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**THE VALIDITY OF INTER-CHURCH MARRIAGES IN INDIA:
A COMPARATIVE STUDY OF THE LATIN AND THE ORIENTAL LEGISLATION**

by
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A dissertation submitted to the Faculty of Canon Law,
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ABSTRACT

At present, the Catholic Church has two separate canon law Codes: one for Latins and another for Orientals, because the Church distinguishes between the Eastern and Western traditions. The hypothesis which initiated this study was that there might be potential problems in India in the future created by differences in the two Codes relating to the adjudication of marriage nullity cases, when non-Catholics are involved. In India, Christianity is a mosaic of rites and cultures which might complicate the adjudication process. The study explores this situation to assess the level of conflicts and lack of clarity created by differences between these two Codes; and also to determine how well the Catholic Church recognizes the regulations of other denominations.

The study first looks at different ecclesial communities in India. Examining the origin and development of different Christian communities there, it is brought to light how the juridical situations of the Church fluctuated due to the influence of different cultures and colonial powers, and how those influences caused divisions and segregation in the Church, leading to different denominations. Then, the ways in which the concept and law on validity of mixed marriages developed in the Church was explored. It was observed that certain factors had their own importance in connection with particular situations which existed in the time frame of history, and that they were incorporated into the system of law to solve the particular problems of their time.

This study then focuses more specifically on c. 1059 of the Latin Code and c. 780 of the Oriental Code. These canons deal with the situations in which non-Catholics are brought into the orbit of canon law. The law states: "Even if only one party is Catholic," marriage is regulated by canon law. The provisions of law relating to the validity of inter-Church marriages were applied in the specific situations of mixed marriage in India creating different scenarios to see how they fit, and to see what problems they might create in the future. Thus, the conflicts between different provisions in different Codes and the confusion they create in nullity cases are brought to light. The Oriental Code recognizes in cc. 780-781 the competence of the non-Catholic Churches to be governed by their own laws. But, it does not seem that the Latin Code achieved fully the aim of translating into canonical terms the ecumenical teachings of Vatican II in this regard. However, the Oriental Code which recognizes non-Catholic law in mixed marriages, has rather inflexible regulations regarding dispensations from canonical form. The Codes hold somewhat opposite policies with regard to a Catholic leaving the Catholic faith. The Latin Code recognizes the fact, while the Oriental Code does not. This also creates confusion and problems with regard to the validity of mixed marriages. Different policies for Orientals and Latins regarding the sacred rites for marriage might even imply a divergence in the basic theology of marriage.

While evaluating the related canons against the background of the ecumenical movement and social reforms in India, the study delves deeper into the doctrines of the Church connected with ecumenism and marriage. Hence, as a conclusion, this critical evaluation of the relevant canons leads to suggest a further revision of certain norms to bring the two Codes into harmony with each other.

TABLE OF CONTENTS

ACKNOWLEDGMENTS	vi
ABBREVIATIONS	vii
GENERAL INTRODUCTION	x
Chapter One:	
THE CHURCH IN INDIA: A MOSAIC OF CULTURES	1
INTRODUCTION	1
I. THE EARLY CHURCH IN INDIA	2
A. Ancient India	2
1. A Mosaic of Cultures	2
2. A Variety of Religions	4
B. Beginnings of Christianity: Apostolic Origins	5
1. Trade Relationships	5
2. Traditions	6
3. Testimonies	7
C. Connections with the Oriental Churches	8
D. Socio-political Status and the Legal System	12
1. Socio-political Status	12
2. The Legal System	16
II. WESTERN INVOLVEMENT IN THE INDIAN CHURCH AND IN ITS LAWS	19
A. The Portuguese Influence	19
1. Latinising Policy	19
2. Synod of Diamper	21
3. Aftermath of the Synod of Diamper	24
B. Establishment of the Latin Church in India	27
1. Padroado Jurisdiction	27
2. De Nobili Movement	29
3. Propaganda Fide Jurisdiction	31
4. Indian Hierarchy	33

TABLE OF CONTENTS

ii

C.	The Origin and Development of Non-Catholic Churches in India	33
1.	The Origin of Orthodox Churches	33
2.	Split over Patriarchal Authority	34
3.	Anglican Influence and Origin of the Marthomite Church	35
4.	Other Non-Catholic Thomas Christians	36
a)	Independent Jacobites of Malabar (Anjoorians)	36
b)	The Nestorians/ <i>Surais</i>	37
c)	The Church Mission Society (CMS)	38
d)	The St. Thomas Evangelical Church of India	38
5.	Origin of Protestant Churches	38
III.	PRESENT SITUATION OF THE CHURCH IN INDIA	39
A.	A General Outlook	39
B.	The Latin Hierarchy and its Power of Governance	43
C.	The Syro-Malabar Hierarchy and its Power of Governance	43
D.	The Syro-Malankara Hierarchy and its Power of Governance	46
E.	The Non-Catholic Churches of India Today	48
	CONCLUSION	51
Chapter Two		
	A GROWING AWARENESS OF THE CHURCH'S JURISDICTION IN MATTERS RELATING TO INTER-CHURCH MARRIAGES	54
	INTRODUCTION	54
I.	THE PRE-CODE LEGISLATION	56
A.	Early Centuries	56
1.	Fathers of the Church	57
2.	Local Councils	59
3.	Liturgical Regulations	62
4.	Tests of Validity	63
B.	Collections of Laws	64
C.	Disputes on Church's Jurisdiction over Marriage	68
D.	Council of Trent and Later Developments	71
E.	Special Situations in India	77
1.	Laws of Ancient India	77
2.	Laws of Early Christians of India	80
3.	Western Influence	82

TABLE OF CONTENTS

iii

II.	THE CODIFICATION OF CANON LAW	84
A.	<i>Codex Iuris Canonici</i> of 1917	84
1.	Promulgation of the Code	84
2.	Provisions in the Code	85
B.	The Codification of Oriental Law on Marriage	88
1.	Pre-Code Situation	88
2.	Promulgation of <i>Crebrae Allatae</i>	90
3.	Provisions in <i>Crebrae Allatae</i>	92
III.	VATICAN II AND THE REVISION OF LAW	97
A.	The 1983 Code (<i>CIC</i>)	97
B.	The Oriental Code of 1990 (<i>CCEO</i>)	102
	CONCLUSION	103
Chapter Three		
	LAWS TO BE OBSERVED FOR THE VALIDITY OF MARRIAGE RELATING TO NON-CATHOLICS	105
	INTRODUCTION	105
I	PREPARATION AND PROMULGATION OF CANONS 1059 OF <i>CIC</i> AND 780-781 OF <i>CCEO</i>	106
A.	Background Study of these Canons	106
1.	Pre-Vatican II Attitude	107
2.	Different Opinions	110
3.	Orthodox Policies	112
4.	<i>Crebrae Allatae</i>	114
5.	Vatican Council II	117
6.	Rotal Decisions	120
B.	Revision of Law	122
1.	Revision of Law for the Latin Church	123
a)	Jurisdiction of Canon Law over Non-Catholics	123
b)	<i>Lacuna Legis</i>	129
2.	Revision of the Law for the Oriental Churches	131
C.	Promulgated Texts Referring to the Marriages of Non-Catholics	134
D.	Comparison of Canon 780 of <i>CCEO</i> with Canon 1059 of <i>CIC</i>	135

TABLE OF CONTENTS

iv

II.	APPLICATION OF CANONS REGARDING THE VALIDITY OF MARRIAGE RELATING TO NON-CATHOLICS	138
A.	General Norms	138
B.	When an Eastern Non-Catholic is Involved	139
1.	Marriage of Eastern Non-Catholics among Themselves	139
2.	Marriage of Eastern Non-Catholics with Protestants	140
3.	Marriage of Eastern Non-Catholics Converted from Protestantism	141
4.	Marriage of Eastern Non-Catholics with Catholics	141
C.	When a Western Non-Catholic is Involved	145
1.	Marriage of Protestants among Themselves	146
2.	Marriage of Protestants Converted from Orthodox Churches	146
3.	Marriage of Protestants with Catholics	147
D.	When One who has left the Church is Involved	148
1.	Leaving the Church	148
2.	Marriages between Those who have left the Church and Non-Catholics	150
3.	Marriages between Those who have left the Church and Catholics	150
4.	Marriages of Oriental Catholics who have left the Church	151
E.	Dispensation from the Canonical Form of Marriage	152
	CONCLUSION	153
Chapter Four		
	EVALUATION OF THE PRESENT SITUATION AND SOME PROPOSALS FOR THE FUTURE	155
	INTRODUCTION	155
I.	THE PRESENT CONTEXT	157
A.	Principles Governing Ecumenism	157
1.	The New Testament Teaching on Unity	157
2.	Vatican II on Ecumenism	158
3.	Post-Conciliar Approach to Ecumenism	161
4.	Post-Code Documents	164
a)	Directory on Ecumenism	164
b)	<i>Ut Unum Sint</i>	166
B.	Social Reforms and Ecumenical Dialogue in India	169
1.	Social Reforms in India	169
2.	The Ecumenical Dialogue in India	173

TABLE OF CONTENTS

v

C.	The Context in Which Mixed Marriages are Celebrated	177
1.	Social Acceptance or Tolerance	177
2.	Ecclesial Acceptance or Tolerance	178
II.	EVALUATION OF THE LEGISLATION	179
A.	Difficulties in Interpreting the Legislation	179
1.	Positive Approach Towards Ecumenism	179
a)	Ecumenical Approach in the Codes	180
b)	Law on Permission for Mixed Marriage	181
2.	Negative Approach Towards Ecumenism	183
B.	Filling the “Lacuna” in the Law	186
C.	The Canonical Form and Consequences for the Validity of Marriage	190
1.	Concept of Marriage as a Sacrament	191
2.	Acceptance of Civil Marriage Form in Mixed Marriages	197
3.	Law on Dispensation from Canonical Form	200
III.	PROPOSALS FOR THE FUTURE	202
A.	Relating to the Law to be Observed in Nullity Cases of Non-Catholics	202
B.	Relating to Dispensation from the Canonical Form of Marriage	203
	CONCLUSION	208
	GENERAL CONCLUSION	210
	BIBLIOGRAPHY	221
	BIOGRAPHICAL NOTE	247

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ABBREVIATIONS

AAS	= Acta Apostolicae Sedis
AA.VV.	= Auctores Varii
AG	= Ad Gentes
Apost. Exhort.	= Apostolic Exhortation
AS	= Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani Secundi
ASS	= Acta Sanctae Sedis
c.	= canon; circa
CA	= Crebrae Allatae
Cap.	= Caput
C.B.C.I.	= Catholic Bishops Conference of India
CCEO	= Codex Canonum Ecclesiarum Orientalium
CIC	= Codex Iuris Canonici 1983
CIC Fontes	= Codex Iuris Canonici, Fontes
CLD	= Canon Law Digest
CLSA	= Canon Law Society of America
CMS	= Church Mission Society
CNI	= Church of North India
Const.	= Constitutio
Const. ap.	= Constitutio Apostolica
Const. past.	= Constitutio Pastorale
Const. dogm.	= Constitutio Dogmatica
CSI	= Church of South India
Decl.	= Declaratio

ABBREVIATIONS

viii

Decr.	= Decretus
DH	= Dignitatis Humanae
DTC	= Dictionnaire de Théologie catholique
ed(s)	= Editor(s)
Encycl.	= Encyclica
Ep. Encycl.	= Epistola Encyclica
Govt.	= Government
IMR	= Indian Missiological Review
LG	= Lumen Gentium
Lib.	= Liber
Lit. ap.	= Littera Apostolica
Lit. encycl.	= Littera Encyclica
LMS	= London Mission Society
Ltd.	= Limited
Mal.	= Malayalam
m.p.	= Motu Proprio
ms.	= Manuscript
NCE	= New Catholic Encyclopedia
OE	= Orientalium Ecclesiarum
OIRSI	= Oriental Institute of Religious Studies, India
PCCICR	= Pontificia Commissio Codici Iuris Canonici Recognoscendo
PCCICOR	= Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo
PG	= Patrologia Graeca, J.P.Minge (ed.), Parisiis 1857-1886
PL	= Patrologia Latina, J.P. Minge (ed.), Parisiis 1844-1865
Pvt.	= Private
SCC	= Sacra Congregatio Concilii
SC	= Sacrosanctum Concilium
SCIC	= Schema Codicis Iuris Canonici

Sess.	= Sessio
S.P.C.K.	= Society for the Propagation of Christian Knowledge
S.P.G.	= Society for the Propagation of Gospel
SRRD	= Sacrae Romanae Rotæ Decisiones seu Sententiae
STAR	= St. Thomas Academy for Research
Tom., t.	= Tome
tran.	= Translation
UR	= Unitatis Redintegratio
VJTR	= Vidyajyoti Journal of Theological Reflection

GENERAL INTRODUCTION

Marriage is one of those basic institutions of society for which concepts and regulations have evolved as human society itself developed. It is an important element in human life, helping society to move from generation to generation through the call of God for love and intimacy. From the time religion became part and parcel of human conduct, marriage has been considered a religious event, and religious customs and values have developed in relation to it. Ancient civilizations were often based on religion; this was particularly evident in early India. Hence, there was little conflict, if any, between civil legislation and religious customs. Civil authority used its legislative and judicial power to govern society and religion supported it with moral principles.

When the Church began to function as a strong faith community, it also began to develop its own concept of marriage, treating the relationship between a man and a woman in marriage like the mystery of the union between Christ and His Church. Marriage was understood both as a spiritual partnership and as a sacrament, more than just as a bond to provide for physical need. According to the teachings of the Church, it is the partnership of the whole of life between a man and a woman, enabling them to grow into the fullness of love by mutual self-gift. Hence, the Church authorities developed rules separate from civil legislation to govern marriage and called for social recognition of their competence over marriage legislation. This, at times, led to conflicts between the Church and civil authorities.

Although divorce, the breaking of the marriage bond, is accepted today by most civil governments and even by many religious communities including the Christian Orthodox and Protestant Churches, the Catholic Church recognizes most sacramental marriages as

indissoluble, and hence, does not grant divorce decrees. Eastern theology and canon law interpret the Gospel regarding this matter quite differently from the Western Church. The Orthodox Churches retain the concept of divorce for adultery (*porneia*) found in the Gospel,¹ and draw from its effect the dissolution of a marriage, thus permitting remarriage. The only limitation was and still is the prohibition of the so-called "tetragamy", i.e., marriage after the third divorce.

If a marriage fails and the relationship is irremediably damaged, the Catholic Church is willing to examine the situation regarding the possibility of a "declaration of nullity", which is a statement by a Church tribunal that what appeared to be a true marriage, in fact, lacked something necessary for such a bond. The Tribunal arrives at this conclusion through an investigation of three basic elements of the marriage contract: a) consent, the free will of the parties to the marriage; b) legal personal qualification in relation to an impediment as defined in law; c) canonical form by which the consent is publicly manifested.

As the Catholic Church claimed its right to regulate the marriages of all the baptized, based upon the fact that Christian marriage is a sacrament and indissoluble, it inevitably created conflicts with non-Catholic Churches, especially in mixed marriage cases because of different policies and approaches. Furthermore, the Catholic Church introduced regulations regarding mixed marriage, at times under pain of nullity, because the parties to a mixed marriage share the same baptism although they do not profess the same beliefs. In their marital relationship, the tragic state of the Christian Churches is displayed: they are united and divided at the same time. This strange situation is well demonstrated in the expression which became current during the Second Vatican Council: "separated brethren", *fratres seiuncti*. This expression stresses the unity (we are brethren), while it reflects the disunity (we are separated). It also captures both the tragedy and absurdity of the situation.

¹ Mt. 5: 32, 19: 9.

The problem is handled in theology by speaking of a partial *communio*, or of *communio* by degrees although such an expression is not used in the Codes of canon law. However, such a complex situation is difficult enough to explain theologically; it is nearly impossible to make satisfactory laws for it.²

The perfect union of persons and the full sharing of life which constitutes the married state are more easily assured when both partners belong to the same faith community. However, despite prohibitions, the number of mixed marriages continues to be high. The results of the growth and spread of civilization and industry, modern means of communication, urbanization and the consequent rural depopulation and migrations in great numbers,³ have broken some of the traditional, racial, cultural, geographical, and religious barriers to mixed marriages.

In this context, we concentrate in this study on matters connected with the validity of Christian marriages, especially inter-Church marriages. According to canon law, if a person who had been in a non-Catholic marriage wishes to marry a Catholic, he/she is not free to do so until an ecclesiastical tribunal has adjudicated whether the previous marriage was valid or not. With respect to marriage legislation in canon law, Christians are divided into Latin Catholics, Oriental Catholics, Oriental non-Catholics — including members of the pre-Chalcedonian Churches — generally called Orthodox, Western non-Catholics, those who have formally rejected the Catholic faith, and the non-baptized.

Against this background, we shall examine canon law relating to the competence of the Catholic Church regarding the validity of a marriage when a non-Catholic is a party to it. At present, the Catholic Church has two separate Codes: one for Latins and another for

² L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions* [=Marriage in Canon Law], Wilmington, Michael Glazier, 1988, p. 180.

³ PAUL VI, *Apost. Letter, Matrimonia Mixta*, March 31, 1970 in *AAS*, 62(1970), p. 257; see also JOHN PAUL II, *Apost. Exhort. Familiaris Consortio*, November 22, 1981, in *AAS*, 74(1982), pp. 81-191.

Oriental, because the Church distinguishes between Eastern and Western traditions consisting of 22 distinct *sui juris* Churches.⁴ The Latin Church or the Western Catholic Church and the 21 Eastern Catholic Churches, each have their own hierarchy in communion with the bishop of Rome. The canons of the *CIC* are addressed to members of the Latin Church, whereas those of the *CCEO* affect members of the Eastern Churches, unless expressly stated otherwise. Since the laws and jurisdictions differ from one *sui juris* Church to another, in a marriage nullity case, the tribunal has to determine to which *sui juris* Church the parties belonged at the time of marriage.

Specifically, c. 1059 of *CIC* states that even if only one party is Catholic, the marriage is regulated by canon law. However, cc. 780 §2 and 781 of the *CCEO* respect the marriage laws of other ecclesial communities in this regard. This situation indicates a possible conflict of laws. The application of the law may have serious consequences in India where a mosaic of ecclesial communities is present. Some Indian Catholics have to follow the *CCEO*, while others observe the *CIC*. Diverse regulations in these new Codes create confusion for the ecclesiastical tribunals which must adjudicate marriage nullity cases. However, the *CCEO* which recognizes non-Catholic law in mixed marriages, has rather inflexible regulations regarding dispensations from canonical form. Furthermore, requiring

⁴ A *sui juris* Church is a group of the faithful united by a hierarchy according to the norm of law and which is expressly or tacitly recognized as *sui juris* by the supreme authority of the Church. It can roughly be translated as an “autonomous” Church. It is mainly through baptism in a particular Church that one becomes a member of that Church, and anyone who has completed the age of fourteen can freely choose his/her *sui juris* Church by receiving baptism in that Church. In the case of a child under the age of fourteen, if both parents belong to the same Church, the child would become a member in that Church by receiving baptism. If the parents belong to different *sui juris* Churches, the child would belong to the father's Church unless the parents decide otherwise; it is not the liturgical rite of baptism which determines one's membership in a *sui juris* Church. The place where the baptism was administered (e.g., a Protestant chapel in a hospital) or the religious affiliation of the person who administered the baptism (e.g. a Protestant minister) are also irrelevant (See ÖRSY, *Marriage in Canon Law*, p. 172; see also J.M. HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, Quincy, IL, Quincy University, 1995, pp. 5-6). After baptism one can become a member of another *sui juris* Church if the permission of the Apostolic See is obtained, or on the occasion of marriage, by sometimes transferring to the *sui juris* Church of the other spouse. The custom, no matter how long-standing, of receiving the sacraments in the rite of another *sui juris* Church, does not, in fact, bring about membership in that Church. For more details, see *CCEO*, cc. 29-38.

the blessing of a priest for the validity of marriage of an Oriental might also make a properly intended marriage null and void due to mere lack of a blessing.

The hypothesis which initiated this study is that there might be potential problems in India in the future created by differences in the two Codes relating to the adjudication of marriage nullity cases, when non-Catholics are involved. In India, there are many non-Catholic denominations and different *sui juris* Churches which might complicate the adjudication process even more. Our study explores this situation to assess the level of lack of clarity created by differences between these two Codes; and also to determine how well the Catholic Church recognizes the regulations of other denominations. Hence, our study evaluates the present laws on validity of marriage in the Indian context focusing specifically on c. 1059 of *CIC* and cc. 780-781 of *CCEO*.

We describe a number of possible scenarios in the Indian context with regard to the problem of nullity of mixed marriage, when a baptized non-Catholic is involved. The results of this study proposes possible solutions to the problems thus foreseen. These proposals were developed by evaluating the spirit of Vatican II, ecumenical and social reform movements and related documents. Our purpose is to suggest a revision of some of the laws to bring the two Codes into harmony with each other.

The study is divided into four chapters. To discuss marriage nullity problems in India in detail, it is necessary first to look into the origin, development and present situations of several rites and ecclesial communities in India. Hence, the first chapter examines this matter in detail, bringing out the differences and even conflicts among different denominations. While the explanations of certain topics may, at first sight, seem somewhat unnecessary, actually they bring to light the strong convictions, beliefs, traditions, and practices of certain groups, and also document vividly rivalries and communal hatred among them. The purpose is to provide a foundation for understanding how regulations in the new Codes might bring

confusion resulting in further disharmony, and even hatred within the Indian Church community. Ultimately, the purpose of this analysis is to foster the ecumenical spirit in the Church and bring about appropriate revisions of the canon law on mixed marriage.

First, we consider the apostolic origins of the Church in Indian soil in the midst of Hindus, Jains and Buddhists. There has never been homogeneity in India, but rather a variety of faiths and religions, customs and traditions. The relations of the early Malabar Christians of India with the Church of Persia grew to such an extent that, by the 4th century, these Christians began to adopt also the customs and regulations of this Oriental Church and later became Chaldean or East Syrian in rite, ruled by the Patriarch of Selucia-Ctesiphon.

When Westerners gained political power in India in the 16th century, the Malabar Church, which was Hindu in culture and Oriental in worship, was forced to adopt certain customs and regulations of the Western Church. The Portuguese adopted several coercive measures, including kidnaping Syrian bishops, accusing the Syrian Church of heresy and imposing sea blockades to prevent the importing of prelates from the Eastern Patriarchates. This Latinizing policy was so intolerable to native Christians in India that it led to an open rupture with the Western Church and even with the Catholic Church represented by the Western Church. As a result, this apostolic Church broke up into many factions, each holding onto different customs and laws. This led to the beginning of the Jacobite Churches in India. Colonialism, prejudice, materialism, and power politics paved the way to even further divisions. By the 18th century, Protestantism gained a significant foothold on Indian soil, further mushrooming the number of ecclesial communities there.

The second chapter is a general examination of the growing awareness of the Church's jurisdiction in matters relating to inter-Church marriages with specific reference to non-Catholics and to different rites. In the beginning, through the patristic teachings and the local Councils, the Church tried to protect the institution of marriage from the ideologies

and practices of the pagan world. In this early Christian period, the Church had only a moral influence rather than legal power over the institution of marriage. When it became influential in the temporal world, it claimed full jurisdiction over marriage legislation. The distinction between the two kinds of mixed marriages — mixed religion and disparity of cult — was developed in the twelfth century when baptism was considered as a fundamental element for a marriage to be valid and sacramental.

In the 16th century, the Reformers' position marked a radical change in the traditional understanding; marriage then became viewed by them as a merely secular reality, and it was explained in humanistic categories. Behind this exposition, there was also a deeply pessimistic theory concerning the lapsed human nature. The Council of Trent, by its teaching on marriage, stated unequivocally that marriage belonged to the order of the sacred in the strictest sense, and it was one of the seven sacraments; that the Church had the power to establish diriment impediments.⁵ The theory of inseparability of sacrament from contract of marriage was also developed. It was the Council of Trent that enacted the first invalidating law regarding the form of marriage. However, it was only by the decree *Ne temere*, in 1908, that the form became effective throughout the Latin Church. Dispensation from mixed religion was not common until the late 18th century.⁶

The first Code of canon law, promulgated in 1917, substantially took over the provisions of *Ne temere*. Even non-Catholics were obliged to follow this Code with regard to marriage except for canonical form and disparity of cult. As the situation of the Orientals was different from that of the Occidentals, the *motu proprio Crebrae allatae* was promulgated in 1949 regarding their marriages. As a result of Vatican II and the post-conciliar approach, the new Codes of canon law, *CIC* and *CCEO*, for Latins and Orientals

⁵ ÖRSY, *Marriage in Canon Law*, pp. 31-32.

⁶ B.Y. BRIA, *The Development of Mixed Marriage Legislation Through Missionary Law from 1622 to the Present*, (Doctoral Thesis), Ottawa, Saint Paul University, 1993, p. 280.

were promulgated and resolved some confusion which remained in this regard, but at the same time, it might have created new confusion and conflicts regarding the validity of marriage when non-Catholics are involved.

The Indian situation was different from the general trend of development of canon law in this matter. The Church followed the local customs of the Hindus along with the practices of the Persian Church. By the middle of the 16th century, jurisdiction was exercised by the archdeacon who was “the Prince” of the Malabar Christians.⁷ He discharged his duties with the help of a characteristically indigenous institution, the “*yogam*”⁸ or assembly of priests and lay people. However, by the end of the 16th century, the Indian Church became connected with the general trends in the development of canon law through the western missionaries from Portugal.

While the second chapter is a bird's eye view on the development of Church legislation on marriage, the third chapter focuses more specifically on c. 1059 of *CIC* and cc. 780-781 of *CCEO*. These canons deal with the situations in which non-Catholics are brought into the orbit of canon law. The purpose of this discussion is to clarify the competence of the Catholic Church with regard to marriage legislation, “even if only one party is Catholic”. Hence, this chapter elaborates the central theme of our study: to enunciate the laws to be observed with regard to the validity of marriage when a non-Catholic is involved.

First, we look into the particular situation that led to the codification of these provisions, clarifying the pattern of attitude change towards non-Catholics which climaxed in Vatican II. Then the special situations relating to the revision of the Codes are studied

⁷ A.M. MUNDADAN, *Indian Christians: Search for Identity and Struggle for Autonomy*, Bangalore, India, Dharmaram Publications, 1984, p. 16.

⁸ This “*yogam*” is said to be one of the contributions of the Malabar Church to the Universal Church as the pastoral council.

along with their outcome. Finally, as an application of these canons, a variety of possible scenarios of Indian situations for nullity of mixed marriage are described.

The Oriental Code recognized in canons 780 and 781 the competence of the non-Catholic Churches to be governed by their own laws. But in spite of the great effort in c. 1059 regarding this situation, it does not seem that the new Latin Code achieved fully the aim of translating into canonical terms the ecclesiological and ecumenical teachings of Vatican II. In c. 11 of *CIC* and c. 1490 of *CCEO*, the Church considers as the subject of its laws only those who are baptized in the Catholic Church or received into it. With regard to the application of the stipulations of these canons to marriage legislation, the Codes did not follow the same pattern. For instance, the *CIC* still considers that non-Catholics are bound by the laws of the Catholic Church in the case of a mixed marriage in which one party is a Latin Catholic.⁹

The Codes hold somewhat opposite policies with regard to a Catholic leaving the Catholic faith. The Latin Code recognizes the fact, while the Oriental Code does not. This creates confusion and problems with regard to the validity of marriages. Different policies for Orientals and Latins regarding the sacred rites for marriage might even imply a divergence in the basic theology of marriage. According to the Oriental theology, it is the priest who is the minister of the sacrament of marriage, whereas, Western theology holds that the parties themselves are the ministers of their marriage. With regard to dispensation from canonical form, a Latin Catholic can obtain it without much difficulty from the local ordinary, while an Oriental can obtain it only from the Patriarch or the Pope and then only for a grave reason. In short, the Codes promulgated under the same papal authority are different even with regard to basic principles to be followed in the Church. It might even

⁹ J.T. KANIAMPARAMBIL, *Competence of the Catholic Church in Mixed Marriages: The New Vision of the Oriental Code*, (Doctoral Thesis), Rome, Pontificium Athenaeum Sanctae Crucis, 1997, (ms.), p. 7.

appear to some that the ecumenical perspectives of Vatican II have been somewhat distorted through these conflicting laws.

In the final chapter, the above canons are evaluated in terms of the possible scenarios mentioned in the third chapter, using as a springboard the present ecumenical teachings of the Church and comparing them with the social reforms and specific ecclesial situations in India. The Church does not deny the possibility of salvation outside the Catholic Church. Indeed, the Vatican II and post-Code documents, such as the *Directory of Ecumenism* and *Ut unum sint*, make this clear. In India, the constant religious fights and an increasing demand for ecumenism and social reforms further urge us to re-think our attitudes towards other Christian denominations.

While evaluating the related canons against the background of the ecumenical movement and social reforms in India, we delve deeper into the doctrines of the Church connected with marriage. The sacramental and covenantal aspects of marriage, its inseparability from contract, the communion of faith necessary for sacramental marriage, the relevance of insertion of the term “*consortium*” in the new Codes, the necessity of priestly blessing, etc., are studied to evaluate the canons in question. When we have a close look at these two sets of legislation, we note some contradictions between the Codes and even within the one and the same Code. It is legitimate to have diverse theological expressions of doctrine in different Codes because they represent different cultures. However, these varied theological formulations must not be opposed to each other because the faithful to whom they are addressed belong to the one and the same Church of Christ.

Hence, this critical evaluation of the relevant canons leads us to suggest a further revision of certain norms. We propose possible solutions to problems that can arise in the community and in the ecclesiastical tribunals in India, as well as in other parts of the world. This revision would include, among other things, the recognition of the civil form of

marriage, suggesting that the matrimonial bond already has an objective existence from the moment that naturally sufficient consent is exchanged in a public form and the commitment for marital love is made. Since we live in a fast-moving world, the laws of the Church need to be reformulated from time to time. As a Church, we are a living organism, subject to growth and change. Our main concern as a Church must be the “salvation of souls”, and our mission to bring harmony and peace in the world.

Chapter One

THE CHURCH IN INDIA: A MOSAIC OF CULTURES

INTRODUCTION

Ancient India was a composite of many kingdoms, basically of Hindu¹ culture. India also gave birth to religions such as Buddhism, Jainism and Sikhism. Tradition has it that the Apostle Saint Thomas brought the message of Christ to this culture and converted many to Christianity in Malabar.² Although they became Christians, they continued to follow Hindu customs and regulations. These early Christians of India had contacts with the Church of Persia since many Persians emigrated to Malabar in the 4th century. Thus, they also began to adopt the customs and regulations of this Oriental Church. Later, somehow, the Malabar Church became subordinate to this Chaldean or East Syrian Church, ruled by the Patriarch of Selucia-Ctesiphon, and as a consequence, the Malabar Church became Syrian in rite.

With time, one of the priests assumed the role of leader of the whole community of Malabar and was called the “Archdeacon”. He discharged his duties with the help of a characteristically indigenous institution, called a *yogam* or assembly of priests and lay people. This *yogam* is said to be one of the contributions of the Malabar Church to the Universal Church in the form of the pastoral council. It was not until the 16th century that

¹ Hinduism is a culture rather than a religion. It evolved as human life developed in India.

² South-west coast of India. It is presently known as Kerala. The northern area of Kerala is still known as Malabar. Malayalam is the language of this place and is probably derived from *mala* (hill) and *alam* (dale) corresponding to the undulating physical features of Kerala, a land of hills and valleys. “Malabar” is a partially Arabicized form of the same word. *Keram* means coconut, and *Kerala* means land of coconut trees. Kerala was the kingdom of the Chera king who was known as “*Keralaputra*” at the time of the edicts of Asoka (257 B.C.). See A.M. MUNDADAN, *History of Christianity in India: From the Beginning up to the Middle of the Sixteenth Century (up to 1542)* [=History of Christianity], Bangalore, Theological Publications in India, 1984, vol. I, p. 15.

the Western Church came into contact with the Indian Church. When the Portuguese gained political power in India, the Malabar Church was accused of heresy in order to force its members to adopt the customs and regulations of the Latin Church. The Portuguese adopted several other coercive measures. This Latinizing policy was so intolerable to the Malabar Christians that it led to an open rupture with the Western Church, causing a great number of them to leave the Catholic Church and to make an allegiance with the Jacobite Church of Antioch. Later, because of colonialism and materialism, they broke up into many factions. In the 18th century, when Protestant missionaries began to flow into India, the number of ecclesial communities further mushroomed, with a great variety of customs and disciplines among Christians in this subcontinent.

In this chapter, we shall examine these developments in detail, and then discuss the present situation of the principal ecclesial denominations in India, examining their autonomous character, their influence on society and their power of governance.

I. THE EARLY CHURCH IN INDIA

We need first to discuss how the Church originated in India against a background of ancient cultures. It would also be necessary to question whether St. Thomas the Apostle came to India or not and how the Church in India became Syrian in rite.

A. Ancient India

Ancient India was a mosaic of cultures with a variety of religions. Four religions originated in the country, while others found a safe haven there.

1. A Mosaic of Cultures

In the early part of the third millennium (B.C.), civilization, in the sense of an organized system of government over a comparatively large area, developed nearly

simultaneously in the river valleys of the Nile, Euphrates and Indus³, those civilizations being Egypt, Mesopotamia and India.⁴ Archaeological remains found at the pre-historic sites of the Indus valley prove conclusively that even before the coming of the Aryans (c. 1500 B.C.), India possessed a civilization of a very high order. It is difficult to determine its origins. The people had a culture of their own with a religion and philosophy particular to them. The spade of the archeologist has revealed that they belonged to at least four different stocks: the Mongoloid, found almost entirely in the north-eastern regions; the Proto-Australoid, scattered throughout the sub-continent; the Dravidians, belonging to the Mediterranean family, who presently form the largest section of the population, with their greatest concentration in the south; and the Adivasis, whom the Dravidians, after their coming to India, drove away into the mountains.⁵

Over the course of early history, many foreigners such as the Greeks, the Scythians, the Huns, poured into the country through its northwestern passes, while a wave of Proto-Mongoloids, known in Sanskrit literature as the Kiratas, had been flowing through its north-eastern gates since pre-historic times. These diverse elements ultimately merged and assimilated into what became Indian society, each of them contributing its share to the store-house of Indian culture.⁶ India is also the home of many languages, with 17 official languages at present and more than 200 dialects.

³ From the word "Indus" came the name India. It was called Sindhu by the natives, but the Persians who found difficulty in pronouncing the name, called it Hindu. See A.L. BASHAM, *The Wonder that was India: A Survey of the History and Culture of the Indian Sub-continent before the coming of the Muslims* [=The Wonder that was India], London, Sidgwick and Jackson, 1985, p. 1.

⁴ BASHAM, *The Wonder that was India*, p. 14.

⁵ Ibid., pp. 10 ff. See also S. CHATTOPADHYAYA, *Traditional Values in Indian Life* [=Traditional Values], Delhi, International centre, 1961, p. 3; S. NEILL, *A History of Christianity in India: The Beginnings to AD 1707* [=A History of Christianity], Cambridge, Cambridge University Press, 1984, pp. 1-2.

⁶ CHATTOPADHYAYA, *Traditional Values*, pp. 3-4.

2. A Variety of Religions

India, known as the land of spirituality and philosophy, is the birthplace of many religions. The first, Hinduism, one of the ancient religions in the world, is the mode of living of one particular people rather than an international missionary religion, spread amongst peoples of different races, cultures and climes.⁷ The second religion born in India is Buddhism, founded around 567 B.C. by Gautama who was moved by the desire to end human misery. The sum total of the teachings of Buddhism is the concept of *deliverance*, and the final *deliverance* in Buddhist terms is *nirvana*, perfect and incomparable bliss. A third religion is Jainism, founded by Mahavira (599-527 B.C.), an elder contemporary of the Buddha. The highest law of Jainism is *ahimsa* (non-violence).⁸

Scholars such as G.M. Moraes say that Jews came to India before the destruction of the second temple in Jerusalem. Without doubt there was a wide dispersion of the Jews in the years following the great disaster of A.D. 66-70.⁹ According to tradition, there were Jewish colonies in Malabar in the first century A.D. India's earliest contact with Islam began in the first quarter of the eighth century mainly through the Arabs who subsequently conquered Sind, the north-Western frontier province and portions of Punjab. The impact of Islam gave rise to several new Indian sects that preached against idolatry, polytheism and caste. The most important sect that arose out of this fusion was the Sikh community founded

⁷ J.M. SHELAT, *Secularism: Principles and Application* [=Secularism], Bombay, N. M. Tripathi Private Ltd., 1972, p. 70.

⁸ Ibid., pp. 11-12; see also SHELAT, *Secularism*, p. 22.

⁹ X. KODAPUZHA, "The Ecclesiology of the Thomas Christians of India" [= "The Ecclesiology"], in T. VELLILAMTHADAM, J. KOIKAKUDY, X. KODAPUZHA and M. VELLANICKAL, (ed.), *Ecclesial Identity of the Thomas Christians* [=Ecclesial Identity], Kottayam, Oriental Institute of Religious Studies, India [=OIRSI], 1985, pp. 64-65; see also G.M. RAE, *The Syrian Church in India*, Edinburgh, W. Blackwood, 1892, p. 139; L.W. BROWN, *The Indian Christians of St. Thomas: An Account of the Ancient Syrian Church of Malabar* [=The Indian Christians], Cambridge, Cambridge University Press, 1956, p. 62; NEILL, *A History of Christianity*, p. 24; G. MENACHERY, (ed.), *The St. Thomas Christian Encyclopedia of India* [=The St. Thomas Christian Encyclopedia], Trichur, India, The St. Thomas Christian Encyclopedia of India, 1973, vol. II, pp. 26-27; BASHAM, *The Wonder that was India*, p. 344.

by Nanak (1469-1538), a Punjabi, born in Talwandi in the Lahore District, now in Pakistan.¹⁰ Sikhism is the fourth religion born in India. A small Zoroastrian community, now generally known as Parsis, also found home in India after the beginning of the Christian era, possibly around the 8th century.¹¹

B. Beginnings of Christianity: Apostolic Origins

Christianity in India is as old as Christianity itself. It is not possible to write a complete history of the early Christians in India, because many ancient documents of their churches were purged after the Synod of Diamper in 1599. However, the main lines of that history are fairly well known.¹² According to a strong tradition, it was St. Thomas the Apostle, one of the disciples of Jesus, who brought the Christian faith to this land. As Dr. Rajendra Prasad, the then President of India, said at the St. Thomas Day celebration in New Delhi on December 18, 1952:

St. Thomas came to India when many of the countries of Europe had not yet become Christian, and so those Indians who trace their Christianity to him have a longer history and a higher ancestry than that of Christians of many of the European countries.¹³

1. Trade Relationships

There are those who question the apostleship of St. Thomas in India because of the hardships of transportation at that time. However, extensive trade relations existed between Malabar and the Mediterranean countries even before the Christian Era. Numerous golden coins of the Roman Empire have been found all over the south, as well as many recent discoveries, and offer abundant proof that Roman trade centres existed along the southern

¹⁰ SHELAT, *Secularism*, p. 24.

¹¹ NEILL, *A History of Christianity*, pp. 23-24; see also BASHAM, *The Wonder that was India*, p. 344.

¹² E. TISSERANT, *Eastern Christianity in India [=Eastern Christianity]*, London, Longmans, Green and Co., 1957, p. xiii.

¹³ MUNDADAN, *History of Christianity*, p. 9.

coasts of India.¹⁴ While King Solomon ruled the Israelites (B.C. 970-930), his warships brought back valuable merchandise supposedly from Muziris (Cranganore), a defunct international port of Malabar.¹⁵ While discussing dealings of the Phoenicians with Muziris, the Roman historian Pliny (A.D. 23-79) complained that every year they were sending large sums of money to India for silk, pearls, gems and spices. He also remarked that Malabar ships were visiting the Persian Gulf, Aden, the Red Sea and Egypt.¹⁶ Pliny, Ptolemy (A.D. 100-160) and the *Periplus of the Erythraean Sea* gave much detailed information about the trading centres of Malabar.¹⁷ Diplomatic relations between India and the Roman Empire existed even before the Christian era.¹⁸

2. Traditions

According to the *Acts of Judas-Thomas*, which probably originated in the last quarter of the second century A.D. or the first years of the third, the Apostle St. Thomas preached the Gospel in the land of Gundaphares, a Parthian King, during the second quarter of the first century.¹⁹

Besides this literary tradition favoring a Thomistic apostolate on the north-west borders of Hindustan (India), there is another tradition, in favour of his preaching among the

¹⁴ TISSERANT, *Eastern Christianity*, pp. 4-5; see also W.J. RICHARDS, *The Indian Christians of St. Thomas, Otherwise Called the Syrian Christians of Malabar*, London, Bemrose, 1908, p. 69; BROWN, *The Indian Christians*, p. 61; NEILL, *A History of Christianity*, p. 31; MUNDADAN, *History of Christianity*, pp. 12-13.

