catholics are always forbidden by the Church for these reasons: (a) serious inconvenience and damage very often occurring on account of the difference in religious belief (faith) and unseemly *communicatio in sacris*; (b) domestic disagreement; (c) danger of drifting away from the faith on the part of the Catholic party and the children; (d) more often, the children falling into religious indifferentism.

¹²¹ Ibid., pp. 204-205: "[...] Attentis circumstantiis expositis, Em.mi Patres huius Supremae S. C. in Coetu Plenario diei 16 decembris 1964 decreverunt: 'pro gratia dispensationis ab impedimento disparitatis cultus, attentis cautionibus aequipollentibus iam datis et monita oratrice de suis obligationibus religiosis quoad se et quodam prolem'."

2) The Church would never dispense from an impediment arising from mixed marriage without a grave cause and the *cautiones*.

3) After a mixed marriage celebration, the pastors were to be watchful over the couples that the promises made by them were faithfully fulfilled.

4) Dual religious celebration in which the parties were asked to give the consent more than once was forbidden. Therefore, the pastors were to see to it that neither before nor after the marriage in the Catholic Church, would the parties present themselves before a non-Catholic minister or a civil official to give or to renew their marital consent. Those who presented themselves before a Protestant minister incurred the penalty of excommunication reserved to the Supreme Pontiff, whereas those who presented themselves before a civil official fell into a grave sin whose absolution was reserved to the Ordinary.¹²²

3.2.3.2 - The First Council of China (1924)

The First Council of China was held in Shanghai from 14 May to 12 June 1924. In its decree on matrimony, many issues were discussed.¹²³ In the general introduction of the decree, the Council stated that the missionaries were not to give up instructing the

¹²² *Acta et decreta concilii plenarii Australiensis III habiti apud Sydney A. D. 1905 a Sancta Sede recognita*, Sydney, W. Brooks, 1907, nos. 175-183, pp. 59-62.

¹²³ See *Primum concilium Sinense anno 1924 a die 14 maii ad diem 12 iunii 1924 in ecclesia S. Ignatii de Shanghai (Zi-ka-wei) celebratum: acta, decreta et normae, votae, etc.*, altera ed., Zi-ka-wei, Shanghai, Typographia missionis catholicae T'ou-sè-wè, 1941, nos. 379-425, pp. 153-186.

spouses on the sanctity of marriage, on the obligations towards each other as husband and wife, and on the parents' obligations towards their children.¹²⁴ Concerning mixed marriage, the Council spelled out the following important points:

1) Besides the faculty given by general law to dispense from matrimonial impediments (cc. 1035-1043), the Ordinaries enjoyed other faculties through a special concession of the Holy See.¹²⁵

2) Due to special circumstances in China, the Council supported the equivalent *cautiones* as expressed in the Holy Office's decree of 5 April 1918 addressed to mission Ordinaries in China.¹²⁶

3) Before an invalid marriage already contracted by a Catholic woman and a unbaptized man was convalidated, the *cautiones* were to be given. If the unbaptized man refused to give the *cautiones*, at least (*saltem*) he was asked to remove any obstacle that might prevent the Catholic party from practicing her faith. But the Catholic woman had to promise, according to the norms of c. 1061, to have all the children baptized and educated in the Catholic Church and to be sincerely willing, according to c. 1062, to work prudently for the conversion of the non-baptized spouse.¹²⁷

¹²⁴ Ibid., no. 379, p. 153.

¹²⁵ Ibid., no. 391, p. 162. This indeed refers to the apostolic faculties published by the *Propaganda* on 6 January 1919 and effective on 1 January 1920 (these faculties have been discussed in sect. 3.2.1.1 on the Three Formulas).

¹²⁶ Ibid., no. 404, p. 169. The Holy Office's decree of 5 April 1918 is discussed in sect. 3.2.2.

¹²⁷ Ibid., no. 405, p. 170.

3.2.3.3 - The Fourth Plenary Council of Australia and New Zealand (1937)

Concerning mixed marriage, the Fourth Plenary Council of Australia and New Zealand, in its decree on matrimony, very clearly stated:

1) The Church always gravely prohibits mixed marriages because of the danger of falling away from the faith on the part of the Catholic party and the future children. Therefore, this Council enjoined the pastors to instruct the faithful at least once a year to stay away from such a marriage which *coram Ecclesia* remains undesirable, even if a dispensation has been granted.¹²⁸

3) The pastors were to inform the faithful that dispensation from the impediments of disparity of cult and of mixed religion would not be granted, unless the *cautiones* be made according to the norms of c. 1061 and of decree no. 452 of this Council.¹²⁹

3) If the *cautiones* were earnestly given, and in the judgement of the Ordinary, some grave causes truly existed, a dispensation could be granted to avoid greater evil. However, a dispensation might be difficult to grant if there was clearly a greater danger to the faith of the Catholic party and the children.¹³⁰

4) If a dispensation was given to avoid the greater evil, the Council prescribed that at least five instructions on the Catholic doctrine in general and on the unity and

¹²⁸ *Concilium plenary IV Australiae et Novae Zelandiae habitum apud Sydney a die 4a ad diem 12am mensis septembris anno Domini 1937*, editio officialis, Manly, N.S.W., Manly Daily Pty, 1937, no. 451, p. 83.

¹²⁹ *Ibid.*, no. 452, p. 83.

¹³⁰ *Ibid.*, no. 453, pp. 83-84.

indissolubility of the marriage in specific were provided for the non-Catholic party.¹³¹ The pastor could not dispense from these instructions unless there was an expressed permission from the local Ordinary, which was rarely granted.¹³²

5) Pertaining to the place and the rite to be used in mixed marriage celebration, the norm of c. 1109, # 3, had to be observed. The norm in question was that marriages between Catholics and non-Catholics were to be celebrated outside the church or other sacred places. If, however, the Ordinary prudently judged that this rule could not be observed without greater evils, it was left to his prudent judgement to dispense from that norm, yet the prescription of c. 1102, # 2, which excluded the celebration of the Eucharist, remained in force.¹³³

6) After a mixed marriage celebration, the pastors were to see to it that the *cautiones* were diligently implemented by the parties.¹³⁴

7) The pastors were to warn the spouses and to obtain from them the assurance of not going to a non-Catholic minister either before or after the marriage to exchange or to renew their marriage consent, under pain of excommunication for the Catholic party reserved to the local Ordinary (c. 2319).¹³⁵

¹³¹ Ibid., no. 454, p. 84.

¹³² Ibid., no. 456, p. 84.

¹³³ Ibid., no. 457, p. 84. Canon 1102, # 2 states: "Sed omnes sacri ritus prohibentur; quod si ex hac prohibitione graviora mala praevideantur, Ordinarius potest aliquam ex consuetis ecclesiasticis caeremoniis, exclusa semper Missae celebratione, permittere."

¹³⁴ Ibid., no. 459, p. 85.

¹³⁵ Ibid., no. 460, p. 85.

3.2.3.4 - The First Plenary Council of India (1950)

The First Plenary Council of India, in its decree *De matrimonio*, spoke of mixed marriages as follows: (a) the faithful were to be informed diligently of the dangers in mixed marriages that might arise and of the opposition of the Church towards such a union;¹³⁶ (b) since it occurred frequently that the non-Catholics promised to embrace the Catholic religion simply to get an easy marriage with the Catholic party, the pastors were to see to it that those people were not to be accepted or baptized, unless there was a solid hope that their religious practice would persevere and, for non-baptized, that the baptismal instruction should be followed before the baptism;¹³⁷ (c) Ordinaries as well as their delegates were not to dispense from the impediment of disparity of cult or mixed religion, unless they were morally certain that the *cautiones* would be faithfully implemented by the parties;¹³⁸ (d) before a mixed marriage was celebrated, the parties were to be instructed by the priest at least four times especially on the nature and the effects of marriage, and on the obligations contained in the *cautiones*;¹³⁹ (e) the *cautiones* given by the parties did not include the children already born, yet the parties were to be advised

¹³⁶ *Acta et decreta primi concilii plenarii Indiae, anno MCML in Bangalorensi civitate habiti*, Ranchi, Catholic Press, 1951, no. 306, p. 99.

¹³⁷ *Ibid.*, no. 308.

¹³⁸ *Ibid.*, no. 301, # 1.

¹³⁹ *Ibid.*, no. 309, # 2.

of their grave obligation under the divine law to care for the Catholic education of those children.¹⁴⁰

3.3 - The Development Between the Second Vatican Council and the 1983 *Code of Canon Law*

After Vatican II, not many enactments spoke of mixed marriages in the missions. This might be the direct result of the drastically changing attitude of the Church towards mixed marriages under the spirit of Vatican II itself.¹⁴¹ However, speaking very broadly from a missionary law point of view, there does not seem to be any new attitude found after the Council. Rather the attitude of the Church towards mixed marriages in mission countries were extended or became the general attitude of the Church towards mixed marriages everywhere. This so-called changing attitude, though not new, is clearly verbalized, among other things, in the Instruction of the Sacred Congregation for the Doctrine of the Faith (=S.C.D.F) *Matrimonii sacramentum* dated 18 March 1966,¹⁴² whose provisions could be summarized as follows:

¹⁴⁰ Ibid., no. 309, # 3.

¹⁴¹ See B. A. KONDA, *The Changing Attitudes of the Catholic Church Towards Mixed Marriages*, Canon Law Studies no. 474, J.C.D. diss., The Catholic University of America, 1971, pp. 92-201.

¹⁴² See S.C.D.F, Instruction on Mixed Marriages *Matrimonii sacramentum*, 18 March 1966, in *AAS*, 58 (1966), pp. 235-239 (the English translation of the document in FLANNERY, pp. 474-478). Such changes can be seen also in the 1967 Synod of Bishops (see F. X. MURPHY and G. MACBORN, *Synod '67: A New Sound in Rome*, Milwaukee, Bruce Pub. Co., 1968), and the *Motu proprio Matrimonia mixta* of Paul VI as will be discussed later.

1) The *cautiones*

The points addressed by this document are: (a) the faith of the Catholic party and the Catholic upbringing of the children are to be safeguarded; (b) only the Catholic party is required to make the *cautiones* and to guarantee their fulfilment in the future; (c) the non-Catholic party is to be informed of the Catholic doctrine on marriage, the grave obligations of the Catholic party to carry out the promises, and even also invited - not obliged - to promise, yet if such promises were against his or her conscience, the matter should be referred to the Holy See; (d) an Ordinary may decide whether the *cautiones* should be made in writing.¹⁴³

2) Dispensation

In certain places the *cautiones*, especially concerning the Catholic baptism and education of children, cannot be made and implemented by the parties on account of the particular circumstances (e.g., local customs). In this case, the local Ordinary may dispense from both the impediments of mixed religion and disparity of cult, provided that the Catholic party is prepared to do his or her best for the Catholic baptism and education of the children.¹⁴⁴

¹⁴³ The origin of demanding the *cautiones* only from the Catholic party can be traced back to the moment when the equivalent *cautiones* were enacted for the first time for some mission countries. In the equivalent *cautiones* only the Catholic party was required to make the promises and to be responsible for their fulfilment in the future (see sect. 3.2.2).

¹⁴⁴ This looks the same as demanding the equivalent *cautiones* before granting a dispensation in some missionary countries when the formal *cautiones* cannot be obtained. The clear examples of such places are the missionary countries such as Japan, China and the Islands of Sunda Minor in Indonesia, as had been discussed in sect. 3.2.2.

3) The canonical form

Canon 1094 (CIC/1917) must be observed for the validity of a mixed marriage. If difficult, the matter must be referred to the Holy See.

4) Liturgical form

The local Ordinaries may permit the celebration of mixed marriages with sacred rites, customary blessings, and sermon. This means cc. 1102, # 2 (on the prohibition of the sacred rites, yet some religious ceremonies may be permitted to avoid greater evils) and 1109, # 3 (on the prohibition of the celebration inside the church buildings, but which may be permitted to avoid greater evils) are partially revoked (derogation).

5) Dual religious celebration

It is forbidden to celebrate a mixed marriage before a Catholic priest together with a non-Catholic minister, each of whom performs his own rite. This would lead to a double request of the parties' consent.

6) Pastoral care

Pastors of souls are to see to it that mixed marriage families are to lead holy lives in keeping with the *cautiones* already given.

7) The abolition of the excommunication

Canon 2319, # 1, no. 1 which punishes those who contracted marriage before a non-Catholic minister is abrogated retroactively.¹⁴⁵

¹⁴⁵ For more comments on this document, see J. MADDEN, "Mixed Marriages," in *Australasian Catholic Record*, 43 (1966), pp. 153-161; A. M. CARR, "The Decree on Mixed Marriages," in *The Homiletic and Pastoral Review*, 66 (1966), pp. 874-879; KONDA, *The Changing Attitudes of the Catholic Church Towards Mixed Marriages*, pp.

3.3.1 - *Formula facultatum decennialium*

Perhaps the most noteworthy enactment of the Holy See dealing directly with mixed marriages in the missions during this time is the renewed decennial faculties. These mission faculties were effective from 1 January 1971 to 31 December 1980; then they were extended until the revised Code (now the CIC/1983) had been promulgated. Of these 34 mission faculties, only two spoke of mixed marriages, i.e., faculty 15 on dispensation, and faculty 16 on the *sanatio in radice*. The following are the texts of the two faculties and some comments.

1) Text of and comments on faculty 15:

To dispense, for a just and reasonable cause and with consideration of the gravity of the impediment, from all matrimonial impediments of ecclesiastical law with the exception of the impediments arising from the sacred order of the priesthood, from affinity in the direct line when the marriage has been consummated, and from defect of age which exceeds two years (*can be subdelegated*).

In granting a dispensation from the impediments of mixed religion or of disparity of cult, the apostolic letter, *Matrimonia mixta*, issued *motu proprio* on 31 March 1970, is to be observed.¹⁴⁶

108-128; T. P. CUNNINGHAM, "The Instruction on Mixed Marriages," in *The Irish Ecclesiastical Record*, 105 (1966), pp. 269-272; MAKOTHAKAT, *The Sincerity of the Mixed Marriage Promises*, pp. 133-151; D'MELLO, *The Dual Religious Marriage Celebration in India*, pp. 120-127.

¹⁴⁶ "Dispensandi, ex iusta et rationabili causa, habita etiam ratione gravitatis impedimenti, super omnibus impedimentis matrimonialibus iuris ecclesiastici, exceptis impedimentis proveniantibus ex sacro Presbyteratus ordine, ex affinitate in linea recta, consummato matrimonio, et ex defectu aetatis, qui biennium excedat (subdelegabilis).

In concedenda dispensatione ab impedimento mixtae religionis vel disparitatis cultus, observatio Litterarum Apostolicarum Motu proprio datarum die 31 martii 1970, 'Matrimonia mixta', eradenda est." -- The English translation from *CLD*, 7 (1968-1972),

This faculty is obviously the simplification of faculty 29 of the previous decennial faculties.¹⁴⁷ Hence detailed comments on the entire faculty seem to be unnecessary. Nevertheless, it is necessary to address the new and significant element found in the faculty. It is the demand that the prescriptions of the *motu proprio Matrimonia mixta* of Paul VI dated 31 March 1970 and effective on 1 October 1970, are to be observed by mission Ordinaries when dealing with the cases involving dispensation from mixed marriage impediments.¹⁴⁸ The summary of the Apostolic Letter and some comments, when necessary, are in order:

First, in the introductory part of the *motu proprio Matrimonia mixta* the Pope starts with a definition of mixed marriages as marriages in which one party is a Catholic and

p. 83.

¹⁴⁷ The simplification was made as follows: (1) the phrase "canonicis existentibus causis" in the former faculty 29 is replaced by "ex iusta et rationabili causa"; (2) the phrase "sive minoris sive maioris gradus (c. 1042) tam publicis quam occultis, etiam multiplicibus" in the former faculty 29 is omitted; (3) the long explanation on the impediment of age in the former faculty "quando sponsi ad aetatem ab antiquo iure praefixam nondum pervenerint (idest ad annum 14 pro viris et ad 12 completum pro mulieribus" is replaced by a very brief description "qui biennium excedat"; (4) the clause "habita ratione gravitatis impedimenti" found in the present faculty is new; (5) the long advice and caution to be taken in granting dispensations "Concedendo tamen has dispensationes, [...] genus interveniat" is replaced by "In concedenda dispensatione ab impedimentis mixtae religionis vel disparitatis cultus observentur Litterae Apostolicae, M. P. datae, die 31 Martii 1970 Matrimonia mixta". -- See I. TING PONG LEE, *Facultates missionariae disciplinae viginti accomodatae*, Roma, Commentarium pro Religiosis, 1976, p. 199.

¹⁴⁸ PAUL VI, *Matrimonia mixta*, pp. 257-263 (the English translation in FLANNERY, pp. 508-263).

the other a non-Catholic, whether baptized or not.¹⁴⁹ Following the definition, some general principles are addressed:

(1) The Church continues to discourage mixed marriages, for such unions are usually not the means for promoting unity, but introducing a certain division into the living cell of the Church due to many difficulties inherent in a mixed marriage.

One might have seen the development of the Church's mind when it spoke of mixed marriages in the previous discussion. Prior to the 1917 Code, the Church not only most severely forbade, but also severely condemned any mixed marriage. Under the 1917 Code, the Church still most severely forbade any mixed marriage (c. 1060), but no longer condemned them (at least not expressly). The 1966 Instruction *Matrimonii sacramentum* of the S.C.D.F and the *motu proprio Matrimonia mixta* employed a more lenient language such as "the Church discourages mixed marriages" and the term "non-Catholics". The terms "heretics", "schismatics" and "perversion of the faith" are avoided or no longer employed.¹⁵⁰

¹⁴⁹ PAUL VI, *Matrimonia mixta*, p. 257: "Matrimonia mixta, id est matrimonia inita a parte catholica cum parte non catholica sive baptizata sive non baptizata."

¹⁵⁰ See J. E. LYNCH, "Mixed Marriages in the Aftermath of 'Matrimonia Mixta'," in *Journal of Ecumenical Studies*, 11 (1974), p. 640; *Id.*, "Ecumenical Marriages," in *CLSA Proceedings of the Annual Convention*, 5 (1973), pp. 34-35.

(2) The Church always respects one's natural right to marry and to have children. Therefore, some rules are needed to safeguard both the divine law mandates and that natural right.¹⁵¹

(3) The Church always exercises a vigilant care and pastoral assistance both before and after a mixed marriage celebration.

(4) Despite the relaxation of the law, the obligation of the Catholic party to preserve his or her own faith and to have all the children baptized and educated in the Catholic faith can never be removed.

Second, in the second part of the Apostolic Letter, the Roman Pontiff established and decreed the following norms:

(1) Dispensation

A dispensation from the local Ordinary is needed for the licit celebration of an inter-church marriage; whereas in the case of dispar marriage, a dispensation is necessary for the validity. However, a dispensation cannot be granted, unless there is a just cause. But the cause also must be reasonable as the mission faculty puts it: "just and reasonable cause and with consideration of the gravity of the impediment".¹⁵²

(2) The *cautiones*

¹⁵¹ The recognition by the Church of one's natural right to marry and to have children had been already expressed very clearly for missionary countries such as in a reply of the Holy Office dated 19 February 1938 to the vicar apostolic of the Islands of Sunda Minor (Indonesia), as has been discussed in sect. 3.2.2.

¹⁵² See TINO PONO LEB, *Facultates missionariae*, pp. 213-215.

The Catholic party is to declare that he or she is ready to remove the dangers of falling away from faith and to make a sincere promise to do all in one's power to have all the children baptized and educated in the Catholic faith. The non-Catholic party must be informed of the promises made by the Catholic party, so that he or she is aware of the Catholic party's obligations. The bishops' conference is competent to determine the manner of requiring the *cautiones*.

The terms "declaration" and "promise" employed here are simply a modified version of what is commonly known as the *cautiones*. The substance is still the same, though. The norm requires only that the Catholic party declare and promise. Yet, again, it is not new for some missionary countries since the equivalent *cautiones* were employed. Until the 1917 Code, the non-Catholic party had to promise to remove the dangers from the Catholic party's faith, and together with the Catholic party he or she had to promise to baptize and educate the children in the Catholic faith. Under the 1966 Instruction *Matrimonii sacramentum*, the non-Catholic party was no longer required, though still invited, to give such promises. Instead he or she had to be informed of the Catholic party's promises and obligations. The 1970 *motu proprio* of Paul VI simply demanded that the non-Catholic be informed and to be made aware of the obligations of the Catholic party. There is no requirement and even no more invitation to promise.¹⁵³

(3) Prenuptial Instruction

¹⁵³ F. TIMMERMANS, "New Norms for Mixed Marriages," in *African Ecclesiastical Review*, 12 (1970), no. 4, pp. 341-342; TING PONG LEE, *Facultates missionariae*, pp. 229-231.

Both parties must be instructed on the essential ends and properties of marriage before the celebration.

(4) The canonical form

The canonical form is required for the validity of a mixed marriage. Nevertheless, the local Ordinary can dispense from the canonical form if serious difficulties impede its observance. But some public form of ceremony is required for the validity. The Ordinary has to act according to the norms laid down by the conference of bishops. There is a significant development here. In the 1966 Instruction of the S.C.D.F, the matter must be referred to the Holy See when serious difficulties impede the observance of the canonical form. In this *motu proprio*, the local Ordinary has the power to dispense from the canonical form. This indicates that the customary required access to the Holy See has been abolished. For mixed marriages contracted by Catholics and non-Catholics of the Eastern Churches, the canonical form is required for liceity only; for the validity the presence of a sacred minister suffices. ¹⁵⁴

(5) Liturgical celebration

A mixed marriage is to be celebrated according to the rite of celebration of marriage outside Mass. In particular circumstances and only after obtaining the local Ordinary's consent, a marriage of a Catholic and a baptized non-Catholic can be celebrated within Mass, while respecting the general law prescriptions on receiving the Eucharistic Communion. Celebration of a mixed marriage before a Catholic priest and a non-Catholic

¹⁵⁴ See TING PONG LEE, *Facultates missionariae*, pp. 234-236.

minister, each of whom performs his own rite, is forbidden. Also the parties are forbidden to go to a non-Catholic minister either before or after the marriage in the Catholic Church to give or to renew their consent.

The celebration of mixed marriages outside Mass and even also outside the church building is not new. The prohibition of a double religious ceremony wherein the consent is asked more than once is also not new. All have been a long-standing practice in missionary countries. What is new in the apostolic letter *Matrimonia mixta* is that in certain circumstances, the celebration at Mass, especially for the marriage between a Catholic and a baptized non-Catholic, can be allowed. Should the intended marriage of a Catholic and an unbaptized be excluded from the possibility of being celebrated in a Mass? Some commentators indicated that the *motu proprio* simply gives the general rule, yet in extraordinary circumstances and if the Ordinary judges it opportune, the celebration within Mass is very possible.¹⁵⁵

(6) Pastoral care

All validly contracted mixed marriages must be entered in the registers as prescribed by canon law. The pastors of souls are to see to it that the Catholic party and the children do not lack spiritual assistance. They are to assist the couples by fostering the unity and family life. Cooperation with other religious communities is advisable and desirable. This seems to be a new point which is possibly influenced by the ecumenical movement.

¹⁵⁵ THOMMERMANS, "New Norms for Mixed Marriages," p. 344; LYNCH, "Ecumenical Marriages," p. 36.

(7) *Sanatio in radice*

The local Ordinary has the power to radically sanate an invalid mixed marriage, provided that the required conditions have been fulfilled. This is a modification of c. 1141 of the 1917 Code which reserved this power to the Apostolic See alone. In missionary countries, however, the radical sanation had been granted by mission Ordinaries for a long time.¹⁵⁶

2) Text of and comments on faculty 16:

To grant a radical sanation, provided that consent perdures, of marriages which were invalidly contracted because of some impediment mentioned above (n. 15) or because of defect of form or because it was attempted in civil form. As regards the legitimation of offspring, the Ordinary should keep in view canons 1051, 1138 (*can be subdelegated*).

The faculty to grant a radical sanation does not extend to cases in which insanity has come upon one or both of the parties. In each such case recourse must be had to the Holy See.¹⁵⁷

¹⁵⁶ For detailed comments on these norms, see TIDGERMANS, "New Norms for Mixed Marriages," pp. 341-345; A. M. CARR, "Rules re Mixed Marriages," in *The Homiletic and Pastoral Review*, 71 (1971), pp. 385-389; KONDA, *The Changing Attitudes of the Catholic Church Towards Mixed Marriages*, pp. 156-176; LYNCH, "Mixed Marriages in the Aftermath of 'Matrimonia mixta'," pp. 637-659; *ib.*, "Ecumenical Marriages," pp. 33-46;

¹⁵⁷ "Sanandi in radice, dummodo consensus perseveret, matrimonia ob aliquod impedimentum, de quo supra (n. 15) vel ob defectum formae, nulliter contracta vel more civili attentata. Quod vero atinet ad prolis legitimationem, Ordinarius prae oculis habeat canones 1051, 1138 (subdelegabilis).