¹⁵ K.L. BERNARD, *Flashes of Kerala History*, Cochin, India, By the Author, 1977, p. 10; see also MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 14.

¹⁶ BERNARD, *Flashes of Kerala History*, 11; see also MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 15; BASHAM, *The Wonder that was India*, p. 229.

¹⁷ BROWN, *The Indian Christians*, p. 60; BASHAM, *The Wonder that was India*, p. 228.

¹⁸ NEILL, *A History of Christianity*, pp. 392-394.

¹⁹ A.E. MEDLYCOTT, *India and the Apostle Thomas: An Inquiry with A Critical Analysis of the Acta Thomae [=India and the Apostle Thomas]*, London, David Nutt, 1905, pp. 2-3; see also TISSERANT, *Eastern Christianity*, p. 2; BROWN, *The Indian Christians*, pp. 43-44; MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 3; NEILL, *A History of Christianity*, pp. 26-28; MUNDADAN, *History of Christianity*, pp. 25-26; BASHAM, *The Wonder that was India*, pp. 60 and 342.

Dravidian populations of the south where the living presence of a strong body of Christians continues. The findings of Palayur, Arthad, Nilamperur, and so on, and the sanctuary of Mylapore which is venerated as the Martyrium of the Apostle, all bear strong testimony to the reliability of the local tradition of Malabar.²⁰ It is believed that the bones of the Apostle were removed from India to Edessa during the lifetime of the king under whom he suffered martyrdom.²¹ According to Cardinal Parecattil, the first Cardinal of the Thomas Christians, the apostolate of St. Thomas in India is “a tradition not written in Papyrus, not carved on stone but buried in the hearts of his (St. Thomas) spiritual children from whom it can never be removed.”²² From time immemorial these Christians were called “Thomas Christians”.²³ Tradition has it that the Apostle ordained two bishops, Kepha and Paul, respectively for Malabar and Coromandal (Mylapore).²⁴ This marks the traditional beginnings of the first hierarchy of India.

3. Testimonies

It would be appropriate to cite here an extract from the radio message of Pope Pius XII in 1952 on the occasion of the 19th century celebrations of the arrival of the Apostle in India:

Nineteen hundred years have passed since the Apostle came to India [...]. During the centuries that India was cut off from the West and despite many trying vicissitudes, the Christian communities formed by the Apostle conserved intact the legacy he left them [...]. This apostolic lineage, beloved sons and daughters, is the proud privilege of the many among you who glory

²⁰ TISSERANT, *Eastern Christianity*, p. 4; for details on the traditions of the tomb of St. Thomas, see also A.M. MUNDADAN, *Traditions of Thomas Christians [=Traditions]*, Bangalore, Dharmaram College, 1970, pp. 2-84.

²¹ MEDLYCOTT, *India and the Apostle Thomas*, pp. 101-102.

²² T. THENAYAN, *The Missionary Consciousness of the St. Thomas Christians [=The Missionary Consciousness]*, Cochin, India, Viany Publications, 1982, p. 3.

²³ MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 3.

²⁴ P.J. PODIPARA, *The Hierarchy of the Syro-Malabar Church [=The Hierarchy]*, Alleppey, India, Prakasam Publications, 1976, p. 32.

in the name of Thomas Christians and we are happy on this occasion to acknowledge and bear witness to it.²⁵

The testimonies of Eusebius (4th century) and St. Jerome (342-420 A.D.) about the mission of Pantaenus, a Christian philosopher sent by bishop Demetrius of Alexandria, "to preach Christ to the Brahmins and to the philosophers of India" in 190 A.D. affirms the tradition.²⁶ The testimonies of the Fathers of the Church like St. Ephrem (306-373 A.D.), St. Gregory of Nazianze (324-390 A.D.), St. Ambrose (333-397 A.D.), St. Gregory of Tours (4th century) and Isidore of Seville (7th century) are also notable. In various ways, they speak about the apostolate of St. Thomas, about the Christians of India, and about the priestly succession there.²⁷ This is also attested to by several ecclesiastical calendars, martyrologies and other liturgical books of the Coptic, Greek, Latin and Mesopotamian Churches.²⁸ Eusebius and Jerome testify also to the apostolate of the Apostle Bartolomew in India.²⁹

C. Connections with the Oriental Churches

The Church of the Thomas Christians was one of the four great "Thomite Churches" of the East. The three others were the Edessan, the Chaldean (of Mesopotamia or Iraq) with Seleucia-Ctesiphon as its center, and the Persian (of Persia proper or Iran). These four

²⁵ *Acta Apostolicae Sedis* [=AAS], 45(1953), pp. 56-57; see also K. VANCHIPURACKAL, "Laity in the Syro-Malabar Church Through the Centuries" [= "Laity in the Syro-Malabar Church"], in *Kanon*, 3(1975), p. 156; A. THAZHATH, *The Juridical Sources of the Syro-Malabar Church* [= *The Juridical Sources*], Kottayam, OIRSI, 1987, p. 4; J. AERTHAYIL, *The Spiritual Heritage of the St. Thomas Christians* [= *The Spiritual Heritage*], Bangalore, Dharmaram Publications, 1982, p. 28; MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 29.

²⁶ EUSEBIUS, *Historia ecclesiastica*, vol. V, 10, in *Patrologiae Cursus Completus, Series Graeca*, J.P. MIGNE, (ed.), Lutetiae Parisiorum, 1857-1866, 20:456; see also THAZHATH, *The Juridical Sources*, pp. 14-15; RAE, *The Syrian Church in India*, pp. 65-70; TISSERANT, *Eastern Christianity*, p. 6; MUNDADAN, *History of Christianity*, p. 84.

²⁷ A.E. MEDLYCOTT, *India and the Apostle Thomas*, pp. 22-45; KOODAPUZHA, *Indian Church History*, (Mal.), Kottayam, OIRSI, 1980, pp. 52-58; THAZHATH, *The Juridical Sources*, p. 15; BROWN, *The Indian Christians*, p. 45; MUNDADAN, *History of Christianity*, pp. 27-28.

²⁸ MEDLYCOTT, *India and the Apostle Thomas*, pp. 22-45; see also MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 3.

²⁹ MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 5.

Churches were “Thomite” in the sense that they looked to St. Thomas as to their direct or indirect Apostle.³⁰ Among these Churches, the Church of Seleucia-Ctesiphon emerged as the organizational centre, mainly owing to the political importance of this place as the capital of the Persian Empire. The Seleucian prelate became known as the Patriarch.³¹ The East Syrian Church is known by different names in the Christian world, including Babylonian, Assyrian, Chaldean and Persian since this part of the world was successively ruled by the Babylonians, the Assyrians, the Chaldeans and the Persians. The Gospel was first preached there to a community of Jews and the first Christian converts were Jews.³²

The Indian Church retained close contact with these Churches, and became hierarchically subordinated to the Church of Persia proper (Iran). We cannot say when this happened, but it was certainly before the time of the Chaldean Patriarch Iso-Yahb of Seleucia-Ctesiphon (650-660 A.D.).³³ Cosmas Indicopleustes, an Alexandrian monk of the 6th century, states in his *Christian Topography*, that there were churches in Malabar and Ceylon in the hands of Persian priests supervised by a Persian bishop.³⁴ This subordination lasted until the end of the 16th century.³⁵

No satisfactory explanation has yet been given for this development in the Indian Church. One plausible explanation is that the canonical legislation of the first ecumenical Councils regarding episcopal ordinations made it difficult for the Indian Church to have bishops without depending on another better organized Church. Canon 4 of Nicea I decreed:

³⁰ P.J. PODIPARA, *The Rise and Decline of the Indian Church of the Thomas Christians* [=The Rise and Decline], Kottayam, India, OIRSI, 1979, p. 5.

³¹ KOODAPUZHA, “The Ecclesiology”, pp. 66-67.

³² F. KANICHIKATTIL, *To Restore or to Reform? A Critical Study on Current Liturgical Renewal in the Syro-Malabar Church in India*, [=To Restore or Reform?], Bangalore, India, Dharmaram Publications, 1992, p. 6.

³³ PODIPARA, *The Rise and Decline*, p. 11.

³⁴ BASHAM, *The Wonder that was India*, p. 343.

³⁵ *Ibid.*, p. 10.

It is by all means desirable that a Bishop should be appointed by all the bishops of the province. But if it is difficult because of some pressing necessity or the length of journey involved, let at least three come together and perform the ordination, but only after the absent bishops have taken part in the vote and given their written consent. But in each province the right of confirming the proceedings belongs to the Metropolitan bishop.³⁶

Canon 6 of Nicea I declared that ordinations performed against this canon were invalid. At this early stage, the Indian Church might not yet have grown into an autocephalous Church so as to constitute a Metropolitan province or to have three bishops for episcopal ordinations. So naturally the Indian Church must have turned to the Persian Church for valid episcopal ordinations. What was in the beginning a relation between two sister Churches, for practical reasons gradually developed into a hierarchical dependence. However, the Indian Church never became an integral part of the East Syrian Church; it retained its autonomy even though its bishops were appointed by the East Syrian Patriarch.³⁷

The Seleucian Patriarch Saliba Zakan (714-728 A.D.) raised the Church of India to a Metropolitan See. The Metropolitan had jurisdiction over all India with the title, "the Metropolitan and Gate of All India".³⁸ The word "Gate" among the Orientals signifies "Sublime power" or "Sublime authority", and "Gate" in our case was of All-India (*Kollah Hendo*).³⁹ Patriarch Abdiso in 1567, by order of Pope Pius IV, erected Angamaly as a residential see with Mar Abraham as its metropolitan.⁴⁰ As it seems, before the

³⁶ Quoted by J. PORUNNEDOM, "The Right of the Syro-Malabar Church for an All India Jurisdiction" [= "The Right of the Syro-Malabar Church"], in J. CHIRAMEL and K. BHARANIKULANGARA, (ed.), *The Code of Canons of the Eastern Churches: A Study and Interpretation* [= *The Code of Canons of the Eastern Churches*], Alwaye, India, St. Thomas Academy for Research [= STAR] Publications, 1993, p. 303.

³⁷ Ibid.

³⁸ A. P. KANJIRATHINKAL, "The Juridical Status of the Syro-Malabar Church in Relation to Its Ancient Sources" [= "The Juridical Status"], in *Kanon*, 1(1973), p. 71.

³⁹ PODIPARA, *The Rise and Decline*, p. 15; see also MUNDADAN, *Traditions*, pp. 143-144.

⁴⁰ P.J. PODIPARA, *The Thomas Christians*, Kottayam, India, St. Paul Publications, 1972, p. 72.

establishment of the archdiocese of Angamaly, only very rarely did the faithful enjoy the presence of a bishop, since the See of Selucia was not always able to supply bishops.

Until the rise of Islam, Aramaic (Syriac) was the commercial language throughout the East, including India. The Jews who spoke this language were very powerful in India. Aramaic⁴¹ was also the vehicle of evangelization. It came to be called Syriac, after Syrus who ruled over Mesopotamia, and became the official language of the Persian Empire around 550 B.C.⁴² Thus the Malabar Church became Syrian in rite with Syriac as the ecclesiastical language.

The East-Syrian Church began to exercise control over the Indian Christians, and the succession of indigenous prelates came to an end. In their place foreign prelates started to rule. The apostolic Church of India was thus reduced to a dependent status. This dependance was both an advantage and a disadvantage. Though the Malabar Church was able to keep a strong Christian tradition, its dependance prevented it from developing a distinct Indian theology and liturgy with an Indian culture.⁴³ Even though the Persian prelates headed the Thomas Christians in India for a millennium, their contribution to the ecclesial and cultural growth of the Malabar community seems to be relatively insignificant.⁴⁴ However, by its contact with the Western Church from the 16th century, the Thomas Christian community was enriched by Western theological thinking and a mission spirit which helped the ancient Christians of India enter into meaningful communication with the

⁴¹ Christ spoke this language. Such expressions as “*talitha qumi, raqa, Eli Eli lama sabaqthani, haqel dama, Aba, Maran atha*”, etc., are seen in the Bible in their original forms.

⁴² PODIPARA, *The Rise and Decline*, pp. 6-7; see also KOODAPUZHA, “The Ecclesiology”, pp. 67-68.

⁴³ MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 47; see also A.M. MUNDADAN, “The Unique Identity and Autonomy of the Church of St. Thomas Christians in India”, in *Tanima*, 1(1993), no. 1, pp. 8-10.

⁴⁴ KANICHIKATTIL, *To Restore or Reform?*, p. 66.

world of Christianity.⁴⁵ Nevertheless, even today, there are some who dream about restoring what they call “the Chaldean golden age.” However, it seems contradictory to say that the Latin Church is foreign, but that the Chaldean Church from Persia is indigenous to Indian Christians!

D. Socio-political Status and the Legal System

We shall now examine the socio-political status and legal system which were very particular to the early Christians of India.

1. Socio-political Status

From its very inception, Christianity found a place in the structural hierarchy of Kerala society. It had a place of honour in Kerala as it was held that St. Thomas came to Malabar and converted a few families of Nambudiri Brahmins. The life these converts led among caste-shaped communities bore the marks of their surrounding social realities. The early Christians engaged in such occupations as were considered noble and appropriate to high caste Hindus. In the caste hierarchy they were second only to the Brahmins who being the priests of kings had the first rank. Religious life based on the caste system had far reaching consequences for converts. The caste shaped life of the Thomas Christians; however, it also helped them preserve and keep their traditions among the vast masses of Hindus.⁴⁶

The Thomas Christians accepted the social structure which was built on the network of castes and subcastes. One's position in society was determined by the social customs one followed. The rulers of the country considered the Thomas Christians high-caste and granted

⁴⁵ MUNDADAN, *History of Christianity*, p. 1; see also KANICHIKATTIL, *To Restore or Reform?*, p. 66.

⁴⁶ X. KOODAPUZHA., "The History of the Church in Kerala in the Pre-Portuguese Period", in MENACHERY *The St. Thomas Christian Encyclopedia of India*, p. 32; see also E.J. THOMAS, "Caste and the Syrian Rite in Keralam" [= "Caste and the Syrian Rite"], in *Jeevadhara*, 23(1993), p. 227.

them great privileges and honours in written documents in the form of copper plates which became the *Magna Carta* of the Thomas Christians.⁴⁷

Historian Elamkulam Kunjan Pillai writes that until the coming of the Portuguese only high caste people who believed in Jesus Christ and wished to enter the Catholic communion were admitted into the Thomas Christian Church. Since they maintained the social structure of Kerala and kept high standards in trade and commerce, the Thomas Christians were considered equal to high caste Hindus.⁴⁸ The four major elements used to distinguish caste from other forms of social stratification are: commensality, hierarchy, restrictions on marriage and hereditary occupation. Since the Thomas Christian community originated from the Nambudiri Brahmins of Malabar, their social customs were mostly those of the Nambudiri Brahmins.⁴⁹ Hence traces of all these elements of the caste system could be found in their practices.⁵⁰

These Christians were respectfully addressed as "*Nazarani mappilas*"⁵¹, "sons of kings" or "first kings". They were of high rank and greatly reputed, well formed and of good behaviour.⁵² According to Antony de Gouvea,⁵³ no other caste was of similar value and esteem among the Malabarians as were these Syrian Christians.⁵⁴ Anandhakrishna Iyer, an anthropologist, asserts that they were almost on a par with their sovereigns and were even

⁴⁷ PODIPARA, *The Thomas Christians*, p. 84; see also THENAYAN, *Missionary Consciousness*, p. 16; BROWN, *The Indian Christians*, pp. 85, 169-170 and 301; NEILL, *A History of Christianity*, pp. 388-390; MUNDADAN, *Traditions*, pp. 130-136.

⁴⁸ As quoted by THOMAS, "Caste and the Syrian Rite", p. 229.

⁴⁹ BROWN, *The Indian Christians*, pp. 176-177.

⁵⁰ THOMAS, "Caste and the Syrian Rite", p. 230.

⁵¹ "Mappila" is a short form of "maha pillā" which means great son.

⁵² MUNDADAN, *Traditions*, p. 121; BROWN, *The Indian Christians*, pp. 170-174; MUNDADAN, *History of Christianity*, pp. 173-174.

⁵³ Augustinian monk who prepared an eulogy of Menezes's work in Malabar towards the end of the 16th century. See BROWN, *The Indian Christians*, p. 13, note 4.

⁵⁴ VANCHIPURACKAL, "Laity in the Syro-Malabar Church", p. 158.

allowed to have a military force of their own, using this military power to safeguard their special privileges.⁵⁵ They were also protectors of certain low-castes and were called “Lords of seventeen castes”. They could try all the cases of their subjects and even could inflict capital punishment on them.⁵⁶ Gouvea says that the Christians supplied the Raja (king) of Cochin with an army of fifty thousand gunmen, and the success of the king in war often depended on the number of his Thomas Christian subjects.⁵⁷ This led non-Christian kings to build churches and endow them with tax-free lands. In addition, many Christians served the kings as ministers and councilors. The rulings of kings that went contrary to their religion or privileges were not obeyed. Indeed, they joined together as a Christian Republic to protect their rights.⁵⁸

Untouchability was as strictly observed by Syrian Christians as by the caste Hindus. The vessels or wells polluted by the approach or touch of low caste people were used only after ceremonial purification. Christians never touched a person of an inferior caste, not even a Nair. On the roads and in the streets, they gave the customary call in order to receive precedence from passengers; and if any one, even a Nair, should refuse this mark of honour, they were entitled to kill him on the spot. Endogamous marriage was prevalent. In the extreme form, in the Knanaya Catholic community, even marriage with other Catholic Syrians was, and still is forbidden for fear of polluting the Knanaya breed. There were many caste practices akin to the Christian belief system which were practised by Malabar Christians in order to keep their identity in the caste hierarchy. Caste and rite were merged into a socio-cultural mosaic.⁵⁹

⁵⁵ A.L.K. IYER, *Anthropology of the Syrian Christians*, Ernakulam, Cochin Govt. Press, 1926, p. 55; see also THENAYAN, *The Missionary Consciousness*, p. 17.

⁵⁶ PODIPARA, *The Rise and Decline*, p. 20; see also THENAYAN, *The Missionary Consciousness*, p. 16.

⁵⁷ BROWN, *The Indian Christians*, p. 15; see also MUNDADAN, *Traditions*, pp. 120-121.

⁵⁸ PODIPARA, *The Thomas Christians*, p. 84.

⁵⁹ THOMAS, “Caste and the Syrian Rite”, p. 231.

Because the Syrian community had a superior position within and outside the Church, it had to withdraw into itself to keep the status, leaving aside the mandate of preaching the gospel to the world and evangelizing the nations. This explains the near absence of missionary movements in the Syrian rite Churches in India. Attempts made by some of the missionaries in Kerala to bring to the Syrian Christian fold some of the low caste was met with great hostility from the church hierarchy and from others. Attempts made by Palakunnel Valliathan at Mannanam and Thevarkad Kunjathan⁶⁰ of Ramapuram are examples of futile individual initiatives to bring low caste persons into the Syrian Christian fold.⁶¹

The Syrian Christians in Kerala until the coming of the Portuguese enjoyed the status of upper caste. Afterwards, they protected their privileged social status by strictly adhering to the Syrian rite. This rite, a complex religious reality expressed in a particular cultural idiom, was now used as caste mark. It emerged as a form of life and worship in west Asia. Any convert could be a member of this congregation of worshippers; caste normally should not have been a barrier. But in Kerala, instead of remaining at the level of religion and church activity, this form of worship was used as a tool for caste stratification. Even those who were originally Syrians but later on became Latins in Verapoly and Quilon were not considered equal in status with Christians of the Syrian rite. The Latins were divided among themselves and had their own caste and social hierarchy. The political climate of Kerala at that time was partially responsible for the emergence of this social scenario. Thomas Christians transformed rite into a socio-structural variable instead of using it as a cultural expression of their religious life and worship.⁶²

⁶⁰ Palakunnel Valliathan's diary describes the difficulties he had to face from the aristocrats of his community when he tried to convert the lower castes. His desire for native bishops even led him to side with the Mellucian schism for some time. He even criticized bishops Pazhayaparambil and Lavigne for their attitude of conciliation towards the Portuguese. Thevarkad Kunjathan, otherwise called Ramapuram Kunjathan, worked among the low castes who now consider him a saint. See THOMAS, "Caste and the Syrian Rite", p. 231.

⁶¹ THOMAS, "Caste and the Syrian Rite", p. 231.

⁶² Ibid., p. 229.

Characteristic of the social life of the early Christians of India was that though Christian in faith, they remained strictly attached to the Hindu way of life.⁶³ They have been described as “Hindu in culture, Christian in religion and Oriental in worship”,⁶⁴ a formula which was an adaptation and amplification of a slogan launched by Catholic lay leaders, in urging Catholic involvement in India's struggle for independence.⁶⁵

2. The Legal System

Towards the middle of the 16th century, one priest assumed the role of leader for the whole community of Malabar, and he was called the “Archdeacon”. Etymologically, the term means “chief minister”. Gradually, this term came to be used for the chief assistant of the bishop in the administration of the diocese. Though the bishop was sent from the Persian Church, he was only the spiritual head who administered the sacraments.⁶⁶ The administration of the Church community was in the hands of the archdeacon, and he was “the Prince”, the civil head, of all the Christians of St. Thomas.⁶⁷ He had great influence over kings, and was accorded the same status as the military political chiefs of the country. According to custom, he was the one to crown the king in order that the latter might indeed be recognized as such.⁶⁸

The life of the Malabar Christians centred on the church. A good many of them settled around the church in rows of houses called *angaties* (bazaars) which later became

⁶³ THENAYAN, *The Missionary Consciousness*, pp. 17-18.

⁶⁴ P.J. PODIPARA, “Hindu in Culture, Christian in Religion, Oriental in Worship”, in *Ostkirchliche Studien*, 8(1959), pp. 89-104; reprinted in MENACHERY, *The St. Thomas Christian Encyclopedia*, pp. 107-112.

⁶⁵ G. NEDUNGATT, “The Spirituality of the Syro-Malabar Church” [= “The Spirituality”], in *Tanima*, 2(1994), p. 34, note 54.

⁶⁶ KANICHIKATTIL, *To Restore or Reform?*, p. 3.

⁶⁷ MUNDADAN, *Indian Christians*, p. 16; see also KOODAPUZHA, “The Ecclesiology”, pp. 74-75; PODIPARA, *The Rise and Decline*, p. 17; NEILL, *A History of Christianity*, p. 204; MUNDADAN, *Traditions*, pp. 145-146.

⁶⁸ THAZHATH, *The Juridical Sources*, p. 26.

business centres.⁶⁹ Around the year 1600 there were some 64 churches, 168 Christian villages and 80,000 families.⁷⁰ The administration of the Church was carried on by an assembly of the Thomas Christians called *yogam*⁷¹ of which there were 3 kinds: the parish assembly, the regional assembly and the general assembly.

The parish assembly looked after the temporalities of the church, as well as the whole Christian life of the local community. This assembly decided cases of public scandal, inflicting punishments which sometimes amounted to excommunication.⁷² The assembly exercised ample powers in such matters as administering justice and punishing delinquents.⁷³ Priests were ordained for a parish church. The assembly presented to the prelate candidates for ordination with the implicit promise that it would maintain them.⁷⁴ The assembly formed a structure similar to both the assembly of the caste Hindus (local or regional) and the assembly of temple administrators called *ooralma* which means “administration by the people of the place.”⁷⁵

Matters that concerned more than one church of a region were dealt with by the representatives of those churches. A regional *yogam* was often constituted for the administration of justice in the larger area. Thomas Paremmakal says, “According to the ancient custom of the Malabar Church, no punishment could be inflicted unless the crime

⁶⁹ Ibid.

⁷⁰ VANCHIPURACKAL, “Laity in the Syro-Malabar Church”, p. 159.

⁷¹ It was a sort of blend between a synod and a pastoral council, and was a significant expression of ecclesial communion and corresponsibility. See NEDUNGATT, “The Spirituality”, p. 29.

⁷² PODIPARA, *The Thomas Christians*, p. 96.

⁷³ MUNDADAN, *Indian Christians*, p. 21; see also KOODAPUZHA, “The Ecclesiology”, p. 78.

⁷⁴ PODIPARA, *The Rise and Decline*, p. 18.

⁷⁵ V. NAGAM AIYA, *The Travancore State Manual*, Vol. II, Trivandrum, Travancore Govt. Press, 1906, p. 72; see also VANCHIPURACKAL, “Laity in the Syro-Malabar Church”, p. 161.

was proved before the representatives of four churches.”⁷⁶ Matters of general interest to the whole Church or community (social, political and religious) were decided by a general assembly of the representatives of all the churches, wherein the Archdeacon played a special role.⁷⁷ They were practically supreme, and in fact no higher ecclesiastical authority questioned their decisions.⁷⁸

The Christian way of life brought by the Apostle Thomas was called the “Law of Thomas” and in the vernacular “*Thoma marga*”. The term “*marga*” means “way”, and it has been used to denote the Christian way of life. Christianity as a “Way” (*hodos*) is also a biblical expression.⁷⁹ In India, “*marga*” was originally a Buddhist term meaning “Buddhism as a way of life: the way of salvation or *nirvana*”. When Christianity was introduced to South India, where Buddhism and Jainism were then the prevalent religions, it was considered to be the new “way” or *marga*.⁸⁰ Christians were called *margakkar*⁸¹ (those of the way). The *Thoma marga* was the sum total of the Christian life and heritage, which was a great mixture of Dravidic, Buddhist, Jainist, Jewish, Persian and Hindu influences.⁸²

⁷⁶ T. PAREMMAKKAL, *Varthamanapusthakam*, (Mal.), Rome, P.J. PODIPARA, (ed.), *Orientalia Christiana Analecta* 190, 1971, p. 41; see also VANCHIPURACKAL, “Laity in the Syro-Malabar Church”, p. 163; THAZHATH, *The Juridical Sources*, p. 42.

⁷⁷ PODIPARA, *The Rise and Decline*, P. 18.

⁷⁸ PAREMMAKKAL, *Varthamanapusthakam*, p. 13; see also THAZHATH, *The Juridical Sources*, p. 42.

⁷⁹ *Acts*, 9:2, 19:9,23; 22:4, 24:14, 22:17.

⁸⁰ THAZHATH, *The Juridical Sources*, p. 8.

⁸¹ In recent times this word is often used to designate “the newly converted” and had a bad connotation in the context of the caste system. When people of low castes were converted to Christianity, those of the high caste began to look down on them - the new converts - with contempt.

⁸² NEDUNGATT, “The Spirituality”, pp. 18-20; see also THAZHATH, *The Juridical Sources*, p. 13.

II. WESTERN INVOLVEMENT IN THE INDIAN CHURCH AND IN ITS LAWS

Western powers and their missionaries brought a radical change to the Indian Church. New powers and ideologies caused division and confusion among the Christians.

A. The Portuguese Influence

We shall first see how the Portuguese tried to Latinise the Syrian Christians in India and the consequences that followed.

1. Latinising Policy

With the discovery in 1498 of a new sea-route by the Portuguese Admiral Vasco de Gama, a new era dawned on the religious horizon in India. He landed at Calicut on the Malabar coast on May 14, 1498.⁸³ Missionary priests, both secular and Franciscan, followed De Gama to India. In 1500 they set up an Oratory in Calicut and began to evangelize. A fortress was built in Cochin in 1505, which became the seat of the Portuguese Viceroy from 1505 to 1530 when it shifted to Goa.⁸⁴ It was Alfonso de Albuquerque who laid real foundation of Portuguese power in India. While he was the Governor of Portuguese affairs in India, Albuquerque captured the rich port of Goa from the Bijapur Sultanate in 1510.⁸⁵

Although the Portuguese missionaries were happy to meet Christians in India in the midst of Hindus and Muslims, they very soon noticed differences in ritual and liturgy which were intolerable to them. They wanted unity in the Kingdom of God and decided to take measures to achieve this goal. With the rise of Goa as the chief seat of Portuguese political

⁸³ K.J. JOHN, (ed.), *Christian Heritage of Kerala: Grand Chavalier Prof. L.M. Pylee Felicitation Volume*, Cochin, [India], Fr. George Veliparampil, 1981, p. 13.

⁸⁴ PODIPARA, *The Thomas Christians*, p. 119.

⁸⁵ P. SPEAR, *India: A Modern History*, Ann Arbor, The University of Michigan Press, 1961, pp. 162-163; see also R.C. MAJUMDAR, H.C. RAYCHAUDHURI and K. DATTA, *An Advanced History of India*, 3rd ed., MacMillan, St. Martin's Press, 1967, p. 624.

and ecclesiastical power in the East, they wanted to bring the Syrian Church directly under Rome and thus under Goa.

For the Portuguese, the “true” Catholic was of the Latin rite. Hence, they tried every means, even illegal and unjust ones, to Latinise the Thomas Christians and to place them under their *padroado* jurisdiction. They contended that the prelate of Goa was the prelate of All-India in opposition to the Chaldean Metropolitan of All-India. They could not suffer the existence in India of the jurisdiction of the Chaldean Patriarch. The Portuguese looked for and even discovered Nestorian heresy and schism in everything. The division within the Chaldean Church between those under the Patriarchs of the line of Sulaqa, and those under the line of Sulaqa's rival, worsened the situation in favor of the Portuguese. In fact, the Thomas Christians were legally under the prelates sent by the Patriarchs of the line of Sulaqa who had Roman confirmation.⁸⁶ However, the Chaldean prelates, in spite of explicit or equivalent papal recommendations, were imprisoned, or expelled from Malabar as Nestorian heretics.⁸⁷

After Mar Jacob's death in 1550/52, the Thomas Christians had no bishop for several years. Having despaired of receiving bishops from the Seleucian Patriarch they showed themselves inclined towards the Portuguese.⁸⁸ With the passage of time, the Latinising policy of the Portuguese became intolerable to the Thomas Christians. On Jan. 3, 1578, Mar Abraham wrote to the Pope asking for protection from the ill-treatment of the Portuguese. He invited the Jesuits to work under him. Then in 1583, Mar Abraham held a synod at Angamaly with the help of the Jesuits, during which time they corrected books and forbade priests to marry, among other things. A new seminary was started at Vaipicotta (Chenotta)

⁸⁶ PODIPARA, *The Rise and Decline*, p. 23.

⁸⁷ Ibid., p. 24.

⁸⁸ PODIPARA, *The Thomas Christians*, p. 126.

and entrusted to the Jesuits. Mar Abraham allowed the Jesuits to Latinise his subjects to some extent provided the East Syriac language was retained in liturgical functions.⁸⁹

2. Synod of Diamper

Mar Abraham died in 1597. Then Dom Menezes, the Portuguese archbishop of Goa and the ex officio political ruler during the absence of the Portuguese Viceroy of Goa, entered Malabar. He claimed he had authority from the Pope and visited the churches of the Thomas Christians exercising jurisdiction over them, even conferring orders. Threatening the non-Christian kings with his political status, he won them to his side against the Archdeacon of All-India.⁹⁰

In June 1599, Dom Menezes convoked a synod at Diamper (Udayamperoor) in the territory of the king of Cochin. All priests and other clerics and four lay men elected from each church were summoned *sub poena excommunicationis latae sententiae*.⁹¹ 153 priests and 650 (671?)⁹² laymen from some 64 churches in 168 villages took part in the Synod during which the Thomas Christians were ordered to condemn as a heretic and schismatic, Patriarch Denha Simon, a bishop in explicit communion with Rome also honored with the sacred pallium.⁹³

The synod of Diamper enacted fundamental changes in the rite and ecclesiastical laws of the Thomas Christians. Latin laws and customs supplanted all others, a Latinization based

⁸⁹ Ibid., pp. 131-132.

⁹⁰ PODIPARA, *The Rise and Decline*, p. 24; see also TISSERANT, *Eastern Christianity*, pp. 49-56; BROWN, *The Indian Christians*, pp. 30-32; J. THEKKEDATH, *History of Christianity in India*, Bangalore, Theological Publications in India, 1982, vol. II, pp. 64-69.

⁹¹ PODIPARA, *The Thomas Christians*, p. 138; see also PODIPARA, *The Hierarchy*, p. 92; THEKKEDATH, *History of Christianity*, pp. 69-75.

⁹² Probably the exact number varied from session to session. See VANCHIPURACKAL, "Laity in the Syro-Malabar Church", p. 166; NEILL, *A History of Christianity*, p. 213 and note 73 on p. 470.

⁹³ PODIPARA, *The Thomas Christians*, p. 138.

mainly on the Tridentine discipline.⁹⁴ Thus the synod practically transformed the Malabar Church into a branch of the Latin Church. It cut the link of the Malabar Church with the Mesopotamian Church which was at that time in full communion with the Church of Rome.⁹⁵ The Portuguese created everywhere, even in Rome, the false impression that they had converted the Thomas Christians from the Nestorian heresy and schism.⁹⁶ It should be noted that there is a contradiction between this notion and the fact that the Thomas Christians were summoned to the Synod under the pain of “excommunication”.

It should also be noted that Mar Jacob, the prelate of the Thomas Christians who was the chaplain of the Portuguese in Cranganore from the beginning, said Mass for them in Latin and also heard their confessions.⁹⁷ Further, it was at the order of Pope Pius IV that the Chaldean Patriarch Abdiso assigned the see of Angamaly to Mar Abraham in 1567.⁹⁸ Although the Thomas Christians received their prelates from the Chaldean Church, said to have received Nestorianism in the fifth century, their Catholic orthodoxy was not affected much, and this is recognized by most in recent times.⁹⁹ Even if we accept that the Chaldean Church was Nestorian, this heresy does not extend to the Malabar Church, because of the relationship they maintained. In a letter sent by Archbishop Leo Kierkels, the Apostolic Delegate and the first Internuncio in India (1931-1952) to Father Placid Podipara, a historian of Syro-Malabar Church, it was stated:

It is plausible to suppose that it (the Indian Church of the Thomas Christians) gradually established communication with the Near East and soon began to introduce books and borrow rites and later prelates and receive

⁹⁴ NEILL, *A History of Christianity*, p. 214; see also KANJIRATHINKAL, “The Juridical Status”, p. 73.

⁹⁵ TISSERANT, *Eastern Christianity*, pp. xv and 17-18.

⁹⁶ PODIPARA, *The Rise and Decline*, p. 24.

⁹⁷ PODIPARA, *The Thomas Christians*, p. 122.

⁹⁸ NEILL, *A History of Christianity*, p. 204; see also APPASSERY, *Catholic Directory of Kerala*, p. 188.

⁹⁹ THAZHATH, *The Juridical Sources*, p. 4; for more details, see X. KOODAPUZHA, *Faith and Communion of the Indian Church of the Saint Thomas Christians*, Kottayam, OIRSI, 1982, 185p.

immigrants thus the Malabar Church was not a branch or offshoot of the East Syrian one, as was early Christianity in China, but it became and long remained a voluntary associate member of the Syro-Chaldean Patriarchate for practical, not for doctrinal reasons. Their mutual relations were the outcome not of organic development of one moral body, but of historical intercourse between two moral bodies, each retaining separate, corporate responsibility.¹⁰⁰

It seems that the East Syrian dependence of the Malabar Church came to the attention of the Apostolic See with the confirmation of Mar Sulaqa as the East Syrian Patriarch in 1553.¹⁰¹ The Thomas Christians commonly believed all the articles of the Nicene Creed and considered their Patriarch subject to the Pope.¹⁰² About the Catholic orthodoxy of this Church, Pope John Paul II said recently:

It is to the glory of this Church (Syro-Malabar Church) that it has not ever been severed from the communion with the Church of Rome, in a continuity that the enormous geographic distance has never been able to break.¹⁰³

Today it is generally held that the laws of the Synod of Diamper had no binding force. It was not a lawful synod because of lack of authority on the part of those who convoked it, the lack of form in the manner of conducting it, and the lack of integrity in the promulgated text, among other things.¹⁰⁴ Fathers Roz and Campori, two Jesuits who were present at the synod, clearly state in their letters to their superior general and to his assistant in Portugal, that the “synod” was not “in forma”. According to them, there was no real synod, but only the reading of regulations which were not understood by those concerned. Further, Dom

¹⁰⁰ This letter was published by V. PATHIKULANGARA, in *Christian Orient*, 2(1981), pp. 125-126; see also KANICHIKATTIL, *To Restore or Reform?*, pp. 91-92; PORUNNEDOM, “The Right of the Syro-Malabar Church”, p. 304.

¹⁰¹ PORUNNEDOM, “The Right of the Syro-Malabar Church”, p. 305.

¹⁰² THEKKEDATH, *History of Christianity*, pp. 30-31.

¹⁰³ Pope John Paul II during the Angelus on August 31, 1980; see THAZHATH, *The Juridical Sources*, p. 4.

¹⁰⁴ KANJIRATHINKAL, “The Juridical Status”, p. 74; NEILL, *A History of Christianity*, p. 218.

Menezes made additions to the acts after the synod was over. Finally, there is no document stating that the Holy See ever approved the synod of Diamper.¹⁰⁵

The Synod, although not legitimately or properly conducted, was the first formal and canonical large-scale endeavour in the Malabar Church. It has great historical value for it brings to light many ancient practices of the Thomas Christians. Indeed, in this respect, it has become the unique and sole important document since many of the other books were burned after the synod by order of Menezes. The synod also helped organize the diocese into parishes and provided for their administration. It did away with some Hindu superstitions, and promoted the evangelisation of the low castes as well as the raising of their social status.¹⁰⁶

3. Aftermath of the Synod of Diamper

Father Francis Roz was appointed to the see of Angamaly as successor to Mar Abraham, on November 5, 1599. On December 20, 1599, he was made suffragan to Goa; thus the metropolitan status of the see of Angamaly was abolished and suppressed. On August 4, 1600, the *padroado* of the king of Portugal was also extended over Angamaly. Thus the Portuguese gained all that they had been looking for.¹⁰⁷ The Thomas Christians were thus placed under Latin jurisdiction. In 1608, Pope Paul V re-established Angamaly as an archdiocese. Later, the residence and title of Angamaly were transferred to Cranganore where there was a Portuguese fortress.¹⁰⁸ The Thomas Christians were also divided between

¹⁰⁵ PODIPARA, *The Thomas Christians*, p. 139-140; see also NEILL, *A History of Christianity*, p. 219.

¹⁰⁶ THAZHATH, *The Juridical Sources*, p. 144; see also BROWN, *The Indian Christians*, pp. 34-36.

¹⁰⁷ PODIPARA, *The Thomas Christians*, p. 142; see also BROWN, *The Indian Christians*, p. 92; THEKKEDATH, *History of Christianity*, p. 75; NEILL, *A History of Christianity*, p. 217.

¹⁰⁸ In 1986, this See was suppressed to create the vicariates of Trichur and Kottayam in 1987.

the *padroado* sees of Cranganore and Cochin in both of which there were also faithful of the Latin rite.¹⁰⁹

The Latinizing policy of the Portuguese in Malabar found no bounds, and this infuriated the Thomas Christians. Bishop Roz, retaining the Chaldean language, Latinised and mutilated the liturgy, adding to it translations from the Latin liturgy. He curtailed the time-honoured powers of the Archdeacon, treating him simply as a vicar general of the Latin Church. Quarrels and unrest, excommunication and the absolution of the Archdeacon etc., were the sad consequences of this policy.¹¹⁰

In 1652, Ahatallah (a Jacobite convert to Catholicism, sent by the Coptic Patriarch) arrived in Mylapore. He informed the Thomas Christians through messengers that he had been empowered by the Pope, though actually he had not received any such authorization. The whole Christian community was roused, and insurrections took place everywhere. However, the Portuguese deported Ahatallah to Goa via Cochin. On the false rumour that the Portuguese (the Jesuits) had drowned him off the sea of Cochin, the Thomas Christians who had gone to Cochin to see Ahatallah, moved to Mattancherry near Cochin. There, on January 3, 1653, they tied a long rope to the open air cross called the Coonan Cross¹¹¹ and, holding the rope, swore they would never be under the Paulists (the Jesuits) any more.¹¹²

¹⁰⁹ PODIPARA, *The Rise and Decline*, p. 25; see also BROWN, *The Indian Christians*, p. 94.

¹¹⁰ PODIPARA, *The Rise and Decline*, p. 25.

¹¹¹ It means "bent cross" in vernacular. The tradition has it that when the people took the oath holding the rope which was tied to this wooden cross, the cross bent to the will of the people.

¹¹² Ibid., p. 152; see also TISSERANT, *Eastern Christianity*, pp. 78-79; PODIPARA, *The Rise and Decline*, p. 25; J. KOLLAPARAMBIL, *The St. Thomas Christians' Revolution in 1653*, Kottayam, The Catholic Bishop's House, 1981, pp. 193-196; PODIPARA, *The Hierarchy*, pp. 124-125; BROWN, *The Indian Christians*, p. 100; THEKKEDATH, *History of Christianity*, pp. 94-96; NEILL, *A History of Christianity*, pp. 316-319.

This revolt split the Thomas Christian community into two groups, one in communion with Rome and the other later establishing a new allegiance, namely to the Jacobite Church of Antioch.¹¹³ Nevertheless, a good number of the malcontents, including leaders such as Fr. Chandy Parambil (Alexander de Campo), came back to the Catholic Church within a few years.¹¹⁴ In the 20th century, another separatist group returned to the Catholic Church as the Syro-Malankara Church.

Even those who wished to remain loyal to the See of Rome could not be held together under one administration (that of Cranganore) due to the fall in political power of the Portuguese in Malabar, as well as for other reasons.¹¹⁵ Italian Carmelites were sent to Malabar by Propaganda Fide under Pope Alexander VII to reconcile the malcontents. The Pope appointed Fr. Sebastiani O.C.D. as apostolic administrator of Cranganore in 1659. He was assisted by Alexander de Campo. In this way, the jurisdiction to the Congregation for the Propagation of the Faith was introduced in Malabar. Then, in 1663 when Sebastiani had to leave India, Alexander de Campo was made the first vicar apostolic of Malabar under Propaganda Fide jurisdiction. After the demise of Mar Alexander in 1687, no indigenous bishop was appointed to succeed him.¹¹⁶

Owing to political changes and troubles, the Propaganda rule of the Latin Carmelites prevailed over the *padroado* rule of the Jesuits in Malabar. Parishes freely passed from one jurisdiction to the other, as one parish or another became vacant or caused displeasure to the community. In some parishes there were two parish priests, one appointed by the prelates

¹¹³ MUNDADAN, *Indian Christians*, pp. 49-50. Because of this new allegiance, they are still called “*Puthenkootukar*” which means “those of the new allegiance”.

¹¹⁴ BROWN, *The Indian Christians*, pp. 101-102.

¹¹⁵ VANCHIPURACKAL, “Laity in the Syro-Malabar Church”, p. 167.

¹¹⁶ APPASSERY, *Catholic Directory of Kerala*, p. 189; see also TISSERANT, *Eastern Christianity*, pp. 121-122; BROWN, *The Indian Christians*, pp. 101-102.

of Cranganore under the *padroado* and the other by the vicar apostolic.¹¹⁷ This troubled state of double Latin regime came to an end only with the establishment of the Latin hierarchy in 1886.¹¹⁸

B. Establishment of the Latin Church in India

The establishment of the Latin hierarchy in India caused cultural conflicts. It created some wounds, although there were attempts to heal them. In this section we discuss the *Padroado* jurisdiction of the Portuguese, the De Nobili movement, Propaganda Fide jurisdiction and the establishment of the Indian hierarchy.

1. Padroado Jurisdiction

After the discovery of America by Columbus in 1492, Pope Alexander VI, by his bull *Inter caetera* of 1493, entrusted the western region to Spain and the eastern region to Portugal for missionary activities. Through the Papal bull *Aequum reputamus* of Paul III, on November 3, 1534, Goa became a suffragan see of the Funchal Archdiocese in the Madeira Islands under the jurisdiction of *padroado*.¹¹⁹ In 1558 Goa was raised to an archdiocese with Cochin and Malacca as suffragan sees. Mylapur was added to these in 1606.¹²⁰ Goa's jurisdiction was thus extended from the Cape of Good Hope to China.¹²¹

The Portuguese came to India with a clear purpose of conquering the world for their "God and King". They had inherited the gloomy ideas of the Middle Ages about the non-Christian world under the sway of Satan, a world which was to be conquered and converted to the Church, the only "saving boat", the "only citadel of Salvation". They thought it their mission to convert as many as possible and as quickly as possible. Consequently, they

¹¹⁷ VANCHIPURACKAL, "Laity in the Syro-Malabar Church", p. 168.

¹¹⁸ APPASSERY, *Catholic Directory of Kerala*, p. 187.

¹¹⁹ Ibid.; see also NEILL, *A History of Christianity*, pp. 400-401.

¹²⁰ MUNDADAN, *Indian Christians*, p. 132.

¹²¹ PODIPARA, *The Thomas Christians*, pp. 120-121.

ordered all Hindus in their territory to become Christians, or else vacate their places. Temples were closed and properties confiscated. Conversions were forced; Gospel preaching was made compulsory.¹²² The construction of temples, the worship of idols, and the practice of non-Christian ceremonies were strictly forbidden. Those who tried to hinder the conversion of others were given severe punishment. The banishment from Goa of Brahmins who were considered harmful was quite common.¹²³

Hence, during the 16th century, Christianity made great progress in Portuguese trade centres and inside Portuguese enclaves. The achievement of St. Francis Xavier, who came to India in 1542 as a missionary, was phenomenal. Yet it must be recognized that Xavier knew very little about the genius and wealth of the Indian culture.¹²⁴ He relied greatly on the power of the civil arm, and favoured the Inquisition to promote faith.¹²⁵ This being the case with Xavier, it was even worse with many who followed him.

The first council of the Latin Church in India was held in Goa in 1567.¹²⁶ Cutting off all the cultural ties of the converts was considered the best guarantee of the genuineness of their conversions. So, when the Portuguese christened the natives, they gave them Portuguese surnames and a dress of European fashion, and they forbade the wearing of Indian dress. They taught them western eating habits, made them drink liquor, and eat beef. They considered Latin the sole language of the Church. Even when natives wanted to use their own language, Konkani, they could do so only in Roman letters and not in their own

¹²² A. PUSHPARAJAN, "The Indian Encounter with Indian Culture" [= "The Indian Encounter"], in *IMR*, 9(1987), p. 10.

¹²³ MUNDADAN, *Indian Christians*, pp. 132-133; see also NEILL, *A History of Christianity*, p. 129.

¹²⁴ MUNDADAN, *Indian Christians*, p. 133.

¹²⁵ The Inquisition for India was established in Goa in 1560. Many people were burned alive. The Christian God, in whose name this was done, was considered by many as a punitive God of vengeance and wrath. Only in 1812 was the inquisition abolished, and all religious cults allowed to enjoy equal toleration. See NEILL, *A History of Christianity*, pp. 160, 229-231.

¹²⁶ NEILL, *A History of Christianity*, pp. 232-233.

Devanagari script. Then, on June 27, 1684, the Viceroy of Goa suppressed the Konkani language in Goa. Convinced that the Western form of Christianity alone was perfect, they tried to show Oriental Christianity as imperfect solely because of its divergence from Western rites. Thus, becoming a Christian also meant becoming *parangi* (Portuguese).¹²⁷

2. De Nobili Movement

It is remarkable to note that, in spite of the general trend of the period, certain Western missionaries developed an appreciation of Indian culture. Fr. Thomas Stephen (1549-1619), an English Jesuit, was perhaps the first of such missionaries. He not only quickly learned Konkani, but mastered it to such an extent that he composed a grammar (*Arte da lingoa Canarim*), a manual of Christian doctrine (*Doutrina Christao*) and a *Purana of Biblical History* in the language.¹²⁸

A greater luminary who appreciatively adapted to Indian culture was an Italian Jesuit, Robert de Nobili (1577-1656). This Italian aristocrat reached India on May 20, 1605. Mathurai was the centre of his mission. He pointed out that the “religious” faith should not be confused with “civil” customs. He adopted the saffron dress and wooden clogs, and ate only vegetarian food. He marked his brow with sandal paste, and wore the sacred thread across the breast, according to the Brahmin custom.¹²⁹

His appreciation of the Hindu style of life was so sincere that he took the trouble to learn the Vedas and the Vedanta, and also the languages Tamil, Telugu and Sanskrit. Only then was he able to steep himself in the ancient wisdom of the land and to begin explaining,

¹²⁷ PUSHPARAJAN, “The Indian Encounter”, p. 10; see also THEKKEDATH, *History of Christianity*, p. 412; NEILL, *A History of Christianity*, p. 280.

¹²⁸ PUSHPARAJAN, “The Indian Encounter”, p. 11; see also NEILL, *A History of Christianity*, pp. 238-241.

¹²⁹ PUSHPARAJAN, “The Indian Encounter”, p. 11; see also BROWN, *The Indian Christians*, p. 302; NEILL, *A History of Christianity*, pp. 280-282.

perhaps reformulating, Christianity in terms and thought-patterns more in accordance with the genius of the country.¹³⁰ Later, he wrote many treatises on the Christian faith in Indian philosophical terms. He pointed out that there was no sacredness about the Christian names of Western terminology, so he translated Christian names and created Tamil versions of them.¹³¹ Pope Gregory XV gave his approval to the movement, and it flourished and brought to Christianity thousands of high caste as well as low caste Hindus.¹³² De Nobili, the greatest missionary to India of his century, died on January 16, 1656.¹³³

Most missionaries to India, by contrast, were rather short-sighted and narrow-minded, so the movement generated by De Nobili was doomed to fail.¹³⁴ In the 18th century, opposition to inculturation hardened. Step by step, Rome succumbed to the pressure, and the death blow to this movement was administered by Pope Benedict XIV in 1744 by the bull, *Omnium sollicitudinum*, confirming the decrees of his predecessors.¹³⁵ However, it is worth noting here that 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."¹³⁶

¹³⁰ MUNDADAN, *Indian Christians*, p. 134.

¹³¹ PUSHPARAJAN, "The Indian Encounter", p. 11.

¹³² MUNDADAN, *Indian Christians*, p. 135; NEILL, *A History of Christianity*, pp. 292-293.

¹³³ THEKKEDATH, *History of Christianity*, p. 224.

¹³⁴ MUNDADAN, *Indian Christians*, p. 136; NEILL, *A History of Christianity*, pp. 283-297.

¹³⁵ According to the Bull, there were disagreements among the faithful concerning the observance of different rites, some of them being ceremonies contradictory to Christian practices. To safeguard the harmony of the faith and purity of discipline, the Pope forbade such ceremonies under the pain of excommunication. He said: "for the light of the gospel everywhere being spread, let it not be overshadowed by the superstitions of paganism." See BENEDICT XIV, "Omnium Sollicitudinum", in *Bullarium, Tom. 1, Romae, Typis Sacrae Congregationis de Propaganda Fide, 1746-1757*, pp. 397-426.

¹³⁶ B. H. OKONKWOR, *The Role of Matrimonial Consent in Igbo Traditional Marriage in the Light of the New Canonical Legislation: A Comparative Study*, Rome, Pontificia Universitas Urbaniana, 1985, p. 58; B. Y. BRIA, *The Development of Mixed Marriage Legislation Through Missionary Law from 1622 to the Present [= The Development]*, (Doctoral Thesis), Ottawa, Saint Paul University, 1993, p. 289.

Inculturation is understood as the dynamic relation between the Christian message and culture or cultures; an insertion of the Christian life into a culture or as an expression of the process by which the Church becomes inserted in a given culture.¹³⁷ In other words, it 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.¹³⁸

3. Propaganda Fide Jurisdiction

On January 6, 1622 Pope Gregory XV inaugurated the Congregation of Propaganda Fide. This decision emerged from the realization that the state of missions left under the control of the colonial powers was not all that satisfactory. The Holy See felt that some urgent reform was needed.¹³⁹ One of the steps envisaged by Propaganda to advance the cause of the missions independent of the colonial patronage was to promote indigenous vocations. The clergy who worked under the *padroado*, even with the de Nobili Movement, were mostly foreigners. Not only were Indians to be promoted to the priesthood, but ecclesiastical power and responsibility were to be vested in them.

So, when Propaganda thought of starting an ecclesiastical unit under its full control in India, namely, the vicariate of Idalcan or Bijapur outside the Goan jurisdiction, the Congregation chose Matteo de Castro, a Brahmin Christian of Goa. This first attempt to establish an indigenous authority ended in disaster mainly because of opposition from the *padroado* archbishop and the priests of Goa.¹⁴⁰ Two opinions regarding the definition of the

¹³⁷ A. R. CROLLIUS, *What is So New About Inculturation?*, Rome, Pontifical Gregorian University, 1984, p. 2, footnote 3; BRIA, *The Development*, p. 290.

¹³⁸ CROLLIUS, *What is So New About Inculturation?*, pp. 15-16; BRIA, *The Development*, p. 291.

¹³⁹ MUNDADAN, *Indian Christians*, p. 137.

¹⁴⁰ *Ibid.*, pp. 138-140; see also NEILL, *A History of Christianity*, pp. 333-341.

padroado took shape with increasing rigidity. According to Propaganda Fide, it was a privilege; but according to the Portuguese, it was a right.¹⁴¹ Hence, the relations between *padroado* and Propaganda Fide became tense. In 1652, the Portuguese *cortes* (the general assembly) banned the acceptance of papal documents unless these were officially recognized by the realm. In practice, this meant that papal letters appointing vicars apostolic were not to be acknowledged.¹⁴²

By 1661, for all practical purposes, Bombay was in the hands of the British who received it from the Portuguese as a part of the dowry for Prince Charles II when he married Catherine Braganza.¹⁴³ Later in 1668, Bombay was transferred to the British East India Company by Charles II.¹⁴⁴ Around 1716, negotiations between Rome and London had begun with a view to transferring the jurisdiction over Bombay churches from the archbishop of Goa to the vicar apostolic. The final decision was made in May 1720. The Portuguese priests were expelled from the city by the British governor, Charles Boone, and the existing four churches of Bombay were entrusted to the vicar apostolic and the five Carmelite missionaries who arrived soon after. The Goan priests were allowed to remain, but they were to come under the jurisdiction of the vicar apostolic. This change-over was not in keeping with the hierarchical conception of the *padroado* and was accepted neither by the archbishop nor by the king. By the end of the 18th century, a sort of "double jurisdiction" had come into force in Bombay. Similar conflicts occurred also in the Canara vicariate from 1674 onwards.¹⁴⁵ The report of the visitation made by Bishops Bonnard and Carbonneaux in 1858-60 is very revealing, although sad. It said, "In the extensive vicariates of Vishakapatnam, Hyderabad, Dacca, Calcutta, Patna and Agra there was not a single Indian priest."¹⁴⁶

¹⁴¹ NEILL, *A History of Christianity*, p. 401.

¹⁴² MUNDADAN, *Indian Christians*, p. 153.

¹⁴³ SPEAR, *India: A Modern History*, p. 168.

¹⁴⁴ MAJUMDAR, RAYCHAUDHURI and DATTA, *An Advanced History of India*, p. 629.

¹⁴⁵ MUNDADAN, *Indian Christians*, pp. 153-154.

¹⁴⁶ *Ibid.*, p. 158.

4. Indian Hierarchy

The far-sighted Pope Leo XIII laid the foundations for an Indian Church when in 1886 he constituted an Indian hierarchy. With the establishment in 1894 of a national seminary (the papal seminary) at Kandy in Sri Lanka (in the 1950s, it was transferred to Pune, India), the same pontiff took an important step towards the indigenization of the hierarchy. But, apart from the appointment of a few Goan Brahmins as vicars apostolic in the 17th century, it was not until 1923 that the first Indian was made head of a Latin Rite diocese; that was Bishop Tiburtius Roche, S.J., of Tuticorin in Tamil Nadu. Since then, more and more Indians have been appointed; so too superiors of religious orders. What really quickened the process was the action taken by the Indian Government to restrict the entry of foreign missionaries. After that, indigenous vocations increased rapidly, and the transfer of power to Indian hands was almost complete within the space of twenty years.¹⁴⁷

C. The Origin and Development of Non-Catholic Churches in India

Colonialism and power politics created divisions in the Indian Church. This section reviews the beginning of Orthodox and Protestant Churches and their many factions in India.

1. The Origin of Orthodox Churches

The “Coonan Cross Oath” taken in January 1653 marked the final outbreak of the storm that had been gathering on the horizon of the Malabar Church for over a century. Revolting against the imposition of Latin rule over the Malabar community, the malcontents held a meeting at Edapally and then met again at Alangat on May 22, 1653. A forged letter of Ahatallah was read which affirmed that in the absence of a bishop, twelve priests might lay their hands on Thomas the archdeacon, and that this would be adequate as episcopal consecration, following an ancient custom narrated by Jerome. Accordingly, twelve priests imposed their hands on archdeacon Thomas calling him Archbishop Mar Thomas I.

¹⁴⁷ Ibid., p. 159.

Although it was not a real consecration, the archdeacon began to exercise episcopal powers.¹⁴⁸ Many people, when they recognized the fraud, returned to the fold.

In 1665, a Jacobite bishop, Mar Gregorios of Jerusalem, arrived in Kerala. He promoted anti-Roman ideas, introducing Jacobitism among the followers of the pseudo-archbishop and bringing the Archdeacon Thomas and some Christians under the Jacobite Patriarch of Antioch.¹⁴⁹ The community under Thomas I then began cultivating relations with the Jacobite Patriarch and since that time, Jacobite bishops have been sent to India by him. Thomas I was succeeded by Thomas II, Thomas III and so on, all related to Thomas I. Mar Thomas VI assumed the name Dionysius I in 1772 when he was consecrated.¹⁵⁰

2. Split over Patriarchal Authority

In 1909, Mar Ignatius Abdalla Satuff, Jacobite Patriarch of Antioch, visited Kerala and became involved in a conflict with Mar Dionysius VI. While the patriarch insisted on comprehensive jurisdiction over the Malabar Jacobite Church, Dionysius allowed him only spiritual power — the right to consecrate bishops and chrism (holy oil) for the Church. This conflict split the Church: Dionysius and his party against the patriarch (“*Methran Kakshi*”, i.e., Bishop's Party), and the second group under Cyril, another Malabar Jacobite bishop, for the patriarch (“*Bava Kakshi*”, i.e., Patriarch's Party). The Bishop's Party appealed to Abdul Masih, a deposed patriarch of Antioch, who then installed Dionysius “Catholicos of Malabar”. Regarding the temporalities, the legitimacy of Patriarchal succession, the validity of excommunication served by the Patriarch outside the synod, the canon law of the Malabar Jacobite Church, the legitimacy of the Catholicate etc., there followed suit after suit before

¹⁴⁸ PODIPARA, *The Thomas Christians*, p. 153; NEILL, *A History of Christianity*, pp. 320-321.

¹⁴⁹ PODIPARA, *The Thomas Christians*, p. 159; see also TISSERANT, *Eastern Christianity*, p. 56; MUNDADAN, *Indian Christians*, p. 51; PODIPARA, *The Hierarchy*, p. 136; BROWN, *The Indian Christians*, pp. 111-112; NEILL, *A History of Christianity*, pp. 327-328.

¹⁵⁰ MUNDADAN, *Indian Christians*, p. 110; see also PODIPARA, *The Thomas Christians*, p. 218; BROWN, *The Indian Christians*, pp. 122 and 129-130.

the civil courts, the parties winning and losing almost alternatively. Finally, in 1959, the Supreme Court of India gave a decision completely in favour of the Bishop's party. Presently, the *Methran Kakshi* calls itself the "Syrian Orthodox Church of India" and the *Bava Kakshi* calls itself the "Jacobite Syrian Orthodox Church (of India)".¹⁵¹

3. Anglican Influence and Origin of the Marthomite Church

Towards the close of Mar Dionysius I's life, Dr. Claudius Buchanan, Principal of Fort William College, Calcutta, visited Malabar (1806-1807). Dr. Buchanan had received a special commission from Lord Wellesley, Governor General of India, to study and report on the Malankara Church (the Syrian Orthodox Church). On his return to England, Dr. Buchanan warmly advocated the cause of the Malankara Christians; as a result, the Church Missionary Society (LMS) under the patronage of the Church of England provided the services of Rev. Thomas Norton, Rev. Benjamin Bailey, Rev. Joseph Fenn and Rev. Henry Baker.¹⁵²

The first Anglican mission (CMS/Church Mission Society) started work in Kerala in 1816. A number of Jacobites came under their influence and reforms were introduced to Anglican lines of thought. Leadership for this reform group was provided by Abraham Malpan of Maramon. But in 1836, the first synod of the Indian Jacobites decided to sever all ties with the Anglicans. Abraham Malpan and his party were excommunicated by Dionysius IV in 1837 and there followed a period of confusion. Matthew Mar Athanasius (nephew of Abraham Malpan), who had been consecrated bishop by the Jacobite patriarch in 1842/43, emerged as the leader of the reform group. In 1875, he was deposed by Ignatius

¹⁵¹ MUNDADAN, *Indian Christians*, pp. 111-112; see also TISSERANT, *Eastern Christianity*, p. 153; PODIPARA, *The Thomas Christians*, pp. 223-224.

¹⁵² A.K. THOMAS, *The Christians of Kerala*, By the author, Kottayam, India, 1993, p. 68; see also P. CHERIYAN, *The Malabar Syrians and the Church Missionary Society 1816-1840 [=The Malabar Syrians]*, Kottayam, CMS Press, 1935, pp. 71-76; TISSERANT, *Eastern Christianity*, p. 146; BROWN, *The Indian Christians*, p. 125.

Mar Peter IV, patriarch of Antioch, who visited India that year. As a result of this excommunication, Mar Athanasius and his followers were deprived of all their churches and properties. In 1887, at the Synod of Mulanthuruthy, with the help of the CMS, they organized a new Church, the “Marthomite Church”.¹⁵³ The Marthomites are “Protestants” in doctrine, but Orientals or Jacobites in the externals. Their Mass and Pontifical were reformed on a Protestant basis. Before they assumed the name “Marthomite” they were known as “Reformed Jacobites”. The name “Marthomite” came into use under Thomas Mar Athanasius, the immediate successor of Matthew Mar Athanasius. Like the Jacobite bishops, the Marthomite bishops also are celibates.¹⁵⁴

4. Other Non-Catholic Thomas Christians

Among the non-Catholics, we find other groups of Thomas Christians who are rather small in numbers, but not insignificant. They also are worth mentioning.

a) Independent Jacobites of Malabar (Anjoorians)

Around the year 1772, two Jacobite bishops in Kerala became rivals who were consecrated for the same See. Dionysius I (Thomas VI), with government influence, exiled Ramban¹⁵⁵ Kattumangatt who assumed the name Cyril (Kurillos) to Anjoor (Thozhiyoor) in the north, in British Malabar. Cyril separated himself from the communion of Dionysius I, and headed a community at Thozhiyur. This community came to be known as the “Independent Jacobite Church of Malabar” or “Independent Syrian Church of Malabar”. It follows the West Syrian rite. In the beginning each bishop used to consecrate his successor. Then the Anjoorians and the Marthomites began to exchange the consecration of each other.

¹⁵³ MUNDADAN, *Indian Christians*, p. 111; see also CHERIYAN, *The Malabar Syrians*, pp. 161-165; TISSERANT, *Eastern Christianity*, pp. 147-153; MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 90; G. CHEDIATH, and T. VELLILAMTHADAM, “Problems and Prospects of Evangelization in India: An Ecumenical Perspective” [= “Problems and Prospects”], in *Jeevadhara*, 13(1983), p. 253.

¹⁵⁴ PODIPARA, *The Thomas Christians*, pp. 227-228.

¹⁵⁵ A Syrian ecclesiastical dignitary.

The Marthomites have no chrism which the Anjoorians have. No Anjoor bishop has ever consecrated chrism. The chrism they now use is what they received from the foreign Jacobite bishops somewhere around 1772. The bishops are celibates. The Anjoorians are a relatively stagnant Church.¹⁵⁶

b) The Nestorians/*Surais*

In 1861, the arrival of a Chaldean Catholic bishop, Thomas Rokkos, sent by the Chaldean Patriarch Joseph Audo against the will of Rome, created more problems among the Thomas Christians. He was excommunicated on his arrival by the Vicar apostolic of Varapuzha, and a schism followed. Another Chaldean bishop, Elias Mellus arrived in 1874 and he too met with the same fate. Though he left Kerala in 1882 and later submitted himself to Rome, the followers of the schism Mellus created made contacts with the Syrian Nestorian Patriarch. Finally, in 1908/9, they adopted Nestorianism, and are popularly known as *Surais* or Chaldeans.¹⁵⁷ Later, when they were greatly influenced by Protestant ideas, they repudiated the name "Nestorian". Abimlech Mar Timotheos, their first "Nestorian" bishop, encouraged some of their priests to be married. Their bishop calls himself "Metropolitan of Malabar and India". In 1963, Darmono Mar Thomas, the immediate successor of Abimlech Mar Timotheos quarrelled with the Patriarch, and formed an anti-Patriarchal party. In 1968, he consecrated two priests from Malabar, Mookkan and Konikkara, as bishops. The first succeeded him as Metropolitan with the name of Mar Aprem. Darmono Mar Thomas thus assumed the role of the Patriarch. This Church is now known as the "Church of the East". Members are called *Surais* and, are seen in and around Thrissur in Kerala.¹⁵⁸

¹⁵⁶ MUNDADAN, *Indian Christians*, p. 110; see also PODIPARA, *The Thomas Christians*, pp. 218, 226, 227; BROWN, *The Indian Christians*, pp. 122 and 129-130.

¹⁵⁷ MUNDADAN, *Indian Christians*, p. 74.

¹⁵⁸ PODIPARA, *The Thomas Christians*, pp. 228- 229.

c) The Church Mission Society (CMS)

As noted above, when the Jacobites and the Anglican missionaries parted company, a few thousand Jacobites became Anglicans. Although they are not to be considered a Church distinct from the Anglican Church, their social exclusiveness from the other members of their Church made them a separate group. They used to call themselves “Syrian Anglicans”, but now they are members of the Church of South India (C.S.I.),¹⁵⁹ which we shall discuss shortly.

d) The St. Thomas Evangelical Church of India

Elections of metropolitans caused a division among the Marthomites. In 1961, some 18 Marthomite priests imposed their hands on two other priests proclaiming them metropolitans or heads of a new Church called "The St. Thomas Evangelical Church of India". We have yet to see how this Church will develop. The Marthomite Church has withdrawn communion from it. The work the Marthomites do in Malabar and outside seems to have suggested the epithet "Evangelical" for this new Church.¹⁶⁰

5. Origin of Protestant Churches

The impact of Protestantism on the missions in India began to be felt only from the beginning of the 18th century. The three pioneering Protestant missions in India were (1) the Tranquebar mission started in 1706 by Lutherans from Halle in Germany, which was patronized by King Frederick IV of Denmark and supported by such British associations as the “Society for the Propagation of Christian Knowledge” (S.P.C.K.) and the “Society for the Propagation of Gospel” (SPG); (2) the Serampur mission founded by William Carrey (1793-1834) in collaboration with two other Englishmen, Joshua Marshman and William Ward; (3) the Mission Movement started in Calcutta by Alexander Duff in 1830. One of the notable and new features of these missions was the pride of place given to the Bible.

¹⁵⁹ Ibid., p. 227.

¹⁶⁰ Ibid., p. 229.

Protestant missionaries had the Bible translated into several regional languages of India and other East-Asian countries, and this helped to popularize it. The Serampur mission also gave great importance to education and journalism.¹⁶¹

By contrast, most of the early missionaries, i.e., Baptists, Anglicans, Scottish Presbyterians, Lutherans, American Presbyterians and American Methodists, failed to identify themselves with the local people and their culture. Many of them were individualists, and thought of Christianity largely in terms of their personal experience of Christ. For some others, the Christian faith primarily was a set of beliefs that could be shown to be superior to the beliefs of other religions. Not only were many missionaries in the beginning not interested in the poor or lower castes, but they often considered themselves to be superior to the natives. The majority of Protestant Christians in India today are the product of Christian mass movements, especially in Punjab, Uttar-Pradesh, Bihar and parts of West Bengal.¹⁶²

III. PRESENT SITUATION OF THE CHURCH IN INDIA

Having discussed in detail the origin and development of the Indian Churches, we now look at the present situation of each Church and its power of governance.

A. A General Outlook

There are around 22 million Christians in India today. This number is almost equal to the entire population of Australia and New Zealand, and more than the total population of several countries in Europe. Furthermore, there are parts of India as heavily Christian as any part of Europe or America, e.g., Kerala, Goa, Mizoram, Nagaland. Yet that number is just more than 2% of the total population of the country, a tiny minority, out of a massive population of more than 950 million people. The major religion of India is Hinduism (nearly

¹⁶¹ CHERIYAN, *The Malabar Syrians*, p. 160.

¹⁶² J. MASSEY, "Christians of North India", in *IMR*, 9(1987), pp. 210-212.

80% of the total Indian population according to the census of 1991), and the second is Islamism (nearly 12%). Today, only about 0.5% of Indians are Jains and about 0.7% are Buddhist. About 2% of Indians are Sikhs. Zoroastrians make up less than 0.01% of India's population. There are also a few thousand Jews. Christians form the third largest group in India and about 73% of them are Catholics. For Catholics there are around 22 archdioceses, 110 dioceses, 6,277 parishes (including quasi parishes) and 17,467 mission stations. According to recent statistics, there are some 15,000 priests, 62,000 nuns, 1,500 religious brothers, and 6,000 major seminarians.¹⁶³

The Catholic Church in India is a composition of three individual Churches: the Latin, the Syro-Malabar and the Syro-Malankara, with their own independent hierarchies. Rounding the figures for membership in the three Catholic Churches, the percentages are roughly: the Latin Church, 75%; the Syro-Malabar Church, 23%; and the Syro-Malankara Church, 2%.¹⁶⁴ There is also diversity within the rites: Northists, Southists (*Knanaya*), *Ezhunooticar* or the community of 700,¹⁶⁵ *Anjooticars* or the community of 500,¹⁶⁶ Topass Christians or the community of 300,¹⁶⁷ Goan Christians, Tamil Christians, Anglo-Indians¹⁶⁸ and Naga Christians,¹⁶⁹ among others who differ in race, caste and social customs.¹⁷⁰ Christians have been the main contributors to education in India. Likewise, their contribution to social work is beyond all proportion to their numbers.

¹⁶³ C.B.C.I. CENTRE, *The Catholic Directory of India, 1994*, New Delhi, C.B.C.I., 1994, p. xxxiii, lx.

¹⁶⁴ KANICHIKATTIL, *To Restore or Reform?*, p. 94.

¹⁶⁵ They are believed to be the Syrian Christians who adopted the Latin rite during the time of the Portuguese and *Propaganda Fide*.

¹⁶⁶ They are mostly converts from the coastal fishermen of Kerala.

¹⁶⁷ They are said to have sprung from the old Portuguese settlers and the low caste women of the soil. They are also called "Topass" because they wear hats being proud of their Portuguese or Spanish connection.

¹⁶⁸ They live mainly in cities and towns with Western style. They do not mix very much with natives.

¹⁶⁹ They are mainly *adivasis* or aboriginals of North-Eastern India.

¹⁷⁰ S. CHAMPAPPILLY, *The Christian Law*, Cochin, [India], Continental Publishing Co (Pvt) Ltd., 1988, pp. 7-10.

Especially in Kerala, where 22% of the population¹⁷¹ is Christian, Christians play a decisive role in politics. In 1959, Pundit Nehru, then Prime Minister of India, remarked on the occasion of the dismissal of the Communist Government of Kerala that the Christians of Kerala are a power to be counted on.¹⁷² In the educational field their work has been noteworthy, and it is due to their efforts, together with those of the government, that Kerala became the leading State in India with 100% literacy in 1990.

The Catholic Bishops Conference of India (C.B.C.I.), was constituted at the Metropolitans' Conference held in Madras in 1944. The First Plenary Council of India was held in Bangalore from January 6-18, 1950. In May, 1987, Pope John Paul II, by his letter to the bishops of India, made the C.B.C.I. a *praeter legem* reality, i.e., neither under the Oriental nor the Latin Code, but with specific tasks of a national and supra-ritual character.¹⁷³ He also determined that the bishops of each of the three rites have the right to establish their own episcopal bodies according to their own ecclesiastical legislation. The national conference continues to convene to address questions of common interest and of a national and supra-ritual character.¹⁷⁴ Shortly after the Second Vatican Council, episcopal conferences were also erected on the regional level.

The Apostolic Delegation of the East Indies was established in 1884. With diplomatic relations established between the Holy See and the government of India, the Apostolic Delegation was raised on June 12, 1948 to the rank of an Apostolic Internunciature. Then, on August 22, 1967 it was raised to the level of Apostolic Nunciature.¹⁷⁵

¹⁷¹ The total Population of Kerala is around 30 million.

¹⁷² VANCHIPURACKAL, "Laity in the Syro-Malabar Church", p. 172.

¹⁷³ H. D'SOUZA, "Change in the Structures of the Catholic Church in India", in *Vidyajyoti Journal of Theological Reflection* [= *VJTR*], 57(1993), p. 139.

¹⁷⁴ *The Catholic Directory of India 1990*, New Delhi, C.B.C.I. Centre, 1990, p. 31.

¹⁷⁵ APPASSERY, *Catholic Directory of Kerala*, p. 107.

The question arises as to why the Christian population is such a small proportion in this country even though Christianity was introduced there in the first century. An answer lies partly in the history of the ancient Church in India, the Syrian Church. As we have discussed, since this Church became more and more stabilized within the social hierarchy, it stagnated with respect to Christian ideals. The Church expansion it achieved both in Kerala and outside was not a result of any missionary movement, but of an explosion of the population within the Syrian Christian community. Syrian Christians settled in Metropolitan cities like Bombay, Calcutta and Madras and formed Syrian Christian communities there. After independence when the caste system weakened and society became more modernized, they started shedding some of their caste customs and taking to modern ways, even though they continued to hold strongly to the rite-caste purity in their relations with the lower caste and with Latin rite people.¹⁷⁶ Later, when the Syrian Christians realized their need for missionary expansion, the socio-religious climate in India had changed. The Latin Church, with its large investment in personnel and materials from the West, together with the human resources from Kerala, had already grown into a great power on the Indian continent in general and in the Christian churches in particular. The Hindu religious revivalism and fundamentalist movements made it impossible for missionaries to create and lead large scale evangelization efforts. Being unskilled and inexperienced in missionary activities, the Syrian Christians met with failure in their attempts to expand.¹⁷⁷

They failed to rise to the first position in the Indian ecclesiastical circles for want of majority and lack of unity among themselves. The fights among themselves and against the Latin Church in India has pushed them to a very sad situation. The latest weapon to come to their hands is the new Code of Canons of the Eastern Churches which prevents the Syrians in Kerala from opting for membership in Latin Dioceses and Latin religious congregations. All these measures lead to less and less socio-religious and political mobility and more and

¹⁷⁶ THOMAS, "Caste and the Syrian Rite", p. 232.

¹⁷⁷ Ibid.

more stagnation for the community. If we pursue this course, we shall be making the same mistake the “Latin” and “Oriental” rites made when they imported their cultures along with their faith in Jesus Christ, fusing them to the point that culture and faith were hardly distinguishable. No doubt, incarnation should be marked with inculturation. While fostering what is good in each culture for the expression of one's faith, faith should not be made the product of a cultural heritage. Wisdom lies in fostering the appreciation of the faith-inspired culture rather than culture-inspired faith.¹⁷⁸ The Catholic nature of the Church implies that it does not restrict itself to any particular culture or place, but that it permeates through every culture and place, so as to become universal.

B. The Latin Hierarchy and its Power of Governance

The Latin hierarchy of India was established through the promulgation of the Bull *Humanae salutis* by Pope Leo XIII on October 1, 1886. As a result of this papal decision, six units were created as archdioceses (Agra, Bombay, Calcutta, Madras, Pondicherry and Verapoly), 10 units were created dioceses (Allahabad, Cochin, Coimbatore, Hyderabad, Krishnagar, Mysore, Pune, Quilon, Tiruchirapalli and Vishakapatnam), and Patna continued to function as a vicariate. Thus, when the hierarchy was constituted in 1886 there were 17 ecclesiastical units under Propaganda and two units — the archdiocese of Goa and the diocese of Mylapore — still under *padroado*.¹⁷⁹ Now there are more than a hundred dioceses. The Latin hierarchy has a separate conference of bishops for governance, called the Conference of Catholic Bishops of India.

C. The Syro-Malabar Hierarchy and its Power of Governance

When the Latin hierarchy under the Propaganda Fide was established in India in 1886, the *padroado* archdiocese of Cranganore was suppressed, and the Thomas Christians were placed completely under Propaganda Fide. The very next year, on May 20, 1887, Pope

¹⁷⁸ Ibid., p. 233.

¹⁷⁹ *The Catholic Directory of India 1990*, p. 24.

Leo XIII, by the Papal Brief *Quod iam pridem* enacting ritual separation, created for the Thomas Christians the first vicariates of Kottayam and Trichur, appointing Adolf E. Medlycott for Trichur and Charles Lavigne for Kottayam.¹⁸⁰ The vicars apostolic were foreigners and of the Latin rite. These apostolic vicars were each to choose from the Syro-Malabar¹⁸¹ clergy a vicar general who was to be given special faculties and privileges.

On July 18, 1896, by the Brief *Quae rei sacrae* of the same Pope, the two vicariates were reorganized into the three vicariates of Changanacherry, Ernakulam and Trichur, and the Syro-Malabar Church received vicars apostolic of its own rite.¹⁸² The Vicariate of Kottayam was recreated exclusively for the Southists,¹⁸³ on August 29, 1911 by the Brief *In universi christiani* of Pope Pius X. In 1917, the Syro-Malabar Church came under the jurisdiction of Congregation for the Oriental Churches.¹⁸⁴

The spectacular progress made by the Syrian Catholic community under indigenous bishops and their sincere devotion to the Holy See were highly appreciated by Rome. On December 21, 1923, the Syro-Malabar hierarchy was established by the Bull *Romani Pontifices* of Pope Pius XI, raising Ernakulam to the status of archdiocese with the dioceses

¹⁸⁰ LEO XIII, "Quod iam pridem", *Leonis XIII Pontificis Maximi Acta*, May 20, 1887, vol. VII, Typis Polyglottis Vaticanis, 1887, pp. 106-108; see also TISSERANT, *Eastern Christianity*, p. 126; PODIPARA, *The Hierarchy*, pp. 173-174.

¹⁸¹ "Syro-Malabar Church", as a proper name is a rather late foreign designation attributed to the Catholic Church of the Thomas Christians. The name came into force after it began to be used by the Holy See in its documents from the time indigenous bishops were first appointed in the Church towards the end of the 19th century. The word "Syro" points towards the past relationship with the East Syrian Church. See NEDUNGATT, "The Spirituality", p. 4, note 1; News and Views, "Proposal to Change the Name of the Church", in *Tanima*, 2(1994), n. 1, p. 41.

¹⁸² LEO XIII, "Quae rei sacrae", *Leonis XIII Pontificis Maximi Acta*, July 18, 1896, vol. XVI, Typis Polyglottis Vaticanis, 1896, pp. 229-232.

¹⁸³ They are also called *Knanaya* Christians who are descendants of the Jewish Christian immigrants from the Middle East in the 4th century. In order to keep the purity of their race, they refrain from evangelising and converting others to Christianity. They also do not marry outside their community. See also MENACHERY, *The St. Thomas Christian Encyclopedia*, p. 73; TISSERANT, *Eastern Christianity*, pp. 8-10; MUNDADAN, *Traditions*, pp. 92-104.

¹⁸⁴ PODIPARA, *The Hierarchy*, p. 186.

of Trichur, Changanacherry and Kottayam as its suffragans.¹⁸⁵ The pallium¹⁸⁶ was conferred on the Metropolitan of Ernakulam, Mar Augustine Kandathil. The historical identification of the Syro-Malabar Church with the ancient apostolic Church has been re-iterated by the Apostolic See time and again.¹⁸⁷

The future Cardinal Accacius Coussa wrote in 1948: "Numerically the Catholics of the Syro-Malabar Church form the second largest community among the Oriental Churches, and it can be said to be the most flourishing Oriental Church of our times."¹⁸⁸ However, only from 1962 have dioceses been created for the Syro-Malabar Church outside Kerala. At present, the Syro-Malabar Church has 22 dioceses including nine mission dioceses outside Kerala. Now the second largest Eastern Church in the world, this Church has a population of three million. There are around 2,200 eparchial and 1,500 religious priests. Women religious number around 21,000.¹⁸⁹ In addition, there are hundreds of priests and religious working in Latin dioceses, not only in India but also in every part of the globe. The second Archbishop of Ernakulam, cardinal Joseph Parecattil, was made the first Cardinal from Kerala in 1969 and, in 1974, his cathedral was elevated to the status of a minor basilica (the only basilica for the Syro-Malabar Church and the only basilica in the state of Kerala) by Pope Paul VI.