Facultas sanandi in radice non extenditur ad casus in quibus supervenerit amentia unius vel utriusque partis. In singulis hisce casibus ad S. Sedem recurrendum erit." -- The English translation from *CLD*, 7 (1968-1972), p. 84.

This faculty is merely a simplification of faculties 30-31 of the former decennial faculties.¹⁵⁸ The Church continued to grant mission Ordinaries the faculty to radically sanate any invalid marriage due to some impediment of merely ecclesiastical law, or defect of form, or a marriage civilly attempted, provided that the consent still lasted. The faculty, however, could not be applied when a marriage was invalidly contracted because of the impediments arising from the order of priesthood, the affinity in the direct line when the marriage had been consummated and defect of age for boys under fourteen years and for girls under twelve. The faculty also could not be applied when one or both of the parties had become insane. For this, recourse to the Holy See was required in each case.

Mixed marriages attempted before a non-Catholic minister were no longer mentioned in the new faculty. Perhaps the reason is that in practice such a marriage is usually attempted by a Catholic and a baptized non-Catholic (attempted mixed religion marriage). This attempted marriage is invalid because of lack of the canonical form as mentioned in the faculty. Thus, no need for double mention. Marriages attempted in civil form are explicitly mentioned apparently because in such a case two problems are involved: (1)

¹⁵⁸ The simplification is made as follows: (1) two former faculties, as indicated above, are combined together; (2) the clause "iuxta regulas in codice a can. 1138 ad can. 1141 statutas" in the former faculty 30 is omitted; (3) the phrase "dummodo consensus perseveret" in the new faculty is new; (4) mixed marriage attempted *coram ministro acatholico* in the former faculty 31 is omitted; (5) moral certitude required by the former faculty 31 that the Catholic baptism and education of all the children would not be impeded by the non-Catholic party is no longer a requirement. -- TUNG PONG LEE, *Facultates missionariae*, p. 238.

lack of proper form by the very fact that the marriage is civilly attempted; (2) the marriage is usually, though not always, attempted by a Catholic and a non-baptized.¹⁵⁹

3.3.2 - Some Particular Legislation in the Missions

A few particular norms enacted during this period in the missions will be reviewed in this section. These norms were enacted mainly as the response to the request of the Apostolic Letter *Matrimonia mixta* of Pope Paul VI which states:

7. Within its territorial competence, it is for the Bishops' Conference to determine the way in which these declarations and promises, which are always required, shall be made: whether by word of mouth alone, in writing, or before witnesses; and also to determine what proof of them there should be in the external forum, and how they are to be brought to the knowledge of the non-Catholic party, as well as to lay down whatever other requirements may be opportune.¹⁶⁰

3.3.2.1 - Particular Norms for India

Prior to 1 October 1970 (no specific date indicated), the Catholic Bishops' Conference of India (C.B.C.I) agreed upon these propositions: (1) declarations and promises are to be made in writing by the Catholic party; (2) the local Ordinary is to

¹⁵⁹ For detailed comments, see TING PONG LEE, *Facultates missionariae*, pp. 238-247.

¹⁶⁰ PAUL VI, *Matrimonia mixta*, p. 261: "7) Conferentiae Episcoporum est, secundum propriam territorii competentiam, statuere modum quo hae declarationes et promissiones, quae semper requiruntur, faciendae sint, sive ore tantum, sive etiam scriptis, sive coram testibus; tum rationem definire qua de ipsis et in foro externo constet et pars acatholica certior reddatur; itemque edicere quae alia sint, pro opportunitate, postulanda." -- The English text from FLANNERY, p. 512.

decide in individual cases that oral declarations and promises are sufficient, yet the pastor of the Catholic party is to make a statement before two witnesses that the oral declarations and promises have been made; (3) for the proof of the declarations and promises in the external forum, the provisions of nos. 1 and 2 above are sufficient; (4) the non-Catholic party is to be informed of the declarations and promises made by the Catholic party at the time of prenuptial instructions; (5) the local Ordinary can dispense from the canonical form for genuine and serious reasons of conscience of the non-Catholic party; (6) for the time being, public form of celebration after obtaining dispensation from form is to be determined by the local Ordinary until a uniform policy is laid down by a regional or provincial Council; (7) a marriage celebrated in the public form must also be entered in the prescribed registers and a certificate can be obtained from the pastor of the Catholic party; (8) a copy of the same certificate is to be sent to the diocesan curia.¹⁶¹

3.3.2.2 - Particular Norms for South Africa

To implement the Apostolic Letter *Matrimonia mixta*, the Southern Africa Catholic Bishops' Conference (S.A.C.B.C), meeting in Plenary Session from 1-4 September 1970, made the following three decisions:

First decision, consisting of seven points:

¹⁶¹ *CLD*, 7 (1968-1972), pp. 725-726.

(1) The pastors are to instruct the Catholic party of his or her moral duty to persevere in the faith, and to do all in one's power to get the children baptized and educated in the Catholic faith. No promises are required from the non-Catholic party.

(2) Declarations and promises of the Catholic party are to be made verbally, but must be recorded on the marriage information sheet and signed by the parties as the legal proof. For pastoral reasons, however, an Ordinary may decide that this must be done in writing.

3) The pastor is to see to it that the non-Catholic party is informed of the above declarations and promises, which also must be recorded on the marriage information form.

4) The non-Catholic party is to inform the minister of his or her Church that a mixed marriage will be celebrated before a Catholic priest.

5) General norms for dispensation from form are: (a) the need for securing the validity of a marriage; (b) the interest of good ecumenical relations; (c) the pastoral good of the whole marriage.

6) Double religious ceremony whereby the consent is asked twice is forbidden; yet the performance of a single ritual shared by two ministers is not excluded by art. 13 of *Matrimonia mixta*.

7) Official and reciprocal notice by the Churches concerning mixed marriages already celebrated is most desirable. When a mixed marriage has been celebrated with a dispensation from the canonical form, the Catholic party is to notify his or her pastor and the marriage be recorded in the ecclesiastical register.

Second decision: A uniform marriage information form is to be drawn up, with a mixed marriage section containing the declarations and promises of the Catholic party, the notification to the non-Catholic party, a dispensation from the impediment of mixed religion or disparity of cult, and any dispensation from the canonical form.

Third decision: The ecumenical and liturgical commissions, in consultation with other churches, are to investigate the possibility of drawing up a suitable marriage rite for use when a Catholic minister officiates in association with a minister of another Church.¹⁶²

3.3.2.3 - Particular Norms for Australia

The Australian particular norms are very ecumenical, for those norms were produced by a Joint Working Group of the Australian Council of Churches and the Roman Catholic Church. In a meeting conducted in Sydney from 24-28 May 1971, the Joint Working Group eventually issued an official report which could be summarized as follows:

I. The Nature of Christian Marriage

1) Marriage is a voluntary union of a man and a woman in full, exclusive and lasting community of life.

2) Relation of husband and wife in marriage is viewed by the Christians as the symbol of the relation between Jesus and his Church.

¹⁶² Ibid., pp. 727-728.

3) Marriage as well as a life of dedicated celibacy are both vocations and gifts from God which bear witness to the presence of the kingdom of God. Both married and unmarried can attain the fullness of life in Christ.

4) Marriage finds its fulfilment not only in the mutual love of the parties, but also in the children they have.

5) The will and the purpose of God for marriage is life-long (see Mt 10:11-12).

II. Church Attitudes to Mixed Marriages and Problems of Mixed Marriages

1) The serious attention of the Churches is required; for the surveys indicate that about half of the marriages taking place in the Catholic Church are mixed marriages, and the number even increases from year to year.

2) Tensions in mixed marriages arise from many sources, such as individual stress, interpersonal conflict, social or family pressure, and divided religious loyalty. These difficulties will remain until the Churches reach genuine understanding and true unity.

3) Deeply aware of the individual's natural right to marry, each Church recognizes and accepts the marriages of the Christians of other Churches and of those who are unbaptized. The Catholics are required by the Church to observe the canonical form for the validity of their marriages, regardless whom they marry, yet for some reasons a dispensation from the canonical form can be granted. However, the Joint Working Group hopes that in the near future the canonical form as a condition will be no longer required.

4) The Apostolic Letter *Matrimonia mixta* requires the Catholic party not to put his or her faith in jeopardy and to promise to do all in one's power to have all the children

baptized and educated in the Catholic Church. This clearly indicates that the non-Catholic party renounces no right or obligation.

5) It is obvious that a marriage is strengthened when the parties are of the same religious belief. Yet the parties in a mixed marriage should have the freedom to confess and to practice their own faith respectively.

6) Religious education of children is the responsibility of both parties. Both parties, through an open and loving dialogue, are to make the decision for this matter.

7) Christians must seriously view the problems that might cause divisions in family life and hinder the common vocation to Christian witness and personal holiness.

III. The Christian Basis for Living a Mixed Marriage

1) Baptism is the basis of all marriages between Christians. It is the source of their unity and mutuality, and through which each party shares in the risen life of Christ.

2) To say that both parties share in the risen life of Christ is to point to Christ's sacrificial love of all people, and the need to follow him in the way of the cross. Difficulties might arise easily in mixed marriage, yet by listening to the word of God and praying together the parties may find common solutions.

3) Through such an approach the partners of a mixed marriage will find a basis of confidence and optimism in the unifying power of the Gospel (cf. Gal. 3:26-28).

IV. Pastoral Care of Marriages

1) The clergy have the opportunity and responsibility of ministering to many people of mixed marriages.

2) Cooperation between Churches is desirable and encouraged. It is lawful and essential that each minister should try to strengthen the commitment of each partner to his or her own Church. Each minister has a responsibility for the family and not only for the member of his Church. In the pastoral care of mixed marriages, ecumenism meets its real challenge, but there is no area where ecumenical cooperation is more necessary.

3) When there is a real conflict of religious belief, the parties are to be led carefully by the ministers towards a sympathetic understanding of one another's faith. Parents of the parties may also need pastoral care.¹⁶³

3.3.2.4 - Particular Norms for The Congo

In 1975 the Catholic Church in the Congo and the Evangelical Church of the Congo reached and signed some agreements on mixed marriage whose summary follows:

1) The two Churches declare that marriage is a divine institution, holy, and indissoluble. They mutually recognize the value of mixed marriages celebrated in either Church and the competence of their ministers.

2) The two Churches exhort their members to contract marriages within their own community to avoid the difficulties arising from mixed marriages.

3) In case a mixed marriage is unavoidable, the parties are to follow the following rules: (a) each party asks his or her Church for a dispensation; (b) each of the parties is to promise to remain faithful to one's own Church; (c) the parties are free to choose in

¹⁶³ For the whole text of the official report, see "Australian Discussions on Interchurch Marriages," in *One in Christ*, 8 (1972), pp. 98-105.

what Church their marriage will be celebrated, but then immediately inform both Churches of this choice; (d) the marriage must be celebrated according to the liturgy of the chosen Church; (e) a double ceremony is forbidden, yet the marriage is to be registered in both Churches; (f) each party is to follow the prenuptial instruction given by one's own Church, but if possible the ministers of both Churches can cooperate and deal with the couple together.

4) The religious practice of each party must not be impeded, and the practice of any proselytism is rejected by both Churches.

5) Both the husband and wife in a mixed marriage must decide in conscience in which Church their children are to receive their religious upbringing. The parents can decide to bring up their children in such a way that those children will be familiar with both Churches and eventually can make their own choice when they are mature enough.

6) As a general rule, the Catholic Church in the Congo does not baptize small children, unless requested by both parents. In such a case those children are to be brought up in the Catholic religion.¹⁶⁴

¹⁶⁴ "Mixed Marriage Agreement: Brazzaville, Congo," in *One in Christ*, 12 (1976), pp. 98-100.

3.3.3 - Mixed Marriages in the 1983 *Code of Canon Law*: An Overview

A brief overview on mixed marriage legislation according to the 1983 Code, though it is not missionary law in the strict sense, might be very significant. The main purpose is to see the difference between the legislation according to missionary law and the legislation according to the universal law.

3.3.3.1 - Mixed Religion Marriage

Mixed religion marriage, generally known as mixed marriage (in the strict sense) or at times inter-church marriage, is discussed in cc. 1124-1128; 1118; 1165, # 2. The legislation of *Matrimonia mixta* of Paul VI is almost incorporated entirely by the Code. The following are the important points of the legislation.