¹⁸⁵ PIUS XI, "Romani Pontifices", December 21, 1923, in *AAS* 16(1924), pp. 257-262; see also *Directory of the Archdiocese of Ernakulam 1992*, Ernakulam, India, The Archdiocesan Curia, 1992, p. 9.

¹⁸⁶ The Syro-Malabar Metropolitan is given the privilege of using the Roman Pallium (according to liturgical laws), as a symbol of metropolitan authority and his immediate dependance on the Holy See. See A. COUSSA, *Epitome praelectionum de Iure Ecclesiastico Orientali*, Romae, Typis Polyglottis Vaticanis, 1940-1950, vol. I, p. 290, note 290. The relevant laws are given in *CIC* (1917) cc. 275-279; see also THAZHATH, *The Juridical Sources*, p. 257, note 30.

¹⁸⁷ For example see the historical introduction of the apostolic constitution *Romani Pontifices* of Pius XI, December 21, 1923, in *AAS*, 7(1924), p. 257; the radio broadcast of Pius XII, December 31, 1952, in *AAS*, 44(1953), pp. 96-97; allocution of John Paul II to the Syro-Malabar and the Syro-Malankara bishops, August 25, 1990, in *AAS*, 83(1991), pp. 198-203; PORUNNEDOM, "The Right of the Syro-Malabar Church", p. 302.

¹⁸⁸ KANJIRATHINKAL, "The Juridical Status", p. 70.

¹⁸⁹ *L'Osservatore romano*, Weekly Edition, February 3, 1993, p. 12.

When the Oriental Code was promulgated in 1990, this Oriental Church did not fall into any of the four hierarchical structures envisaged by the Code of Canons of the Eastern Churches (*CCEO*).¹⁹⁰ On January 29, 1993, Pope John Paul II established the Syro-Malabar Church as a Major Archiepiscopal Church with the title of Ernakulam-Angamaly and its seat in Ernakulam, and with its territory covering the two ecclesiastical provinces of that time (Ernakulam and Changanacherry).¹⁹¹ Cardinal Antony Padiyara, then archbishop of Ernakulam, was raised to the dignity of Major Archbishop of the Church, although the pontifical delegate, archbishop Abraham Kattumana, was provisionally invested with the supra-episcopal faculties normally belonging to the Major Archbishop.¹⁹² The Syro-Malabar Bishops' Conference is now replaced with the Synod of Bishops and the first meeting of the Synod was held on May 20, 1993 at Ernakulam.¹⁹³

D. The Syro-Malankara Hierarchy and its Power of Governance

As we have discussed, because of the Latinizing policy of the Portuguese, a large number of Malabar Christians became separated from the Catholic Church and joined the Jacobite Church of Antioch. They were not truly happy with the change and repeatedly sought to return to the Catholic fold with self-respect. Such efforts were constantly thwarted by the Latin domination.

In the second half of the 18th century, the requests of Mar Dionysius I (Mar Thomas VI), to be received into the Catholic Church, were looked upon with suspicion by the *padroado* and the Propaganda prelates. This led the Thomas Christian priest, Joseph Kariattil (an alumnus of the Propaganda College, Rome), to go to Rome where he did not

¹⁹⁰ G. NEDUNGATT, "The Syro-Malabar Church Under the New Oriental Code", in *The Code of Canons of the Eastern Churches*, 1993, p. 278.

¹⁹¹ *L'Osservatore romano*, Weekly Edition, February 3, 1993, p. 12.

¹⁹² *Ernakulam Missam*, 63(1993), p. 31.

¹⁹³ *Ibid.*, n. 6, pp. 194-195.

receive a cordial reception.¹⁹⁴ While in Lisbon, Kariattil, his rite having been changed into Latin, was consecrated archbishop of Cranganore under the *padroado*, on December 16, 1782. With all due faculties to receive Mar Dionysius I into the Church, Kariattil returned to Malabar. But before reaching his destination, he met with a “premature death” in Goa on September 10, 1786.¹⁹⁵

On June 21, 1799, through the efforts of Thachil Mathoo Tharakan, Mar Dionysius I embraced the Catholic Church at an unauthorized assembly. Neither the vicar apostolic nor anyone else did anything in the matter. No one could be found to receive Mar Dionysius I legally into the Catholic Church even as a priest; so, after six months he returned to Jacobitism.¹⁹⁶ Before his death in 1808, Mar Dionysius invited to Malabar the Church Missionary Society (CMS) consisting of Anglican missionaries.¹⁹⁷

The Malankara Church (The Syrian Orthodox Church) always had a sort of tension with the Jacobite Patriarchate in Antioch and so from the Malankara Church there had been numerous attempts to restore communion with the Holy See of Rome. Mar Ivanios, the founder of the “Order of the Imitation of Christ” in the Jacobite Church, after much study and prayer, determined to be reunited with the Catholic Church. In 1926, an episcopal synod at Parumala empowered Mar Ivanios, metropolitan of Bethany, to enter into negotiation with Rome to effect a reunion with the Catholic Church with the express condition that the ancient and venerable tradition of the Malankara Church would be kept intact. Pope Pius XI

¹⁹⁴ For details of this journey see PAREMMAKKAL, *Varthamanapusthakam*. Paremmakkal accompanied Mar Kariattil all through his journey; see also PODIPARA, *The Thomas Christians*, p. 173; BROWN, *The Indian Christians*, pp. 122-123.

¹⁹⁵ PAREMMAKKAL, *Varthamanapusthakam*, p. 363; see also PODIPARA, *The Thomas Christians*, p. 174; MUNDADAN, *Indian Christians*, p. 52; PODIPARA, *The Hierarchy*, pp. 149-150; BROWN, *The Indian Christians*, p. 123.

¹⁹⁶ PODIPARA, *The Thomas Christians*, pp. 179-180; see also BROWN, *The Indian Christians*, p. 124.

¹⁹⁷ PODIPARA, *The Thomas Christians*, p. 218.

graciously accepted the condition and welcomed the reunion. Accordingly, archbishop Mar Ivanios with his followers made their profession of faith on September 20, 1930 and were duly received into the Catholic Church. By the apostolic constitution, *Christo pastorum principi*, Pope Pius XI constituted the Syro-Malankara hierarchy in 1932 with Mar Ivanios as archbishop of Trivandrum and Mar Theophilos as the suffragan bishop of Thiruvalla.¹⁹⁸ Mar Severios who followed them in 1937 was also of the Bishop's Party, while Mar Dioscoros who embraced the Catholic Church in 1939, was of the Patriarch's Party and a prelate of the Jacobite Southists.¹⁹⁹

The Syro-Malankara Church is the third rite and hierarchy in India. It has been granted all rights and privileges and has its own liturgy and legitimate customs of the Syro-Antiochene Church as well as administrative autonomy. The married clergy were retained but they were asked to observe priestly celibacy in the future. The Syro-Malankara Church has also adopted a few laws, customs and practices of Latin derivation.²⁰⁰ Enactments and codifications of regulations made by the hierarchy in 1933 and the following years, together with *CCEO* regulate the ecclesiastical life of the community. At present, there are 300,000 faithful with 5 bishops, 500 priests and 1,200 religious men and women. This archiepiscopal Church has one archdiocese at Trivandrum with three suffragan dioceses.

E. The Non-Catholic Churches of India Today

In the 19th century more and more Protestant denominations from Europe and America began to arrive in India. Their denominational differences posed great problems in the mission situation of India. Then, by sheer force of necessity the various denominations

¹⁹⁸ PIUS XI, *Christo Pastorum Principi*, in *AAS*, 24(1932), pp. 289-292; see also MUNDADAN, *Indian Christians*, pp. 127-128; PODIPARA, *The Thomas Christians*, pp. 211-212; TISSERANT, *Eastern Christianity*, pp. 159-160.

¹⁹⁹ PODIPARA, *The Thomas Christians*, p. 226.

²⁰⁰ MUNDADAN, *Indian Christians*, p. 128.

formed the habit of consulting together on common problems.²⁰¹ In 1914, as a result of international ecumenical movements, there came into being the National Christian Council (N.C.C.I.) in India. Various Congregational and Presbyterian Churches, which have missionary links with different countries, came together and formed the United Church of Northern India (U.C.N.I.) in 1924. In the same year, this new Church sent out invitations to other Protestant Churches and gave a call for organic unity.²⁰²

Joint ventures in the fields of education and charity gave rise to many United Theological Colleges as well as to united secular colleges and to charitable institutions. The most recent joint venture culminated in the formation of the Church of South India (CSI) in 1947, in which four different traditions came together: Anglican (CMS), Congregational, Presbyterian and Methodist.²⁰³ Of these Churches seeking union, the Anglican was the only episcopally ordered Church. The South India United Church, generally speaking, followed the Presbyterian model of order and worship combined with that of the Congregational Church. The Methodist Church, while having much in common with the Anglican Church from which it originated, developed a greater freedom in its worship and use of lay people in the conduct of its services and in administration.²⁰⁴

The scheme for Church Union for South India was, in many ways, a test case for the Church of England. It envisaged the uniting of episcopal, congregational and presbyterian elements into a single church order. The scheme received cautious approval from the Lambeth Conferences of 1920 and 1930. Many critics, especially among Anglo-Catholics,

²⁰¹ Ibid., p. 160.

²⁰² MASSEY, "Christians in North India", p. 213.

²⁰³ Ibid., p. 214.

²⁰⁴ R.P. FLINDALL, (ed.), *The Church of England, 1815-1948; A Documentary History*, London, S.P.C.K., 1972, pp. 443-445.

saw it as a denial of the Church's Catholic principles in regard to the historic episcopate, the sacraments and the creeds.²⁰⁵

When the scheme in its final form was approved by the joint committee in 1941, the Metropolitan of India sought from the consultative body of the Lambeth Conference and the metropolitans of the Anglican Communion advice on the position of the Anglicans involved in the scheme. The reply was that the United Church in India would not itself be an Anglican Church; instead, it would be a distinct province of the Universal Church. Its bishops would be received as bishops and its episcopally ordained ministers would be entitled under the usual rules to administer Communion in the Churches of the Anglican Communion. Its communicants would be entitled to communicate with the Churches of the Anglican Communion, except in cases forbidden by the rules of those Churches. On the other hand, no right to minister in the churches of that Communion would be acquired by those ministers who had not been episcopally ordained. However, no censure would attach to any of its members, ordained or un-ordained, who communicated with the United Church or assumed work of any kind in it.²⁰⁶ The formation of the Church of South India took place on September 27, 1947.

Negotiations started soon after for a similar union of Churches in North India, and in 1970 the Church of North India (CNI) was born.²⁰⁷ The following six Churches came into the Church of North India: (1) the Council of Baptist Churches in North India which professes that baptism can be administered only by immersion, and only to those who consciously profess their faith in Jesus Christ and their repentance of sin; (2) the Church of Brethren of India which is deeply committed to peace and opposes war; (3) the Disciples of Christ who believe in the practice of adult baptism and see the celebration of the Lord's

²⁰⁵ Ibid., p. 442.

²⁰⁶ Ibid., pp. 452-456.

²⁰⁷ MUNDADAN, *Indian Christians*, p. 161.

supper as the central act of worship; (4) the Church of India which grew out of the work of Anglican missionary Societies; (5) the Methodist (British and Australian conferences) Church which emphasizes personal commitment to Jesus Christ, salvation through faith, holiness of life and the fellowship of believers; (6) the United Church of Northern India which emphasizes preaching and the exposition of the word of God, discipline, and unity of Churches and Christians.²⁰⁸

Reliable statistics on the affiliations to different non-Catholic denominations are not available. However, the many divisions among Protestants have been substantially reduced as a result of mergers creating the Churches of North India and of South India. Many small fundamentalist sects, however, have maintained their independence. Converts to Christianity, especially since the mid 19th century, have come largely from the lower castes and tribal groups.

The non-Catholic Thomas Christians are mainly the following: Syrian Orthodox Christians (around one million), Jacobite Syrian Orthodox Christians (around one million), Independent Jacobites (around 9,000), Nestorians/*Surais* (around 100,000), Anglicans/CMS, Marthomites, and the St. Thomas Evangelical Christians. There are around 6 million non-Catholic Christians in India, including Orthodox Christians and Protestants.

CONCLUSION

India is a country characterized by a diversity of religions and a mosaic of ecclesial traditions. The most ancient Christian Church in India is a fusion of Oriental liturgical traditions and Indian cultural traditions of different ethnic groups. While many local

²⁰⁸ MASSEY, "Christians in North India", pp. 214-215.

Churches disappeared in the West, the Malabar Church not only survived but also succeeded in maintaining its identity resisting the all-absorbing nature of Hinduism.²⁰⁹

Colonialism which started in the 16th century gradually developed into ecclesiastical Latin jurisdiction. The dioceses of Goa and Cochin tell us this story. The purpose of the diocese of Cochin was mainly to bring Oriental Catholics under the control of the Portuguese. The English naval force accompanied by the CMS and LMS missionaries established pockets of colonial power mainly in Bombay, Calcutta, Madras and Kottayam. These became the administrative centres of Anglican influence. The result was that the ancient Church of India with its indigenous heritage fell prey to the influence and domination of these colonial powers.²¹⁰

The undue interference of Portuguese missionaries in the affairs of the Malabar Church created a tragic division within the Church, and thus the Jacobite Church found place in India. Again, power-seeking primates, Anglican influence, etc., caused further divisions. Along with the colonial powers and missionaries, several Protestant denominations reached India. However, when ecumenical movements brought them together, two powerful united Protestant Churches (CSI and CNI) were born. The Syro-Malankara Catholic Church came into existence as a result of the reunion movement of a group from the Syrian Orthodox Church.

In India, there are three Catholic Churches: the ancient Apostolic Church of the Thomas Christians (the Syro-Malabar Church), the Latin Church from the 16th century onwards, and the Malankara Catholic Church, since 1932. There are also non-Catholic Churches of both the Eastern and Western traditions: the Jacobite Church, since 1665, the

²⁰⁹ M. VELLANICKAL, "Biblico-Theological Foundations of Ecclesial Identity", in *Ecclesial Identity*, pp. 32-33.

²¹⁰ KOODAPUZHA, "The Inter-Ecclesial Relations", p. 248.

Independent Jacobite Church since 1772, the Marthomite Church since 1887, the Nestorian Church since 1908, the Syrian Orthodox Church since 1912, the Church of South India since 1947 and the Church of North India since 1970. In addition, there are several other minor ecclesial communities and churches.²¹¹

Anyone with an analytical mind may ask why Christians in India are a tiny minority with only 2% of the population of the country, although Christianity was introduced there in the first century itself. It was mostly power politics that obstructed the growth of the Indian Church, whether it be Chaldean, Antiochene or Western. Church authorities often acted as agents of colonial power. They failed to identify the Indian Church with Indian people and their Indian life style. This failure of colonialism and the stubbornness and conservatism of certain Church authorities caused division among Christians. The idea of evangelization and the goal of "*salus animarum*" became distorted by the ambition of certain Church leaders, racial pride of different communities, overconcern of keeping the social status and clinging to old traditions, among other things. Now that the Churches are free, and all have learned lessons from history, they need to come together and to plan and launch common programs for better evangelization and for a more authentic Indian Christian discipline to be lived in the present day. They have the call to transform society by infusing the "mind of Christ" into the mentality, customs, laws and structures of the world in which they live. This is the call John Paul II emphasized in New Delhi on November 7, 1999 when he proclaimed the Exhortation *Ecclesia in Asia*.²¹² By this authentic and renewed Christian discipline, the Church in India may prove the value of unity in diversity in the modern world, and may help solving the problems the motherland faces today.

²¹¹ CHEDIATH and VELLILAMTHADAM, "Problems and Prospects", p. 253.

²¹² JOHN PAUL II, Apost. Exhort., "Ecclesia in Asia", November 6, 1999. English text in *Origins*, 29(1999-2000), pp. 357-384.

Chapter Two
A GROWING AWARENESS OF THE CHURCH'S JURISDICTION
IN MATTERS RELATING TO INTER-CHURCH MARRIAGES

INTRODUCTION

The Church exercises jurisdiction over the marriages of its members, because it considers marriage to be a sacred institution and a sacrament. However, in the early centuries, the Church was not conscious of the extent of its power. Christians were a minority and lived in an environment which was non-Christian, so it was natural that they followed existing local customs. However, the Fathers of the Church and early councils warned the Christians regarding the dangers of marriage with heretics and unbelievers as these might affect the growth of their faith.

Later, when the sacramentality of marriage was explicitly recognized and baptism was considered a fundamental element for marriage to be valid and sacramental, the Western Church began to enact legislation regarding the marriages of Christians. The teaching on indissolubility was introduced declaring that once Christian sacramental marriage was consummated, no earthly power could dissolve the bond. Not surprisingly, there arose a conflict between the Church and the State over competence in marriage cases. Although the Church's competence in this regard grew when the civil authorities were weak and lenient toward the Church, nevertheless, with time, it lost its secular power over marriage. The Protestant reformation played a role in this development, since the Reformers, denying the sacramentality and indissolubility of marriage, taught that marriage was a secular institution, thus coming under civil authority.

However, the Protestant Reformation produced a counter-reaction so that the principle of indissolubility was even more firmly established by the Council of Trent and subsequent declarations of the Popes. Each made clear that the sacramental aspect of marriage cannot be separated from its contractual aspect. The argument was: since the sacrament belongs to the Church, the jurisdiction over the sacrament of marriage also belongs to the Church.

The problem of inter-Church marriages became acute in Europe after the Reformation. The Catholic Church did not wish to share its jurisdiction with non-Catholics, not even with the Orthodox who enjoyed valid sacraments. The Catholic Church's claim of jurisdiction over marriage was affirmed by enforcing the canonical form introduced by the Council of Trent. However, when the first Code of canon law was promulgated for the Latin Church in 1917, although non-Catholics were generally considered to be under the rule of this Code, they were exempted from the canonical form and the impediment of disparity of worship when marrying among themselves. In 1949, when a marriage law for Orientals (*Crebrae allatae*) was promulgated, it was more severely binding on non-Catholics of Oriental rites without even allowing any exceptions. It was only when Vatican Council II changed the perspectives and reformed the ecclesiology, that the power of non-Catholics to govern themselves was acknowledged. With that renewed vision, the codifiers revised the laws, and thus we now have the revised Canon Law: *CIC* of 1983 for Latins and *CCEO* of 1990 for Orientals, each promulgated by the same Pontiff, John Paul II.

Since our study focusses on marriage nullity problems with special reference to inter-Church marriages in India, in this chapter, we wish to examine the background which shaped the developmental pattern of law in this regard. In particular, we must focus on laws that vary significantly between East and West. Likewise, the laws of the Church developed in India in a particular fashion and this shall be noted.

I. THE PRE-CODE LEGISLATION

To have a better understanding of the present Codes of canon law regarding mixed marriages, we shall glimpse through the history of canon law to see why and how they developed. We look into the needs of the time and attitudes of law makers in forming particular law.

A. Early Centuries

Law appeared early in the life of the Christian community. Although St. Paul was a model par excellence of the early Christian legislator, articulating many moral and disciplinary norms for his converts, the so-called "Council of Jerusalem" is one of the best examples of a law-drafting situation found in the New Testament. Beginning with St. Clement, around the year A.D. 97, the bishops of Rome carried on ecclesiastical government largely by means of correspondence, deciding cases submitted to them and settling points of general discipline. Many of these decisions acquired the force of law in the course of time. Other bishops enacted for their own dioceses such regulations as local conditions required. These regulations sometimes spread from one diocese to another, often ending by gaining universal recognition and thus becoming part of the general law. The development of law became particularly rapid when, after the Edict of Milan by Constantine, A.D. 313, the Church became free to develop its own organization.¹

In the early centuries, Christians lived and moved within the traditional religious and secular horizons in understanding marriage and accepting binding norms for it. There was no specific Christian law for marrying, but people simply followed the customs of the place where they lived or of the ethnic groups to which they belonged. In fact, in the first three centuries there was no official legislation concerning the marriages of Christians.²

¹ T. L. BOUSCAREN, A.C. ELLIS, F.N. KORTH, [= BOUSCAREN], *Canon Law: A Text and Commentary* [= *Canon Law*], 4th rev. ed., Milwaukee, The Bruce Publishing Company, 1966, pp. 1-2.

² L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions* [= *Marriage in Canon Law*], Wilmington, Michael Glazier, 1988, p. 19.

1. Fathers of the Church

Marrying a heretic or infidel was considered problematic even in the early centuries. At that time, the teachings of Church Fathers were the norm in safeguarding the faithful from the danger of falling into a marriage relationship with those of other religious convictions. St. Ignatius of Antioch (+107), one of the earliest Apostolic Fathers to speak about the sanctity of Christian marriage, taught that the Christian marriage celebrated with the approval of the Church was more authentic. In his letter to Polycarp, he exhorted spouses to seek the bishop's permission or blessing before concluding a marriage.³ Ignatius was followed by other early authors who urged Christians to submit their marital relationship to the public blessing of the Church. In a way, this requirement set a condition for celebrating Christian marriage limiting the individual's freedom to marry.⁴

The most severe among the Fathers in disapproving mixed marriages was Tertullian (+223). He drew a picture of Christian marriage as a transcendental reality and championed it as an ideal that should be earnestly sought.⁵ Marriage with a non-Christian, according to him, was a grave outrage to the Christian community.⁶ This kind of marriage should not be tolerated because it would cause harm to the Church by dividing the faithful between service to God and the enticing allurements of pagan worldly lusts.⁷ In *De pudicitia*⁸ and *De*

³ ST. IGNATIUS, *Epistolae ad Polycarpum*, in *Patrologiae Cursus Completus*, Series Graeca [= PG], MIGNE, J.P., (ed.), Parisiis, Lutetiae Parisiorum, 1857-1866, vol. V, p. 867.

⁴ F.X. WERNZ, and P. VIDAL, *Ius Canonicum*, Apud Aedes Universitatis Gregorianae, 1927-1946, Romae, 1946, vol. V, pp. 663 - 671; see also J.T. KANIAMPARAMBIL, *Competence of the Catholic Church in Mixed Marriages: The New Vision of the Oriental Code* [= *Competence of the Catholic Church*], (Doctoral Thesis), Rome, Pontificium Athenaeum Sanctae Crucis, 1997, (ms.), p. 11. Many of the ideas in this section are taken from this work.

⁵ H. JEDIN and J. DOLAN, (eds), *Handbook of Church History*, Freiburg, Herder, [1965], vo. I, pp. 307-308.

⁶ TERTULLIAN, *Ad Uxorem*, in *Patrologiae Cursus Completus*, Series Latina [= PL], J.P. MIGNE, (ed.), Parisiis, Exudabat Migne, 1844-1865, lib. 2, cap. III, vol. I, Parisiis, 1844 -1865, pp. 1292-1293.

⁷ Ibid., PL I, pp. 1293-1294.

⁸ TERTULLIAN, *De Pudicitia*, cap. IV, PL 2, pp. 986-987.

*monogamia*⁹ Tertullian required that the faithful, wishing to marry, obtain the permission of the Church community, otherwise such marriages would run the risk of being considered as adultery or fornication. He also argued that such unions would break the Christian customs and would introduce one to pagan manners. It could also keep one aloof from prayer and Eucharist.¹⁰

St. Cyprian (+258), the bishop of Carthage, viewed marriage with the non-believer as a manifest abandonment of the member of Christ's body.¹¹ He expressed his strong protest against marriage with pagans in his writings to Quirinus.¹² However, although severe in this matter, he was moderate in his expressions.¹³ St. Ambrose (+397) prohibited marriage with Jews and unbelievers because they were not baptized. Thus from his time, baptism was considered essential for Christian marriage. It is, therefore, an early reference to what later theologians and canonists would crystallize into the matrimonial impediment of disparity of cult.¹⁴ St. Jerome (+420) was also strictly against marriage with pagans or Jews.¹⁵

However, St. John Chrysostom (+407) and St. Augustine of Hippo (+430) took more liberal attitudes in this matter. This might be a function of their time; by then, the Church had passed the period of persecution and was enjoying peace and toleration. In commenting on St. Cyprian's work, *De lapsis*,¹⁶ in which Cyprian relied heavily on St. Paul for his strong position, Augustine stated that the New Testament did not so clearly and explicitly condemn

⁹ TERTULLIAN, *De monogamia*, cap. XI, PL 2, pp. 943-947.

¹⁰ M. THUNDATHIL, *Mixed Marriage Promises and Religious Liberty in the Light of the New Code*, Rome, Pontificia Universitas Urbaniana, 1986, p. 21.

¹¹ ST. CYPRIAN, *De Lapsis*, cap. VI, PL 4, pp. 470-471.

¹² ST. CYPRIAN, *Ad Quirinum*, lib. 3, cap. LXII, PL 4, pp. 767-768.

¹³ GROCHOLOWESKI, "I matrimoni misti", p. 259.

¹⁴ ST. AMBROSE, *De Abraham*, lib. 1, cap. IX, PL 14, p. 451.

¹⁵ ST. JEROME, *Adversus Jovinianum*, lib. 1, n.10, PL 23, pp. 223-224.

¹⁶ ST. CYPRIAN, *De Lapsis*, cap. VI, PL 4, pp. 469-471.

such marriages.¹⁷ But even despite his more lenient approach, Augustine expressed real concern in situations where there was a conflict in religious beliefs.¹⁸ St. John Chrysostom for his part, was not only lenient on the question, but also took an optimistic outlook on mixed marriages considering them a special sign of God's goodness. Nevertheless, based on the historical evidence available, we can say that an ecclesiastical form of marriage did not exist in the first few centuries.¹⁹

2. Local Councils

In the 4th century, the Church developed into a more organized, hierarchical establishment with diverse communities, each ruled by its own bishop. The Church, through its local councils, defended its position regarding marriage between Christians and unbelievers. These councils also initiated a legislative process.²⁰ The Spanish Council of Elvira (305-306) is one of the earliest Councils which sought to address Church organization and to establish measures concerning Christian morality and discipline. It is also the first Council to legislate on marriages of the faithful with non-believers. It addressed the problem of regulating such marriages and set forth conditions under which they were prohibited.²¹ Canons 15²² and 16²³ of this Council were to this effect. Canon 11²⁴ of the French Council of Arles (314) denied communion for a time to those who had married pagans. The Councils of Elvira and Arles forbade mixed marriages of Catholic girls with heretics, but not vice

¹⁷ ST. AUGUSTINE, *De Coniugiis Adulterinis*, lib. 1, cap. XXV, PL 40, pp. 468-469.

¹⁸ ST. AUGUSTINE, *Epistola XXIII*, n. 5, PL 33, p. 97.

¹⁹ K.J. COYLE, "Marriage Among Early Christians: A Consideration for the Future" [= "Marriage"], in *Église et Théologie*, 8(1977), p. 78; see also E. SCHILLEBEECKX, *Marriage: Human Reality and Saving Mystery* [= *Marriage*], London, Sheed and Ward, 1965, p. 251; A.G. MARTIMORT, "Contribution de l'histoire liturgique à la théologie du mariage" [= "Contribution"], in *Esprit et Vie*, 8(1978), p. 130.

²⁰ ÖRSY, *Marriage in Canon Law*, p. 20.

²¹ P.W. HILL, *Mixed Marriages and Their Pre-requisites in the Light of Ecumenism: The Cautiones and Mixed Marriages*, Rome, Pontificia Università Lateranense, 1980, p. 160.

²² *Sacrorum Conciliorum Nova et Amplissima Collectio* [= *Sacrorum Conciliorum*], J.D. MANSI, (ed.), Parisiis, H. Welter, 1901-1927, vol. I, p. 8.

²³ Ibid.

²⁴ Ibid., p. 472.

versa, since according to the existing social system, the wife was supposed to adhere to the religion of the husband.²⁵

The Council of Laodicea (341-381) in c. 10²⁶ warned parents to be careful about marriages with pagans or heretics. Canon 31²⁷ allowed this type of marriage only on condition that the non-Christian party first promise to join the Christian household. When the marriage was celebrated within the liturgical setting with the benediction of the priest, c. 33²⁸ prohibited *communicatio in sacris* with heretics and schismatics.²⁹

The Ecumenical Council of Chalcedon (451) was the first general Council to legislate specifically on mixed marriages. The disciplinary canons of this Council demanded unmarried clergy, chanters and lectors to avoid marriage with heretics. Further, those already married were not to allow their children to marry Jews, heretics or pagans.³⁰ Canon 14³¹ of this Council prohibited any marriage with Jews, heretics and pagans. The discipline against mixed marriages was very severe in places where there were persecutions, and milder where there was relative peace. However, there was no uniform regulation.³² Canon 19 of Orleans Council II (533) explicitly forbade Christian-Jewish marriages, and spoke of them as *illicitas*.³³ The 14th canon of the third Council of Toledo (589) prevented public officials

²⁵ G. LOBO, *The New Marriage Law*, Bombay, St. Paul Publications, 1989, p. 100.

²⁶ *Sacrorum Conciliorum*, II, p. 566.

²⁷ *Ibid.*, p. 569.

²⁸ *Ibid.*

²⁹ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 19.

³⁰ P. HUGHES, *The Church in Crisis: A History of the General Councils, 325 - 1870*, London, Burns and Oates, 1961, pp. 94-96.

³¹ *Sacrorum Conciliorum*, VII, p. 388.

³² KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 20.

³³ *Sacrorum Conciliorum*, VIII, p. 838.

from providing the occasion for, and offering assistance to, couples who wished to enter marriages forbidden by the Church.³⁴

In 691, a new synod was convoked and was called Trullan in as much as it was assembled in the hall of the imperial palace at Constantinople named Trullo, i.e. "dome." It was not Sergius I, who was supreme pontiff at the time, but the Emperor Justinian II who convoked this Council from which no dogmatic canon came forth. However, 102 disciplinary canons were issued which were immediately accepted by the Byzantine Church as its own Code.³⁵ In contrast, the Roman See acknowledged the decrees of the Trullan Synod only after long hesitation and not without restrictive clauses. John VIII (872-882), when eventually approving the canons of the Council of Trullo, used these words:

Therefore, the regulations which the Greeks use as issued by the Sixth Synod (Trullan) the main See admits in this Synod (probably the Synod of Troyes, 878) in such wise that those regulations are in no way received which are opposed to the previous canons or decrees of the holy pontiffs of this See or, certainly, to good morals.³⁶

H. I. Cicognani, who was at that time secretary of the Pontifical Commission for the Codification of Oriental Canon Law, asserted: "The 102 Trullan canons had juridical value for the Oriental community" although within the limits set by John VIII.³⁷ The Council of Trullo, in c. 72 §1, had decreed:

It is not allowed that an Orthodox man be joined with an heretical woman, nor, indeed that an Orthodox woman be united with an heretical man. But if anything of this kind appears to have been done by any at all, the marriage is considered invalid and the union thus dissolved. What must not be intermingled is not to be intermingled, neither sheep with wolf, nor the lot of sinners with that of a member of Christ. However, if anyone shall have transgressed what we have decreed, let him be removed from the flock.³⁸

³⁴ *Sacrorum Conciliorum*, IX, p. 996.

³⁵ *CLD*, 8, p. 3.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Sacrorum Conciliorum*, XI, p. 975; *CLD*, 8, p. 4.

This canon was to exert a considerable influence upon the legislation of the Eastern Church for many centuries, although it was practically rejected by the Latin Church.³⁹ Canon 72 does not speak about the schismatics, presumably because at this time there was no clear distinction between heretics and schismatics. Neither does it treat marriages between Christians and non-Christians since the civil laws of the time prohibited those marriages.⁴⁰

3. Liturgical Regulations

Around the 4th century, the first elements of marriage liturgy began to appear. It was customary to hold the ceremony at the home of the family of the bride. A priest was often invited to be present at the wedding; once there he was requested to pronounce the blessing over the couple, which otherwise was the task of the father of the bride. It did not take long before the celebration of marriage was transferred to church buildings. Quite naturally, the role of the priest then increased,⁴¹ but the presence of the clergy was not mandatory.⁴² Martimort observes that the blessing of the spouses was a part of the Jewish tradition and of the ancient pagan peoples of the Mediterranean. The fact that the blessing was given by the bishop or priest, rather than the father of the groom or bride, was an innovation.⁴³ According to Pope Innocent I (401-417) the blessing given to the newly married couple by the priest originated in an ancient law instituted by God.⁴⁴ In the Eastern Church, St. Gregory of Nazianus mentioned the practice of the priest joining the hands of the couple.⁴⁵ In the West, Leo the Great (pope 440-461) was the first to insist on a public celebration, which as yet did

³⁹ F.X. WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium* [= *Ius decretalium*], Prati, Giachetti, 1908-1915, vol. IV, n. 576; See also H.A. AYRINHAC, *Marriage Legislation in the New Code of Canon Law*, New York, Benziger Brothers, 1938, p. 99.

⁴⁰ D. SALACHAS, "La normativa del Concilio Trullano commentata dai canonisti bizantini del XII secolo Zonaras, Balsamone, Aristenos", in *Oriente Christiano*, 2(1991), pp. 98-99.

⁴¹ ÖRSY, *Marriage in Canon Law*, p. 20.

⁴² ST. AUGUSTINE, *Sermo CCCXXXII*, n. 4, *PL* 38, p. 1463; see also SCHILLEBEECKX, *Marriage*, p. 250; COYLE, "Marriage", p. 85.

⁴³ MARTIMORT, "Contribution", p. 130.

⁴⁴ INNOCENT I, *Epistula II ad Victricium*, cap. VI, *PL* 20, p. 475.

⁴⁵ ST. GREGORY NAZIANZUS, *Epistola CXCI*, *PG* 37, pp. 315-316.

not mean that the wedding had to take place in the church. It meant only that the ceremony was not to be hidden from the community. The liturgical celebration of marriage with the participation of a priest not only conferred a visible ecclesial dimension on the sacrament but also contributed toward bringing marriage under the jurisdiction of the Church.⁴⁶

4. Tests of Validity

Tests of validity were not so frequent in those early days because impediments were fewer and the judgments made by bishops prior to marriages of the faithful surely prevented some invalid unions. However, due to the contacts between secular and ecclesiastical courts, the latter must have been affected by the more elaborate procedure of the secular tribunals.⁴⁷ New and relatively sophisticated developments in society demanded a better defined and uniformly acceptable legal framework through which marriage cases could be handled. Looking for it, the canon lawyers turned to Roman law and found the model they wanted in the law of contracts. However, for a long time, Christians did not think of marriage as a contract; it was a state of life.⁴⁸

Classic Roman law recognized different types of contracts. The one chosen as the model on which the marital agreement could be patterned was the consensual type. This type of contract came into existence by consent alone, without any prescribed formality; so too did marriage. Consensual contracts had a well determined internal structure of rights and duties; so had marriage. Thus the consensual model was judged eminently suitable for

⁴⁶ ÖRSY, *Marriage in Canon Law*, p. 22.

⁴⁷ E.J. KENNEDY, *The Special Matrimonial Process in Cases of Evident Nullity; An Historical Conspectus and Commentary* [=The Special Matrimonial Process], Washington, D.C., Catholic University of America, 1935, pp. 10-11.

⁴⁸ ÖRSY, *Marriage in Canon Law*, pp. 26-27.

marriage cases.⁴⁹ Roman jurisprudence did not consider matrimony a matter for court action, but treated it as an essentially private transaction.⁵⁰

Nicholas I (858-867) was the first pope to state authoritatively that the consent of the parties was required and that consent was enough to bring an authentic marriage into existence. Without consent, even if sexual intercourse had taken place, there could not be a marriage. He quoted Chrysostom: "Marriage is not brought into existence by intercourse but by consent."⁵¹ However, only in the eleventh and twelfth centuries of the Christian era, did the norms governing a person's juridical right to question the validity of a marriage begin to crystallize.⁵²

B. Collection of Laws

One of the most interesting features of the growth of canon law was the attempt to keep the growing mass of legislation in order. There appeared an almost endless series of collections of laws, many of which have since been proven not to have been authentic. The most famous of these is the so-called *Pseudo-Isidorian Collection*, or the *False Decretals*, which we now know to have been made in France about the middle of the ninth century. These were attributed to Isidore Mercator to lend them greater weight.⁵³ The authors inserted sixty pseudo-apocryphal papal letters among genuine texts for the period from Clement I (97) to Melchiades (314) and interpolated thirty or more false decretals among valid documents for the period from Sylvester I (335) to Gregory II (731).⁵⁴ These false decretals appeared,

⁴⁹ Ibid., p. 27.

⁵⁰ A. NACE, *The Right to Accuse a Marriage of Invalidity* [=The Right to Accuse], Washington, DC., The Catholic University of America, 1961, p. 9; see also KENNEDY, *The Special Matrimonial Process*, p. 5.

⁵¹ ÖRSY, *Marriage in Canon Law*, p. 25.

⁵² NACE, *The Right to Accuse*, p. 9; see also KENNEDY, *The Special Matrimonial Process*, p. 5.

⁵³ JEDIN and DOLAN, *Handbook of Church History*, vol. III, pp. 168-169.

⁵⁴ C. DUGGAN, "Decretals, Collections of", in *New Catholic Encyclopaedia* vol. IV, Washington, 1967, pp. 709-711.

therefore, to have the force of a papal document or an imperial statute. It could well be that the overall motive of the forgers was to enhance ecclesiastical authority, to protect the sanctity of the person and property of bishops, and to consolidate papal jurisdiction. However, it must be noted that even the pseudo-Isidorian decretals did not claim a general and exclusive authority for the Church over marriage although they emphasized compliance with Church tradition regarding the celebration of marriage.⁵⁵ Their purpose in the area of marriage was to assert the indissolubility of marriage, to discourage contracting marriage within forbidden categories, and to deter abduction.⁵⁶

The false decretals assumed a special importance in the history of ecclesiastical marriage because they gave civil proceedings a canonical significance.⁵⁷ These were also incorporated into the *Decretum* of Gratian,⁵⁸ and they were accepted as authentic until the fifteenth century.⁵⁹ The *False Decretals* contributed greatly toward the Church's assuming veritable jurisdiction over the marriages of the faithful. This gradually led to increased legislation and, by the tenth century, to the beginnings of a judicial system.⁶⁰

By the middle of the twelfth century, canon law was in a rather confused condition. Around A.D. 1140, a learned Italian Camaldolese monk, Gratian, who taught at the University of Bologna, performed a monumental task. He collected and attempted to put in order the entire mass of ecclesiastical legislation which had accumulated up to his time. He called his work *Concordia discordantium canonum*, but it came to be known popularly as *Gratian's Decree*. As its title suggests, "concordance" and "harmony" among the canons was

⁵⁵A. ESMEIN, *Le mariage en Droit canonique* [= *Le mariage*], 2 ed., Paris, Librairie du Recueil Sirey, 1929-1935, vol. I, p. 24.

⁵⁶ SCHILLEBEECKX, *Marriage*, p. 268.

⁵⁷C. VOGEL, "Le rôle de la liturgie dans la formation du lien conjugal," in *Revue de Droit canonique*, 30(1980), p. 19; see also SCHILLEBEECKX, *Marriage*, p. 269.

⁵⁸ See C. 30, q. 5, c. 1; C. 30, q. 5, c. 10.

⁵⁹ SCHILLEBEECKX, *Marriage*, p. 296.

⁶⁰ ÖRSY, *Marriage in Canon Law*, p. 23

its purpose. Although unofficial and not binding universally, it was so useful that it soon became the best-known book of canon law.⁶¹ Gratian devoted a section on marriage in part II, Book IV, Titles 1-21 of his "decretal".⁶² It is significant that he considered baptism as the determining factor in establishing the validity of a marriage between a Christian and an unbaptized person.⁶³

It is to be noted here that Peter Lombard (1095-1160) was probably the first to formulate the doctrine of the seven sacraments, marriage being one of them.⁶⁴ This new and strong articulation of the sanctity of marriage was also a rejection of the heresy of the Cathari and Albigenses who preached a revived form of Manicheism that claimed that the "sensible" world was the creation of the devil, therefore it was intrinsically evil. Marriage, being an institution of this sensible world, could not be a way of life for spiritual persons. Such attacks, by prompting more reflections, contributed indirectly to a healthy development of the Catholic doctrine of sacramentality of marriage.⁶⁵

It was Lombard who introduced the thesis that consent makes marriage.⁶⁶ In as far as mixed marriage is concerned, he made no distinction of discipline for pagans, Jews, or heretics. He seems to have included all these classes under one diriment impediment. He argued that the diversity of faith and religion existing between partners precluded the possibility of a valid union.⁶⁷ St. Thomas Aquinas affirmed that the lack of faith constituted

⁶¹ BOUSCAREN, *Canon Law*, p. 2.

⁶² U. NAVARRETE, "Competentia Ecclesiae in matrimonium baptizatorum eiusque limites" [= "Competentia Ecclesiae"], in *Periodica*, 67(1978), p. 96.

⁶³ C. 28, q. 1, c. 15.

⁶⁴ ÖRSY, *Marriage in Canon Law*, p. 29.

⁶⁵ Ibid., p. 28.

⁶⁶ P. LOMBARDUS, *Sententiae in IV Libris Distinctae*, Lib IV, dist. XXVII, cap. 3, vol. 2 (3ed studio et cura PP. Collegii S. Bonaventurae in Lucem editi, ad Claras Aquas, Romae, 1981), p. 422.

⁶⁷ LOMBARDUS, *Sententiae in IV Libris Distinctae*, Lib. IV, D. XXXIX, cap. 1, pp. 483-484.

an impediment to marriage between a Catholic and an unbeliever.⁶⁸ He pointed out the validity of a marriage between a Catholic and a heretic, precisely because of a harmony of faith through baptism.⁶⁹ He was among the first to show that for the valid sacramental union of marriage all that was required was parity of baptism, although he held that marriage with a heretic was sinful and illicit.⁷⁰ He made a distinction between the prohibition of marriage with non-Catholic Christians and the diriment impediment for marriage with non-Christians.⁷¹

The Decretals of Gregory IX⁷² (A.D. 1234) were the first authentic collection of Church laws, composed by the famous canonist, St. Raymond of Pennafort, O.P., and promulgated by order of the Supreme Pontiff. It was at first called *Liber extra* due to the fact that it was outside the *Decretum*.⁷³ Pope Innocent III (1198-1216) taught that a marriage which had become *verum et ratum* precisely because of the sacrament of baptism could not lose its enduring character, despite the fact that one or the other party chose to offend the Creator by some sinful and contumelious act. The thought of Pope Innocent III was indeed a milestone in the development of Church teaching with regard to disparity of cult and of mixed religion.⁷⁴

The Decree of Pope Innocent IV (1243-1254) gave implicit recognition to the distinction between disparity of cult and mixed religion. The document ordered the confiscation of the dowry as the only punishment to be imposed upon a Catholic woman who

⁶⁸ ST. AQUINAS, *Summa Theologiae*, English translation by the Fathers of the English Dominican Province, Westminster, Carroll Press, 1981, Suppl. q. 45, art. 4.

⁶⁹ Ibid, q. 59, art. 1, ad. 5.

⁷⁰ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 38.

⁷¹ LOBO, *The New Marriage Law*, p. 100.

⁷² J.W. GOLDSMITH, *The Competence of Church and State over Marriage - Disputed Points* [=The Competence of Church and State], Washington, DC, The Catholic University of America, 1944, p. 3.

⁷³ BOUSCAREN, *Canon Law*, p. 3; see also NACE, *The Right to Accuse*, p. 16.

⁷⁴ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 37.

knowingly and deliberately entered into a marriage with a heretic. Nowhere in the document did the Pope attack the validity of the union. Hence there would seem to be some recognition by the Pope that mixed religion was not an invalidating, but rather a prohibitive impediment. During this period, the Church achieved a sort of stability and organization in its legal system. The Church recognized the distinction between the diriment impediment of disparity of cult and the prohibitive impediment of mixed religion, based upon a solid theological understanding of the sacrament of baptism as fundamental for the *matrimonium ratum*. By making strict regulations, the Church asserted its jurisdiction over the marriage of the baptized.⁷⁵ Another major collection was made in 1500 by a learned canonist, John Chapuis, who brought together all the previous laws. His entire work was known as the *Corpus iuris canonici*. This is the chief source for the study of ante-Tridentine legislation.⁷⁶

C. Disputes on Church's Jurisdiction over Marriage

It cannot be denied that in the first centuries of the Christian era, civil authorities exercised extensive jurisdiction over marriage. Marriage essentially remained a secular affair.⁷⁷ According to J. De Reeper, the Church adapted its practice to the existing customs, wherever they were found acceptable, keeping whatever was not contrary to Christian principles of doctrine and morality, purifying them of abuses and adding customs of its own.⁷⁸ Only with the spread of Christianity through the Roman Empire, and particularly with the conversion of the emperors themselves, did Christian principles gradually find their way

⁷⁵ NAVARRETE, "Competentia Ecclesiae", p. 101.

⁷⁶ BOUSCAREN, *Canon Law*, p. 3; see also J.A. ALESANDRO, "Overview of the Revised Code", in *Catholic Lawyer*, 29(1984), p. 169.

⁷⁷ I. FAHRNER, *Geschichte der Ehescheidung im Kanonischen Recht*, Freiburg, Herder, 1903, p. 27ff.; see also P. DAUDET, *Études sur l'histoire de la juridiction matrimoniale. Les origines Carolingiennes de la compétence exclusive de l'Église*, Paris, Librairie du Recueil Sirey, 1933; O. ROBLED A, *El matrimonio en Derecho Romano: esencia, requisitos de validez, efectos, disolubilidad*, Roma, 1970, p. 265ff; J. FREISEN, *Das Eheschliessungsrecht in Spanien, Grossbritannien, Irland und Skandinavien in geschichtlicher Entwicklung*, Paderborn, 1913, pp. 77-78.

⁷⁸ J. DE REEPER, "Power of the Civil or Tribal Authority Over Marriages of non-Baptized Persons", in *The Jurist*, 3(1959), p. 353.

into imperial law. The clergy were not only the recipients of privileges but also were assigned special functions in the administration of justice. Hence, the Christian spirit slowly influenced the spirit of the civil law as it did popular customs.⁷⁹ The competence to regulate daily life and marriage remained principally in the hands of the secular power.⁸⁰ Although Constantine granted some judicial power to the bishops, this did not extend to the matter of divorces; it must be remembered that divorce under Roman Law was *divortium ab intrinseco*, and there was no dissolution of a marriage by a judge.⁸¹

Under the converted Merovingian kings, the authority of the bishops advanced to some extent. In the Frankish kingdom the bishops were able to meet in provincial synods and enact canons, many of which dealt with Christian marriage; but their control over the faithful was disciplinary rather than legislative. This change took place gradually and was not effected by a formal grant; it began as a matter of custom and was gradually recognized as a matter of right.⁸² The Justinian and Theodosian Codes adopted many of the ecclesiastical laws on marriage. The Church, in turn, canonized some civil regulations.⁸³

The very sacredness of marriage tended to bring it within the sphere of the authority of the Church at the time when the State recognized that such matters were outside the scope of its authority.⁸⁴ The actions of the papacy in royal marriage affairs attest to the vigour with

⁷⁹ J.C. AYER, *A Source Book for Ancient Church History from the Apostolic Age to the Close of the Conciliar Period*, New York, C. Scribner's Sons, 1924, pp. 356-357.

⁸⁰ J. GAUDEMET, "La formation de la théorie canonique du mariage," in *Revue de Droit canonique*, 32(1982), p. 104; see also J. MUIRHEAD, *Historical Introduction to the Private Law of Rome*, 3rd ed., London, A. and C. Black, 1916, p. 346; W.W. BASSETT, "The Marriage of Christians — Valid Contract, Valid Sacrament?," in IDEM, *The Bond of Marriage: An Ecumenical and Interdisciplinary Study*, Notre Dame, University of Notre Dame Press, 1968, p. 129.

⁸¹ GOLDSMITH, *The Competence of Church and State*, pp. 1-2.

⁸² Ibid.

⁸³ T.H. KAY, *Competence in Matrimonial Procedure*, Washington, D.C., The Catholic University of America, 1929, p. 5.

⁸⁴ GOLDSMITH, *The Competence of Church and State*, p. 5.

which the Church asserted its proper competence in matrimonial causes. Despite the close intertwining of ecclesiastical and civil courts in the Middle Ages, the exclusive and proper competence of the Church in matrimonial causes was rarely questioned.⁸⁵ There was a gradual weakening of royal power and authority.⁸⁶ In this period of political turmoil, the jurisdiction of the secular courts over matrimonial cases also steadily weakened. Consequently, the jurisdiction of the ecclesiastical courts on this matter became stronger.⁸⁷ Different authors give various reasons for this transference of matrimonial cases to the Church. For Salvioli and Chenon the profoundly Christian character of society and the inconsistencies that resulted from the dual exercise of jurisdiction by the Church and the State were important factors.⁸⁸ Other authors stressed the emergence of feudalism in which bishops held the position of overlord.⁸⁹ By acquiring jurisdiction over matrimonial matters, the Church also acquired legislative power.⁹⁰ Secular rulers not only did not oppose the Church but also enacted marriage legislation generally in accordance with canon law.⁹¹ The science of canon law thus became an adequate expression of medieval papalism and reached its highest perfection in the reign of Pope Innocent III (1198-1216), under whose leadership the Church emerged as a supreme and universal monarchy, considered by all to be the true *Imperium Romanum*.⁹²

⁸⁵ KAY, *Competence in Matrimonial Procedure*, p. 8.

⁸⁶ ESMEIN, *Le mariage*, p. 274; see also G.H. JOYCE, *Christian Marriage: An Historical and Doctrinal Study*, London, Sheed and Ward, 1948, p. 225.

⁸⁷ JOYCE, *Christian Marriage*, p. 222.

⁸⁸ E. CHENON, *Le rôle social de l'Église*, Paris, Bloud et Gay, 1921, p. 74.

⁸⁹ ESMEIN, *Le Mariage*, p. 28; see also G. LE BRAS, "Mariage: La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille" in *Dictionnaire de théologie catholique*, vol. IX, Paris, 1926, pp. 2123-2317; JOYCE, *Christian Marriage*, pp. 214-216; SCHILLEBEECKX, *Marriage*, p. 274.

⁹⁰ ESMEIN, *Le mariage*, p. 28.

⁹¹ *Ibid.*, p. 29.

⁹² K. BIHLMAYER and H. TÜCHLE, *Church History*, Westminster, Newman Press, 1966-1968, pp. 193-194; 254-256.

Gradually, however, recognition of the Church's power was undermined. The first manifestation of infringement by the civil authority upon what were considered to be the rights of the Church took the form of interference with the judicial power of the Church.⁹³ As the fourteenth century began, the State began to encroach upon the exclusive matrimonial competence of the Church. At a time marked by grave political disturbances and the removal of the papal court to Avignon, the action of Louis of Bavaria (1342) stands as a determined departure from the traditional obedience of princes. Later, the divorce case of Henry VIII, which shook Christendom, was submitted in the beginning to the proper ecclesiastical courts. Throughout the proceedings, great care was taken to impress upon all that the affair had ecclesiastical sanction and was not merely a civil matter.⁹⁴

D. Council of Trent and Later Developments

The Council of Trent (1545-1563) began a half-century after the publication of the *Corpus iuris canonici*. This, the nineteenth of the general or ecumenical councils, was a landmark in the history of the Church and of canon law. It was the only Council, before Vatican Council II, to issue a major document on the sacrament of marriage.⁹⁵ In the twenty-fourth session of the Council, twelve doctrinal canons were enacted that related to matrimony.

In that time, Martin Luther (1483-1546) and John Calvin (1509-1564) were the two leading theologians on the side of the Reformers. They taught that marriage was a human institution because it existed before the coming of Christianity. Precisely because marriage was, in their view, a merely human institution, it had to come under civil jurisdiction. This principle was taken strictly by Calvin, less so by Luther, who admitted that when matters of conscience are involved, civil and ecclesiastical "commissions" could act jointly. Both

⁹³ GOLDSMITH, *The Competence of Church and State*, p. 13.

⁹⁴ KAY, *Competence in Matrimonial Procedure*, pp. 8-10.

⁹⁵ ÖRSY, *Marriage in Canon Law*, p. 31.

Luther and Calvin stressed “in principle” the indissolubility of marriage, although both held that the bond could be dissolved because of adultery.⁹⁶ The denial by Luther and Calvin of the sacramentality of marriage stressed the exclusive role of the secular prince over the marriage contract. In the field of marriage law, this advance of secular authority dividing itself from that of the Church placed a rigorous, systematic separation between the contract and the sacrament.⁹⁷

The primary purpose of the Council of Trent was to combat the erroneous teachings of the Protestant reformation.⁹⁸ Its goal was to increase and advance in esteem the Christian faith, by uprooting the heresies and promoting peace and unity of the Church.⁹⁹ This Council officially listed marriage as one of the seven sacraments,¹⁰⁰ and doctrinally stated the competence of the Church regarding the marriage of the baptized.¹⁰¹ The Council decreed that matrimonial causes were reserved to the exclusive examination and sole jurisdiction of ecclesiastical judges.¹⁰² Threatened by widespread “heretical” doctrines and fearful of the danger of greater perversion to the faith by clandestine and mixed marriages, the Council of Trent issued the famous chapter *Tametsi* (D-SCH 1813-1816) in 1563. While the chapter itself directly legislated against clandestine marriages, it indirectly touched the question of mixed marriages by introducing the obligation of canonical form, demanding that all marriages be celebrated before the proper pastor or some other priest enjoying the permission

⁹⁶ ÖRSY, *Marriage in Canon Law*, p. 31.

⁹⁷ J.A. NOWAK, “Inseparability of Sacrament and Contract in Marriages of the Baptized” [=“Inseparability of Sacrament and Contract”], in *Studia Canonica*, 12(1978), p. 334.

⁹⁸ N.P. TANNER, *The Decrees of the Ecumenical Council*, vol. II, London, Sheed and Ward, 1990, p. 657.

⁹⁹ *Ibid.*, p. 600

¹⁰⁰ Conc. Trident., *De Reformatione Matrimonii*, Sess. XXIV, November 11, 1563, cap. 1, “*Tametsi*,” *Sacrorum Conciliorum*, XXXIII, p. 149.

¹⁰¹ *Ibid.*, cc. 12 & 3, 4; see also L. BRESSAN, “Ratio et finis potestatis ecclesiae quoad matrimonium fidelium iuxta theologos et patres Concilii Tridentini”, in *Periodica*, 67(1978), p. 301.

¹⁰² NACE, *The Right to Accuse*, p. 31; see also GOLDSMITH, *The Competence of Church and State*, pp. 13-14.

of the pastor or the ordinary, in addition to the required two or three witnesses.¹⁰³ Thus essentially, the Council of Trent established a form which affected the very validity of marriage.¹⁰⁴

Melchior Cano (1509-1560), who distinguished himself at the Council of Trent, held that the matter of the sacrament was the consent of the parties; the blessing of the priest was the form. If a couple contracted without the blessing, they were married but without the benefit of the sacrament: there was a valid marriage, but no valid sacrament. However, Cano's opinion gained little support among theologians. As they continued to debate the "causes" of the sacrament of marriage, they placed the role of the priest outside of its structure: his specific role was to witness the agreement, no more. The ministers were the parties themselves. Official documents, too, were careful to speak of the priest whose presence was required for validity after Trent, as a "qualified witness".¹⁰⁵

From another point of view, the Council of Trent represented the continuing assertion by the Church of its independence from the State. The mark of this is its own legal system. Vestiges of this controversy are still seen today in countries where Catholics must go through two wedding ceremonies, one religious and one civil.¹⁰⁶ Heresy and nationalism joined forces and provided opposition in the succeeding centuries to the proper and exclusive competence of the Church in matrimonial causes. Generally, the marriages of the Catholics were left to the Church and to the guidance of canon law, but mixed marriages continued to be a sore point in the relations between the two powers.¹⁰⁷ In the years following Trent, a complex

¹⁰³ Conc. Trident., *De Reformatione Matrimonii*, Sess. XXIV, November 11, 1563, cap. 1, "Tametsi," *Sacrorum Conciliorum*, XXXIII, p. 152; see also WERNZ, *Ius decretalium*, vol. IV, nn. 176-181; ÖRSY, *Marriage in Canon Law*, p. 33.

¹⁰⁴ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 43.

¹⁰⁵ ÖRSY, *Marriage in Canon Law*, p. 34.

¹⁰⁶ ALESANDRO, "Overview of the Revised Code", p. 169.

¹⁰⁷ KAY, *Competence in Matrimonial Procedure*, pp. 10-11.

system of centralized Church governance developed, including the formation of many Roman dicasteries, both administrative and judicial, the predecessors of today's Roman Curia.¹⁰⁸

On November 3, 1741, Pope Benedict XIV issued the constitution, *Dei miseratione*,¹⁰⁹ in which he revised the judicial procedure for matrimonial cases, emphasizing the need for two concordant sentences before the invalidity of the marriage bond could be juridically recognized, even in cases of evident nullity. As a consequence, the parties were free to enter a second marriage only after an appeal, and two sentences favouring the nullity of their first union. Gradually, however, the stringent requirements of the judicial process demanded by this constitution were modified in cases of obvious and patent nullity, and faculties were even granted to certain bishops authorizing a summary trial.¹¹⁰ At the time of the Tridentine legislation, in regions where non-Catholics and Catholics lived side by side and where the non-Catholics had their own churches and ministers, the marriages of baptized non-Catholics among themselves or with Catholics were exempt from the form required by the *Tametsi*.¹¹¹ On September 17, 1746, Benedict XIV wrote a letter *Redditae sunt nobis*, to a Carmelite named Paul Simon of St. Joseph in which the Pope took a neutral position regarding the Tridentine form.¹¹² It is interesting to compare this "neutral" position with his letter *Paucis abhinc*, dated March 19, 1758 to the archbishop of Goa. In this latter letter, Benedict XIV seems to adopt the thinking of Robert Bellarmine identifying sacramentality precisely with the contract:

¹⁰⁸ ALESANDRO, "Overview of the Revised Code", p. 169.

¹⁰⁹ SACRA CONGREGATIO CONCILII, decl. *Matrimonii*, November 4, 1741, in P. GASPARRI and I. SEREDI, (eds.), *Codicis Iuris Canonici Fontes [= CIC Fontes]*, Civitatae Vaticanae, 1923 - 1939, vol. V, n. 3527, p. 968.

¹¹⁰ *CIC Fontes*, vol. 4, n. 1114.

¹¹¹ S.S.C., decl. *Matrimonia*, 4 Nov. 1741, nos.2-3, *CIC Fontes*, n. 3527, vol. 5, p. 969.

¹¹² *CIC Fontes*, vol. II, p. 42; see also NOWAK, "Inseparability of Sacrament and Contract", pp. 334-335.

It was first doubted whether the Church could abrogate clandestine unions, because the legitimate contract, the matter at the same time as the form, is the sacrament of matrimony: namely, the mutual and legitimate transferring of bodies by words and also by assents expressing the interior assent of the soul — the matter and likewise, the mutual and legitimate acceptance of the bodies — the form.¹¹³

Another solemnity was introduced by Pope Benedict XIV: the necessity of a special officer, the *Defensor matrimoniorum*. Required to be present at every marriage trial when the validity of a bond was in question, he thus replaced the arbitrary presence of a person or persons interested in defending the marriages.¹¹⁴

Pius IX (1846-1878) condemned the opinion that the contract could be separated from the sacrament (D-SCH 2966). This point of doctrine was later incorporated into the 1917 Code of canon law. Pius IX on August 22, 1851, issued an Apostolic Letter, *Ad Apostolicæ* condemning the works of John Nuytz (*Iuris Ecclesiastici institutiones* and *in Ius Ecclesiasticum universum tractationes*). He judged that such an error of separating sacrament from contract gave a false nature to marriage and deprived the Church of its proper power.¹¹⁵ The following year (1852), two pronouncements made by the Pope defended the rights of the Church in regard to the sacrament of marriage, based on the doctrine of the real inseparability of sacrament and contract between the baptized. Both documents were in reaction to civil laws claiming jurisdiction over marriage contracts.¹¹⁶ Problems, however, remain: the sacrament is clearly an added dimension to the contract, hence, the two cannot be considered fully identical. Moreover, when a baptized person marries a non-baptized one, the position

¹¹³ *CIC Fontes*, vol. II, p. 575; NOWAK, "Inseparability of Sacrament and Contract", p. 335.

¹¹⁴ KENNEDY, *The Special Matrimonial Process*, pp. 23-25.

¹¹⁵ *CIC Fontes*, vol. II, p. 858.

¹¹⁶ NOWAK, "Inseparability of Sacrament and Contract", p. 343.

of the Church is that they truly contract, but without benefit of the sacrament. Hence in that case at least, a Christian can contract without the benefit of the sacrament.¹¹⁷

On December 17, 1860, Pius IX in an allocution *Multis gravibusque*, lamented over the loss of Church liberty in its subservience to the civil power.¹¹⁸ On December 8, 1864, he issued an encyclical entitled *Quanta cura* in which he recalled earlier statements he had made concerning various contemporary evils. He specifically cited naturalism, communism, and socialism and reaffirmed once again the independence of the Church's power from civil power.¹¹⁹ On January 15, 1866, the Apostolic Penitentiary directed an instruction to bishops in areas where a civil form of marriage had become mandatory. The dicastery warned of the grave moral dangers involved where persons bound to the Tridentine form were forced to submit to this civil form. If Catholics contracted marriage simply according to the civil form, they were living then in concubinage. If they contracted sacramentally according to the Tridentine requirements, the civil law considered them to be unmarried and their children illegitimate.¹²⁰

One of the outstanding events in the nineteenth century and especially in the life of Pius IX was the First Vatican Council (December 8, 1869 — September 1, 1870). The preparatory commissions of this council considered at length the matter of inseparability of sacrament and contract. In the first chapter dealing with the elevation of marriage to sacramental dignity, the third and final redaction of the *Schema de rebus theologica-dogmaticis* specifically treated the question of inseparability. It described marriage as a "conjugal covenant (*coniugale foedus*) entered into by a legitimate contract."¹²¹

¹¹⁷ ÖRSY, *Marriage in Canon Law*, p. 35.

¹¹⁸ *CIC Fontes*, vol. II, p. 937.

¹¹⁹ *CIC Fontes*, vol. II, pp. 993-999.

¹²⁰ NOWAK, "Inseparability of Sacrament and Contract", p. 348.

¹²¹ *Ibid.*, p. 349.

A decree of the Holy Office, June 5, 1889¹²² permitted that where the existence of the impediments of disparity of cult, ligamen, consanguinity, affinity from lawful intercourse, spiritual relationship, or clandestinity could be proved by certain and authentic documents or by certain arguments adduced to show that the aforementioned impediments had existed and were not dispensed from, then the Ordinary could omit the solemnities required by the constitution *Dei miseratione* and, with the intervention of the *Defensor vinculi*, declare the marriage invalid. In such cases even a second sentence was not required.¹²³

E. Special Situations in India

As we concentrate our study on the Indian situation, it is necessary to see how laws and customs developed there. We begin with the laws of ancient India, and then see the Church laws and customs that were developed.

1. Laws of Ancient India

In ancient India, society was governed by laws supposedly envisaged by the seers, and the science of politics was considered part of this life and steeped in religion. The ethical principles that were the basis of the customary traditions guiding society became the foundation-stones of the ancient Indian legal system and of the science of state-craft.¹²⁴ The *Dharmasthiyam* or "the Code for the Royal Judges", dating from around 300 B.C., is one of the earliest Codes of law in the world and in quality, it is recognized as superior to most other contemporary Codes.¹²⁵ *The Laws of Manu* (*Manava Dharma sastra* also known as the

¹²² *CIC Fontes*, vol. IV, n. 1118.

¹²³ *CIC Fontes*, vol. IV, n. 1168, p. 237, nota 1; see also W.J. DOHENY, *Canonical Procedure in Matrimonial Cases*, vol. I, Milwaukee, The Bruce Publishing Company, 1948, p. 4.

¹²⁴ J.M. SHELAT, *Secularism: Principles and Application* [=Secularism], Bombay, N. M. Tripathi Private Ltd., 1972, p. 26.

¹²⁵ K. P. JAYASWAL, *Manu and Yajnavalkya - A Comparison and A Contrast: A Treatise on the Basic Hindu Law* [=Manu and Yajnavalkya], Calcutta, Butterworth & Co. (India) Ltd., 1930, pp. xix-xx.

Manava Code) is a product of the early days of the Brahmin Empire, circa 150 B.C., and the *Code of Yajnavalkya* followed it some three centuries later.¹²⁶

The Aryans were looked upon as guardians of society and their values of life became the standard for all ethnic groups. The principal fountain-head for these values is the extensive body of religious, philosophical and legal writings dating from antiquity.¹²⁷ In the Hindu mind, law and religion were inextricably connected.¹²⁸ Hindu polity could not contemplate, as in the West, a dichotomy of the state's secular and spiritual functions, for both were closely interwoven. The belief was that the state was a necessary institution only because it afforded security and protection and enabled the citizens to live and develop their personality according to the tenets of *Dharma*, the supreme law.¹²⁹

Among the ancient writers on *Dharma sastra* (Law), Manu is considered the greatest; he is called "the Law-giver". While Manu did not define marriage, he prescribed it as a necessity and treated it in a sacred contractual perspective.¹³⁰ Ancient lawmakers insisted on two aspects: marriage is sacred, and is a sacrament with permanency. According to Manu the husband receives his wife from the gods. He must always support her while she is faithful.¹³¹ Moreover, marriage was considered a sacrifice performed according to social customs. The marriage rites and ceremonies portray the sacred unity of the couple, the status

¹²⁶ Ibid., p. xx.

¹²⁷ These writings may be grouped as follows: the Vedas (1500-1200 B.C.); the Brahmanas; the Aranyakas and the Upanishads; the Dharma Sastras; the Epics: the Ramayana (c.100 B.C.) and the Mahabharata (c. 400 B.C.- c. 300 A.D.); and the Puranas (eighteen in number besides a huge body of Upapuranas). The traditional values as enjoined in these works may be classified under four heads: *Dharma* (duty) or natural justice, *Artha* or material welfare, *Kama* or creative desire, and *Moksha* or liberation. See SHELAT, *Secularism*, pp. 4-5.

¹²⁸ J.D.M. DERRETT, *Dharmasastra and Juridical Literature*, Wiesbaden, Otto Harrassowitz, 1973, p. 21.

¹²⁹ SHELAT, *Secularism*, p. 68.

¹³⁰ J. MALIEKAL, "The Celebration of Catholic Marriages in India", in *Studia Canonica*, 17(1983), p. 389.

¹³¹ Ibid., p. 390.

of their kinsmen and members of their caste and friends. Treating marriage as a contract, consent is essential for validity; and as a sacrament (*samskara*), religious ceremonies are also essential for validity. The present civil law also prescribes ceremonies for validity.¹³² Though the *Dharma* school regarded marriage as a sacrament, the *Artha* regarded it as a contract whether entered into by the parties themselves or vicariously through guardians. So according to *Artha sastra* of Kautilya there could be divorce between the parties, and there could be a forced dissolution by the State.¹³³ The summary of the *Dharma sastra* on marriage is: "Let mutual fidelity continue until death", i.e., no divorce (9:101).¹³⁴

The Manava Code carries caste¹³⁵ into every law and institution, including marriage. Certain marriages are open only to people from a given caste. However, no trace of division of marriage based on caste is found in the *Artha sastra* or earlier laws.¹³⁶ Eight marriage rites are described in the *Laws of Manu*. These indicate which rite is lawful for each caste, and the ways in which caste must be considered as well as degrees of relationship (3:4). Although caste is important, it is not the only consideration; the *Laws of Manu* nevertheless declare that the spiritual process of faith can transcend customary caste distinction, and enable a man to obtain an excellent wife even from a lower social stratum.¹³⁷

¹³² Ibid., pp. 392-393.

¹³³ JAYASWAL, *Manu and Yajnavalkya*, p. 221.

¹³⁴ G. BÜHLER, (tr.), *The Laws of Manu*, in F. MAX MÜLLER, (ed.), *The Sacred Books of the East*, Delhi, Motilal Banarsidass, 1967, vol. xxv, p. 345.

¹³⁵ The institution of caste divided the Indian people broadly into four groups, the *Brahmanas* or the priestly class, the *Kshatriyas* or the knightly order, the *Vaisyas* or the husbandmen and traders, and the *Sudras* or the class that served others. See S. CHATTOPADHYAYA, *Traditional Values in Indian Life*, Delhi, India, International Centre, 1961, p. 11.

¹³⁶ JAYASWAL, *Manu and Yajnavalkya*, p. 242.

¹³⁷ M.W. PINKHAM, *Woman in the Sacred Scriptures of Hinduism*, New York, AMS Press Inc., 1967, p. 74.

2. Laws of Early Christians of India

The Christians of Malabar had accepted the caste system, probably right from the beginning; they followed the customs in use among the Namputhiri Brahmins, after such customs were Christianized, using Christian symbols.¹³⁸ Parents chose the partners in marriage for their sons and daughters. Regarded as part of the discipline of the Malabar Church, these very old customs are almost certainly traceable to the time when Christianity was introduced in Malabar; they were accepted spontaneously so as not to change the indigenous character of the inhabitants.¹³⁹ From tradition, we know there were inter-marriages with the higher castes, especially the Nairs, who became baptized.¹⁴⁰ Divorce as such was unheard of among the Thomas Christians.¹⁴¹

As the East-Syrian Church began to exercise control over the Indian Christians, the canons of the Seleucian synods and the decisions, rules and constitutions of their patriarchs and bishops contributed to the creation of the *Malabar Codex*,¹⁴² or the "Law of Thomas", discussed in the first chapter. The Malabar Christians, who were living in a land of ancient civilization with strongly rooted customs, obviously did not follow the same pattern of life as their co-religionists in Mesopotamia. Since social and religious life in the East are closely interdependent, popular customs, religious practices, prescriptions of canon law, and local, private laws were all interrelated. However, with time, in the ninth session of the Synod of Diamper, *De reformatione morum*, only a few prescriptions of strictly juridical character are found.¹⁴³ Previously, there had been no formal exchange of consent of marriage. As the

¹³⁸ A.M. MUNDADAN, *Traditions of Thomas Christians* [=Traditions], Bangalore, Dharmaram College, 1970, p. 174.

¹³⁹ E. TISSERANT, *Eastern Christianity in India* [=Eastern Christianity in India], London, Longmans, Green and Co., 1957, p. 165.

¹⁴⁰ Ibid, p. 154.

¹⁴¹ P.J. PODIPARA, *The Thomas Christians*, Kottayam, India, St. Paul Publications, 1972, p. 91.

¹⁴² A. P. KANJIRATHINKAL, "The Juridical Status of the Syro-Malabar Church in Relation to Its Ancient Sources" [= "The Juridical Status"], in *Kanon*, 1(1973), p. 72.

¹⁴³ TISSERANT, *Eastern Christianity in India*, p. 164.

entire congregation witnessed the marriage celebration, there was no need for formal witnesses. However, in 1599, the decree of the Synod of Diamper made the formal exchange of consent mandatory.¹⁴⁴

The Malabar Church enjoyed a *sui juris* status.¹⁴⁵ Its civil cases were decided by the ecclesiastical authority. Only criminal cases were taken to the kings. In a certain locality in Quilon, and in another in Cranganore, even criminal cases were judged by their own who could also inflict capital punishment in those localities.¹⁴⁶ They could even mint their own money.¹⁴⁷ European authors such as Vincent Mary and Paulinus called this community a "Christian Republic".¹⁴⁸ The Thomas Christians also had a king until about the end of the 15th century. According to some, this king was himself a Christian while according to others, he was a Hindu who took special care of the Thomas Christians.¹⁴⁹ To show the orthodoxy of this dynasty, the Christians quote letters from Pope John XXII in 1330 and from Pope Eugene IV in 1439 to the Christian Kings of India.¹⁵⁰ At any rate, the Christians enjoyed a certain amount of civil autonomy.

The Archdeacon and the *yogam* (see chapter I) looked after the overall Christian life of the local community. This assembly decided cases of public scandal, inflicting

¹⁴⁴ MALIEKAL, "Celebration of Catholic Marriages in India", p. 397.

¹⁴⁵ KANJIRATHINKAL, "The Juridical Status", p. 71.

¹⁴⁶ PODIPARA, *The Thomas Christians*, p. 84; see also P. J. PODIPARA, *The Canonical Sources of the Syro-Malabar Church*, X. KODAPUZHA, (ed.), Kottayam, India, OIRSI, 1986, p. 65; MUNDADAN, *Traditions*, pp. 124-125.

¹⁴⁷ P.J. PODIPARA, *The Rise and Decline of the Indian Church of the Thomas Christians* [= *The Rise and Decline*], Kottayam, India, OIRSI, 1979, p. 21.

¹⁴⁸ Ibid., p. 18; A.M. MUNDADAN, *Indian Christians: Search for Identity and Struggle for Autonomy* [= *Indian Christians*], Bangalore, India, Dharmaram Publications, 1984, p. 21.

¹⁴⁹ PODIPARA, *The Thomas Christians*, p. 85; see also P.J. PODIPARA, *The Malabar Christians*, Allepey [India], Prakasam Publications, [1972], p. 34; MUNDADAN, *Traditions*, pp. 125-129.

¹⁵⁰ A. THAZHATH, *The Juridical Sources of the Syro-Malabar Church* [= *The Juridical Sources*], Kottayam, OIRSI, 1987, p. 25.

punishments which sometimes amounted to excommunication.¹⁵¹ The assembly exercised ample powers in administering justice, in punishing delinquents, etc.¹⁵² However, we do not have any recorded evidence on marriage cases particular to Thomas Christians. We assume that they followed the Hindu practices and Seleucian regulations concerning marriage and its validity.

3. Western Influence

With the arrival of the Portuguese, Latin rite laws were introduced in India among the converts of the 16th century. Although the missionaries of those days were not wanting in zeal, they lacked the knowledge and personal appreciation of Eastern Christians in general and of the Thomas Christians in particular. Whatever the local customs or the regulations made by the Catholicate of Seleucia, the Portuguese lost no time trying to persuade the Christians of St. Thomas to conform to the discipline of the Latin Church.¹⁵³

It was in 1599 that the discipline of the Malabar Church was fixed at Diamper by Alexis de Menezes and his collaborators. Many decrees of Diamper were passed on to posterity as the canon law of the Syrians of Malabar; *Propaganda Fide* practically acknowledged it as the special Code of the Thomas Christians.¹⁵⁴ The marriage discipline was the same as that fixed by the Council of Trent (session VII, *De sacramento matrimonii*, decrees 1-16).¹⁵⁵ There were only a few punishments directly intended to reform the morals of the laity. One of these was an *anathema* on married people who separated without the intervention of the ecclesiastical authority (session VII, *De sacramento matrimonii*, decree

¹⁵¹ PODIPARA, *The Thomas Christians*, p. 96.

¹⁵² MUNDADAN, *Indian Christians*, p. 21; see also KOODAPUZHA, "The Ecclesiology", p. 78.

¹⁵³ TISSERANT, *Eastern Christianity in India*, p. 165.

¹⁵⁴ *Ibid.*, p. 166.

¹⁵⁵ *Ibid.*, p. 168.

11). After Diamper the Syrians had a discipline so similar to that of the Latins, that little care seemed to have been taken to draw up special laws for them.¹⁵⁶

From the time the Syrians received their own prelates, their discipline was given more attention and made a little more precise in some respects. An example of such were the episcopal regulations published in 1891 by Mgr. Charles Lavigne for the apostolic vicariate of Kottayam. Mar Matthew Makil did the same in 1903 for Changanacherry. The regulations of Mar Louis Pareparambil, the Apostolic Vicar of Ernakulam and those of Mar Augustine Kandathil, Archbishop of Ernakulam, have been promulgated in the official paper of the eparchy, *Ernakulam Missam*.¹⁵⁷ However, the promulgation of the Latin Code of canon law in 1917, although meant only for the Latin Church, had great influence on the Malabar Church until *Crebrae allatae* was published.¹⁵⁸

The Jacobite and Syrian Orthodox bishops had of course introduced in Malabar the law of the patriarchate of Antioch, which is based mainly on the *Nomocanon* of Bar-Hebraeus, but this law was not in force in Malabar before the nineteenth century. Today, certain local characteristics have been preserved, which originated either in the old law of the Chaldeans, or in local customs, or even in the legislation imposed by the Portuguese before 1653. Within the last hundred years the secular courts of Travancore and Cochin have intervened several times in the life of the Jacobite community, and their decisions possessed the force of law. Since the reunion of Mar Ivanios and the formation of a new Catholic community of the Syro-Malankara rite in India, certain regulations have settled important details. All these sources were utilized in the methodical survey prepared for the commission of the codification of Oriental canon law.¹⁵⁹

¹⁵⁶ Ibid., p. 171.

¹⁵⁷ Ibid., p. 172.

¹⁵⁸ THAZHATH, *Juridical Sources*, p. 256.

¹⁵⁹ PLACID OF ST. JOSEPH, *Fontes Juris Canonici Syro-Malankarensium, Fonti*, II, 8-9, Città del Vaticano, vol. II, 1937-1940; TISSERANT, *Eastern Christianity in India*, pp. 172-173; see also S.

II. THE CODIFICATION OF CANON LAW

We must now consider the situations behind the first codifications of canon law — Western and Eastern — and the provisions of both Codes.

A. *Codex Iuris Canonici* of 1917

The Latin Code of 1917 was the first Code of canon law to be promulgated. In this section, we wish to examine the necessity of such a promulgation. Also, we present a general overview of the provisions in the Code relating to inter-Church marriages.

1. Promulgation of the Code

The process of centralization required a codification of laws in order to maintain harmony and to promote unity in the Church. *Tametsi* was somewhat ineffective because of the inadequate means used for its promulgation. By the time of the First Vatican Council (1869-1870), the Church's legislation was in a state of confusion. The Council fathers realized that the system needed to be revamped completely. Despite significant historical attempts to coordinate the Church's laws, there had never been an authoritative or official codification. Even the *Corpus iuris canonici*, a scholarly work, was unofficial. Several decades after the close of Vatican I, Pope Pius X began to accomplish this task.¹⁶⁰

Some parts of the Code were published in advance as separate decrees, e.g., *Sapienti consilio* on the reform of the administration of the Roman Curia, and *Ne temere* on the canonical form of marriage. The Decree *Ne temere*¹⁶¹ of 2 August 1907, which was a modification of *Tametsi*, extended the requirement of canonical form for marriage to the entire Latin Church. It gave authority to the territorial pastor, rather than to the pastor of the

CHAMPAPPILLY, *The Christian Law*, Cochin, [India], Continental Publishing Co (Pvt) Ltd., 1988, p. 9.

¹⁶⁰ ALESANDRO, "Overview of the Revised Code", p. 170.

¹⁶¹ SACRA CONGREGATIO CONCILII, decr. *Ne temere*, August 2, 1907, in *ASS*, 40(1907), pp. 525-530.

domicile or quasi-domicile of one of the parties, for the valid assistance at marriage.¹⁶² The entire *Codex iuris canonici*, the first codification of the Church laws, was promulgated for the Latin Church by Pope Benedict XV with the apostolic constitution *Providentissima mater Ecclesia* on Pentecost, May 27, 1917, and acquired the force of law on May 19, 1918.¹⁶³

This Code abrogated, or disqualified, all other extant universal canonical legislation. It represented the most radical revision of the Church's law since the work of Gratian, eight centuries earlier. It was modeled after the significant nineteenth century civil Codes of Europe and consisted of 2,414 canons divided into five books. At the time of its promulgation, the Code was the most centralized and clearest system of universal ecclesiastical legislation the Church had ever known.¹⁶⁴

2. Provisions in the Code

The main architect of the law of marriage in the first Code, Pietro Gasparri, was concerned with upholding and protecting the institution of marriage.¹⁶⁵ During the consultation period, there was agreement regarding proposing a canon on the competence of the Church in the matters of marriage. Gasparri suggested that this canon should express that the "only" competent authority with regard to the marriage of the baptized is the Church. He affirmed that since marriage is a contract, it should be regulated by a competent authority and as marriage is also a sacrament, the competent authority in marriage is the Church. The teaching that the sacrament and the contract are inseparable for Christians, which was asserted strongly in the nineteenth century by Pope Pius IX¹⁶⁶ and Pope Leo XIII,¹⁶⁷ was

¹⁶² Ibid., pp. 527-528.

¹⁶³ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus, Benedici Papae XV auctoritate promulgatus*, Rome, 1917, in *AAS*, 9(1917), pp. 5-10; see also J.D. FARIS, *Eastern Catholic Churches: Constitution and Governance [=Eastern Catholic Churches]*, New York, Saint Maron Publications, 1992, p. 70.

¹⁶⁴ ALESANDRO, "Overview of the Revised Code", p. 170.

¹⁶⁵ ÖRSY, *Marriage in Canon Law*, p. 35.

¹⁶⁶ *Syllabus errorum*, December 8, 1864, no. 66, in *Enchiridion symbolorum, definitionum et*

summed up in the Code of 1917: "A valid matrimonial contract cannot exist between baptized persons without its being by that very fact a sacrament" (c. 1012 §2).