1) Permission, not dispensation

To contract a mixed marriage, only the express *permission* of the competent authority is required, as is clear in c. 1124:

Without the express permission of the competent authority, marriage is forbidden between two baptized persons, one of whom was baptized in the Catholic Church or received into it after baptism and has not left it by a formal act, and the other of whom is a member of a church or ecclesial community which is not in full communion with the Catholic Church.¹⁶⁵

¹⁶⁵ "Matrimonium inter duas personas baptizatas, quarum altera sit in Ecclesia catholica baptizata vel in eandem post baptismum recepta, quaeque nec ab ea actu formali defecerit, altera vero Ecclesiae vel communitati ecclesiali plenam communionem cum Ecclesia catholica non habenti adscripta, sine expressa auctoritatis competentis licentia prohibitum est."

Until *Matrimonia mixta*, it was a *dispensation* from the prohibitive impediment of mixed religion that was required. The 1983 Code simply requires a permission. But there seems to be no difference *in fact* between requiring dispensation and permission, for the purpose or the result is still exactly the same, i.e., the liceity of the marriage in question. If the permission (or dispensation in the former law) is not obtained, the marriage is still presumed valid (cf. c. 1060 of the CIC/1983 and c. 1014 of the CIC/1917), though illicit.¹⁶⁶

2) Cause for permission

The cause for permission must be just and reasonable as the first part of c. 1125 puts it: "The local Ordinary can grant this permission if (*si*) there is a just and reasonable cause."¹⁶⁷ The cause can be either negative such as the danger of falling away from the

¹⁶⁶ Perhaps the only difference is that in the CIC/1917 mixed religion was considered as an impediment, though only prohibitive; whereas in the CIC/1983, mixed religion is apparently no longer considered as an impediment. The term "dispensation" is indeed different from "permission". Dispensation is always seen as a *vulnus legis* (wounding of the law) and is given simply as a toleration for something (e.g., disparity of cult) which is forbidden according to the law, yet it is difficult to be prevented. Permission is not a *vulnus legis*, and is given not because something is prohibited and cannot be avoided, but rather because the law says so to make sure that everything is in order before a permission is granted. For more comments on c. 1124, see L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, Wilmington, Del., M. Glazier, 1986, pp. 183-185; B. A. SINGLE, *Marriage According to the New Code of Canon Law*, New York, NY, Alba House, 1986, pp. 149-153; T. P. DOYLE, in *CLSA Commentary*, pp. 801-802; CHIAPPETTA, *Il codice di diritto canonico*, vol. 2, pp. 252-253; R. N. VALLS, in *Code de droit canonique*, pp. 657-658; LÖDICKER, in LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*.

¹⁶⁷ "Huiusmodi licentiam concedere potest Ordinarius loci, si iusta et rationabilis causa habeatur; [...]."

faith and the danger of civil marriage, or positive such as the maturity and commitment of the parties with regard to their future marriage and respective Churches.¹⁶⁸

3) Conditions for permission

Although a just and reasonable cause may already be had, the permission is still not to be granted unless (*nisi*) some conditions have been fulfilled as stated in c. 1125:

[...]; he [the local Ordinary] is not to grant it [the permission] unless the following conditions have been fulfilled:

(1) the Catholic party declares that he or she is prepared to remove dangers of falling away from the faith and makes a sincere promise to do all in his or her power to have all the children baptized and brought up in the Catholic Church;

(2) the other party is to be informed at an appropriate time of these promises which the Catholic party has to make, so that it is clear that the other party is truly aware of the promise and obligation of the Catholic Party;

(3) both parties are to be instructed on the essential ends and properties of marriage, which are not to be excluded by either party.¹⁶⁹

¹⁶⁸ For more comments on this matter (the first part of c. 1125), see DOYLE, in *CLSA Commentary*, p. 802; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, pp. 253-254.

¹⁶⁹ "[...]; eam ne concedat, nisi impetis condicionibus quae sequuntur:

(1) pars catholica declaret se paratam esse pericula a fide deficiendi remove atque sinceram promissionem praestet se omnia pro viribus facturam esse, ut universa proles in Ecclesia catholica baptizetur et educetur;

(2) de his promissionibus a parte catholica faciendis altera pars tempestive certior fiat, adeo ut constet ipsam vere consciam esse promissionis et obligationis partis catholicae;

(3) Ambae partes edoceantur de finibus et proprietatibus essentialibus matrimonii, a neutro contrahente excludendis." -- More comments on this canon (c. 1125), see DOYLE, in *CLSA Commentary*, pp. 802-804; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, pp. 253-254; VALLS, in *Code de droit canonique*, pp. 858-659; LÜDICKER, in LÜDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*, ÖRSY, *Marriage in Canon Law*, pp. 185-188; SINGLE, *Marriage According to the New Code of Canon Law*, pp. 153-155.

The declarations and promises are always required. The way in which they are to be made (e.g., in writing or oral) and to be made known to the non-Catholic party (e.g., by the Catholic party or the pastor during the pre-nuptial instruction) is to be determined by the conference of bishops (c. 1126). It will be seen how the bishops' conferences in the missions handle this matter.

4) Canonical form and liturgical celebration

The canonical form, as prescribed by c. 1108, is usually required for the validity of a mixed marriage. If the marriage is to be contracted by a Catholic and a non-Catholic of an Eastern Church, the form is required only for the liceity; for the validity the presence of a sacred minister suffices (c. 1127, # 1). The canonical form can be dispensed from in individual cases by the local Ordinary of the Catholic party when serious difficulties impede its observance. Yet, for the validity of the marriage, there must be some public form of celebration, such as a recognized civil ceremony or a non-Catholic religious celebration (c. 1127, # 2).

If the canonical form is observed, the liturgical form found in the approved liturgical book is to be followed. A double religious ceremony wherein the parties are asked to give the marriage consent each in turn by the Catholic and the non-Catholic ministers, either in the same celebration or one celebration after the other, is strongly forbidden (c. 1127, # 3). The canon, however, does not seem to forbid a double religious ceremony as such. What is clearly forbidden is the double exchange of the marriage consent. The reason is that by doubly exchanging the consent which brings about the marriage (c. 1057), there is a presumption that the validity of the marriage is not accepted by or at least is doubtful

for at least one of the parties. The religious ceremony itself does not in any way bring about the marriage. Hence, the second religious celebration without renewing the consent is not prohibited.¹⁷⁰

5) Place of celebration

A mixed marriage is to be celebrated in a parish church or in any other suitable places with the approval of the local Ordinary or the pastor (c. 1118).¹⁷¹

6) Radical sanation

Radical sanation in general is discussed in cc. 1161-1165. With regard to mixed marriages, c. 1165, # 2 indicates that any invalid mixed marriage can be sanated, provided that the conditions mentioned in c. 1125 have been fulfilled.¹⁷²

7) Pastoral care

Postmarital pastoral assistance for the mixed marriage families is strongly recommended. The purpose of this pastoral care is to foster the spiritual good of the

¹⁷⁰ More comments on c. 1127, see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, pp. 255-258; VALLS, in *Code de droit canonique*, pp. 659-661; LÖDICKER, in LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*; DOYLE, in *CLSA Commentary*, pp. 804-806; SIEGLE, *Marriage According to the New Code of Canon Law*, pp. 155-159; ÖRSY, *Marriage in Canon Law*, pp. 189-193.

¹⁷¹ For more comments on c. 1118, see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, pp. 245-246; LÖDICKER, in LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*; DOYLE, in *CLSA Commentary*, pp. 797-798; ÖRSY, *Marriage in Canon law*, pp. 173-174; SIEGLE, *Marriage According to the New Code of Canon Law*, p. 143.

¹⁷² For more comments on c. 1165, see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, pp. 289-290; LÖDICKER, in LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*; ÖRSY, *Marriage in Canon Law*, pp. 258-259; DOYLE, in *CLSA Commentary*, pp. 828-829.

Catholic party as well as the children, and to promote the strong unity of conjugal and family life (c. 1128).¹⁷³

3.3.3.2 - Dispar Marriage

Dispar marriage is dealt with in cc. 1086 (1125-1129) and 1118. The main points of the legislation are similar to those of mixed religion.

1) Dispensation

The impediment arising from dispar marriages is called disparity of cult or disparity of worship. It is a diriment impediment by the very fact that the other party is unbaptized; hence a dispensation from the impediment is required, lest the marriage would be invalidly contracted. C. 1086 states:

1. Marriage between two persons, one of whom is baptized in the Catholic Church or has been received into it and has not left it by means of a formal act, and the other of whom is non-baptized, is invalid.

2. This impediment is not to be dispensed unless the conditions mentioned in can. 1125 and 1126 are fulfilled.

3. If at the time the marriage was contracted one party was commonly considered to be baptized or the person's baptism was doubted, the validity of the marriage is to be presumed in accord with the norm of can. 1060 until it is proven with certainty that one party was baptized and the other was not.¹⁷⁴

¹⁷³ More comments on c. 1128, see DOYLE, in *CLSA Commentary*, p. 806; CHIPPITTA, *Il Codice di diritto canonico*, vol. 2, p. 258; ÖRSY, *Marriage in Canon Law*, pp. 128-129.

¹⁷⁴ "# 1. Matrimonium inter duas personas, quarum altera sit baptizata in Ecclesia catholica vel in eandem recepta nec actu formali ab ea defecerit, et altera non baptizata, invalidum est.

2. Ab hoc impedimento ne dispensetur, nisi impletis condicionibus de quibus in can. 1125 et 1126.

2) Conditions for dispensation

Canon 1086, # 2, says that the conditions prescribed by cc. 1125- 1126 are to be fulfilled before a dispensation is granted. Those conditions are: (1) there must be a just and reasonable cause; (2) the *cautiones* must be made by the Catholic party to maintain his or her Catholic faith and to do everything in one's power for the baptism and upbringing of all the children in the Catholic faith; (3) the non-Catholic party is to be informed of the promises made by the Catholic party; (4) prenuptial instruction for both parties; (5) with regard to the conditions 2-3, the norms established by the conference of bishops are to be followed.

3) Canonical form, liturgical celebration, pastoral care

With reference to the canonical form, liturgical celebration and pastoral assistance after the marriage, c. 1129 states: "The prescriptions of cann. 1127 and 1128 are also to be applied to marriages involving the impediment of disparity of cult mentioned in can. 1086, # 1."¹⁷⁵

3. Si pars tempore contracti matrimonii tamquam baptizata communiter habebatur aut eius baptismus erat dubius, praesumenda est, ad normam can. 1060, validitas matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam." -- For more comments on c. 1086, see VALLS, in *Code de droit canonique*, pp. 622-623; LÖDICKER, in LÖDICKER (ed.), *Münsterischer Kommentar zum Codex iuris canonici*; CHIAPPETTA, *Il codice di diritto canonico*, pp. 206-208; DOYLE, in *CLSA Commentary*, pp. 677-769; SINGLE, *Marriage According to the New Code of Canon Law*, pp. 77-84; ORSY, *Marriage in Canon Law*, pp. 112-115.

¹⁷⁵ "Praescripta can. 1127 et 1128 applicanda sunt quoque matrimoniis, quibus obstat impedimentum disparitatis cultus, de quo in can. 1086, # 1."

A dispar marriage can be celebrated in a parish Church or in any other suitable places (c. 1118, # 3) according to the approved liturgical form, yet normally outside Mass.

3.4 - The Development after the 1983 *Code of Canon Law*

After the 1983 Code came into effect, missionary law on mixed marriage no longer developed. This is mainly because the new Code successfully incorporated most of the mission faculties into the Code itself and without hesitation granted the local Ordinaries and the conferences of bishops ample powers to deal with their local Churches. Mission faculties do not seem to be needed at least for the time being. Perhaps Fr. Amand Reuter, O.M.I., a consultor of the *Propaganda*, is correct when he wrote:

The more the particular Churches in the missions approach and even reach maturity, the more they shall conform to the rules of law governing the universal Church as regards both: their organization, also in the regional and/or national context culminating in the respective Episcopal Conferences, and in their everyday life in parishes or similar pastoral units. The less then there will be a need of properly called missionary law and of special faculties for local Ordinaries in mission territories.¹⁷⁶

However, in many respects, the main issue is perhaps not whether the particular Churches have or have not reached maturity in order to conform or not to conform to the universal law of the Church. The main issue might be whether a law fits or can be applied in the situation of the particular Churches in the missions, or whether a law is

¹⁷⁶ REUTER, "The Missions in the New Code of Canon Law," p. 319.

able to answer the needs and provide directions and possible solutions for the problems of those particular Churches, or how a law should be made in order that the particular Churches in their various background will be able to conform to it. A law which is produced in the Western circumstances, for instance, is indeed suitable for those circumstances; yet it is not always useful for the Oriental situation, and vice versa, regardless the maturity. Thus, it has almost nothing to do with maturity or immaturity of the particular Churches. The 1983 Code seems to be very cautious in this case. Therefore, as previously indicated, it grants ample power and normative discretion to the authorities of the local Churches to deal with their own situation. By so doing, it is obvious that the system of granting the faculties for a limited time (e.g., decennial faculties) has been replaced.¹⁷⁷ For mixed marriages, the example is c. 1126 which states:

The conference of bishops is to establish the way in which these declarations and promises, which are always required, are to be made, what proof of them there should be in the external forum and how they are to be brought to the attention of the non-Catholic party.¹⁷⁸

This canon gives the right and power to the conferences of bishops to establish particular norms and the manner in which the universal law on mixed marriage can be applied properly in their particular circumstances.

¹⁷⁷ See c. 381 on the power of the diocesan bishops, and cc. 85-93 on dispensations.

¹⁷⁸ "Episcoporum conferentiae est tum modum statuere, quo hae declarationes et promissiones, quae semper requiruntur, faciendae sint, tum rationem definire, qua de ipsis et in foro externo constet et pars non catholica certior reddatur."

The following are some particular norms established by some mission conferences of bishops for their respective territories. Norms of each conference will be briefly presented, despite the enormous similarities among them.¹⁷⁹

3.4.1 - Particular Legislation of Northern Africa

As to how the declarations and promises spoken of in c. 1125 are to be made, the Regional Episcopal Conference of North Africa established the following norms:¹⁸⁰ (a) the Catholic party is to declare in writing that he or she will remove the danger of falling away from the faith and to do his or her best for the Catholic baptism and upbringing of the children; (b) the minister who establishes the marriage record is to make sure that the non-Catholic party is informed of this obligation. This assurance must also be mentioned in the written petition for a dispensation or permission from the bishop.¹⁸¹

That conference of bishops also stated that in the countries where Islam marks the life of the society, the Ordinary of the place can dispense from the canonical form (c. 1127, # 2), provided that serious difficulties impede its observance. The difficulties can be either personal such as the refusal of the non-Catholic party to present oneself before

¹⁷⁹ These particular norms are taken from J. T. MARTÍN DE AGUIR, *Legislazione delle conferenze episcopali complementare al C.I.C.*, Milano, A. Giuffrè, 1990. The original texts can be found on the pages indicated in the following footnotes.

¹⁸⁰ The *recognitio* was given by Apostolic See on 19 December 1987 and 2 July 1988.

¹⁸¹ *Ibid.*, p. 48.

the Catholic minister, or of social order such as sociological or family environment which renders the presence of the Catholic minister impossible.

The Ordinary of the place of the Catholic party can grant the dispensation for each particular case after consulting the Ordinary of the place where the marriage is to be celebrated. However, there must be some public form of celebration such as the recognized civil ceremony of the country in question. If this is the case, a copy of the civil act is to be put together with the marriage record. The marriage is to be registered in the parish where the civil marriage has been celebrated as well as in the special register of the diocese. The Catholic party is obliged to notify the parish of baptism.¹⁰²

3.4.2 - Particular Legislation of Chile

The Episcopal Conference of Chile indicated that in the cases wherein a dispensation from the impediment of disparity of cult is required for an intended dispar marriage to be validly celebrated (c. 1086, # 1) or a permission for an inter-church marriage to be licitly celebrated (c. 1124), the declarations and promises of the Catholic party are to be made beforehand (cc. 1125; 1086, # 2). The following specific norms are to be followed:¹⁰³

1) Regarding the manner of proceeding: (a) the pastor, or a priest or deacon delegated, is to instruct the contracting parties personally, together or separated, on the

¹⁰² Ibid., pp. 48-49.

¹⁰³ These norms were approved in a plenary meeting of 10-16 June 1985 (*recognitio* by the Apostolic See on 20 February 1988).

essential ends and properties of marriage, which are not to be excluded by either party (c. 1125, no. 3); (b) the same pastor, or the priest or deacon, is to inform the non-Catholic party of the promises made by the Catholic party, so that the non-Catholic party is truly aware of the promise and obligation of the Catholic party (c. 1125, no. 2); (c) the Catholic party is to declare that he or she is prepared to avoid any danger of falling away from the faith and sincerely promise to do everything in one's power to have the children baptized and educated in the Catholic Church. The non-Catholic party is to declare that he or she is truly conscious of the promise and obligation of the Catholic party. Then both parties declare that they are aware of the essential ends and properties of marriage.¹⁸⁴

2) Regarding the manner of recording: (a) the pastor, or a priest or deacon who acts in the above arrangements, is to make a written document indicating that the arrangements have been duly fulfilled; (b) likewise, each party, if able to sign, must sign a written document to prove that he or she accepts the other party freely; (c) if any of the contracting parties is not able to read or to write, the same pastor, or the priest or deacon, is to write a document indicating that the parties have already presented their free and mutual acceptance; (d) the document must be made in duplicate. One must be kept in the marriage file, the other has to be sent to the diocesan curia or to the authority who, by law or by delegation, can grant dispensation or permission for the marriage. This

¹⁸⁴ Ibid., pp. 173-174.

authority, after granting a dispensation, is to send to the diocesan curia the same document together with a signed document regarding the granting of the dispensation.¹⁴⁵

3) If it is difficult to reach a priest or deacon who has the faculty because of great distance or some other causes, the Ordinary of the place can permit the paperwork to be under the responsibility of a layman with the faculty to assist at marriages, or in some specific case, by an expressly designated person. The Ordinary is to give such authorizations in writing.¹⁴⁶

Regarding c. 1127, # 2, which deals with dispensation from the canonical form, the conference of bishops first of all stated that the form is a condition for the valid celebration of marriage. However, the Ordinary of the place can dispense from the canonical form if serious causes impede the carrying out of the condition. The following are considered grave causes: (a) persistent opposition of the non-Catholic party; (b) a majority of the parties' families refusing to accept the canonical form; (c) the loss of very stable friendships; (d) economic hardship; (e) any serious conflict of conscience of the contracting parties; (f) civil law obligation for at least one of the parties to follow a religious form distinct from the Catholic.¹⁴⁷

Once a dispensation has been granted, the marriage can be celebrated, though publicly, either before a minister of another confession according to the prescribed form

¹⁴⁵ Ibid., pp. 173-174.

¹⁴⁶ Ibid., p. 174.

¹⁴⁷ Ibid., p. 174.

of that confession, or before a competent civil authority in the prescribed legitimate civil form.¹⁸⁸ Nevertheless, the Ordinary of the place cannot grant a dispensation from the canonical form without a written petition of the parties, supported by the proper pastor who is to verify the presence of the just causes. If in the petition the parties ask permission for a Catholic priest to attend the wedding held in a non-Catholic Church, the priest should be reminded of the prohibition of c. 1127, # 3. That priest, however, may take part in the Bible readings and at the end he may bless the parties. The prescription of c. 1121, # 3, regarding the recording of the marriage celebrated without the canonical form, remains effective.¹⁸⁹

3.4.3 - Particular Legislation of Colombia

To fulfil the prescriptions of c. 1126, the Conference of Bishops of Colombia established in its decree the following norms:¹⁹⁰

1) when a mixed marriage is to be celebrated, the pastors or the ministers of the Catholic Church are to instruct the contracting parties on the sacrament of marriage, its essential ends and properties, and on the particular aspects of mixed marriage.

2) The declarations and promises required by c. 1125, nos. 1-2, are to be made in writing and signed by the Catholic party. The non-Catholic party is to be informed of

¹⁸⁸ Ibid., p. 174.

¹⁸⁹ Ibid., p. 175.

¹⁹⁰ This particular legislation was published in 1986 (no specific date indicated) after obtaining the *recognitio* from the Holy See on 11 January 1986.

these written declarations and promises. This document must be kept in the marriage file.

3) For the sake of uniformity and to facilitate the carrying out of the preceding requirements, an approved formula is to be utilized.

4) After fulfilling the previous requirements and obtaining the permission of the Ordinary of the place, the mixed marriage must be celebrated with the canonical form (c. 1108), following the proper rite of marriage and with due regards for the prescriptions of c. 1127, §§ 1 and 3. In case of doubt concerning the validity of the non-Catholic party's baptism, a dispensation from the impediment of disparity of cult is to be obtained *ad cautelam*.

5) In the cases of dispar marriages, besides the above formalities, dispensation from the impediment is required, and the celebration can be performed in the church or in any other suitable place, but without the celebration of the Eucharist.

6) The registration of mixed marriages must be made in the parish where the marriage is celebrated and to be communicated to the parish of baptism of the parties respectively.

7) Special continuing pastoral assistance is required for mixed marriage spouses particularly with regard to the practice of the faith, education of any children, and the promotion of the authentic ecumenical relationships in the family.¹⁹¹

¹⁹¹ Ibid., pp. 199-200.

3.4.4 - Particular Legislation of the Dominican Republic

The Conference of Bishops of the Dominican Republic established the following norms to be observed before a mixed marriage celebration (c. 1126):¹⁹² (1) the pastor is to advise the Catholic party of the obligation to obtain the proper permission or dispensation from the diocesan bishop; (2) declarations and promises must be made in writing (three copies) in the presence of the pastor; a copy will be sent to the diocesan curia, one will be kept for the parish record, and the other will be held by the party in question; (3) the pastor is to inform the non-Catholic party of the promises and obligation of the Catholic party; (4) the pastor is to instruct the contracting parties on the essential ends and properties of marriage, and then the parties must declare in writing (three copies) that they accept these essential ends and properties.¹⁹³

To dispense from the canonical form, that conference of bishops states that there must be some valid difficulties which impede the observance of the form, such as: (1) invincible opposition of the non-Catholic party; (2) serious conflict of conscience; (3) grave and real damage of the union and harmony of the couple; (4) refusal of the canonical form by the majority of the non-Catholic party's family; (5) the loss of very profound friendships; (6) economic hardships.¹⁹⁴

¹⁹² This particular legislation obtained the *recognitio* of the Holy See on three different dates: 6 August 1985, 5 May 1986, and 27 February 1987.

¹⁹³ *Ibid.*, pp. 592-593.

¹⁹⁴ *Ibid.*, p. 593.

3.4.5 - Particular Legislation of Ecuador

To put the prescription of c. 1126 in practice, the Conference of Bishops of Ecuador states in its decree norm 38:¹⁹⁵ (1) the declarations and promises required of the Catholic party for a mixed marriage are to be made in the presence of the bishop, or the person he designated, or the pastor; (2) these declarations and promises must guarantee the freedom of conscience and the perseverance in the Catholic faith for the Catholic party and the children; (3) they must be made in writing and be signed in triplicate according to the forms worked out by the conference.¹⁹⁶

Pertaining to dispensation from the canonical form (c. 1127, # 2), the conference states in norm 39 that a dispensation can be granted if it is difficult and impossible to prevent the contracting parties from going to a non-Catholic minister when a dispensation is denied. However, those parties are required to fill out the prenuptial information, sign the declarations and promises, as well as sign an act, in the presence of two witnesses, in which the marriage consent will also be recorded. This document is to be kept in the archives of the curia.¹⁹⁷

¹⁹⁵ These norms were approved by the Conference of Bishops of Ecuador in a plenary meeting dated 24 March 1986. *Recognitio* was obtained from the Holy See on 16 May 1986 and promulgation was made on 24 September 1986.

¹⁹⁶ *Ibid.*, p. 222.

¹⁹⁷ *Ibid.*, p. 223.