In the partial consultation on the preliminary canons of marriage on 6th July 1905, Gasparri proposed that Protestants and other non-Catholics would certainly be excluded in the new law from the obligation to observe the substantial form for the marriage. But the consultors reacted to this proposal of excluding the Protestants and the non-Catholics from the marriage impediments of merely ecclesiastical laws, by stating that, they "do not believe that they can soon pronounce on this matter."¹⁶⁸ As a result, in the final text of the preliminary canons of *Ne temere*, Gasparri's proposal was not included.¹⁶⁹

In an answer to the Vicar Apostolic of Natal, the Code Commission dated December 3, 1919, clarified:

The Protestants or schismatics who are baptized, even validly, in heresy or schism and have not been converted to the Church from heresy or schism, when they contract marriage with pagans contract validly under the new Code, because they are bound neither by the impediment of disparity of worship nor to the observance of the canonical form of marriage."¹⁷⁰

In requiring certain formalities for the valid expression of consent, the Church exercises its authority over the contract directly, and not over the sacrament as such. It is true that a valid contract between baptized persons becomes by that very fact a sacrament, and the conditions imposed by the Church are required for the validity of the contract. Hence no change can be effected by the Church that affects the dignity of the sacrament which is

declarationum de rebus fidei et morum [= *Enchiridion*], H. DENZINGER and A. SCHÖNMETZER, (ed.), 35 emendata, Friburgi Brisgoviae, Herder, 1973, n. 2966, p. 583.

¹⁶⁷ Encyclical letter, *Arcanum*, February 10, 1880, in *Enchiridion*, nn. 3142-3146, pp. 612-614.

¹⁶⁸ "Non credono di potersi subito pronunciare su di essa."

¹⁶⁹ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 53.

¹⁷⁰ S.C. GULOVICH, "The Principle Underlying the Validity of Oriental Marriage Law" [= The Principle], in *The Jurist*, 6(1946), p. 43.

instituted by Christ. The Church can make laws for a valid and lawful contract.¹⁷¹ Canonists like F.X. Wernz, P. Vidal, P. Gasparri,¹⁷² and others, drew on this teaching when responding to objections raised on the theological ground that the Church has no power to modify the substance of the sacraments, because the matter and form of all the sacraments were determined by Christ.¹⁷³

In practice, according to the 1917 Code, the legislative, judicial, and executive power of the Church extended to all marriages in which at least one of the parties is baptized. The Church reserved judgement for determining the absence of danger to the faith, which is a fundamental element in its law with regard to mixed and diverse marriages. For this reason, the Church legislated in the 1917 Code against an interested individual judging for himself/herself in such cases. The Church reserved the decision to itself,¹⁷⁴ not referring to the rights of the non-Catholic.¹⁷⁵

Canon 12 considers all baptized persons, whether Catholic or non-Catholic, as subjects of merely ecclesiastical laws. Since this canon presupposes the reception of baptism by the subjects of ecclesiastical law, the non-baptized are not bound by ecclesiastical law. The non-baptized, even if they are catechumens, do not enjoy the status of persons in canon law; therefore they are not directly subject to the Church.¹⁷⁶ According to c. 87, an individual by virtue of baptism, acquires juridical capacity in the Church, and acquires the rights and

¹⁷¹ BOUSCAREN, *Canon Law*, p. 473.

¹⁷² WERNZ, *Ius Decretalium*, vol. IV, n. 158; WERNZ and VIDAL, *Ius Canonicum*, vol. V, I, n. 57; P. GASPARRI, *Tractatus Canonicus de Matrimonio*, t. I, Parisiis, Secrétariat de l'Institut catholique, 1904, n. 227.

¹⁷³ BOUSCAREN, *Canon Law*, p. 472; KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 53.

¹⁷⁴ CIC 1917, c. 21: "Leges latae ad praecavendum periculum generale, urgent etiam si in casu particulari periculum non adsit."

¹⁷⁵ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 54.

¹⁷⁶ J.A. ABBO and J.D. HANNAN, *The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church*, vol. I, St. Louis, Herder, 1957, p. 125.

duties of a Christian.¹⁷⁷ It is clear from c. 1016 that all persons who received a valid baptism were subject to the jurisdiction of the Catholic Church.¹⁷⁸

B. The Codification of Oriental Law on Marriage

A separate Code of canon law for Orientals seemed essential because of differences of culture and discipline. Hence, we review here the situations that led to a separate codification, noting the major differences between the provisions of the Western and Eastern Codes.

1. Pre-Code Situation

The division of the Church into East and West, or Oriental and Latin, is of political origin. It followed the division of the Roman Empire by Diocletian at the end of the third century. The Oriental Churches were those which belonged to the Eastern division of the Empire.¹⁷⁹ Most of these at various times fell away by schism from the Catholic Church, the Maronite Church being a notable exception. Some remained in schism, and now go by the name of Orthodox. But, as is well known, many Oriental Churches have returned to the Catholic Church and acknowledged the supremacy of the Pope. They have for a long time retained, without objections from Rome, their traditional government and discipline. The 1917 Code, by the first canon, confirms that traditional policy by limiting its jurisdiction only to the Western Church.¹⁸⁰

¹⁷⁷ See A. DE JORIO, "Acatolici baptizati tenentur legibus ecclesiasticis?" *Ephemerides Iuris Canonici*, 32(1976), 34; K. LÜDICKE, "Die Kirchengliedschaft und die Plena Communio: eine Anfrage an die Dogmatische Theologie aus der Perspektive der Kirchenrechts", in AA.VV. *Recht in Dienste des Menschen*, Graz-Wien-Köln, 1987, p. 377; D. FLATIN, "De legibus quibus baptizati acatolici ritui Orientali adscripti tenentur", *Apollinaris*, 35(1962), p. 239.

¹⁷⁸ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 55.

¹⁷⁹ The division between the Eastern and Western Empire was first made by Diocletian (284-305) and was confirmed by the sons of Theodosius (Arcadius in the East, 394-408, Honorius in the West, 395-423).

¹⁸⁰ BOUSCAREN, *Canon Law*, pp. 15-16.

The Roman law tradition never died in Byzantium. It was slowly transmuted through contact with Christian principles. The Byzantine ideal of “symphony” between *imperium* and *sacerdotium* assumed the concordance of civil law and Church law; hence the most characteristic expression of the Byzantine canonical tradition, the *Nomocanon*, which conveniently arranged civil *nomoi* and ecclesiastical *kanones* by topic.¹⁸¹ Derived from the two Greek terms, νόμος (*nomos*=law) and κανών (*kanon*=rule), the term denotes a collection of both secular and ecclesiastical law. The institution of the *Nomocanon* arose because civil authorities, in addition to their secular authority, assumed the position of guardian of the Church and disposed of matters which were essentially ecclesiastical in nature. It was natural, therefore, that collections of laws treat both ecclesiastical and civil matters.¹⁸²

The *Nomocanons* exercised a great influence on the evolution of ecclesiastical law in the East. Two collections are particularly well-known: the earliest, the *Nomocanon of the Fifty Titles*, was elaborated during the sixth century; updated versions were in use in the East through the twelfth century. Another collection, the *Nomocanon of the Fourteen Titles*, underwent three major revisions and was adopted by a council at Constantinople in 920 as the official legislation of the Constantinopolitan Church.¹⁸³

Of course, each Eastern Church had to satisfy its own needs in collecting laws passed over the years, and so there were collections, often systematic, of the Chaldean (East Syrian), West Syrian, Maronite, Armenian, Georgian, and the Coptic legislation. Many of these collections are no longer in print and remain for the most part generally unknown because they are practically inaccessible.¹⁸⁴ Interest in the codification of legislation was revived

¹⁸¹ J.H. ERICKSON, *The Challenge of Our Past: Studies in Orthodox Canon Law and Church History* [= *The Challenge*], Crestwood, NY, St. Vladimir's Seminary Press, 1991, p. 46.

¹⁸² FARIS, *Eastern Catholic Churches*, p. 68.

¹⁸³ *Ibid.*, pp. 68-69.

¹⁸⁴ *Ibid.*, p. 69.

during the second half of the eighteenth century when a collection of Eastern canon law was assembled.¹⁸⁵ The specific marriage law of the Eastern Catholic Churches before *Crebrae allatae* can be found roughly sketched in Acacius Coussa's *De matrimonio*.¹⁸⁶

With the apostolic constitution *Romani Pontifices* (January 6, 1862),¹⁸⁷ Pope Pius IX established a section in the Congregation for the Propagation of the Faith called the *Congregation of the Propagation of the Faith for Affairs of the Eastern Rite*.¹⁸⁸ One of the tasks given to this group was to collect and study the canons of the Eastern Churches.¹⁸⁹

2. Promulgation of *Crebrae Allatae*

It was not until the *Codex iuris canonici* was promulgated in 1917 and its benefits appreciated that a serious effort was made to create a similar Code for Eastern Catholic Churches. On July 25, 1927, at a plenary meeting of the Congregation for the Eastern Church, the project of a codification of Eastern canon law was formally proposed; this proposal was unanimously accepted and referred to Pope Pius XI on August 3, 1927.¹⁹⁰

A preliminary College or Council of the Presidency, comprising the Pope as president, along with Cardinal Pietro Gasparri, Cardinal Sincero and Syrian Patriarch Rahmani, was established in 1927. The constitution of this commission was modified on July 13, 1929, and its name changed to *Commission for the Eastern Codification*. On November 29, 1929, Pope Pius XI created the *Commission of Cardinals for the Preparatory*

¹⁸⁵ A. CICOGNANI, "De Codificatione Canonica Orientali", in *Apollinaris*, 5(1932), pp. 86-95; A. COUSSA, "De Codificatione Canonica Orientali", in *Acta Congressus Iuridici Internationalis*, 4(1937), pp. 491-532; see also FARIS, *Eastern Catholic Churches*, p. 69.

¹⁸⁶ V.J. POSPISHIL, *Eastern Catholic Marriage Law*, Brooklyn, NY, Saint Maron Publications, 1991, p. 134.

¹⁸⁷ *CICFontes*, vol. II, nn. 946-953.

¹⁸⁸ *Ibid.*, nn. 949-950.

¹⁸⁹ *Ibid.*, n. 950; see also FARIS, *Eastern Catholic Churches*, p. 69.

¹⁹⁰ FARIS, *Eastern Catholic Churches*, p. 69.

Studies of the Eastern Codification under the presidency of Cardinal Pietro Gasparri. A. Cicognani, the Assessor of the Congregation of the Eastern Churches, served as the secretary of that Commission.¹⁹¹

On July 17, 1935, Pope Pius XI established the *Pontifical Commission for the Redaction of Eastern Canon Law*,¹⁹² hereinafter referred to as the Redaction Commission, which was entrusted with the task of revising the *schemata* in consideration of the comments submitted by the various consultative bodies.¹⁹³ After more than twelve years of work, in March, 1948, the Redaction Commission presented to Pope Pius XII a complete draft of the *Codex iuris canonici orientalis* in nearly final form, i.e., “*ad promulgationem*.” Because there was an immediate need by some Churches for parts of the new legislation, some portions of the canons were promulgated separately: (1) *Crebrae allatae* (CA) — 131 canons on marriage promulgated on February 22, 1949;¹⁹⁴ this acquired the force of law on May 2, 1949; (2) *Sollicitudinem nostram* (SN) — 576 canons on procedure promulgated on January 6, 1950;¹⁹⁵ this acquired the force of law on January 6, 1951; (3) *Postquam Apostolicis* (PA) — 325 canons on religious, temporal goods and the definition of terms promulgated on February 9, 1952;¹⁹⁶ this acquired the force of law on November 21, 1952; (4) *Cleri sanctitati* (CS) — 558 canons on rites and persons promulgated on June 2, 1957;¹⁹⁷ this acquired legal force on March 25, 1958.¹⁹⁸

¹⁹¹ Ibid., p. 73.

¹⁹² See AAS, 27(1935), pp. 306-308.

¹⁹³ FARIS, *Eastern Catholic Churches*, p. 74.

¹⁹⁴ PIUS XII, m.p. *Crebrae Allatae Sunt*, February 22, 1949, AAS, 41(1949), pp. 89-119.

¹⁹⁵ AAS, 42(1950), pp. 5-20.

¹⁹⁶ Ibid., 44(1952), pp. 65-152.

¹⁹⁷ Ibid., 49(1957), pp. 433-603.

¹⁹⁸ FARIS, *Eastern Catholic Churches*, p. 74.

In the motu proprio *Crebrae allatae*, dated February 22, 1949, the Feast of St. Peter in Antioch, Pope Pius XII published the new marriage law for the Oriental Church. This law adhered closely to the respective canons of the Code of canon law for the Latin Church of 1917, and fulfilled the desires frequently expressed during the previous forty years that marriage law be made uniform for the entire Catholic world.¹⁹⁹ With even more explicit force than the constitution of Pope Benedict XV, *Providentissima mater Ecclesia* (May 27, 1917), the motu proprio of Pope Pius XII abrogated all other statutes, laws and customs, general or particular, unless explicitly retained, so that these newly promulgated canons would be the only law on the subject of marriage for the faithful of the Eastern Churches.²⁰⁰

The Oriental sources taken into consideration for codification were mostly Byzantine, except for a very limited number of sources of other Churches.²⁰¹ This Code, "apparently Byzantine, but really Latin in spirit", disregards the genuine traditions of the non-Byzantine Churches, that is, of the Armenians, Copts, Ethiopians, Chaldeans, Maronites, Malabarese, and Malankarese. To put together all these traditions in one Code would be a difficult task indeed.²⁰²

3. Provisions in *Crebrae Allatae*

In reading over the canons of the 1949 legislation, the striking impression is the general *verbatim* adherence to the terminology of the canons of the Latin Code, although numerous variations could be noted. *CA* also borrowed the same general structure and the same division into 12 chapters from *CIC* of 1917. The content of the canons was almost

¹⁹⁹ J.D. CONWAY, "A Comparative Glance at the Latin and the Oriental Marriage Discipline" [= "A Comparative Glance"], in *The Jurist*, 9(1949), p. 316.

²⁰⁰ CONWAY, "A Comparative Glance", p. 316; see also S.C. GULOVICH, "The Motu Proprio *Crebrae Allatae*" [= "The Motu Proprio"], in *The Jurist*, 10(1950), p. 335.

²⁰¹ The sources indicated include also the letter of the Sacred Congregation of Propaganda Fide to the bishops of India on August 28, 1893; see I. ŽUŽEK, "The Ancient Oriental Sources of Canon Law and the Modern Legislation for Oriental Catholics" [= "The Ancient Oriental Sources"], in *Kanon*, 1(1973), p. 155.

²⁰² ŽUŽEK, "The Ancient Oriental Sources", pp. 149-150.

identical.²⁰³ However, there are some important differences between *CIC* and the *Crebrae allatae*. The reason for this difference is not only the wish of the Church to uphold genuine Oriental tradition, but also the different actual situation of non-Catholic Orientals compared with that of non-Catholic Occidentals, chiefly Protestants. Among the latter, many are found to be not baptized at all, or baptized invalidly, so that marriages among them would often be invalid. Non-Catholic Orientals on the contrary did not desert the ancient doctrinal tradition concerning the sacraments; generally speaking, they baptize validly, and there are no more non-baptized persons found among them than among Catholics. Marriages with the non-baptized are, in accordance with local custom, rarer than among Catholics. The Church, therefore, had no motive for exempting them from the diriment impediment of disparity of worship.²⁰⁴

While c. 1070, §1 of the 1917 Code exempts non-Catholics from the diriment impediment of disparity of worship when they marry among themselves, c. 60 §1 of *CA* affirms the ancient tradition of the East as well as of the West that marriages between baptized and non-baptized persons are invalid, except if a dispensation has been granted by legitimate ecclesiastical authority. It follows that the baptized non-Catholics referred to in *CA* must be Oriental non-Catholics. *Crebrae allatae* expressed thus clearly that there is a dividing wall not only between Western and Eastern Catholics, but also between Western and Eastern non-Catholics.²⁰⁵ Hence, in adjudicating marriage nullity cases of non-Catholics, it should be determined in what sect they were baptized. If the denomination traces its origin to the Latin Church, those who received baptism in this denomination are subject to the *CIC*.

²⁰³ J. VADAKUMCHERRY, "Marriage Laws in the Eastern and Latin Codes", in J. CHIRAMEL, and K. BHARANIKULANGARA, (eds.), *The Code of Canons of the Eastern Churches: A Study and Interpretation*, Alwaye, St. Thomas Academy for Research Publications, 1992, p.184.

²⁰⁴ V.J. POSPISHIL, *Inter-ritual Canon Law Problems in the United States and Canada* [= *Inter-ritual Canon Law*], Chesapeake City, Maryland, St. Basil's, 1955, p. 101.

²⁰⁵ POSPISHIL, *Inter-ritual Canon Law*, p. 100.

If it traces to the ancient Oriental Churches, those who were baptized in such a denomination are subject to *CA*.²⁰⁶

While the 1917 Code (c. 1094) establishes as essential elements of the marriage form the presence of the qualified priest and two witnesses at the moment when the parties, requested by the priest, exchange their consent, *Crebrae allatae* (c. 85) adds for Oriental Catholics a third element: the blessing bestowed upon them by the assisting priest. This is an affirmation of the Oriental tradition, uniform in this point, at least during the last centuries, that the act of exchange of consent must be accompanied by a religious, liturgical celebration.²⁰⁷

Another notable difference, though naturally to be expected, reflects the customs and the nomenclature of the Oriental Churches. Special provisions were made for those who lived in a territory in which there was no pastor or hierarch of their own rite (c. 86, §3). It should be noted that canon 98, §2, authorized the bishop to permit the solemnization of a marriage in a private home whenever a just cause prevailed. This would seem to indicate that the solemnization of a marriage in church was not required for validity.²⁰⁸

Canon 5 was a reproduction of c. 1016 of the 1917 Code. With regard to *CA* there was a question as to whether the Code applied only to the Oriental Catholics or also to other Oriental Christians not in full communion with Rome. Until the Second Vatican Council it was a common opinion that *CA* was binding not only on the Oriental Churches of the Catholic fold but also on baptized Oriental non-Catholics as well. The only exception allowed in this regard was related to the canonical form of the marriage.²⁰⁹ Hence, the

²⁰⁶ Ibid., p. 101.

²⁰⁷ Ibid., p. 122.

²⁰⁸ GULOVICH, "The Motu Proprio", p. 349.

²⁰⁹ *CA* c. 90 §1-2; see also J. PRADER, "De iure quo regitur matrimonium baptizatorum

Oriental Churches not in full communion with the Catholic Church were bound by all the canons that existed in those Churches prior to the schism; and all the laws legitimately promulgated for Oriental Christians since the separation of the Churches, whether common to all Catholics or special to the particular Ritual Churches.²¹⁰ At this time, the Catholic Church did not attribute any legitimate jurisdiction to the hierarchy in the Orthodox Churches after their separation. Consequently those Oriental Christians were considered not bound by the canonical legislation of their own Orthodox Church if this had been promulgated after the separation.²¹¹

It is to be noted that before *CA* was promulgated, a marriage between an Eastern Catholic and an Orthodox celebrated before an orthodox priest was considered valid and a true sacrament by the Catholic Church, with the exception of marriages in the territories where the Oriental Catholics were subject to the canonical form prescribed by the Decree of *Tametsi* or the Decree *Ne temere*.²¹² But *CA* created a new situation with regard to the canonical form of marriage between a Catholic and a non-Catholic of an Oriental rite, a situation which continued up to the Second Vatican Council Decree *Orientalium Ecclesiarum*. The canonical form laid down by *CA* in canons 53 and 85 stated that a marriage between a Catholic and a non-Catholic of an Oriental rite was valid only if it was celebrated before a Catholic priest. It required two conditions: the presence of the Catholic priest to ask for and receive the consent, and the blessing of the priest, at least, as part of the sacred rite.²¹³

acatholicorum: ius conditum et ius condendum", in *Periodica*, 67(1978), p. 135; B. FRANCK, "Evolution récente du droit et de la jurisprudence catholiques touchant la validité d'un mariage entre les chrétiens acatholiques dont l'un appartient à l'Orthodoxie", in *Revue de Droit canonique*, 27(1977), p. 277.

²¹⁰ A. COUSSA, *Epitome Praelectionum de Iure Ecclesiastico Orientali*, vol. I, Romae, Typis Polyglottis Vaticanis, 1948, pp. 11-15.

²¹¹ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 61.

²¹² J. PRADER, *Il matrimonio in Oriente e Occidente*, in *Kanonika*, 1(1992), p. 135.

²¹³ B. GIANESIN, "Matrimoni misti tra Cattolici e Ortodossi di Grecia", in R. COPPOLA, (ed.), *Incontro fra Canonici d'Oriente e d'Occidente*, vol. 2, Bari, 1994, p. 494.

With this disposition legislators decided to extend to the whole Church the norms contained in the Latin Code. This was apparently done without evaluating sufficiently the consequences it could effect in an Oriental environment, where practices were diverse, or without considering whether the norms would contribute to the equilibrium achieved after great efforts. The Orientals are more interested in the sacred rite, rather than in the problems of canonical form. Orthodox Churches could not understand why a marriage celebrated in their rite could not be considered valid by the Catholic Church. The consequence was that when the non-Catholic party did not accept the conditions put forward by *CA*, and he/she entered into a marriage celebrated in front of the Orthodox minister, that marriage was considered invalid by the Catholic Church only for this reason. In order to resolve this difficulty, the Catholic Church conceded slowly to the Patriarchs and to the Ordinaries more ample faculties to give dispensations, but such measures were only partially effective.²¹⁴

Canon 1102 of the 1917 Code, which prohibited “sacred rites” in mixed marriages was omitted, since it had already been supplanted by the general requirement of c. 85 that a sacred rite be required for the valid assistance at any marriage. Canon 1101 of the Latin Code regarding the nuptial blessing was omitted. The impediment of disparity of cult is simply stated, without condition or exception: all members of the Eastern Churches (schismatic as well as Catholic) are governed by the impediment of disparity of cult.²¹⁵

There were, however, many provisions which either differ from or are not contained in the Latin Code. One of these was that the priest had to be of the same rite as the contracting parties or, if of a different rite, must have proper delegation; another was that all marriages, including mixed marriages, had to be solemnized in conjunction with a *sacer ritus*.²¹⁶ This was an affirmation of the Oriental tradition, uniform in this point at least during

²¹⁴ KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 63.

²¹⁵ CONWAY, “A Comparative Glance”, pp. 319-320.

²¹⁶ GULOVICH, “The Motu Proprio”, pp. 348, 355.

the last centuries, that the act of exchange of consent must be accompanied by a religious, liturgical celebration.²¹⁷ As to the blessing itself, required by c. 85 §2 as an essential part of the Oriental marriage form, the Redaction Commission resolved on May 3, 1953 that any blessing sufficed, as far as validity was concerned, and no special liturgical act was required.²¹⁸

III. VATICAN II AND THE REVISION OF LAW

The Second Vatican Council brought about a thorough renewal in the Church. An awakening experience called for a revision of the canon law. How did the Latin and Oriental Churches implement the theology and instructions of Vatican II in their Codes?

A. The 1983 Code (*CIC*)

Law is, after all, an evolving science and art as it reflects the changing practices and life of the community. It was inevitable that the Church's legal system would once again grow complicated, confusing and unwieldy. Within a relatively short period of time, the interpretations clarifying various canons and their commentaries amounted to a printed volume almost as long as the Code itself. A good example of the need for new law can be seen in the 1936 Roman document on marriage nullity procedures, *Provida mater*, implementing and supplementing the 1917 Code's norms on matrimonial process. Changing theological insights and pastoral values in the Church also called for a thorough canonical reform of the Church's structures. Pope John XXIII stepped into this situation with the announcement on January 25, 1959 that an ecumenical council would be convoked.²¹⁹ The purpose of this Council, as outlined in his first encyclical, *Ad Petri cathedram*,²²⁰ was the

²¹⁷ POSPISHIL, *Interritual Canon Law*, p. 122.

²¹⁸ AAS, 45(1953), p. 313; POSPISHIL, *Interritual Canon Law Problems*, p. 123.

²¹⁹ JOHN XXIII, Allocution, February 27, 1959, in AAS, 51(1959), pp. 65-69; see also F.G. MORRISEY, "The Revision of the Code of Canon Law" [= "The Revision"], in *Studia Canonica*, 12(1978), p. 178.

²²⁰ JOHN XXIII, encyl., *Ad Petri Cathedram*, July 22, 1959, in AAS, 51(1959), pp. 497-531.

updating of the Church in an effort to achieve unity with the separated brethren. In this encyclical he also expressed his intention of updating the whole canonical discipline of the Church and “of revising the Code of canon law to meet the needs of the contemporary world and of forming a new Code of the same kind for the Churches of Oriental rite.”²²¹

Following Vatican Council II (1962-1965), the Code was revised and organized differently, based on the threefold office of Christ as king, prophet, and priest. It considers the people of God a hierarchical communion in which each person is commissioned to imitate Christ according to his or her own proper “juridic condition.”²²² On March 28, 1963, Pope John established the Pontifical Commission for the Revision of the Code of canon law, appointing some forty Cardinals to this commission. The group held its first meeting on November 12, 1963. A consultative commission was established by Pope Paul VI on April 17, 1964, with 70 consultors appointed.²²³ After the Council, episcopal conferences were asked to suggest other names. Eventually, sixty-six members were appointed to the Commission together with one hundred and twenty-five consultors.²²⁴ On November 20, 1965, the Code Commission’s work was inaugurated by Paul VI. Sections of the conciliar documents *verbatim* or in summary form, much of the post-conciliar legislation implementing the Council’s decrees, such as norms on dispensations, ecumenical marriages, nullity procedures and liturgical discipline, were incorporated into the revised Code. Consequently, the Code must be interpreted in the light of conciliar documents, as Paul VI explained:

Now, however, with changed conditions of things — for life seems to move along with greater speed — we must recognize with due prudence that canon law must be adapted to the new mentality of the Second Vatican

²²¹ Ibid., p. 498.

²²² ALESANDRO, “Overview of the Revised Code”, p. 171.

²²³ *Communicationes*, 1(1969), p. 35.

²²⁴ MORRISEY, “The Revision”, p. 178.

Ecumenical Council from which great contributions are being made to pastoral duties and the new needs of the People of God.²²⁵

The Pope also stated at a later date that the revision of the Code cannot mean simply improving the earlier Code by introducing a more appropriate order of material, adding what seems worthwhile and omitting what is no longer relevant. Rather the Code must become an aid to contemporary Church life in the post-Vatican II age.²²⁶ Some of Pope Paul's strongest words regarding the new canon law are to be found in his allocution of January 27, 1969 when he stated that

a Church in which an external and formalistic canon law would depart from the spirit of the Gospel, or prevail over theological speculation, or stifle the formation of a conscience enlightened by self-determination [...] would not correspond to the renovating orientations of the council.²²⁷

A number of general criteria, ten in all, were approved by the participants in the first Synod of Bishops, September 30—October 4, 1967. The first principle was that the Code was to be a juridical text. It is not, then, to be a textbook of theology, spirituality or exegesis. The principal purpose of the canons will be to outline the rights and obligations of all members of the Church and to provide means for their protection and implementation.²²⁸

The issue of marriage was taken up in the Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*.²²⁹ The Decree on Ecumenism, *Unitatis redintegratio*,²³⁰

²²⁵ PAUL VI, "Allocution to the Commission for the Revision of the Code of Canon Law", in *AAS*, 57(1965), p. 988; ALESSANDRO, "Overview of the Revised Code", pp. 171-172.

²²⁶ PAUL VI, Allocution of February 4, 1977, in *The Pope Speaks*, 22(1977), pp. 173-174; see also MORRISEY, "The Revision", p. 185.

²²⁷ PAUL VI, Allocution of January 27, 1969, in *The Pope Speaks*, 14(1969-1970), p. 41; see also MORRISEY, "The Revision", p. 185.

²²⁸ *Communicationes*, 1(1969), pp. 77-85; see also MORRISEY, "The Revision", p. 186.

²²⁹ CONCILIIUM VATICANUM II, Const. past. *Gaudium et Spes*, December 7, 1965, *AAS*, 58(1966), pp. 1025-1120.

²³⁰ CONCILIIUM VATICANUM II, Decr. *Unitatis Redintegratio*, November, 1964, *AAS*, 57(1965), pp. 90-112.

acknowledged the work of the Spirit in non-Catholic Christian Churches and ecclesial communities. It follows that the marriage of a Catholic to a Christian of another denomination need not be a dangerous source of “perversion”; it too could be a marriage “in the Lord.”²³¹ The Declaration on Religious Freedom, *Dignitatis humanae*,²³² stressed the right of all humans to follow the light of their own conscience and their right to profess publicly their religious convictions.²³³

On March 18, 1966, the Congregation for the Doctrine of the Faith promulgated an Instruction on mixed marriages, entitled *Matrimonii sacramentum*²³⁴ which provided that, if the norms laid down therein stood the test of experience, they should be introduced in a definite and precise form into the Code of canon law which is now being revised. Although prior to the Second Vatican Council, the possibility of a dispensation from canonical form in the case of mixed marriage had to be admitted, it was only with the appearance of the curial documents, *Matrimonii sacramentum* of March 18, 1966 and *Crescens matrimoniorum* of February 22, 1967,²³⁵ and an apostolic letter of Pope Paul VI on March 31, 1970, *Matrimonia mixta*²³⁶ that the issue was clearly faced. The present position is definitively expressed in c. 1127 of the 1983 *CIC*, concerning so-called mixed marriages in the Latin Church. With the one possible exception of *Evangelii nuntiandi*,²³⁷ from the publication of the apostolic letter *Matrimonia mixta*, there has been no significant statement advanced by

²³¹ ÖRSY, *Marriage in Canon Law*, p. 36.

²³² CONCILIUM VATICANUM II, Decl. *Dignitatis Humanae*, December 7, 1965, *AAS*, 58(1966), pp. 929-946.

²³³ ÖRSY, *Marriage in Canon Law*, p. 36.

²³⁴ SACRA CONGREGATIO PRO DOCTRINA FIDEI, Instructio de matrimoniis mixtis, *Matrimonii Sacramentum*, March 18, 1966, in *AAS*, 58(1966), pp. 235-239; *CLD*, 6, pp. 592-597.

²³⁵ SACRA CONGREGATIO PRO ECCLESIAE ORIENTALI, decr. *Crescens matrimoniorum*, February 22, 1967, in *AAS*, 59(1967), pp. 165-167; A. FLANNERY, (ed.), *Vatican Council II: The Conciliar and Post-Conciliar Documents*, Vol. I, Grand Rapids, MI, Eerdmans, 1980, pp. 481-482; *CLD*, 6, pp. 605-606.

²³⁶ *AAS*, 62(1970), pp. 257-263; *CLD*, 7, pp. 711-718.

²³⁷ PAUL VI, Apost. Exhort., *Evangelii Nuntiandi*, December 8, 1975, in *AAS*, 68(1976), pp. 5-76; *The Pope Speaks*, 21(1976), pp. 4-51.

the Holy See dealing with mixed marriage until the publication of the apostolic exhortation *Familiaris consortio* (November 21, 1981).²³⁸ According to *Familiaris consortio* (n. 68), only those who reject explicitly and formally what the Church intends to do are to be excluded from the sacramental celebration of marriage.²³⁹

On January 25, 1983, after almost two decades of strenuous studies, heated discussions, and diligent work in which the entire Latin Church took part, Pope John Paul II promulgated the revised *Codex iuris canonici* (CIC) for the Latin Church with the apostolic constitution *Sacrae disciplinae leges*.²⁴⁰ This Code acquired force of law on November 27, 1983.

The new Code has retained the strongly institutional orientation of the old one, but the insights of the Council concerning the dignity and rights of individual persons have made substantial inroads into the old structures. The result is a somewhat uneasy coexistence of two diverging trends, one upholding the primacy of the institution, the other the importance of human persons. The understanding of marriage appears now in a broader religious context through the doctrine of the covenant, yet the highly juridical language of the contract is still present in many traditionally-formulated canons. The difficulties that have surfaced in recent years reflect this conflict: the increased number of declarations of nullity shows a concern for the welfare of individual persons; the stricter control of the courts and the restrictions imposed on their operation display a preoccupation with the institution. As always, we shall have the correct solution when the two seemingly conflicting trends meet in peaceful

²³⁸ JOHN PAUL II, Apost. Exhort., *Familiaris Consortio*, November 22, 1981, in *AAS*, 74(1982), pp. 81-191; see also J.F. HOTCHKIN, "Familiaris Consortio — New Light on Mixed Marriages", in *One in Christ*, 22(1986), p. 73.

²³⁹ LOBO, *The New Marriage Law*, p. 18.

²⁴⁰ JOHN PAUL II, const. ap. *Sacrae Disciplinae Leges*, January 25, 1983, in *AAS*, 75, part II(1983), p. vii-xiv.

harmony and concordance is achieved between apparently discordant purposes.²⁴¹ Note that according to the new Code, any person (including the non-baptized) may impugn a marriage before an ecclesiastical tribunal (c. 1674).²⁴²

B. The Oriental Code of 1990 (*CCEO*)

When on January 25, 1959, Pope John XXIII announced an ecumenical council for the universal Church,²⁴³ he indicated that one aspect of the program of *aggiornamento* would be an updating of its canonical discipline, and mentioned specifically the forthcoming promulgation of the Code of Eastern canon law, which was to be a forerunner of the great project. On November 21, 1964, together with *Lumen gentium*, the Dogmatic Constitution on the Church, and *Unitatis redintegratio*, the Decree on Ecumenism, the Second Vatican Council promulgated a decree treating select issues relative to the Eastern Catholic Churches, *Orientalium Ecclesiarum*. In as much as this decree dealt with many disciplinary issues, it can be rightly considered as a pre-Code text, the first step in the program of conciliar canonical reform for the Eastern Catholic Churches.²⁴⁴

A Commission for the Oriental Code, *Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo* [=PCCICOR], was appointed by Pope Paul VI on June 10, 1972, under the presidency of Joseph Cardinal Parecattil, then archbishop of Ernakulam, of the Syro-Malabar Church in India. It was subsequently divided into ten sub-commissions.²⁴⁵

The conciliar documents, especially *Lumen gentium*, *Unitatis redintegratio*, and *Orientalium Ecclesiarum*, the *Guidelines* adopted by the PCCICOR, and the allocution of

²⁴¹ ÖRSY, *Marriage in Canon Law*, p. 37.

²⁴² Ibid., p. 184.

²⁴³ AAS, 51(1959), pp. 65-69.

²⁴⁴ FARIS, *Eastern Catholic Churches*, p. 75.

²⁴⁵ *Nuntia*, 1(1973), pp. 1-19; see also MORRISEY, "The Revision", p. 178.

Pope Paul VI on the occasion of the inauguration of the work of the PCCICOR on March 18, 1974, provided certain principles which were to be fundamental to the project of renewing the canonical discipline of the Eastern Catholic Churches.²⁴⁶ Again, Pope Paul VI exhorted that the revision be carried out according to the mind of the Council fathers and the genuine tradition of the Oriental Churches.²⁴⁷

The final draft of the Code was delivered to Pope John Paul II on January 28, 1989. Then, on October 18, 1990, the *Codex Canonum Ecclesiarum Orientalium* (CCEO) was promulgated by the Pope with the apostolic constitution *Sacri canones*,²⁴⁸ and it acquired the force of law on October 1, 1991.

Since Orthodox priests were recognized as such by Vatican II (*OE*, n. 18), the marriage of an Eastern Catholic with an Eastern non-Catholic before an Eastern non-Catholic priest is now considered valid. The stipulation acquired legal force of law on January 21, 1965 which was then extended to Latin Catholics marrying Oriental Orthodox by the decree *Crescens matrimoniorum* on February 22, 1967. This provision has been incorporated into the Latin Code: *CIC* c. 1127 §1.

CONCLUSION

Marriage is a well-developed institution in modern society. However, in the beginning of human history, there were no strict laws or regulations concerning its celebration. Later, as marriage came to be viewed as an institution, it was brought under the law of contract in order to maintain harmony in society. The State, as the guardian of the social order, was deemed competent to legislate on marriage. When Church authorities gained power and civil authorities declined in the Middle Ages, the Church began claiming

²⁴⁶ FARIS, *Eastern Catholic Churches*, p. 88.

²⁴⁷ *Nuntia*, 1(1975), pp. 6-7; see also BHARANIKULANGARA, "An Introduction", p. 12.

²⁴⁸ *AAS*, 82(1990), pp. 1033-1044.

jurisdiction over marriage, enforcing its own laws. By maintaining separate laws and standards, both Church and State seemed to be competing for governance over the institution of marriage thus complicating the personal lives of the parties to marriage.

The Church claimed governance over marriage because it considered marriage not merely a contract, but also a sacrament; it was viewed as a covenant with God and that sacramental aspect could not be separated from its contractual nature. The sacrament of marriage was linked to baptism, and all those who were baptized were brought under the law of the Church. This created problems in societies where people lived in the midst of a plurality of religions. Mixed marriages were regulated, and all those who married any one who had been baptised had to follow Church laws. Baptised non-Catholics also had to observe Catholic canon law because the Catholic Church assumed the “proper power” to legislate on sacraments. The Catholic Church denied this power to non-Catholics to govern themselves, and also to civil authorities for the same reason, and conflicts arose because of this.

In the subcontinent of India, the colonial nature of Churches, plurality of rites and denominations and the system of castes were other dimensions of the problems connected with marriage nullity cases. However, the revised Codes of Latin and Oriental canon law, in the spirit of the Second Vatican Council, are rather less institutional in their approach compared to their older versions. Even more importantly, the revised Codes exhibit an almost welcoming attitude towards ecumenical marriages although still there are considerable reservations in this matter. Thus the Church seems to be progressing on the way to perfection of the Kingdom of God by leaving behind its parochial mentality and taking the road of ecumenism. With the new Codes, it has repainted its weather-beaten signs to the Kingdom, although some confusion still remains to be clarified. We shall look into these in the next chapter.

Chapter Three
LAWS TO BE OBSERVED FOR THE VALIDITY OF MARRIAGE
RELATING TO NON-CATHOLICS

INTRODUCTION

This chapter is an exegetical study of cc. 780 and 781 of *CCEO* in comparison with c. 1059 of *CIC* evaluating the change of attitude of the Catholic Church and its law makers concerning the validity of the marriages of baptized non-Catholics. This study also identifies, for the purpose of suggesting some solutions, some of the confusion and problems created by the different Codes and by different laws within one and the same Code concerning the validity of the marriages of non-Catholics.

Baptism makes a person subject to differing systems of marriage law, according to the legal norms established by the Catholic Church and contained in either of the Codes of canon law. Thus, to adjudicate marriage nullity cases, it must be established whether a person is baptized or not, and if baptized, into which ecclesial group. It must further be established whether the person professes membership in the Catholic Church, or more precisely, in which autonomous Church of the Catholic Communion. These facts determine which system of marriage law must be followed.

Questions may arise regarding which legislation is to be followed when judging the nullity of the marriages of persons, at least one of whom was not a Catholic, especially if the parties belong to different ecclesial communities. Many possible juridical situations can be distinguished. For instance, marriage could have been celebrated between a Catholic and an Oriental non-Catholic, between a Catholic and a Western non-Catholic, between an Oriental

non-Catholic and a Western non-Catholic, between a baptized person and a non-baptized person, among the Orthodox themselves, among Western non-Catholics themselves, and when at least one party has left the Catholic Church.

The power of jurisdiction of non-Catholic Churches not in full communion with the Catholic Church has been a disputed question in the history of the Church. From Vatican II on, there has been a change of perception regarding the power of each Church to govern itself, especially in regard to marriage. While the 1917 Code was binding on all the baptized, the 1983 Code was limited to Latin Catholics. In spite of this, in mixed marriages between Catholics and non-Catholics, non-Catholics are still considered subject to canon law. The 1990 Code for the Orientals allowed non-Catholics to follow their own law; however, this is not fully true in the case of mixed marriages, especially with regard to canonical form.

In this chapter, we shall first examine what the prevalent Catholic policy was before Vatican II with regard to the jurisdiction of non-Catholic Churches over the marriage of their subjects. This will lead us to see how this policy was later modified, and what is now the actual position of the Catholic Church in these matters, as well as examining some confusion created by the new laws.

I. PREPARATION AND PROMULGATION OF CANONS 1059 OF *CIC* AND 780-781 OF *CCEO*

As we focus our study on c. 1059 of *CIC* and cc. 780-781 of the *CCEO*, it would be worthwhile to look first at those events that prepared the way for the provisions of these canons.

A. Background Study of these Canons

To do so, we shall first examine the pre-Vatican II attitude in the Church, different opinions of theologians and canonists, Orthodox policies regarding mixed marriages, the

provisions of *Crebrae allatae*, Vatican II's approach to the issue and some recent Rotal decisions.