3.4.6 - Particular Legislation of The Gambia, Liberia, and Siera Leone

With regard to the manner in which the declarations and promises are to be made (c. 1126), the Inter-territorial Catholic Bishops' Conference of The Gambia, Liberia, and Siera Leone (ITCABIC) decrees that the party in question is to declare the promises orally.¹⁹⁸ But then the pastor, when seeking a dispensation or permission, is to state clearly so in writing and must also indicate that the non-Catholic party has been informed of the promises and the obligations of the Catholic party.¹⁹⁹

To dispense from the form, the ITCABIC asserts that it is the right of the diocesan bishop to do so in single cases, preferably only in very exceptional circumstances. The ITCABIC also states that this dispensation must include the specific date, place, and official witness with a new dispensation needed for any change.²⁰⁰

3.4.7 - Particular Legislation of Ghana

The Ghana Bishops' Conference speaks very briefly of mixed marriage promises as is clear in its decree, reads:

Three points were considered and decided on, namely:

¹⁹⁸ These particular norms were approved by the Inter-territorial Catholic Bishops' Conference (ITCABIC) of The Gambia, Liberia, and Sierra Leone in October, 1985. The *recognitio* was obtained from the Holy See in April, 1986 and promulgation was made on 8 March 1987 with a *vacatio legis* until 8 June 1987.

¹⁹⁹ *Ibid.*, p. 294.

²⁰⁰ *Ibid.*, p. 294.

- a. The promises made by the Catholic party would be made and signed in the presence of two witnesses who would also sign.
- b. The priest would usually be the one to inform the non Catholic party that the promises have been made.
- c. The non-Catholic party would sign a form acknowledging the fact that he/she has been informed of the promises made.²⁰¹

3.4.8 - Particular Legislation of India

The Catholic Bishops' Conference of India (CBCI) decrees that the declarations and promises required by c. 1125 of the Catholic party should be made in writing at the time of the pre-nuptial enquiry.²⁰² The non-Catholic party is to be informed of these promises in due time. However, the local Ordinary has the right to establish procedures for both making the promises and informing the non-Catholic party.²⁰³

Concerning dispensation from the canonical form, the CBCI states that there must be some grave reasons for this dispensation, yet some public form of celebration is required. If another religious ceremony is to be used, the principles regarding *communicatio in sacris* must be observed.²⁰⁴

²⁰¹ Ibid., pp. 747-748. These norms were approved by the Ghana Bishops' Conference in a plenary meeting dated 16-18 May 1984.

²⁰² There are three series of the Indian Particular Norms which were approved by the Catholic Bishops' Conference of India in three plenary meetings, respectively in February 1984, April 1986, and April 1988. Norms of mixed marriages were approved in April 1988. It is not clear if they have received the *recognitio* from the Holy See and been properly promulgated.

²⁰³ Ibid., p. 346.

²⁰⁴ Ibid., pp. 346-347.

3.4.9 - Particular Legislation of Nigeria

Particular norms concerning the declarations and promises established by the Catholic Bishops' Conference of Nigeria (CBCN) seem to require the commitment and responsibility not only of the Catholic party, but also of the non-Catholic party, the parents, and the pastor.²⁰⁵ The CBCN decrees that the declarations and promises are to be made in writing and be signed by the Catholic party. Yet the pastor or his representative and the parents or close relatives of both parties are also to sign the document as witnesses. The original of this document will be kept in the parish archives, while a copy of it must be sent together with the application for the permission or dispensation. Banns must also be published, and due investigation be carried out.²⁰⁶

With reference to dispensation from the canonical form in the cases of mixed marriage (c. 1127, # 2), the CBCN establishes four norms as follows:

I. The dispensation from canonical form can only be granted where there is sufficient guarantee about the faith of the Catholic party. It is left to the local Ordinary to determine if the danger of defection from the Catholic faith exists or not.

II. Before the dispensation is granted, the Catholic community is to be prepared by good catechesis to bring out clearly that marriage outside the Catholic Church with dispensation from canonical form does not involve defection from the Catholic faith.

III. In the application for the dispensation from the canonical form the Catholic party must indicate the form of celebration which they intend to have.

²⁰⁵ This particular legislation was promulgated by the Catholic Bishops Conference of Nigeria through a decree dated 17 February 1989, and came into effect on 29 June 1989.

²⁰⁶ *Ibid.*, pp. 494-495.

IV. The public forms of celebration acceptable in Nigeria for the validity of dispensation from form are still under discussion.²⁰⁷

3.4.10 - Particular Legislation of El Salvador

In its decree dated 15 July 1987, the Conference of Bishops of El Salvador states that before a permission or dispensation is granted for a mixed marriage to be celebrated, the following must be had:²⁰⁸ (a) a just cause; (b) the Catholic party is to declare that he or she is prepared to remove the danger of losing the faith; (c) the Catholic party is to make a sincere promise that he or she will do all in one's ability for the children to be baptized and educated in the Catholic Church; (d) the non-Catholic party is to be informed of the declarations and promises of the Catholic party; (e) both parties are to be informed of the essential ends and properties of marriage which cannot be excluded by either of the parties. The Episcopal Conference decrees that the declarations and promises must be made in writing and signed by the Catholic party alone at the matrimonial proceedings.²⁰⁹

Relative to the canonical form, the Episcopal Conference states that it is a condition for the validity of a mixed marriage. However, the Ordinary of the place can dispense from the form whenever grave causes hamper its observance. Such causes might be: (1)

²⁰⁷ Ibid., p. 496.

²⁰⁸ The particular norms of El Salvador were promulgated through a decree of the Conference of Bishops of El Salvador dated 15 July 1987. The *recognitio* was obtained from the Holy See on 24 May 1986, 27 February 1987, and 9 May 1987.

²⁰⁹ Ibid., p. 609, art. 26.

the persistent opposition of the non-Catholic party; (2) most of the non-Catholic party's family refuse the canonical form; (3) loss of very stable friendships; (4) serious economic damage; (5) serious conflict of conscience of the non-Catholic party; (6) if civil law requires a different form.²¹⁰

3.5 - Summary and Analysis

1. The relatively stable mixed marriage legislation from the end of the nineteenth century continued to have binding force during the short period before the 1917 *Code of Canon Law*. Perhaps the only major change occurring in this period was influenced particularly by the decree *Ne temere* of the Sacred Congregation of the Council dated 2 August 1907. Through this decree all Catholics anywhere in the world were made subject to the Tridentine form regardless whom they married. The only exception was Germany, yet only in the cases of inter-church marriage and not dispar marriage. Along with this development, the passive assistance of pastors at inter-church marriages was abolished. Passive assistance at dispar marriages was never an issue or required by the Church. Later the 1917 Code incorporated this legislation with some little changes. The very significant change was that the *cautiones* were no longer three, but two. The third *cautio* which used to be the promise of the Catholic party to work for the conversion of the non-Catholic party was dropped as such but became c. 1062 in the CIC/1917.

²¹⁰ Ibid., pp. 609-610, art. 27.

2. The difficulties in the missions always made the universal law impossible to be implemented. For this reason the Holy See granted repeatedly many new mission faculties and other special concessions during the period between the 1917 Code and Vatican II. If the universal law (1917 Code) simply granted the Ordinaries extraordinary power to dispense from matrimonial impediments of merely ecclesiastical law in danger of death (cc. 1043-1044) and in perplexing situations only (c. 1045), mission Ordinaries, in virtue of the mission faculties, were granted broader powers to dispense from those marriage impediments (including mixed marriage impediments) in normal circumstances and to radically sanate invalid and attempted marriages, though with the fulfilment of some conditions.

3. One of the most profound developments in the period between the 1917 Code and Vatican II was perhaps the enactment of the equivalent *cautiones*, although they were intended only for certain mission countries (China, the Islands of the South Sea, Japan) and to be employed only when the formal *cautiones* were difficult to be obtained. In the formal *cautiones* system, both parties were required to promise (i.e., the non-Catholic party is to promise that the danger of the downfall of the Catholic party's faith will be removed, and both parties must promise to have all the children baptized and educated in the Catholic Church), in the equivalent *cautiones* system, only the Catholic party was required to promise both to maintain his or her faith and educate the children in the same faith. This is exactly the same as what was later established as a general rule for the universal Church in *Matrimonii sacramentum* of the S.C.D.F dated 18 March 1966,

though the non-Catholic party was still invited, not obliged, to promise;²¹¹ then it was reiterated in *Matrimonia mixta* of Paul VI dated 31 March 1970 in which the non-Catholic party was no longer invited to promise, but simply informed of the promises and obligations of the Catholic party regardless what he or she feels;²¹² and eventually was codified in the 1983 *Code of Canon Law*.²¹³ This new law seems to be more simple, yet it does not seem to consider the rights and responsibility of the non-Catholic party, partly because first of all the non-Catholic party is merely informed of the promises and obligations of the Catholic party, and secondly, the law at least does not spell out what might be the rights and obligations of the non-Catholic party.

4. The development between Vatican II and the 1983 Code seems to be very much influenced especially by some postconciliar documents, namely, the 1966 Instruction *Matrimonii sacramentum* of the S.C.D.F and the 1970 *motu proprio Matrimonia mixta* of Paul VI. Interestingly, in these documents, as has been mentioned above, what used to be the equivalent *cautiones* required by the Church to be made only by the Catholic party in certain mission countries became the formal *cautiones* for the universal Church, and what used to be the formal *cautiones* required by the universal law to be given by

²¹¹ See S.C.D.F, *Matrimonii sacramentum*, I, 1-3, p. 237 (the English translation in FLANNERY, p. 476).

²¹² PAUL VI, *Matrimonia mixta*, nos. 4-5, p. 261 (the English translation in FLANNERY, p. 512).

²¹³ See c. 1125.

both parties were revoked, so to speak. Other norms concerning dispensation, the radical sanitation, canonical form, liturgical celebration, etc., found in these documents do not seem to be new for mission countries. Ergo, a question to be asked is whether missionary law on mixed marriage during this period was influenced by the postconciliar documents or vice-versa? Thus, practically speaking, the legislation from the period between the 1917 Code and Vatican II continued to have binding force in one way or another.

5. Particular norms enacted in some mission countries after the Apostolic Letter *Matrimonia mixta* truly implemented what was mandated in # 7 of that document.²¹⁴ The very significant development found in these norms was that some ecumenical aspects were very clearly pointed out. To be clear, the norms indicated that: (1) the interest of good ecumenical relations is to be considered as a norm justifying dispensation from the canonical form; (2) more pastoral cooperation between the Catholic Church and other Churches in mixed marriage cases is strongly suggested and encouraged; (3) there is an inclination to draw up an ecumenical marriage rite to be used when a Catholic minister officiates at a marriage in association with a minister of another Church; (4) religious upbringing of offspring is the right and responsibility of both parties and not only one of them, hence both parties should make a decision on this very important matter in an open and loving dialogue; (5) the practice of proselytism is rejected; (6) canonical form must not be a requirement in the future.

²¹⁴ See PAUL VI, *Matrimonia mixta*, p. 261.

6. The development after the 1983 Code very much depends on the particular norms enacted in the missions. These norms vary from place to place due to different circumstances; yet there are some profound similarities which might be condensed as follows:

(1) The promises and declarations, which are always required of the Catholic party before a dispensation or permission is granted, are to be made in writing. Some norms require the other party, the pastor, parents or close relatives and witnesses to sign also the written promise. If made orally, the pastor is to put the oral promise in writing. Since the non-Catholic party is not required to give the promises, there is no indication that the Catholic party can be excused from making the promises.

(2) These norms also indicate that the non-Catholic party is to be informed of the obligations and promises of the Catholic party either by the Catholic party him or herself or by the pastor during the pre-nuptial inquiry.

(3) All the norms agree in principle with the universal law (c. 1127, # 1) that the canonical form is to be observed for the validity of a mixed marriage celebration. If grave difficulties hinder its observance, a dispensation from form can be obtained from the local Ordinary of the Catholic party. The grave difficulties common to almost all of the previously discussed mission territories are: (a) the persistent refusal of the canonical form by the non-Catholic party or his or her family; (b) a serious conflict of conscience in any of the parties; (c) serious economic problems; (d) the loss of the very deep friendship; (e) a different form of celebration required by civil law. However, for the validity of a mixed marriage after obtaining a dispensation from form, there must be

some public form of celebration. In this regard, all the particular norms indicated that public form of celebration can be: (a) a celebration before a minister of a non-Catholic Church according to the prescribed form of the said Church; (b) a celebration before a civil official according to the prescribed legitimate civil form; (c) in some areas where there is no civil marriage, a celebration according to the recognized custom or culture of that region.

(4) Dual religious celebration in which the marital consent is asked more than once is forbidden. Yet some conferences of bishops indicated that joint celebration performed by a Catholic minister and a minister of another Church can be permitted by the local Ordinary who is to decide what kind of celebration is to be had, with due regard for the prescription of c. 1127, # 3.