1. Pre-Vatican II Attitude

In the past, Catholic theology had a rather narrow or restricted outlook concerning the jurisdiction of the non-Catholic Churches. During the nine centuries of separation of Oriental non-Catholic Churches before the Second Vatican Council, the members of the separated hierarchy were considered illegitimate; as a consequence, their official acts were also considered illicit. The attitude of Catholic thinkers over this period towards those who were separated from the Catholic Church was, for various reasons, very severe. Some even went so far as to consider that non-Catholics lacked the Holy Spirit who works through the sacraments.¹

The non-Catholic Churches were considered to be totally outside the Church since, after the Council of Trent, apologetic theology regarded the visible Catholic Church as the exclusive representative of the Church of Christ. As a result, non-Catholic Churches were considered to be deprived of the rights due to the members of the Church, while at the same time, they were not free from the obligations of the baptized.² At that time, there existed confusing ideas concerning the status of non-Catholics in the Church. They were denied communion with the Catholic Church but, at the same time, were obliged to obey the canon law of the Catholic Church.

In order to be *reapse* members of the Church, Pope Pius XII asked for three things: baptism, profession of the Catholic faith, and union with the Catholic Church. Consequently, non-Catholics were not considered to be members of the Church, and therefore could not

¹ J.T. KANIAMPARAMBIL, *Competence of the Catholic Church in Mixed Marriages: The New Vision of the Oriental Code [=Competence]*, Rome, Pontificium Athenaeum Sanctae Crucis, 1997, p. 31. We rely on this work, to a certain extent, in this section.

² Ibid, p. 32.

enjoy the privileges of Catholics.³ In the encyclical *Mystici corporis*, he says that members of the Church are only those who, have “received the baptismal bath, profess the true faith, and are not pitifully separated from the structure of the body.”⁴

The concept of hierarchical communion was taken in an indivisible sense and without gradations. It was a question of full communion or no communion.⁵ Even after a developed, adequate and generous interpretation of the principle “*extra ecclesiam nulla salus*”, there existed many obstacles to recognizing the ecclesial nature of other Christian communities.⁶ However, according to c. 87 of the 1917 Code, by baptism a human being was constituted a “person” in the Church, with all the rights and duties of Christians. According to c. 12 of the same Code, only those persons who had not received baptism were not bound by merely ecclesiastical laws. Nevertheless, this Code confirmed that all who had received baptism, including non-Catholics, were bound by ecclesiastical laws.⁷

It was also held that the Orthodox Churches were also subject to all those canons that had obtained in those Churches prior to the schism, including that of the Council of Trullo convoked in the year 691. At the same time, these Eastern Christians were considered not bound by the canonical legislation of their own Orthodox Churches promulgated since the time of the schism, a conclusion that followed logically from the view that the hierarchy in the Orthodox Churches, since the time of the separation from Rome, had no legitimate

³ I. ZUZEK, “La giurisdizione dei vescovi ortodossi dopo il Concilio Vaticano II” [= “La giurisdizione”], in *La Civiltà Cattolica*, 122(1971), p. 552.

⁴ “In Ecclesiae autem membris reapse ii soli annumerandi sunt, qui regenerationis lavacrum receperunt veramque fidem profitentur, neque a Corporis compage semet ipsos misere separarunt, vel ob gravissima admissa a legitima autoritate seiuncti sunt.” See PIUS XII, encycl. *Mystici Corporis*, June 29, 1943, in *AAS*, 35(1943), p. 202.

⁵ U. NAVARRETE, “La giurisdizione delle Chiese Orientali non-Cattoliche sul matrimonio (c. 780 CCEO)” [= “La giurisdizione”], in AA.VV., *Il matrimonio nel codice dei Canoni delle Chiese Orientali*, Vatican, 1994, p. 106.

⁶ KANIAMPARAMBIL, *Competence*, p. 33.

⁷ *CLD*, 8, p. 26.

jurisdiction. For example, *mixta religio* was considered a diriment impediment for marriage of the Orthodox Christians because of c. 72 of the Trullan Council, and was binding at least until the promulgation of *Crebrae allatae* in 1949.⁸

When theologians began to recognize that non-Catholic bishops were in possession of the power of order since their ordination was considered valid, a notable distinction between the power of order and the power of jurisdiction was brought out. St. Thomas Aquinas writes: "Spiritual Power is twofold, sacramental and jurisdictional; the first one is conferred by consecration and the second comes through simple human command."⁹ Theologians of the time denied the power of jurisdiction to non-Catholic bishops since they "lacked" the canonical mission. In fact, before the Second Vatican Council, it was a general understanding that all jurisdiction in the Church came directly through the Pope by legitimate canonical mission.¹⁰

Catholic thinking before Vatican II maintained that the legislative authority of the Church was expected to act for the good of the community and, further, that the hierarchy of the separated communities could not act for the good of the souls of their faithful and the good of their community. This was a privilege "reserved" to the Catholic Church alone. Hence even the Orthodox were denied the right to have their own valid jurisdiction and norms.¹¹ Their bishops were considered to be suspended *a divinis*, because they were

⁸ C. GALLAGHER, "Marriage in the Revised Canon law for the Eastern Catholic Churches" [= "Marriage in the Revised Canon law"], in *Studia Canonica*, 24(1990), pp. 71-72; see also J. VADAKUMCHERRY, *Marriage in Canon Law and in Ecclesiastical Tribunals*, [= *Marriage in Canon Law*], (Mal.), Ernakulam, [India], Viany Printings, 1984, p. 6.

⁹ "Dicendum quod duplex est spiritualis potestas: una quidem sacramentalis, alia jurisdictionalis sacramentalis quidem potestas est quae per aliquam consecrationem confertur.....Potestas autem jurisdictionalis est quae ex simplici injunctione hominis confertur." See ST. T. AQUINAS, *Summa Theologiae*, English translation by the Fathers of the English Dominican Province, Westminster, Carroll Press, 1981, 2a 2ae, q. 39, a. 3.

¹⁰ W.W. BASSETT, "The Impediment of Mixed Religion of the Synod in Trullo (A. D. 691)" [= "The Impediment"], in *The Jurist*, 29(1969), p. 401.

¹¹ C. PUJOL, "*La consuetudine degli orientali separati*", in *Orientalia Christiana Periodica*,

ordained by persons who themselves were schismatics and excommunicated. These bishops were also considered as invalidly elected or appointed to their respective sees. As a result, they were considered incapable of holding any ecclesiastical office or performing any acts that were juridically valid.¹² However, over time, diversity in the effects of excommunication and a lack of due precision in applying this penalty universally to the separated Oriental Churches gave rise to great confusion.¹³

2. Different Opinions

Even before Vatican II, there were some theologians and canonists who attributed some type of ecclesiastical jurisdiction to the Orthodox hierarchy. Arcadius, guided by the considerations expressed in the encyclical *Ad evitanda*, published by Pope Martin V, in the year 1418,¹⁴ retained as valid but illicit the exercise of jurisdiction of the Orthodox bishops from the moment that they were not *excommunicati vitandi*. According to him, the Roman Pontiffs never denounced the jurisdiction of the schismatic bishops, but Arcadius' teaching was not followed in practice.¹⁵

Thomas of Jesus denied the jurisdiction of the schismatics, but admitted that the Church could supply it to them in the case of common error, where the people considered them to be legitimate. Cardinal G. D'Annibale, speaking of the marriage contracted before a Greek schismatic priest, recognized the validity of that marriage but, according to him, such priests "do not use any power either of Order or of jurisdiction, but act, as by mandate of the Church, as if with the jurisdiction inherent to the office."¹⁶

27(1971), p. 136.

¹² ZUZEK, "La giurisdizione", p. 551.

¹³ NAVARRETE, "La giurisdizione", p. 107.

¹⁴ V. MARTINUS, Const. *Ad Evitanda*, a. 1418 in GASPARRI, *Codicis juris Canonici Fontes*, vol. I, Vatican, 1923, p. 58.

¹⁵ KANIAMPARAMBIL, *Competence*, p. 35.

¹⁶ "Nec ulla seu ordinis seu jurisdictionis potestate utitur, sed quasi ecclesiae mandato velut ad instar jurisdictionis officio cohaerente." See G. D'ANNIBALE, *Summula theologiae moralis*, t. 3, n. 62, Mediolani,

P. Gasparri, in the first edition of his treatise *De matrimonio*, forcefully recognized the jurisdiction of schismatic priests. But, later, in the third edition of this same treatise, he softened his words by using the term, “most probably”. He stated: “The Oriental schismatic pastor, commonly called ‘pope’, most probably is a true pastor, because the schismatic bishop who conferred on him the office does not lack a true jurisdiction.”¹⁷

V. Maroto held that the schismatic Orientals retained a true jurisdiction, and the priests who were approved by competent superiors could validly absolve and validly assist at a marriage. They retained and exercised this jurisdiction by way of delegation or as ordinary power.¹⁸ Theologians like Y. Congar, T.H. Metz, F. Delandes and V. Dalpiaz said that, according to the ancient discipline of the Church, the heretic bishops, when reconciled with the Church, continued to exercise their office without any confirmation from the Catholic Church. The patriarchs and the bishops maintained proper jurisdiction because the Roman Church, interested in the spiritual welfare of many people who live in schism in good faith, did not wish to deprive the Oriental non-Catholic Churches of this power.¹⁹

However, the Catholic Church at this time was ready to concede to non-Catholics at most a *iurisdictio suppleta*. This was given exclusively for the internal form, for the spiritual

S. Josephi, 1908, p. 387.

¹⁷ P. GASPARRI, *Tractatus canonicus de matrimonio*, t. II, n. 921, Parisiis, Secrétariat de l’Institut catholique, 1891. In the first edition he writes: “*parochus autem schismaticus orientalis, vulgo pope, probabilius est verus parochus, cum Episcopus schismaticus ipsum instituens verius iurisdictione non careat...*”; in the third edition t. II, Parisiis, 1904, in the place of “probabilius” and “verius” he writes “probabiliter”.

¹⁸ “Schismatici orientales, qui pariter ut scimus non ex uno capite haeretici sunt, et quidem notorii, retinent veram iurisdictionem ita ut valide sacerdotes a competentibus superioribus approbati, absolvant, valide parochi et Ordinarii adsistant matrimoniiis et ita porro.” See V. MAROTO, *Institutiones juris canonici as normam novi codicis*, Romae, Apud Commentarium pro Religiosis, t. I, Matriti, 1921, p. 670.

¹⁹ Y. CONGAR, “Schisme”, in *Dictionnaire de Théologie catholique*, vol. 14, Paris, 1939, pp. 1308-1310; T.H. METZ, “*Le clergé orthodoxe ont-ils la jurisdiction?*”, in *Irenikon* 5(1928), pp. 142-146; see also F. DELANDES, “*Les prêtres Orthodoxes ont-ils la jurisdiction?*”, in *Echos d'Orient*, 16(1927), pp. 385-395; V. DALPIAZ, “*An Orientales schismatici legibus matrimonialibus Ecclesiae Latinae teneantur?*”, in *Apollinaris*, 10(1937), pp. 457-459.

welfare of their faithful. This conferring of power confirms the general thesis that non-Catholic bishops were deprived of all jurisdiction.²⁰

3. Orthodox Policies

The Orthodox Church developed significant differences in policy over the centuries, because of estrangement from Rome and owing to a great number of other factors, including differences in theological and spiritual emphasis, as well as political, cultural, and social variations, coupled with a fundamentally different ecclesiology. These differences caused the separate development and exercise of the organ of juridical authority in the East. Eastern non-Catholics, generally called the Orthodox, are baptized, but are not in full communion with the Catholic Church.

Non-Catholic Orientals did not desert the ancient doctrinal tradition concerning the sacraments. They baptize validly, and, generally speaking, there are no more non-baptized persons found among them than among Catholics. Also, marriages with the non-baptized are rarer among the Orthodox than among Catholics. The Orthodox Churches do not authorize their members to marry non-baptized persons. Those who infringe on this law are often excluded from the sacraments, and generally speaking, this rule is strictly implemented.²¹

While the Catholic Church excommunicated the Orthodox Churches and denied them the power to govern themselves, the Orthodox Churches disregarded such actions of the Catholic Church, and continued to believe in the apostolic origin of their Churches and in their power to govern themselves. The office of the Pope as head of the whole college of

²⁰ KANIAMPARAMBIL, *Competence*, p. 38.

²¹ P. L'HUILLIER, "An Eastern Orthodox Viewpoint of the New Code of Canon Law", in *The Jurist*, 46(1986), p. 390.

bishops and as chief lawmaker of the Church was not readily appreciated, much less accepted, by the non-Catholic Churches.²²

The break between the East and the West took place dramatically in 1054. In the centuries following the wars of the Crusades, the Orthodox Churches and the Russian Church began to take a harder line even regarding the very validity of Catholic baptism. After the second half of the 18th century, the Hellenic Church officially classified Catholics as heretics, and even ordered that all Catholics joining this Greek Church were to be rebaptized absolutely. Marriages with Catholics were strictly forbidden. This rule, however, was relaxed in Greece by virtue of a civil law issued in 1861.²³

Most of the Orthodox Churches formulated their own laws concerning marriage. For Russians, a decree of the Holy Synod was issued on 23 June, 1721. This allowed mixed marriages between Orthodox and Protestants. The remaining Orthodox Churches also, little by little, changed their discipline on the matter, and believed that canon 72, §1 of the Council of Trullo had lost its invalidating force.²⁴ According to them, this canon could not be applied to the present conditions because of the economy of salvation, i.e., a new discipline was necessary for the salvation of souls.²⁵

Orthodox authors, such as P. Evdokimov, recognize that mixed marriages can be blessed by non-Orthodox priests. After the Catholic Church's revised legislation on marriages between Catholics and Orthodox or other Eastern Christians,²⁶ the Patriarchate of Moscow

²² F.R. McMANUS, "Marriage in the Canons of the Eastern Catholic Churches" [= "Marriage in the Canons"], in *The Jurist*, 54(1994), p. 57.

²³ S.C. GULOVICH, "The Principle Underlying the Validity of Oriental Marriage Law," in *The Jurist*, 6(1946), p. 47.

²⁴ *CLD*, 8, p. 7.

²⁵ *Ibid.*, p. 6.

²⁶ *OE*, n. 18 and *SACRA CONGREGATIO PRO ECCLESIAE ORIENTALI*, decr. *Crescens matrimoniorum*, February 22, 1967, in *AAS*, 59(1967), pp. 165-166.

declared that it would also recognize marriages between the Orthodox and Catholics celebrated in the Roman Catholic Church by a Catholic priest, provided there was a previous agreement with the Orthodox authorities. Other Orthodox Churches have acted in a similar way.²⁷

The Orthodox Churches do not appear to have developed jurisprudence on the declaration of nullity of marriage. There are a number of reasons for this: (1) Since the time of Justinian I, the Orthodox Churches have accepted the current civil law procedures for divorce; (2) The Ancient Oriental Churches did not have and still do not have clear distinctions between liceity and validity, and between the illicit and the invalid, that are to be found in the Catholic Church. It is, therefore, important to realize that some of the grounds for divorce in the Orthodox and ancient Oriental Churches are at times rather close to what the Catholic Church might consider grounds for a declaration of nullity.²⁸

4. *Crebrae Allatae*

When *Crebrae allatae* was being formulated, many theologians and canonists hoped that there would be a solution to the confusion that existed in the Church regarding the force of canon law on non-Catholics. Nonetheless, when *Crebrae allatae* was finally promulgated for Oriental Catholics on February 22, 1949 by Pope Pius XII, its binding force on Oriental non-Catholics was not certain.²⁹ The formula of promulgation states:

We, however, by this Apostolic letter, given of Our own initiative, promulgate the canons reported above, and We give them the force of law for “the faithful” of the Oriental Church, wherever on earth they are and even though they are subject to a prelate of a different rite.³⁰

²⁷ GALLAGHER, “Marriage in the Revised Canon law”, p. 86.

²⁸ Ibid., p. 89.

²⁹ *CLD*, 8, p. 29.

³⁰ *AAS*, 41(1949), p. 117; see also *CLD*, 8, p. 17.

In the year 1964, however, the Congregation of the Holy Office proposed the following question to the Pontifical Commission for the Redaction of the Oriental Code of Law: “Whether in the decree, *Crebrae allatae*, the word, ‘the faithful’, embraces Catholics only, or also the Oriental schismatics?” In its plenary session of March 23, 1964, the Commission responded: “For now it is not expedient to reply and the reply is deferred.”³¹

A special Commission of Cardinals was then set up by the Supreme Pontiff, and on February 24, 1966, it replied that the term “the faithful” comprehends not only Catholics, but also the Oriental non-Catholics. This decision, as a declarative response, was communicated on March 14, 1966, to the Departments and Tribunals of the Roman Curia which were concerned in the matter.³² Later, Pope Paul VI decided that the question was to be entrusted to another Commission of Cardinals and that it should be considered once again. On September 23, 1968, in its plenary session at the seat of the Congregation for the Oriental Churches, this Commission declared that the term, “the faithful” in *Crebrae allatae*, applied only to Oriental Catholics and not to Oriental non-Catholics.³³

The above decisions, contrary to each other, again created confusion in judging marriage nullity cases. For example, for those who believed that canon 72, §1 of the Council of Trullo, in relation to marriages between the Orthodox and non-baptized persons, constituted a diriment impediment up until *Crebrae allatae*, this interpretation of the word, “the faithful”, would be the hinge of the decision. If it were true that *Crebrae allatae* abrogated canon 72, §1 of the Council of Trullo, those marriages would be null if they were entered into before the promulgation of this *motu proprio*. However, they would be valid if entered into between May 2, 1949, when *Crebrae allatae* went into effect, and October 18,

³¹ *CLD*, 8, p. 17.

³² *Ibid.*, p. 17.

³³ *Ibid.*, p. 18; see also *Periodica*, 62(1973), p. 6; J. CHIRAMEL and V. PALATHINGAL [= PALATHINGAL], *Patriarchal and Matrimonial Legislations in the Oriental Code* [= *Patriarchal and Matrimonial Legislations*], Alwaye [India], St. Thomas Academy for Research, 1992, p. 113.

1968, on which date the Supreme Pontiff approved the decision made by the cardinals on September 23, 1968. Further, they would be null again if contracted after that date, if that decision were considered constitutive; i.e., establishing canon 72, §1 of the Council of Trullo as a diriment impediment. On the other hand, if the Commission's decision were considered to be purely declarative, it would follow that all marriages between the Orthodox and the non-baptized must be recognized as valid, whether they were entered into before or after the aforesaid times.³⁴

Some authors were of the opinion that the word "the faithful" referred only to Oriental Catholics, because in the same formula of promulgation, there was a reference to those who were subject to a prelate of a different rite, which would be usually a Latin prelate.³⁵ From the very diligent investigation of C. Pujol regarding the use of the term "the faithful" in the documents of Pius XII directed to the Orientals, it appears that this term was used consistently to signify Catholics. In the encyclical, *Mystici corporis*, moreover, a clear distinction is made between "the faithful", i.e., Catholics, and other Christians.³⁶

Also raised in objection to the view that *Crebrae allatae* binds only Catholics, are canons 60, §1 and 90, §2 of the *motu proprio*. Canon 60, §1 decrees: "Null is a marriage contracted by a non-baptized person with a baptized person." When it is held that this norm binds Oriental non-Catholics also, the response is made certain because the basis of the impediment of disparity of cult is baptism alone. But, it cannot be concluded that they are held by all the rest of the canons. As a matter of fact, since there is the question of an exception, the application must not be extended to other canons.³⁷

³⁴ *CLD*, 8, p. 18.

³⁵ *Ibid.*, p. 24.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 27.

Canon 90, §2 of *Crebrae allatae* stipulates: “Without prejudice, however, to the prescription of paragraph 1, baptized non-Catholics, if they contract marriage among themselves or with non-baptized non-Catholics are nowhere bound to observe the Catholic form of marriage.” Hence, for some, there did not seem to be any doubt but that Oriental non-Catholics were also bound by this law, since this canon provided an explicit exception.³⁸

In short, no matter which opinion was followed, there has always been an ambiguity regarding the binding force of canon law on non-Catholics.

5. Vatican Council II

The Second Vatican Council, however, altered the whole ecclesiological perspective in this matter when, in chapter III of the Decree on Ecumenism (*Unitatis redintegratio*), it clearly acknowledged the legitimacy of the jurisdiction of Eastern non-Catholic hierarchies:

To remove any shadow of doubt, then, this Sacred Synod solemnly declares that the Churches of the East, while keeping in mind the necessary unity of the whole Church, have the power to govern themselves according to their own disciplines, since these are better suited to the temperament of their faithful and better adapted to foster the good of souls.³⁹

Pope John Paul II referred to this “new phase” in the matter of ecumenism when he addressed his apostolic letter, *Euntes in mundum*, in 1988 on the occasion of the celebration of the millennium of the Russian Church. The Pope quoted the above passage from the Decree on Ecumenism and added:

From the decree there clearly emerges the characteristic disciplinary autonomy which the Eastern Churches enjoy. This is not the result of privileges granted by the Church of Rome, but of the law itself, which those Churches have possessed since apostolic times.⁴⁰

³⁸ Ibid.

³⁹ UR, n. 16; see also GALLAGHER, “Marriage in the Revised Canon law”, p. 72; VADAKUMCHERRY, *Marriage Laws*, p. 6.

⁴⁰ “Ex hoc Decreto eruitur dilucide autonomiam, qua quoad disciplinam Ecclesiae Orientales fruuntur, non manare e privilegiis ab Ecclesia Romana concessis, sed a lege ipsa, quam huiusmodi Ecclesiae a

All doubts concerning the Conciliar teachings, mainly in the "*Nota bene*"⁴¹ of the "*Nota explicativa*", on this matter are now solved by this papal declaration. Now we can speak of a unique "*ordinamento*", as Santi Romano and others call it, in the Church of Christ.⁴² A valid and licit exercise of the power of jurisdiction and of *magisterium* can be concluded even when hierarchical communion in its full sense is not present.⁴³ The Orthodox must be thought of as being in good faith, because the Decree on Ecumenism, n. 3 states that they cannot "be accused of the sin of separation." Consequently, all the arguments against the validity of the Orthodox custom should collapse since they are based on the legal presumption that the Orthodox, in as much as they are schismatics, are not in good faith and have been excommunicated. Moreover, because the Decree on Ecumenism, chap. I, n. 3 refers also to Protestants, they also are presumed to be in good faith. Wherefore, not even to them can the definition in canon 1325 of *CIC* be applied, nor are they included under the term "heretic" in canon 72, §1 of the Council of Trullo.⁴⁴ The Orthodox are recognized by the Council as "still joined to us in closest intimacy." Consequently, their juridical situation cannot be looked upon as one which is extraneous to the Church. Moreover, the Orthodox have true sacraments, the priesthood and the Eucharist.⁴⁵

temporibus apostolicis tenent." See JOHN PAUL II, lit. ap., *Euntes in Mundum Universum*, January 25, 1988, n. 10, in *AAS*, 80(1988), p. 950 [English translation in *Origins*, 17(1987-1988)], p. 716; see also GALLAGHER, "Marriage in the Revised Canon law", p. 72; VADAKUMCHERRY, *Marriage Laws*, p. 6.

⁴¹ *Nota Bene* stated: "The ontologico-sacramental function, which must be distinguished from the juridico-canonical aspect, cannot be discharged without hierarchical communion. It was decided in the commission not to enter into questions of liceity and validity, which are to be left to theologians, particularly in regard to the power exercised *de facto* among separated Eastern Christians, about which there are divergent opinions." See *AAS*, 57(1965), p. 75.

⁴² S. ROMANO, *Corso di diritto costituzionale*, Padova, 1931, pp. 3-5; see also P. LOMBARDIA, *Sobre las características peculiares del ordenamiento canónico*, in *Temis*, 5(1959), p. 68.

⁴³ NAVARRETE, "La giurisdizione, p. 109.

⁴⁴ *CLD*, 8, p. 15.

⁴⁵ *UR*, n. 15; *CLD*, 8, p. 16.

In all things concerning the Orthodox Churches, the Code must be inspired by the words of Pope Paul VI:⁴⁶ the “Sister Churches”, the “almost full” communion, the “Pastors to whom has been entrusted a portion of the flock of Christ.” It must be inspired also by the Conciliar text on their “right to govern themselves according to their own disciplines, since these are better suited to the temperament of their faithful and better adapted to foster the good of souls.”⁴⁷ By this declaration, the Catholic Church officially recognized that jurisdiction is transmitted among the separated Orientals, as it was in the past, by the lawful election and consecration of their own bishops according to their proper ritual and discipline.⁴⁸

In the Oriental non-Catholic Churches, the *missio canonica* is conferred according to the ancient oriental canons, which were never revoked. In relation to the episcopacy, the fullness of power conferred sacramentally by ordination is referred to simply as the power of Christ and is not distinguished according to the power of Order and the power of jurisdiction.⁴⁹ The acceptance of the validity of the episcopal consecration of separated Orientals makes it easy to acknowledge that the separated Oriental bishops, together with the episcopal consecration for a determined see, receive also the *missio canonica* and are therefore considered as having *potestas ad actum expedita*.⁵⁰ It would therefore follow that there can be no doubt about the true ecclesiastical jurisdiction of non-Catholic Oriental Churches over their own faithful. Hence, they can also be considered as communities having power to change the laws concerning marriage.⁵¹

⁴⁶ CLD, 6, p. 701.

⁴⁷ UR, n. 16; see also CLD, 8, p. 33.

⁴⁸ BASSETT, “The Impediment”, p. 410.

⁴⁹ LG, n. 28.

⁵⁰ NAVARRETE, “La giurisdizione”, p.107.

⁵¹ KANIAMPARAMBIL, *Competence*, p. 45.

Vatican II's decree on Ecumenism declared that the Oriental Orthodox Churches have true sacraments⁵² and acknowledged the legitimacy of the jurisdiction of the Oriental non-Catholic hierarchs.⁵³ The decree *Dignitatis humanae* states that religious communities by their very nature are capable of having a juridical system proper to them and have the right to govern themselves according to their proper laws.⁵⁴

As a practical consequence of this renewed ecclesiology, Eastern Christians who are not Catholics are now considered bound by their own laws and discipline and not at all by the merely ecclesiastical legislation of the Roman Catholic Church.⁵⁵ Marriages between Eastern Catholics and Eastern non-Catholics were recognized as valid by Vatican II in *OE*, n. 18. Later this recognition was extended by Pope Paul VI to marriages between Catholics of the Latin rite and non-Catholic Eastern Christians in the *motu proprio*, *Crescens matrimoniorum*, of February 22, 1967.⁵⁶ However, while the Council supposes that the Oriental non-Catholic Churches enjoy true ecclesiastical jurisdiction, such an hypothesis does not seem to be present in respect to the Western non-Catholic Christian Communities.⁵⁷

6. Rotal Decisions

The recognition of the Catholic Church regarding the faculty of the non-Catholic Oriental Churches to govern themselves by their own discipline is confirmed by a number of Rotal decisions. A decision of the S. R. Rota, *coram* De Jorio, on October 17, 1968, recognized that c. 72 §1 of the Council of Trullo had already lost the nature of a diriment

⁵² *UR*, n. 15

⁵³ *Ibid.*, n. 16.

⁵⁴ *DH*, n. 4.

⁵⁵ GALLAGHER, "Marriage in the Revised Canon law", p. 73; see VADAKUMCHERRY, *Marriage Laws*, p. 9.

⁵⁶ *AAS*, 59(1967), pp. 165-166; see also GALLAGHER, "Marriage in the Revised Canon law", p. 78.

⁵⁷ NAVARRETE, "La giurisdizione", p. 119.

impediment long before *Crebrae allatae*.⁵⁸ A sentence *coram* Abbo dealt with a mixed marriage between an Orthodox Christian of Byzantine rite and a Protestant, celebrated before a Protestant minister. The decision for nullity was made not on the basis of the diriment impediment of mixed marriage established in c. 72 of the Council of Trullo, but for the lack of canonical form. The Rotal decision recognized that the Orthodox Church had derogated from the diriment impediment of mixed marriage through a contrary custom.⁵⁹ Another Rotal decision on February 5, 1970, *coram* Abbo,⁶⁰ declared a marriage between a Syro-Orthodox party and a Lutheran party null for the defect of sacred rite. In this decision, it was said that the marriage could not be declared null on the ground of impediment of mixed religion, as that was only prohibitive in the Syrian Church.⁶¹

Admitting the power of changing the conciliar legislation of Trullo, the Roman Rota recognized the actual legislative power of the Orthodox Churches as *UR*, n. 16 has stated. The sentence *coram* Abbo was a model for successive decisions *coram* Bejan, Lefebvre, Canals, Mercieca, Ferraro and Agustoni.⁶²

⁵⁸ This case was published in *Ephemerides Iuris Canonici*, 25(1969), pp. 147-152; reported in *CLD*, 7, pp. 3-4; see also *CLD*, 8, p. 18.

⁵⁹ *Sacrae Romanae Rotae Decisiones seu Sententiae [= SRRD]*, *coram* Abbo, June 4, 1969, vol. 61, pp. 599-613; see also J.A. ABBO, "De impedimento mixtae religionis canone 72 Trullanae Synodi sancito atque de forma a graecis orthodoxis servanda in ineundo matrimonio", in *Periodica*, 58(1969), pp. 595-612; GALLAGHER, "Marriage in the Revised Canon law", p. 73.

⁶⁰ SRRD, *coram* Abbo, vol. 62(1970), pp. 133-141, published as "Trullan Impediment and Oriental Form of Marriage", in *The Jurist*, 31(1971) pp. 392-405.

⁶¹ KANIAMPARAMBIL, *Competence*, p. 50. For a discussion of the history of this jurisprudence, cf. P. SHANNON, "The Diriment Impediment of Mixed Religion", in *The Jurist* 23(1963), pp. 340-351; BASSETT, "The Impediment", pp. 383-415; J.J. MYERS, *The Trullan Controversy: Implications for the Status of Orthodox Churches in Roman Catholic Canon Law*, Canon Law Studies, n. 491, Washington, DC, The Catholic University of America, 1977.

⁶² SRRD, *coram* Bejan, vol. 61(1969), pp. 1158-1171; *coram* Lefebvre, vol. 62(1970), pp. 384-391; *coram* Canals, vol. 62(1970), pp. 917-921; *coram* Canals, vol. 63(1980), pp. 366-371; *coram* Mercieca, vol. 63(1980), pp. 382-386; *coram* Ferraro, vol. 63(1980), pp. 817-824; *coram* Agustoni, vol. 63(1980), pp. 739-749; see also A. MENDONÇA, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1998 [= Rotal Anthology]*, Washington, DC, Canon Law Society of America, 1992, p. 385.

This new Rotal jurisprudence was confirmed by the Supreme Tribunal of Apostolic Signatura, with a decision of November 28, 1970. In this sentence, the marriage contracted between two Orthodox Christians of Rumanian Rite before a civil officer only was declared null for the lack of sacred rite. Pope Paul VI gave the *nulla obstat* for the publication of this sentence on December 28, 1970.⁶³ With this papal approval, this sentence can be followed as a norm.

The “*Animadversiones*” added to this sentence give directives for the tribunals which are meant to decide similar matrimonial cases of Oriental non-Catholics. According to these directives, tribunals should examine: (1) whether the marriage was celebrated without the priestly blessing; and (2) whether the lack of priestly blessing was attributed to the impossibility of finding a priest.⁶⁴ The Apostolic Signatura, on July 1, 1972, declared that the marriage between an Orthodox woman of Byzantine rite and a Methodist baptized man, celebrated before an Orthodox priest, was not null by virtue of c. 72 of the Trullan Council.⁶⁵

B. Revision of Law

One of the most effective ways of implementing the “aggiornamento” of the Church, as desired and decreed by the Second Vatican Council, was the revision of the Code of canon law carried out in accordance with the principles and spirit of the same Council.⁶⁶

⁶³ X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, vol. V, Roma, Commentarium pro Religiosis, 1980, col. 6394-6399.

⁶⁴ J. PRADER, “*Differenze fra il diritto matrimoniale del codice latino e quello del codice orientale che influiscono sulla validità del matrimonio*”, in *Ius Ecclesiae*, 5(1993), p. 489.

⁶⁵ D. STAFFA, “*De validitate matrimonii inter partem orthodoxam et partem protestantem baptizatam*”, in *Periodica*, 62(1973), p. 38.

⁶⁶ *CLD*, 8, p. 30.

1. Revision of Law for the Latin Church

To understand the mind of the law-makers, we need to highlight some of the procedures and steps taken during the revision process. We also need to deal with the confusion created by the alleged *lacuna legis* in the Latin Code.

a) Jurisdiction of Canon Law over Non-Catholics

Implementing the principles of the Council was a long and difficult process which encountered much opposition. In the first session of the study group on "*De normis generalibus*" of 1966, the consultants had already advanced a proposal of changing c. 12 of the 1917 Code which was written in a negative formulation which brought all the baptized under canon law. Some proposed a test in which it could be established that merely ecclesiastical laws oblige only those baptized in the Catholic Church in such a way that those baptized in a non-Catholic Christian community who continue to live in that community, would be exempted from those laws.⁶⁷ Others, all the more, affirmed that an exemption from ecclesiastical laws can be given only in special cases, but such an expectation cannot be established as a general principle.⁶⁸

In the second session in 1967, the consultants considered, because of practical and ecumenical reasons, that it was unreasonable to oblige members of the non-Catholic Christian community to merely ecclesiastical laws. The practical reason was that the laws emanating from those communities were to be respected and in reality those who lived outside the Catholic Church did not observe the laws of the Catholic Church. So it was better to consider them as "*dispensati*".⁶⁹ The ecumenical reason was deduced from the ecumenical

⁶⁷ "Legibus mere ecclesiasticis teneri solos baptizatos in Ecclesia catholica; insuper censet leges urgendas non esse erga eos catholicae baptizatos qui extra Ecclesiam adoleverunt: in voti eiusdem est ut hoc principium generale in Codice inscribatur." See *Communicationes*, 16(1984), p. 146.

⁶⁸ "Agitur in canone de subiectis qui obiective legibus ecclesiasticis tenentur; admittunt talem dispositionem de legibus particularibus in ceteris loci statui posse, non vero de legibus ecclesiasticis in genere." *Communicationes*, 17(1985), p. 32.

⁶⁹ "Ecclesia potest eos legibus suis obligare qui sunt baptizati, etiam illos qui in communitate quadam

spirit of the Second Vatican Council. At the end of this session, it was proposed to reformulate a norm for c. 12 of the 1917 Code, but in a positive way.⁷⁰

In the third session (1968), all the consultors affirmed that c. 12 of the 1917 Code should be positively stated. The secretary of the group presented the following proposal: "Merely ecclesiastical laws bind only the baptized for whom they are promulgated [...]."⁷¹ It said "*solī baptizati pro quibus latae sunt*", because this would indicate those baptized in the Catholic Church or received into it, and also would give the possibility of exempting from merely ecclesiastical laws those who had abandoned the Catholic Church or continued to live in the non-Catholic community.⁷² The 1977 Schema added a second paragraph to c. 12:

Those baptized persons who belong to Churches or ecclesial communities separated from the Catholic Church, are not bound to the precepts of merely ecclesiastical unless by way of exception.⁷³

From the text it was not clear whether the "*adscripti*" would be only those Christians who never belonged to the Catholic Church or also those who were once Catholics. Hence, in a revised c. 11, three paragraphs were devoted to this problem:⁷⁴

ecclesiastica non-Catholica sunt baptizati; tales vero, cum non sint plene in Ecclesia, scilicet cum non plene ad Ecclesiam pertineant, "dispensati" debent a legibus mere ecclesiasticis, et eos obligare non est sapiens, quia leges feruntur ut observentur et tales baptizati leges non observant." See *Communicationes*, 17(1985), p. 31.

⁷⁰ "Melius insuper est ut positivo modo enuntietur norma statuens quoniam legibus teneantur." See *Communicationes*, 17(1985), p. 31.

⁷¹ "legibus mere ecclesiasticis tenentur soli baptizati pro quibus latae sunt, et quidem soli baptizati qui sufficienti rationis usu gaudent [...]", See *Communicationes*, 19(1987), p. 20.

⁷² KANIAMPARAMBIL, *Competence*, p. 11.

⁷³ "Baptizati qui Ecclesiis aut communitatibus ab Ecclesia catholica seiunctis adscripti sunt, ordinationibus mere ecclesiasticis directe obligari non intelliguntur, nisi exceptio statuatur." See PCCICR, *Schema canonum libri I de normis generalibus*, Romae, Typis Polyglottis Vaticanis, 1977, p. 14.

⁷⁴ PCCICR, *Codicis Iuris Canonici: Schema Patribus Commissionis Reservatum [= Schema] 1980*, [Città del Vaticano], Libreria Editrice Vaticana, 1980, pp. 4-5. English translation taken from H. EIJSINK, "Some Striking Changes in the Code of Canon Law since April 1982" in J.H. PROVOST and K. WALF, (eds), *Studies in Canon Law Presented to P.J.M. Huizinga*, Leuven, University Press, 1991, pp. 6-7.

§1: Merely ecclesiastical laws bind those who were baptized in the Catholic Church or received into it, enjoy the sufficient use of reason and have completed seven years of age, unless the law expressly provides otherwise.⁷⁵

§2: The baptized, who are registered in Churches or ecclesial communities, which are separated from the Catholic Church, are indirectly bound by these laws.⁷⁶

§3: Without prejudice to the stipulation in §2, these laws are applicable to those who have left the Catholic Church, unless the law expressly provides otherwise.⁷⁷

In the plenary session of the Commission for the Revision of the Code in October 1981, there was strong opposition to §3. The question was whether such a norm was indeed legal and in conformity with the Gospel. After all, such a stipulation could easily be interpreted as a means of coercion for those who have left the Church, and would then be contrary to c. 707 §2 of the 1980 Schema (c. 748 §2 of *CIC*) which states: "Persons cannot ever be forced by anyone to embrace the Catholic faith against their conscience."⁷⁸

Because of this opposition there was a proposal to delete this paragraph and to formulate the first paragraph as follows:

Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who have not left it by means of a formal (and public) act and who enjoy the sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age.⁷⁹

⁷⁵ Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent, et, nisi aliud iure expresse caveatur, qui septimum aetatis annum expleverunt.

⁷⁶ Baptizati qui Ecclesiis aut communitatibus ecclesialibus ab Ecclesia catholica seiunctis adscripti sunt, iisdem legibus directe non obligantur.

⁷⁷ Firmo praescripto §2, eadem leges iis applicantur qui ab Ecclesia catholica defecerint, nisi aliud iure expresse caveatur.

⁷⁸ "Ad amplectendam fidem catholicam a nemine unquam homines contra propriam conscientiam coactione adduci possunt." See PCCICR, *Schema 1980*, p. 170.

⁷⁹ "Legibus mere ecclesiasticis tenentur baptizati in Ecclesia Catholica vel in eandem recepti, nisi actu formali (et publico) ab eadem defecerint, quique sufficienti rationis usu gaudent, et, nisi aliud iure expresse caveatur, qui septimum aetatis annum expleverunt." See PCCICR, *Relatio complectens syntheses animadversionem ab Em.iss atque Exc.iss Patribus Commissionis ad novissimum schema codicis juris*

The Secretariat notified the commission that this proposed amendment was not acceptable, since it was based on a mistaken ecclesiological notion in which the Church was seen as a "*Kirche der freien Gefolgschaft*" (Church of free allegiance). It feared that the proposal could lead to some absurd consequences as well, for it would: (1) deprive ecclesiastical law of all force, since it would be sufficient for a person to declare formally that he/she no longer wished to be a member of the Church, so as no longer to be bound by its laws; (2) allow the legal obligation to depend on a private person; and (3) mean that leaving the Church formally would no longer be a punishable offense. Finally, the Secretariat added another remarkable counter-argument that the reference to c. 707 §2 of the 1980 Schema was not applicable, since this canon referred to the first embrace of the faith (*amplexus*) or the first incorporation into the Church.⁸⁰

However, because of many objections to it, §3 was removed in the revised Schema, and in §2, were added: "Those baptized outside the Catholic Church, who have not been accepted into this Church, are not directly bound by these laws."⁸¹ Even this last amended paragraph was not retained in the final revision of 1983; all that remained was §1 of the 1980 Schema, the reason for which is not given. However, according to K. Lüdicke, the reason is that both §1 and §2 of this canon stated the same thing: while §1 spoke in a positive way, §2

canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis [= *Relatio 1981*], [Città del Vaticano], Typis Polyglottis Vaticanis, 1981, p. 23.