C O N C L U S I O N

1. The attitudes of the Church towards mixed marriages in fact changed and developed, though very slowly, from a very strong opposition (prohibition, condemnation, and even also excommunication) to the more lenient and tender heart of a loving, caring and understanding "mother." This is very obvious from the extensive study above. These attitudes might be briefly highlighted as follows:

(a) The Church, in the first twelve centuries, strongly condemned, opposed, and prohibited any marriage entered into by a Catholic and a non-Catholic, either baptized or not. The only way to contract such a union was that the non-Catholic party promised to convert or to abandon heresy and then embrace the Catholic faith. There was no distinction between mixed religion and disparity of cult as is known today, although in the sixth century the Church seems to have started to see mixed marriage, especially with Jews, as a diriment impediment.¹ A further development towards the distinction between the two kinds of mixed marriages occurred in the twelfth century when Gratian started

¹ See footnotes 29, 30 and 175 in Ch. II.

to consider baptism as a fundamental element for a marriage to be valid and sacramental. During the period from the thirteenth century to the sixteenth, the distinction between the two was very obviously based on baptism, as pointed out by Thomas Aquinas.² However, the bitter opposition of the Church towards any mixed union was still going on. There were no formal *cautiones* required and also no formal dispensation granted by the Church. Such a marriage could be tolerated only if the non-baptized promised to convert or the so-called heretic renounced heresy and professed the Catholic faith.

(b) Dispensation from mixed marriage impediments, especially disparity of cult, became a major issue when the missionary activities of the Church reached the Oriental world and the newly discovered lands in the West such as the Americas in the sixteenth century. Since then and particularly after the establishment of the *Propaganda* (1622), under whose jurisdiction all missionary countries were put, the faculty to dispense was extensively granted to the missionaries, though certain conditions, such as giving the *cautiones* and presenting the grave causes, had to be fulfilled. Dispensation from mixed religion was not common until the late eighteenth century.

(c) After the Council of Trent, marriages, in the places where the Tridentine form had been promulgated, could not be validly entered into unless that form was observed. However, Benedict XIV, by his Constitution *Matrimonia* of 4 November 1741, exempted marriages of Catholics and baptized non-Catholics or so-called heretics in The Netherlands and Belgium from the required form. This provision, which was also called

² See footnotes 33, 34 and 177 in Ch. II.

the *Benedictine Declaration*, was later extended to Germany, Hungary, the United States of America, and Canada.³ About forty years after the *Benedictine Declaration*, the abjuration of heresy began to be abandoned when Pius VI, through his Apostolic Letter *Execuendo nunc* of 13 July 1782 to the archbishop of Malines, indicated that such a condition was no longer required.

(d) During the nineteenth century, although the mitigation of the rules occurred every now and then in one way or another, any mixed marriage was still strongly opposed and prohibited by the Church. The Church was always unwilling to grant a dispensation, unless the *cautiones* were given and at least a *causa gravis* was present. However, in extraordinary circumstances, according to Gregory XVI in his Apostolic Letter *Quas vestro* of 30 April 1841 to the bishops of Hungary, a dispensation from a mixed marriage impediment could be granted even without the *cautiones*.

(e) Furthermore, the Holy Office made a significant development when it stated in its decree of 4 June 1851 to the vicar apostolic of Manchuria that the impediment of disparity of cult could cease to bind, if, in particular and extraordinary circumstances such as during the persecution and war, the parties were unable to seek and obtain a dispensation.

(f) By the end of the nineteenth century, mixed marriage legislation had been relatively stable, despite some variations of rules in many areas. The *cautiones*, for

³ See footnotes 59 and 181 in Ch. II.

instance, had been reduced to only three since the beginning of the second half of the nineteenth century.

(g) That relatively stable legislation still continued to bind until it was codified together with many other mission faculties in the 1917 *Code of Canon Law*. The only change occurring prior to this Code was brought about by the Congregation of the Council's decree *Ne temere* of 2 August 1907. This decree made all Catholics anywhere, except in Germany but only in the cases of inter-church marriages, subject to the Tridentine form. Thus, by this very fact the *Benedictine Declaration* was revoked.

(h) As usual, various problems and difficulties in the missions always made the universal law impossible to be observed. For this reason, larger faculties were again granted during the period between the 1917 Code and Vatican II. One of the serious difficulties faced by some mission countries was the observance of the formal *cautiones*. Therefore, equivalent *cautiones* were accepted as a substitute. Amazingly, the equivalent *cautiones* later appeared as the general rule for the whole Church, though no longer called equivalent, in the Sacred Congregation for the Doctrine of the Faith's instruction *Matrimonii sacramentum* of 18 March 1966, reiterated in Paul VI's *motu proprio Matrimonia mixta* of 31 March 1970, and then codified in the 1983 *Code of Canon Law*.

(i) After the 1983 Code, a new historical period of development began. It was probably for the first time in the history of the Church that the particular Churches, by the law itself, were granted large powers to enact particular laws. Meanwhile, at least for the time being, norms such as mission faculties are no longer issued by the Holy See. Therefore, whatever development might happen during this post-1983 Code period will

be through particular legislation. These norms, again, were made possible by the Code. For instance, the Code laid down some norms on mixed marriages, but the manner of implementing the norms was left to the particular Churches (individual bishops, bishops' conferences).⁴ For this reason, such a manner varies from one country to the other. And, of course, this applies equally to mission and non-mission countries.⁵

2. Mixed marriage is one of the most difficult issues the Church has had to cope with since its early age. This unpleasant experience haunted the Church for centuries; yet it is through that experience that mixed marriage legislation itself developed. It is clear through this study that the legislation of mixed marriage developed very slowly and step by step from below, so to speak, namely from the real situation of the faithful, and not simply imposed from above by the Church authorities. Therefore, missionary law legislation usually reflects the concrete situation of the people. The role of the ecclesiastical authorities throughout the past centuries, as this study indicated, was no more than providing the legal responses, directions, and solutions to the needs, problems,

⁴ See c. 1126.

⁵ To know the substance of missionary law exactly as it is, one should go through at least three steps: a) try to understand the complex missionary activities in missionary countries with diverse cultures, customs, difficulties, and needs; b) examine the various documents issued by various competent ecclesiastical authorities from time to time when dealing with certain issues in missionary countries; c) read critically the reference books or articles published by those whose expertise in this field of missionary law is recognized.

and difficulties of missionary countries. It was not required, in fact, that the general law be implemented blindly when it appeared to be ineffective.⁶

3. Mixed marriage legislation as commonly known in the universal law (*Code of Canon Law*) today seems to have developed, at least partially, through missionary law during the course of many centuries. All aspects of the universal law legislation on mixed marriages are found in the development of missionary law. The main point to be kept in mind in this development is that the Church, during the past centuries, always tried to provide some mixed marriage regulations which could answer the needs and render possible solutions for various peoples in their concrete situation. This might be a very good lesson to be taken into consideration when a law that will affect the common good of various peoples is to be issued. It is very difficult indeed to enact a law which reflects and satisfies the variety of the faithful's situation in many parts of the world. Nonetheless, common principles are not impossible to be made, and the details pertaining to the manner or procedure of implementation should be left to the particular Churches.

⁶ The necessity for studying and understanding the needs of the faithful in their various backgrounds (cultures, customs, circumstances), is strongly recommended before enacting a law. A law must reflect these backgrounds, lest it will be strange, alien, and overburdening. By way of example, for the people who live in the situation of famine (in which they only have a very simple meal a day if they are fortunate) during their lifetime, a law of fasting which obliges them to have only one full meal a day during some penitential days is irrelevant. Let us remember that no one is bound to do the impossible.

4. Unlike mixed marriage in the past centuries, mixed marriage today is not something to be condemned or prohibited by the Church. The spiritual welfare of the Catholic party and the children is indeed a serious cause for concern; yet it should not be the cause for condemnation, opposition, and prohibition. Such a way will never solve the problems. In this democratic age, perhaps the best way to handle the mixed marriage question is by promoting ecumenical dialogue and fostering pastoral cooperation with other Christian Churches. This has been done very well by many of the particular Churches.

5. History shows, among other things, that (a) in particular and extraordinary circumstances the Ordinary could dispense from the *cautiones* (but never from the *conditiones*), (b) a mixed marriage could be validly and licitly entered into without dispensation, and (c) the impediment of disparity of cult could cease to bind. Seen from this history, it is not impossible if the same rules could be applied in many mission countries whenever they fall in similar circumstances. In spite of that, particularly with regard to the baptism and religious education of the children, the decision should be left to the two parents to make in a loving and prayerful dialogue. Such a norm not only will apply the ecumenical movement in the *ecclesia domestica*, but also respect and recognize the primary rights and obligations of both parties in their children's education.

6. After dealing with the development of mixed marriage legislation and how the Church coped with the problems related to it during the past few centuries, the

significance of some areas in the present universal canon law on marriage to the situation in many mission countries could be seriously questioned. The following - though further studies are still needed - are three examples:

(a) With regard to mixed marriage itself, a question to be asked is whether the permission or a dispensation to enter into an inter-church marriage or an inter-faith marriage should be granted only by local Ordinaries (cc. 1124-1125). It is not impossible though, that because of the peculiar situation in the missions the faculty to give the permission or the dispensation to enter into a mixed marriage could be granted by or delegated to all parish priests in the diocese (cc. 132; 137), though with the condition that the faculty is to be exercised within their respective territories only.⁷

(b) Canon 1057, # 1, states that only the consent of the two parties makes the marriage. True, but this might be very offensive and unacceptable to many societies, according to whose customs or traditions, marriage is considered as both a personal and a communitarian or social affair.⁸ In practice, a marriage in these societies is not only

⁷ So far, perhaps only the particular churches in New Zealand have taken such a step. In the faculty sheets issued under the title FACULTIES by the Episcopal Conference of New Zealand (no specific date indicated), p. 6, reads:

"If a parish priest, to permit the marriage between two baptized Christians, one of them baptized in the Catholic Church or received into it after baptism and having not defected from the Church by a formal act, the other a member of a Church or ecclesial community not in full communion with the Catholic Church. Their proper exercise of this faculty requires that the usual conditions be fulfilled (c. 1125).

If a parish priest, to dispense from the impediment of disparity of cult. The proper exercise of this faculty requires that the usual conditions be fulfilled (c. 1125)."

⁸ See F. URRUTIA, "The Challenges on Canonical Doctrine on Marriage Arising from Africa," in *Studia Canonica*, 23 (1989), pp. 5-26; P. Riwu, "'Pastoral Musyawarah' of the Archdiocese of Ende, Indonesia," in *East Asian Pastoral Review*, 28 (1991), pp. 211-

contracted by the parties (a man and a woman) or is not only a union of two people, but also the two families, two clans or tribes and societies. For a further clarification, it is noteworthy to quote Fr. Philip Riwu, former rector of the Major Seminary of St. Peter in the island of Flores (Indonesia), who wrote as follows:

It has already been realized that one of the main problems of marriage faced by young couples was the disharmony between traditional and church marriage, which caused much confusion.

[...] Church marriage as regulated by the Code of Canon Law was more or less coloured by western traditional marriage customs. There should be a way to inculturate church marriage with our own traditional marriage. The present church marriage gave prime importance to the juridical moment of marriage, something quite irrelevant in traditional marriage which accentuated the marriage process and the social aspect. [...]

For us marriage was a process that grew in stages from courtship and on until death. Marriage did not just suddenly happen in one particular moment or rite where a contract was made between a man and a woman based on the consent of both sides in front of witnesses, church or otherwise.⁹

[...] In marriage, the problem is complicated by the basic difference between the Christian (western) and traditional concept: the juridical moment against the lifelong process; contract or consent by two individuals against communion of families, clans, villages, the whole society. Of course traditional marriage went on as usual, the husband and wife living together happily because they had been properly married, and church blessing was asked only as an afterthought "to make it complete", all fulminations against living in sin and threats of hellfire notwithstanding.¹⁰

213. See also B. H. OSONKWOR, *The Role of Matrimonial Consent in Igbo Traditional Marriage in the Light of the New Canonical Legislations: A Comparative Study*, Rome, Pontificia Universitas Urbaniana, 1985, pp. 18-38.

⁹ Riwu, "'Pastoral Musyawarah' of the Archdiocese of Ende, Indonesia," pp 212-213.

¹⁰ Ibid., p. 221.

Interestingly, Fr. Riwu's remark is very similar to a statement from Africa that reads:

As a matter of fact, most of the Church marriages are a post factum "patching up" or fixing up marriage in Church afterwards. After the traditional marriage celebration, many of the Christians avoid the "church 2nd marriage" and no one frowns at that; for now, they are truly and validly married in the eyes of their community. They find no sense in repeating a ceremony which would involve them in enormous expenditure. Nobody finds fault with them, except the Church authorities who brand them as "those living in sin" and deny them Holy Communion. [...] And by this attitude, the Christians find themselves faced by a difficult choice between loyalty to the authority of the Church and loyalty to their native cultural inheritance.¹¹

Fr. Riwu is clearly talking about customary law and customary marriage which in practice are highly respected more than Church law and Church marriage which are more or less still alien to the people.¹² In customary law, the consent of parents or guardians is most often considered as a condition for the validity of a customary marriage. This indeed is not acceptable to the Church¹³ with regard to a Church marriage,¹⁴ for the consent of parents or the families is simply needed, not required, for the liceity to marry in the Church. The problem is that the Church's point of view is still difficult to accept as part of Christian life by the people in question, who, from an ecclesiological stand

¹¹ OSONKWOR, *The Role of Matrimonial Consent in Igbo Traditional Marriage*, p. 64.

¹² For an excellent treatment on customary law, see J. P. McINTYRE, *Customary Law in the Corpus iuris canonici*, San Francisco, Mellen Research University Press, 1991, esp. ch. 1, pp. 1-34 and ch. 3, pp. 73-116.

¹³ The Church in this case is clearly "the hierarchy" or "the legislator(s)."

¹⁴ The phrase "Church marriage" means the Christian or the Catholic marriage.

point, are also the Church, yet they have their own traditions and what is called customary laws.¹⁵ We see here the tension between the Church as the hierarchy or the legislator(s) with canon law and the Church as the people of God in the missions with their customary laws. This causes serious problems. How to solve them? So far, Fr. Riwu simply suggests that there should be a way to inculturate the Church marriage with the traditional, customary, marriage. In fact, the necessity of inculturation in mission countries has been emphasized by the Church for so long. In 1659, the *Propaganda* sent an instruction to the missionaries in China saying among other things:

What could be more absurd than to try to transplant France, Spain, Italy, or some other part of Europe into China? It is not these that you have to introduce but the faith, which will never despise or violate the rites and usages of any people provided they are not perverse but instead intends to safeguard and strengthen them.¹⁶

Even nearly a century before the above instruction from the *Propaganda*, the Church, through the Council of Trent, had already indicated such a necessity, as it stated that "If any provinces have in this matter other laudable customs and ceremonies in addition to the aforesaid [the canonical form], the holy Council wishes earnestly that they be by all means retained."¹⁷

¹⁵ See Dr REPER, *The Sacraments on The Missions*, pp. 225-226.

¹⁶ *Collect.* (1907), vol. 1, no. 135: "[...] Quid enim absurdius quam Galliam, Hispaniam, aut Italiam, aut aliam Europae partem in Sinas invehere? Non haec, sed fidem importare, quae nullius gentis ritus et consuetudines, modo prava non sint, aut respuit aut laedit, imo vero sarta tecta esse vult." [...]. The English translation from OKONKWOR, *The Role of Matrimonial Consent in Igbo Traditional Marriage*, p. 58.

¹⁷ CONCILIIUM TRIDENTINUM, SESS. XXIV, cap. I, 11 November 1563: "Si quae provinciae aliis ultra praedictas laudabilibus consuetudinibus et caeremoniis hac in re utuntur, eas

For the purpose of this study, the following is a brief synopsis on inculturation. Without going into details, however, maybe the best way to begin is by asking: What is inculturation exactly? Many experts (anthropologists as well as theologians) acknowledge that the term "inculturation" is not easy to define precisely. Yet, some description is available. Theologians, especially, have consistently attempted to reserve the term inculturation for expressing the relationship between the Christian message or Christian life and culture.¹⁸ It is understood as "the dynamic relation between the Christian message and culture or cultures; an insertion of the Christian life into a culture;"¹⁹ or "as an expression of the process by which the Church becomes inserted in a given culture."²⁰ Fr. A. Roest Crollius, S.J., describes the process of inculturation in this way:

omnino retineri sancta synodus vehementer optat." The English translation from SCHROEDER, *Canons and Decrees on the Council of Trent*, p. 185.

¹⁸ M. DE CARVALHO AZEVEDO, *Inculturation and the Challenges of Modernity*, Rome, Pontifical Gregorian University, 1982, p. 7. In p. 10, Carvalho Azevedo describes "culture as the set of meanings, values and patterns which underlie the perceptible phenomena of a concrete society, whether they are recognizable on the level of social practice (acts, ways of proceedings, tools, techniques, costumes and habits, forms and traditions), or whether they are the carriers of signs, symbols, meanings and representations, conceptions and feelings that consciously or unconsciously pass from generation to generation and are kept as they are or transformed by people as the expression of their human reality." And he goes on saying that "culture, therefore, is the deepest code to reveal a human, social group and to make it understandable. On the one hand, it is culture that gives a concrete human group the meaning of life. On the other hand, without having the key to understand what life is for a group, would outsiders be able to have an insight into the group at all?"

¹⁹ *Ibid.*, p. 11.

²⁰ A. ROEST CROLLIUS, *What is So New About Inculturation?*, Rome, Pontifical Gregorian University, 1984, p. 2, footnote 3.

The inculturation of the Church is the integration of the Christian experience of a local Church into the culture of its people, in such a way that this experience not only expresses itself in elements of this culture, but becomes a force that animates, orients and innovates this culture so as to create a new unity and communion, not only within the culture in question but also as an enrichment of the Church universal.²¹

If inculturation is understood as the process of the insertion or integration of the Church or of Christianity into a given culture or cultures, there seems to be no question that Church law is also included in that process. Principle no. 10 on the revision of the Code states among other things that the systematic framework of the Code should reflect the mind and spirit of the conciliar decrees.²² And amazingly, this was verified by Pope John Paul II at the moment when he promulgated the new Code by saying that:

"[...] it [the Code] corresponds perfectly with the teaching and character of the Second Vatican Council. Therefore not only because of its content but also because of its very origin, the Code manifests the spirit of this council [...]."²³

There is no doubt, therefore, that inculturation also exists in the mind and has become the spirit of the Second Vatican Council. This is very obvious in the following three statements:

It has come about through divine providence that, in the course of time, different Churches set up in various places by the apostles and their

²¹ Ibid., pp. 15-16.

²² J. A. ALESSANDRO, "General Introduction," in *CLSA Commentary*, pp. 5-7.

²³ JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges*, 25 January 1983, in *AAS*, 75 (1983), pp. viii-ix: "[...] cum magisterio et indole Concilii Vaticani II plane congruit. Quare Codex non modo ob ea quae continet, sed etiam iam in suo ortu prae se fert afflatum huius Concilii, [...]. The English translation from *CLSA Commentary*, p. xxiv.

successors joint together in a multiplicity of organically united groups which, whilst safeguarding the unity of the faith and the unique divine structure of the universal Church, have their own discipline, enjoy their own liturgical usage and inherit a theological and spiritual patrimony.²⁴

[...] they constitute large and distinct groups united by enduring cultural ties, ancient religious traditions, and strong social relationships. Of these, some belong to one or other of the great religions, others have no knowledge of God, while others expressly deny the existence of God and sometime even attack it. If the Church is to be in a position to offer all men the mystery of salvation and the life brought by God, then it must implant itself among all these groups in the same way that Christ by his incarnation committed himself to the particular social and cultural circumstances of the men among who he lived.²⁵

[...] the Christian life will be adapted to the mentality and character of each culture, and local traditions together with the special qualities of each national family, illumined by the light of the Gospel, will be taken up into a Catholic unity. So new particular Churches, each with its own traditions, have their place in the community of the Church, the primacy of Peter which presides over this universal assembly of charity all the while remaining intact.²⁶

Thus, again, the Church very clearly recognizes the differences (customs, cultures) in the Church itself and the need for inculturation. Therefore, it would be very strange and sociologically confusing, even also illegitimate from a theological point of view, if we pick up, for instance, a marriage institution according to a certain culture in Latin America and then apply it to the whole Church while ignoring the positive values of

²⁴ *LG*, no. 23, in *AAS*, 57 (1965), p. 28 (the English translation from *FLANNERY*, pp. 377-378).

²⁵ *AG*, no. 10, in *AAS*, 58 (1966), p. 959 (the English translation from *FLANNERY*, pp. 824-825).

²⁶ *AG*, no. 22, in *AAS*, 58 (1966), p. 974 (the English translation from *FLANNERY*, p. 840).

marriages and families which are embodied in other cultures.²⁷ Consequently, only inculturation is acceptable, for the Church and the Gospel message never exist without a real people in a real culture. If before the 1983 Code, the missionaries or local Churches in the missions needed what used to be called apostolic faculties, maybe after that Code what they need most is inculturation. And perhaps for this reason Fr. John McIntyre, S.J., suggests:

So local Churches must learn how to respond accurately to their present concerns, however expressed. That is, a diocesan Church which does no more than reproduce the Church of another time and place is not fulfilling its vocation in the Spirit. Local customs may indeed mediate between divided loyalties by rendering them incarnate. The cultural pluralism characteristic of our time requires an appropriate hermeneutic, one that will tax the energies and imagination of all churchmen.²⁸

How is inculturation or the process of the integration of the Church together with many of its laws, if not all, in a given culture to be undertaken and what will it be like? Nobody seems to know exactly. Perhaps for now we should just leave this question for future studies.

(c) Canon 1103 indicates that a marriage cannot be validly contracted if entered into by force or fear, even inflicted unintentionally. However, force and fear are common and oftentimes cannot be avoided in the society which considers marriage as both personal and communitarian as previously indicated. The most common element, which causes a marriage to be entered into, is the so-called *reverential fear*. It is a fear of displeasing the

²⁷ See OKEKUNWO, *The Role of Matrimonial Consent in Igbo Traditional Marriage*, p. 62.

²⁸ MCINTYRE, *Customary Law in the Corpus iuris canonici*, p. 201.

parents or family or families if the marriage they want is opposed. It is obvious that this fear is not caused by a physical threat or force, but rather emerges from the custom or culture. Physical force can take place when a party rejects the proposed marriage. This usually happens when the families of both sides have already approved the marriage to be contracted. Thus, it is clear that the consent of the families very often prevails over that of the parties. The problem, which is not realized by many, is that force and fear, reverential or not, in a certain degree can destroy the use of reason and hence affect the true consent. Therefore, if force and fear are taken seriously as the grounds for the nullity cases, it is very likely that 90% of the marriages in many mission countries could be declared null and void.²⁹

* * * * *

If anything but God has its own beginning and its end, so does this work. And if we believe in the Bible which also states that "there is nothing new under the sun" (Qo 1:9), maybe we have to say also that there is nothing new in this work in that biblical sense. However, this study has convinced the author more than ever that everything we do, particularly in enacting and executing the laws, must redound into the *salus animarum*,

²⁹ See Dr. REPPER, *The Sacraments on The Missions*, pp. 223-225; T. P. DONA, comments on c. 1103 in *CLSA Commentary*, pp. 789-790. For an excellent treatment on reverential fear, see R. F. KNOWLES, *Reverential Fear in Matrimonial Cases in Asiatic Countries: Rota Cases; A Historical Synopsis and Commentary*, Canon Law Studies, no. 294, Washington, D.C., The Catholic University of America Press, 1949, pp. 1-85.

which is always the supreme law of the Church (c. 1752). There is a Chinese proverb saying that "If I point at the moon, do not look at my finger but the moon." Indeed the law must be enacted, but its function must remain always as a "finger", because the *salus animarum* is always the "moon".

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BIOGRAPHICAL NOTE

Fr. Benyamin Y. Bria was born of a Catholic family on 7 August 1956 in a small village about 40 km south of the city of Atambua on the Island of Timor, Indonesia. He attended elementary school (1964-1969), junior high school (1970-1972), senior high/minor seminary (1973-1976). He then attended St. Peter's Major Seminary, Ritapiret, on the Island of Flores (1977-1984). He was ordained deacon on 28 October 1984 and then priest on 29 June 1985.

After ordination to the priesthood, he was named a parochial vicar to the parish of St. Theresa in Kefamenanu, about 80 km west of Atambua. In 1987, he taught at the Diocesan Minor Seminary of St. Mary Immaculate, Lalian, near Atambua. In the Fall of 1988, he started his canon law studies, obtaining the Licentiate in Canon Law (J.C.L.) in 1990 at The Catholic University of America, Washington, DC. In the Spring of 1991, he began his doctoral studies in canon law at Saint Paul University, Ottawa, Canada.