⁸⁰ "Animadversio admitti nequit. Nitiar conceptu ecclesiologice erroneo, secundum quem Ecclesia configuratur ut "Kirche der Freigehegschaft" (J.Klein) e qua unusquisque ad libitum egredi potest. Propositio duceret ad absurdas conclusiones et omnem vim legi ecclesiastica aufert: sufficeret ut quis declaret formaliter se relinquere Ecclesiam, ut non obligaretur lege, obligatio legis penderet ab ipsa persona privata; apostasia non amplius esset delictum punibile. Canon 707 § 2 non applicatur ad casum, nam respicit primum fidei amplexum seu incorporationem in Ecclesiam." See PCCICR, *Relatio 1981*, p. 23; See also K. LÜDICKE, "Die Kirchengliedschaft und die Plena Communio: eine Anfrage an die Dogmatische Theologie aus der Perspektive der Kirchenrechts" [= "Die Kirchengliedschaft"], in AA.VV., *Recht in Dienste des Menschen*, Graz-Wien-Köln, 1987, p. 384.

⁸¹ "Baptizati extra Ecclesiam Catholicam, qui in eandem recepti non sunt, iisdem legibus directe non obligantur." See PCCICR, *Relatio 1981*, p. 23.

put it in a negative way. Since both §1 and §2 spoke the same thing in the latest amendment of this canon, §2 was omitted.⁸²

Canon 11 of *CIC* makes it very clear that the subjects of ecclesiastical laws are only those persons who are baptized in the Catholic Church and those received into it. Canon 1124 of *CIC*, while prohibiting mixed marriages, declares that the marriages of those who are baptized in the Catholic Church, who continue to remain in the Catholic Church without formally abandoning it, come under the authority of the Catholic Church. To be baptized in the Catholic Church means to receive baptism with the intention of being incorporated into the same Church with all the rights and duties that such membership entails.⁸³

In 1986, the Secretariat for Promoting Christian Unity issued a brief study of the revised Code and its significance for ecumenism. This study called attention to the significant revision of the law in c. 11 of *CIC*, commenting that here was “the explicit desire to avoid imposing on other Churches and ecclesial communities purely ecclesiastical laws for Catholics of the Latin rite [...]. So what used to be the exception has today become the rule.”⁸⁴

According to the commentators, this canon is the reproduction “*iisdem fere verbis*” of the principle contained in c. 1016 of 1917 *CIC* with some changes.⁸⁵ Nonetheless, between these canons we notice some relevant differences. The previous canon affirms the applicability of the Code over the marriages of all the baptized; in the present canon, it is limited to the marriage of Catholics, making it very clear that the Code prevails even when

⁸² LÜDICKE, “Die Kirchengliedschaft”, p. 384; see also KANIAMPARAMBIL, *Competence*, p. 15.

⁸³ *CIC*, c. 96; see also KANIAMPARAMBIL, *Competence*, pp. 15-16.

⁸⁴ SECRETARIAT FOR PROMOTING CHRISTIAN UNITY, “Ecumenism and the Revised Code of Canon Law”, in *Information Service*, 60(1986), pp. 57-58.

⁸⁵ F.R. AZNAR GIL, “Título VII: del Matrimonio (cc. 1055-1165)” in L. ECHEVERRÍA, *Código de Derecho Canónico*, Madrid, 1985, p. 506; see also J. HERVADA, “Title VII: Marriage”, in CAPARROS, *Code of Canon Law Annotated*, p. 661.

only one contracting party is a Catholic. The term "*catholicorum*" has replaced the term "*baptizatorum*".⁸⁶

Note that the incidental clause "*etsi una tantum pars sit baptizata*" was added in the first schema of *CIC*.⁸⁷ This explicitly expressed the traditional doctrine about the exclusive right of the Catholic Church concerning form and diriment impediments in matters of marriage between the baptized and non baptized.⁸⁸ Canon 246 of the 1975 project stated: "marriage of the baptized, even if only one party is baptized, is regulated not only by the divine law, but also by canon law."⁸⁹ The clause "*etsi una tantum pars sit baptizata*" appeared unchanged in the correlative canon (c. 1012) of the 1980 Schema.⁹⁰ The secretary of the plenary session prepared the *Relatio* on the basis of the observations of the Fathers who were to attend the plenary session, and presented these under c. 1012 of the schema.⁹¹

In any case, this change shows the changed attitude of the Catholic Church towards the marriage of baptized non-Catholics. All those baptized outside the Catholic Church were bound by the legislation of the Catholic Church until the new *CIC* went into effect on

⁸⁶ KANIAMPARAMBIL, *Competence*, p. 19.

⁸⁷ *Communicationes*, 3(1971), p. 71.

⁸⁸ J. SCHEEPERS, *De regimine matrimonii disparis*, Roma, Libreria Editrice dell' Università Gregoriana, 1964, pp. 21-41.

⁸⁹ "Matrimonium, utpote humanae consortionis principium et fundamentum, civilem quoque societatem spectat; sed cum matrimonium inter baptizatos initum adnumeretur inter novae legis sacramenta, disciplina eius et cura, quod ad integritatem sanctitatemque attinet, a Christo Ecclesiae commissae sunt. Matrimoni baptizatorum, etsi una tantum pars sit baptizata, regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus." See PCCICR, *Schema Documenti Pontifici quo Disciplina Canonica de Sacramentis Recognoscitur*, Vaticano, Typis Polyglottis Vaticanis, 1975, p. 73.

⁹⁰ PCCICR, *Schema 1980*, p. 232.

⁹¹ *Dicatur "matrimonium catholicorum, etsi una tantum pars sit catholica [...]"*, ut concordet cum can. 11, 2 (Card. Ratzinger, Hume, Freeman et Exc. O'Connell). See *Communicationes*, 9(1977), p. 223; PCCICR, *Relatio 1981*, p. 246.

November 27, 1983, with an exception for the impediment of disparity of cult⁹² and the obligation of the canonical form.⁹³

b) *Lacuna Legis*

According to some authors, the non-Catholic Churches now being exempted from merely ecclesiastical laws were devoid of a marriage law.⁹⁴ Some consultors asserted that it was for the Church to state explicitly by what laws the marriages of the baptized non-Catholics would be regulated.⁹⁵ The following norm was proposed:

The marriage of those who are baptized outside of the Catholic Church, or those who are not united with it, is regulated by the divine law and by the religious law or civil law which regulates marriage in the Christian community to which they belong.⁹⁶

To the majority of the consultors, the introduction of this norm seemed unnecessary in the Latin Code. Others thought it absolutely dangerous for a variety of reasons: because it recognized the competence of other ecclesiastical communities; because it was opposed to ecumenical considerations; because the necessity to fill up such a *lacuna* did not seem to be so urgent, since those marriages are governed by the divine and customary laws.⁹⁷ But, according to Joseph Prader, the marriage of baptized non-Catholics is regulated not simply by customary law, and so there is a genuine *lacuna legis* here.⁹⁸

⁹² 1917 CIC, c. 1070.

⁹³ Ibid, c. 1099.

⁹⁴ J. PRADER, "Il matrimonio in Oriente e Occidente", in *Kanonica*, 1(1992), p. 2.

⁹⁵ *Communicationes*, 9(1977), p. 126.

⁹⁶ "Matrimonium eorum qui extra Ecclesiam catholicam baptizati sunt, nec in eam recepti, regitur iure divino et iure religioso vel civili, quo regitur (matrimonium) in coetu christiano ad quem quisque pertinet." See *Communicationes*, 9(1977), p. 127.

⁹⁷ Ibid.

⁹⁸ J. PRADER "Il diritto matrimoniale latino e orientale", in GHERRO, S., (ed.), *Studi sul Codex Canonum Ecclesiarum Orientalium*, Padova, 1994, p. 71.

This problem was highlighted again in the *Relatio* of 1981 by Cardinal Joseph Parecattil of the Syro-Malabar Church in India, who was the President of the Commission for the Revision of Code of Oriental canon law and a member of the Commission for the Revision of Code of Latin canon law:⁹⁹

Suppressing the obligation of canon law for non-Catholics (cf. c.11 § 2) creates a great *lacuna legis*, if the legislator in some way does not recognize the faculty of the Occidental non-Catholics (for the Orientals, it has already done so in the Second Vatican Council: *UR*, n. 16) of governing according to proper discipline.¹⁰⁰

The Secretariat of the Latin codification, responding to this observation of Cardinal Parecattil, stated that in no way was it intended to deny the competence of the Church over marriages of baptized non-Catholics.¹⁰¹ The Secretariat wanted to re-affirm the competence of the Catholic Church on marriage. It further stated:

It does not seem opportune, especially for ecumenical reasons, that the Church states by which laws marriage may be regulated. The general canonization of either civil law or the law of non-Catholic communities to be valid in this matter is dangerous. It is much better that nothing be said in the Code.¹⁰²

In fact, the Code does not say anything on the subject. The phrase "*Melius praeterea est ut nihil in codice dicatur*" in the reply of the Secretariat, would seem to indicate that this

⁹⁹ *Directory of the Archdiocese of Ernakulam-Angamaly*, Ernakulam, The Archdiocesan Curia, 1998, p. 15.

¹⁰⁰ "Suppressa obligatorietate iuris canonici pro acatholicis (cf. can.11 § 2) magna legis lacuna crearetur nisi legislator aliquo modo communitatibus non catholicis occidentalibus (pro orientalibus iam fecit Conc. Vat.II: *UR* 16) facultatem agnoscat se secundum propriam disciplinam regendi. See PCCICR, *Relatio* 1981, p. 246; *Communicationes*, 15(1983), p. 223.

¹⁰¹ PCCICR, *Relatio* 1981, p. 246. See also *Communicationes*, 15(1983), p. 223.

¹⁰² Non videtur opportunum, praesertim ob rationes oecumenicas, quod Ecclesia statuatur quibus legibus regantur illa matrimonia. Generalis canonizatio legum civilium vel legum communitatum acatholicarum in hac materia valde esset periculosa. Melius praeterea est ut nihil in Codice dicatur." See PCCICR, *Relatio* 1981, p. 246. See also *Communicationes*, 15(1983), p. 223 [The translation of the text is from R.J. RYAN, *The Canonical Status of Marriages Attempted Before Civil Authorities: A Historical Analysis From the Council of Trent to the 1983 Code*, Ann Arbor, MI, UMI, 1991, p. 230].

matter is reserved to a future law.¹⁰³ Indeed, the legislators later formulated a canon concerning this matter in *CCEO*, which we shall discuss next.

2. Revision of the Law for the Oriental Churches

The 1983 Code was promulgated exclusively for members of the Latin Church; it says nothing about the legislation that binds non-Catholics. To avoid such a *lacuna iuris*, the Eastern law recognizes the power of the other ecclesial communities, even that of the secular authority.

Working with an initial text prepared by the Faculty of Canon Law of the Pontifical Oriental Institute, the *Guidelines for the Revision of the Code of Oriental Canon Law* were approved at the first Plenary Assembly of the PCCICOR on March 18-23, 1974.¹⁰⁴ These *Guidelines* indicate the fundamental principles which were to be operative throughout the revision process.¹⁰⁵ According to n. 3 of the guidelines, in accordance with the principles adopted at the Second Vatican Council, the promotion of the unity of the Churches must be of primary concern in the elaboration of the Code. Also, the Code was to recognize that the Orthodox Churches are now regarded as “sister churches” and enjoy the right to govern themselves.¹⁰⁶ In the Guidelines, the Commission expressed at the very outset of the project:

The future Code shall declare that it holds good only for those who legitimately belong to any Oriental Catholic Church.¹⁰⁷

Again this matter was specifically addressed by the *Coetus de matrimonio*: “The canons of marriage have the force of law only for the Christians of the Oriental Catholic

¹⁰³ NAVARRETE, “*La giurisdizione*”, p. 119; see also KANIAMPARAMBIL, *Competence*, p. 24.

¹⁰⁴ The Guidelines are published in *Nuntia*, 3(1976), pp. 18-23 and *CLD*, 8, pp. 29-39.

¹⁰⁵ FARIS, *Eastern Catholic Churches*, p. 89.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Nuntia*, 3(1976), p. 20; see also KANIAMPARAMBIL, *Competence*, p. 55.

Churches, unless the law itself expressly provides otherwise.”¹⁰⁸ Since the Catholic Church declared that non-Catholic Churches are no longer bound by its laws, the *coetus* felt that a positive statement must be made concerning the laws governing Oriental non-Catholics. Otherwise, these marriages would come only under the principles of natural and divine law.¹⁰⁹

The Consultors, therefore, decided to make a positive statement concerning the laws to be applied to non-Catholic parties who enter into a direct or indirect canonical relationship with the Catholic Church. They studied with great attention the problem of formulating a new norm which would establish in what and under what conditions the laws of other ecclesiastical communities can be applied.¹¹⁰ The *Coetus* also declared that it was not legislating on behalf of non-Catholics, but only determining what laws are to be applied.¹¹¹ This decision of the *coetus* is seen in c. 118 of the 1982 Schema:

In contracting marriage between a Catholic party and a non-Catholic party or a non-baptized party, with regard to the impediments that are not of divine law, the proper law of both parties should be observed, unless it is contrary to divine law.¹¹²

In 1987, the Commission for the Revision of the Code of Oriental canon law published the final schema of the *Codex iuris canonici orientalis* in *Nuntia*, nn. 24-25. This

¹⁰⁸ “*Canones de matrimonio vim legis habent pro christifidelibus Ecclesiarum Orientalium Catholicarum tantum, nisi aliud expresse iure caveatur.*” *Nuntia*, 5(1977), p. 53.

¹⁰⁹ “Si nihil dicatur in iure condendo, quaenam in casu lex applicanda sit, praesumi licebit, personas a legibus Catholicis exemptas solo iure naturali obnoxias esse quod attinet ad impedimenta et ad formam iuridicam celebrationis matrimonii. Sed quomodo, uno iure naturali spectato, scire quis potest quaenam, paucis exceptis, ad validatem matrimonii requirantur? Si norma clare expressa in futuro Codice hac in re deficiet, inevitabiles nascentur conflictus inter legislationem catholicam et legislationem cui non-Catholici de facto subiiciuntur; nam matrimonia invalida ob non observatam legem propriam contrahentium valida esset iure catholico quia valida sunt iure naturali.” *Nuntia*, 5(1977), p. 53.

¹¹⁰ *Nuntia* 5(1977), pp. 52-62.

¹¹¹ *Ibid.*, p. 53.

¹¹² “In matrimonio ineundo inter partem catholicam et partem baptizatem non catholicam aut partem non baptizatem, quod attinet ad impedimenta quae non sunt iuris divini, ius proprium utriusque partis servetur, nisi iuri divino contrarium sit.” *Nuntia*, 15(1982), p. 59.

was again revised in November 1988 by the Commission in plenary session and was presented to Pope John Paul II on January 28, 1989.¹¹³

Canons 774-776 of the Oriental Schema¹¹⁴ provide a particularly clear illustration of how ecclesiological teaching can have canonical consequences. These canons deal with determining the validity of marriage in a variety of circumstances. They provide answers to such questions as: (1) What legislation is to be followed when an Eastern Catholic decides to marry a baptized person who is not a Catholic? (2) What laws apply when the Church has to decide on the validity of a marriage between two baptized persons who are not Catholics? Canonists have generally agreed that the marriage of non-baptized persons among themselves is governed by the natural law and the laws of the country where they actually live. The law adds, however, two further requirements: the form must always be public and, if at least one of the parties is an Eastern Christian, there must be a sacred rite of marriage.¹¹⁵

Through c. 118, later c. 775 in the *Schema* of 1989 and finally, c. 780 §2 of *CCEO*, the Catholic Church clearly states that, with regard to marriage, the Catholic party is bound by the law as stipulated by the Catholic Church and the non-Catholic party is bound by the law stipulated by the legislation to which he/she is subject. In the light of proposed c. 128 §2,¹¹⁶ later c. 790 §2 of *CCEO*, if either party is bound by an invalidating impediment of the law to which he/she is subject, the marriage is invalid. Thus, the possibility of a marriage being valid in the eyes of the Catholic Church and invalid in the eyes of another ecclesial community or civil society is eradicated.¹¹⁷

¹¹³ GALLAGHER, "Marriage in the Revised Canon Law", p. 70.

¹¹⁴ *Nuntia*, 24(1987).

¹¹⁵ GALLAGHER, "Marriage in the Revised Canon Law", pp. 73-74.

¹¹⁶ *Nuntia*, 15(1982), p. 63.

¹¹⁷ KANIAMPARAMBIL, *Competence*, p. 57.

The second paragraph of c. 828 has been taken from the conciliar Decree for the Eastern Catholic Churches:

In order to provide against invalid marriages, when Eastern Catholics marry baptized Eastern non-Catholics, and also in order to promote the permanence and sanctity of marriage as well as peace in the home, the holy council determines that the canonical form of celebration for these marriages is of obligation only for lawfulness. For their validity the presence of a sacred minister is sufficient, provided that the other prescriptions of canon law are observed.¹¹⁸

The decision by the Catholic Church to recognize as valid marriages between Eastern Catholics and Eastern non-Catholics received a positive welcome from the Orthodox Churches. The Patriarchate of Moscow and the Orthodox Church in Poland returned complements, but the majority have maintained their own ancient discipline according to which, for validity, marriages must be blessed by an Orthodox priest.¹¹⁹

C. Promulgated Texts Referring to the Marriages of Non-Catholics

The framework for analysis in this study of the competency of the Church in adjudicating the marriage nullity cases of non-Catholics is based on *CIC* c. 1059 and *CCEO* cc. 780-781. According to c. 1059 of *CIC* and c. 780 §1 of *CCEO*,

even if only one party is Catholic, the marriage of Catholics is regulated not only by divine law but also by canon law, with due regard for the competence of civil authority concerning the merely civil effects of such a marriage.¹²⁰

Further, canon 780 §2 of *CCEO* states:

In addition to divine law, marriage between a Catholic and a baptized non-Catholic is also regulated by: (1) the law proper to the Church or

¹¹⁸ *OE*, n. 18.

¹¹⁹ GALLAGHER, "Marriage in the Revised Canon Law", p. 78.

¹²⁰ *CIC*, c. 1059 - Matrimonium catholicorum, etsi una tantum pars sit catholica, regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus. *CCEO* c. 780 § 1 - Matrimonium catholicorum, etsi una tantum pars est catholica, regitur iure non solum divino, sed etiam canonico salva competentia auctoritatis civilis circa effectus mere civiles matrimonii.

ecclesial community to which the non-Catholic belongs, if that community has its own matrimonial law; (2) the law that binds the non-Catholic, if the ecclesial community to which this person belongs does not have its proper matrimonial law.¹²¹

The Oriental Code continues the subject in canon 781:

If the Church must judge the validity of a marriage between baptized non-Catholics: (1) there is to be concern for the law by which the parties were bound at the time of the celebration of marriage in the light of c. 780, §2; (2) with regard to the form of the celebration, the Church recognizes any form prescribed or admitted by the law to which the parties were subject at the time of the celebration of the marriage, provided that the consent be expressed in a public form and, when at least one of the parties is a baptized member of an Eastern non-Catholic Church, the marriage be celebrated with a sacred rite.¹²²

D. Comparison of Canon 780 of *CCEO* with Canon 1059 of *CIC*

It is very important to note the nuances between c. 1059 of *CIC* and cc. 780-781 of *CCEO*, especially when adjudicating marriage nullity cases. To this purpose, we now make a comparative study of these canons.

The Eastern Code was directly and greatly influenced by the Latin Code. In part, such large-scale derivation or dependence may be explained by the influence, for better or worse, of Latin Church legislation and Church order upon the Eastern Catholic Churches in recent

¹²¹ Matrimonium inter partem catholicam et partem baptizatam acatholicam salvo iure divino regitur etiam: 1° iure proprio Ecclesiae vel Communitatis ecclesialis, ad quam pars acatholica pertinet, si haec Communitas ius matrimoniale proprium habet; 2° iure, quo pars acatholica tenetur, si Communitas ecclesialis, ad quam pertinet, iure matrimoniali proprio caret.

¹²² Si quando Ecclesia iudicare debeat de nullitate matrimonii acatholicorum baptizatorum: 1° quod attinet ad ius, quo partes tempore celebrationis matrimonii tenebantur, servetur c. 780 §2; 2° quod attinet ad formam celebrationis matrimonii, Ecclesia agnoscit quamlibet formam iure prescriptam vel admissam, cui partes tempore celebrationis matrimonii subiectae erant, dummodo consensus expressus sit forma publica et, si una saltem pars est christifidelis alicuius Ecclesiae orientalis acatholicae, matrimonium ritu sacro celebratum sit.

centuries. In part, it also reflects what was thought, rightly or wrongly, to be necessary or useful Church law derived from the Latin Church's experience.¹²³

In spite of c. 11, the Latin Code in c. 1059 shows that the Church continues to hold that the Latin canon law is the only law to be applied to non-Catholic Christians who enter into a marriage relationship with a Latin faithful in the mixed marriage. In this case, c. 1059 excludes the jurisdiction of non-Catholics in the case of a mixed marriage. Regarding the application of c. 11 to c. 1059, the majority of canonists hold that it is an exception to the stipulation of c. 11.¹²⁴ In any case, the exemption has created a good deal of dispute among canonists.

Canon 780 §2 of *CCEO* did justice to the stipulations of its own c. 1490¹²⁵ (the corresponding canon to *CIC* c. 11¹²⁶), which also excluded non-Catholics from the merely ecclesiastical laws of the Catholic Church. The legislator did not show any hesitation in implementing the teachings of Vatican II about the laws governing marriage and the competence of non-Catholic Orientals in legislating for marriage, a matter which was addressed in an incomplete manner by the Latin Code. The Oriental Code accomplished its work of filling the *lacuna* by adding a second paragraph to c. 780 and by introducing the new canon 781. The introduction of these two canons is a significant contribution of the Oriental Code.¹²⁷ It should also be noted that for ecclesiastical communities of Protestants who do not have a proper marriage law, the canon law “canonizes” the civil norm to which c. 780 §2, 2° refers.

¹²³ McMANUS, “Marriage in the Canons”, p. 59.

¹²⁴ KANIAMPARAMBIL, *Competence*, p. 5.

¹²⁵ “Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficientem usum rationis habent et, nisi aliter iure expresse cavetur, septimum aetatis annum expleverunt.”

¹²⁶ “Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent et, nisi aliud iure expresse caveatur, septimum aetatis annum expleverunt.”

¹²⁷ *Ibid.*, p. 63.

However, since there is no parallel in *CIC* for c. 781 of *CCEO*, to resolve the *lacuna*, the Apostolic Signatura made a declaration on this matter on 28 May, 1993. It states that in order to judge the nullity or validity of the marriage contracted between non-Catholics, the judicial process would be implemented according to the norms of cc. 1671-1691.¹²⁸ This declaration says nothing about the substantive laws that should be applied in the judgement of the validity or nullity of the marriage contracted between non-Catholics. Since *CIC* and the Apostolic Signatura did not say anything about this matter, there is no way of knowing about the laws that should be applied in this case.¹²⁹

According to U. Navarrete, to fill the gap that exists in the Latin Code concerning this subject matter, it would suffice if only these canons (i.e., of *CCEO*) were also extended authoritatively to the Latin Church. In that way, unity would also be gained in a matter of great importance and the greatest complexity.¹³⁰ M. Ortiz is of the opinion that the prescription of the *UR* n. 16 could be used in this case.¹³¹ However, the proposed instruction of the Interdicasterial Commission for Matrimonial Process, suggested on February 22, 1999 to follow the canons 780-781 of *CCEO*.¹³²

¹²⁸ SUPREMO TRIBUNALE DELLA SEGNETURA APOSTOLICA, *Dichiarazione sulla giurisdizione della Chiesa riguardo al matrimonio celebrato tra due acattolici*, 28 May 1993 (Prot. n. 23805/92 V.T.); see also *Ius Ecclesiae*, 6(1994), p. 366.

¹²⁹ M.A. ORTIZ, "Note circa la giurisdizione della Chiesa sul matrimonio degli acattolici" [= "Note circa la giurisdizione"], in *Ius Ecclesiae*, 6(1994), pp. 374-375.

¹³⁰ U. NAVARRETE, "Ius matrimoniale latinum et orientale, Collatio Codicem latinum inter orientalium", in *Periodica*, 80(1991), p. 618.

¹³¹ ORTIZ, "Note circa la giurisdizione", p. 376.

¹³² Art. §2 Matrimonium inter partem catholicam et partem baptizata acatholicam salvo iure divino regitur etiam: 1° iure proprio Ecclesiae vel Communitatis ecclesialis, ad quam pars acatholica pertinet, si haec Communitas ius matrimoniale proprium habet; 2° iure, quo pars acatholica tenetur, si Communitas ecclesialis, ad quam pertinet, iure matrimoniali proprio caret [c. 780 §2 *CCEO*]; §3 Si quando Ecclesia iudicare debeat de nullitate matrimonii acatholicorum baptizatorum: 1° quod attinet ad ius, quo partes tempore celebrationis matrimonii tenebantur, servetur §2; 2° quod attinet ad formam celebrationis matrimonii, Ecclesia agnoscit quamlibet formam iure prescriptam vel admissam, cui partes tempore celebrationis matrimonii subiectae erant, dummodo consensus expressus sit forma publica et, si una saltem pars est christifidelis alicuius Ecclesiae orientalis acatholicae, matrimonium ritu sacro celebratum sit [c. 781 *CCEO*]. See COMMISSIO INTERDICASTERIALIS «PER IL PRIMO PROGETTO DI UNA ISTRUZIONE SUI PROCESSI MATRIMONIALI» (1996-1999), *Primum Schema*, a Commissione Approbatum, (Reservatum), 1999, vii, 83p.

II. APPLICATION OF CANONS REGARDING THE VALIDITY OF MARRIAGE RELATING TO NON-CATHOLICS

Having studied in detail c. 1059 of *CIC* and cc. 780-781 of *CCEO*, we now apply them in actual situations of inter-Church marriages. We shall thus examine various scenarios to see various types of mixed marriages. Further, provisions regarding the canonical form of marriage in mixed marriage are also studied.

A. General Norms

Both Codes expressly state in their first canon that they legislate only for members of their respective Catholic Churches. Other Christian communities or Churches are left outside the orbit of merely ecclesiastical laws. However, the Catholic Church asserts its exclusive authority to define the contents of divine law, natural and positive, which obliges all human beings. In this way, Catholic marriage law applies even to non-Catholics with respect to impediments which are assumed to be derived from divine law. The law is applied when the validity of the marriage of a non-Catholic is challenged in the ecclesiastical tribunals.

The Church also claims jurisdiction over all marriages when at least one of the parties is Catholic. Hence, a non-Catholic Christian who desires to marry a Catholic is brought into the orbit of canonical legislation.¹³³ When a Catholic wishes to enter marriage with a non-Catholic who was married previously and whose spouse is still alive, a Catholic marriage can be permitted only after judging that the earlier marriage was invalid.¹³⁴ It is to be noted that most non-Catholic Churches do not have a procedure of adjudicating marriage nullity cases,

¹³³ L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions* [= *Marriage in Canon Law*], Wilmington, Glazier, 1986, p. 65; see also J.M. HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, Quincy, IL, Quincy University, 1995, , p. 189; L. BWAMBALE, *The "Bonum Coniugum" and "Bonum Prolis" in Mixed marriages: With a Special Reference to the Diocese of Kasese* [= *Mixed Marriages*], Romae, Pontificia Universitas Urbaniana, 1994, p. 101.

¹³⁴ *CCEO*, c. 781.

and that for them the civil procedure of divorce is accepted as sufficient for remarriage among non-Catholics.

When the ecclesiastical judge is to assess the validity of the prior union of a partner to a new marriage with a Catholic, he will proceed in reverse order with the three elements for the valid marriage: consent, absence of impediments and marriage form. If he finds that the prescribed obligatory marriage form had not been observed, which is easily ascertained, the marriage was obviously invalid, and there is no need to investigate the absence or presence of impediments, or whether the consent was a valid one. If the form was found to have been valid, the question of impediments is studied. If, finally, the first marriage of such a prospective partner was valid on account of the form and the absence of impediments, there could still exist the possibility that the consent was defective, in which case the matter must be processed thoroughly by the competent ecclesiastical tribunal.

B. When an Eastern Non-Catholic is Involved

First, we shall examine different scenarios of inter-Church marriages where an Eastern non-Catholic is involved.

1. Marriage of Eastern Non-Catholics among Themselves

The principle stipulated by c. 780 §2, 1° applies to all the Oriental non-Catholic Churches, which Vatican II (*UR* n. 16) recognized as possessing their own proper marriage law to be observed by their own members. In fact, these Churches have a rich common patrimony founded in the ancient canons of the Councils. In addition, the patrimony of these Churches was enriched with appropriate renewal and changes over the centuries. The Catholic Church, while recognizing that these Churches possess valid sacraments, especially the priesthood and the apostolic succession of the episcopacy, as well as ecclesiastical jurisdiction, acknowledges their right to govern themselves with proper discipline.

Consequently, the Catholic Church attributes legal force to their marriage law unless there is a violation of divine law.

Commenting on c.781, Prader states that if the motive of nullity arises from a defect of consent based on the natural law or arises from an impediment based on divine or natural law, the norms of the canon law should be applied. But if the nullity of marriage is due to a defect of consent founded on merely ecclesiastical law or because of a diriment impediment of human law, or because of defect of form, the judges should take into account the respective Orthodox disciplines.¹³⁵ Canon 781, 1° addresses juridical capacity, matrimonial impediments and defects of consent arising from human law. The same principle is applied to marriage between a Catholic and a baptized non-Catholic.¹³⁶

2. Marriage of Eastern Non-Catholics with Protestants

Most Orthodox Churches grant permission for a marriage of an Orthodox with a Protestant, provided that the Protestant guarantees the Orthodox baptism and the rearing of their children in the Orthodox faith.¹³⁷ The Catholic Church recognizes the obligation of Eastern non-Catholics to observe their own marriage form, namely, the priestly blessing, and declares null and void those marriages entered without observing that form, i.e., marriage before a civil magistrate or a Protestant minister who is not a priest, or before a non-Christian priest. If such form were missing, this enables the Eastern Orthodox party to remarry in the

¹³⁵ J. PRADER, "Il matrimonio in Oriente e Occidente" [= Il matrimonio"], Kanonica 1, Roma, Pontificum Institutum Orientalium Studiorum, 1992 p. 40.

¹³⁶ D. SALACHAS, "The Ecumenical Significance of the New Code", in J. CHIRAMEL and K. BHARANIKULANGARA, (eds.), *The Code of Canons of the Eastern Churches: A Study and Interpretation*, Alwaye [India], STAR Publications, 1992, p. 273.

¹³⁷ V.J. POSPISHIL, *Eastern Catholic Marriage Law According to the Code of Canons of the Eastern Churches* [= *Eastern Catholic Marriage Law*], Brooklyn, NY, Saint Maron Publications, 1991, p. 232.

Catholic Church. This policy was confirmed by many decisions of the Rota¹³⁸ and the Apostolic Signatura.¹³⁹ *CCEO* c. 781, 2° confirms this law.

3. Marriage of Eastern Non-Catholics Converted from Protestantism

When a Protestant is received into a non-Catholic Oriental community, he/she becomes, in canon law, an Oriental non-Catholic. Therefore, the validity of a marriage into which he may afterwards enter must be examined according to Oriental canon law. The former Protestant will no longer be exempt from the diriment impediment of disparity of worship. Specifically, by conversion, a Protestant enters the legal sphere of the Eastern non-Catholic Church and becomes bound to the obligation of the marriage form and the impediments of that Eastern Church. The laws of the Orthodox Church should be observed when adjudicating a marriage nullity case.

4. Marriage of Eastern Non-Catholics with Catholics

Mixed religion, which was a prohibitive impediment in *Crebrae Allatae*, is no longer an impediment in the new Code. There exists only a simple prohibition with regard to this in the canon on mixed marriage (*CCEO* c. 813). Such a marriage needs permission from the local ordinary. But, even without the permission or in contravention of refusal to grant permission, the marriage would still be valid as long as both parties are baptized.¹⁴⁰

According to *CIC* c. 1059 and *CCEO* c. 780 §1, even if only one party is Catholic, the marriage is regulated by canon law. Thus, if a Catholic marries an Eastern non-Catholic or a Protestant or even a non-baptized person, canon law must be observed because in any

¹³⁸ SRRD, *coram* Canals, vol. 63(1980), pp. 366-371; *coram* Mercieca, vol. 63(1980), pp. 382-386; *coram* Ferraro, vol. 63(1980), pp. 817-824; *coram* Agustoni, vol. 63(1980), pp. 739-749; *coram* Canals, vol. 66(1983), pp. 416-418; see also MENDONÇA, *Rotal Anthology*, pp. 380, 385.

¹³⁹ *Signatura Apostolica*, Nov. 28, 1970; *Periodica de re morali et canonica*, 60(1971), pp. 306-308; see also G. LOBO, *The New Marriage Law*, Bombay, St. Paul Publications, 1989, p. 96.

¹⁴⁰ I. GRAMUNT, J. HERVADA, and L.A. WAUCK, *Canons and Commentaries on Marriage*, Collegeville, MN, The Liturgical Press, 1987, p. 72; see also CORIDEN, *The Code of Canon Law*, p. 802.

of these cases, at least one party (the Catholic) is baptized. Hence, the Catholic marriage form provided in *CIC* c. 1108, §1 or *CCEO* c. 828, §1, as the case may be, must be observed. However, c. 1127 §1 of *CIC* and c. 834 of *CCEO* allow a concession to Oriental non-Catholics. These canons state that if the Catholic party contracts marriage with a non-Catholic party of Oriental rite, the canonical form of celebration is to be observed for lawfulness only. For validity, however, the intervention of a sacred minister is required, while observing other requirements of the law. This is because of the fuller ecclesial reality and the validity of the Orders in the Orthodox Churches which are recognized by the Catholic Church.¹⁴¹

In mixed marriages, the Catholic should be free from all the impediments stated in canon law, and the Eastern non-Catholic should be free from all the impediments stated by the law of the Church or ecclesial community to which he/she belongs at the time of marriage for the validity of the marriage.¹⁴² The impediments specified in *Hudaya canon* of the Syrian Orthodox Church in India are the following: consanguinity in the direct line; consanguinity in the collateral line up to and including the 7th degree; affinity up to and including 7th degree; spiritual relationship arising from sponsorship at baptism, up to and including 7th degree; relationship arising from breast feeding for two years, up to and including 7th degree; bond of marriage; age under twelve (specified only for women); impotency (specified only for women); slavery; and mixed religion.¹⁴³ When adjudicating a marriage case in which a Syrian Orthodox is involved, the tribunal has to see whether any of these impediments were existing at the time of marriage. Even though some of them are outdated, discriminatory and not suited to modern society, the Catholic tribunal cannot discard such impediments until the Syrian Orthodox Church abolishes them, or as far as they are not against divine law.

¹⁴¹ LOBO, *The New Marriage Law*, p. 106.

¹⁴² *CIC* c. 1059; *CCEO* c. 780.

¹⁴³ Y. JULIUS, *Hudaya Canon*, [Translated in Malayalam], Mulanthuruthy [India], Seminary Publications, 1994, pp. 90-97.

The Catholic Church and the Malankara Syrian Orthodox Church in India entered into an agreement on inter-Church marriages in 1993. This agreement was prepared taking into account the elements of the Common Declaration of Pope John Paul II and Syrian Orthodox Patriarch Zakka I Iwas of Antioch, on June 23, 1984. This agreement, along with the attached *Pastoral Guidelines*, was drafted in November 1993 by the Commission for Dialogue between the Catholic Church and the Malankara Syrian Orthodox Church. It was released on January 25, 1994, after it was approved by the competent authorities of both Churches.¹⁴⁴

According to this agreement, both Churches accept the sacredness and indissolubility of the sacramental bond of marriage and consider the conjugal relationship an expression of communion and a means to achieve self-effacing mutual love and freedom from selfishness. The celebration of an inter-ecclesial marriage can take place in either Church. The marriage can be blessed either by the Catholic or by the Syrian Orthodox minister; however, a joint celebration is prohibited. The agreement also says that any declaration of the nullity of such mixed marriages can be considered only with the consent of the bishops concerned from both Churches.¹⁴⁵

Marriages of the members of Knanaya community, belonging to the diocese of Kottayam in India can be blessed only by the bishop of Kottayam or the pastor assigned by him. If the local pastor, not a Knanaya but of the same rite belonging to a different diocese, blesses such a marriage, it can be declared null.¹⁴⁶ However, the mixed marriage between a

¹⁴⁴ For details see "Agreement between the Catholic Church and the Malankara Syrian Orthodox Church on Inter-Church Marriages", in *Ernakulam Missam*, 64(1994), pp. 43-48; see also "Documents", in *Eastern Churches Journal*, 1, n.2(1994), pp. 181-186; AA. VV., *Oriental Orthodox Roman Catholic Interchurch Marriages and Other Pastoral Relationships*, United States National Conference of Catholic Bishops, Washington, 1995, pp. 127-131.

¹⁴⁵ Ibid.

¹⁴⁶ *CIC*, c. 1110; *CCEO*, c. 829 §2; see also VADAKUMCHERRY, *Marriage in Canon Law*, p. 43.

Knanaya Catholic and a Knanaya Syrian Orthodox, blessed by a non-Knanaya Orthodox priest, cannot be adjudicated as invalid. This creates an anomaly.

Oriental theology teaches that it is the priest who celebrates the sacrament of marriage. Sacramental grace comes to the couple through the blessing of the priest, who according to Orthodox theology, is the minister of the sacrament of matrimony. The mutual matrimonial consent of the couple is regarded as the indispensable precondition for receiving the sacrament.¹⁴⁷ In the celebration of the marriage there is a proper sacramental epiclesis which can be performed only by the priest. This is the reason behind the insistence of the Oriental Code on the sacred rite of marriage; i.e., the blessing and assisting of a priest.¹⁴⁸

Is a marriage between a Latin Catholic and an Oriental Christian, Catholic or non-Catholic, valid if officiated at by a deacon; i.e., without priestly blessing? There are differing opinions. To some, like Dimitrios Salachas, such a marriage would be invalid due to the absence of sacred rite, and on the argument that the Latin Code also admits Oriental theology regarding sacred rite in its legislation in c. 1127 §1. According to him, and others, the intervention mentioned in this canon is in the sense of *CCEO* c. 828 §2 (with sacred rite accomplished by the priest assisting and blessing).¹⁴⁹ None of the Oriental Churches, Catholic or Orthodox, have in their liturgical tradition a deacon or a lay person as the minister of marriage, even in extraordinary circumstances by way of delegation.

However, according to J. Prader, V.J. Pospishil and J.D. Faris, there is no doubt that a Latin deacon, delegated by the norm of *CIC* c. 1111 §1, can validly bless such a marriage

¹⁴⁷ P. EVDOKIMOV, *The Sacrament of Love: The Nuptial Mystery in the Light of the Orthodox Tradition*, trans. by A.P. GYTHIEL and V. STEADMAN, New York, St. Vladimir's Seminary Press, 1985, p. 146.

¹⁴⁸ D. SALACHAS, *Il sacramento del matrimonio nel nuovo Diritto canonico delle Chiese Orientali* [= *Il sacramento*], Roma, Dehoniane, 1994, pp. 32-33.

¹⁴⁹ *Ibid*, p. 223.

in his Church, even if in the Oriental Churches, on the other hand, deacons are not delegated to bless marriages.¹⁵⁰ It would seem that the legal axiom sanctioned by the approval of centuries, *locus regit actum* — i.e., the legal formalities of a juridical act follow local requirements — is the principle to be followed.¹⁵¹ The new Ecumenical Directory of 1993 referring to both Latin and Oriental Catholics in n. 153 speaks only of marriage being “celebrated [...] by an ordained minister”; it does not specify “priest”. The discussion still continues as to whether the Latin deacon is a valid minister in such cases or not.

C. When a Western Non-Catholic is Involved

Western non-Catholic ecclesial bodies are also placed beyond the scope of the marriage law of the Catholic Church. These Churches and communities historically trace their origin to the Latin Church of Rome, and are usually identified by the term “Protestants”. Some of them have preserved some of the sacraments in accordance with the teaching of the Catholic Church and of the Eastern non-Catholic Churches. However, they consider marriage to be a secular affair, and not a sacrament, even though they are zealous in invoking God’s blessing upon the married couple and their families.¹⁵² Consequently, they assign to the state the ordering of marriage in law. They are thus Churches or ecclesial communities for which the state is the source of marriage law. For this reason, they are not considered by canon law to be in the same juridical situation as Oriental non-Catholics. The civil law in force at the time of the celebration of the marriage should be applied in determining the validity of the marriage. The same principle is valid in the case of the marriage between baptized non-Catholics and non-baptized persons.¹⁵³

¹⁵⁰ PRADER, “*Il matrimonio*”, p. 38; J.D. FARIS and V.J. POSPISHIL [=FARIS], *The New Latin Code of Canon Law and Eastern Catholics* [=The New Latin Code], Brooklyn, Diocese of Saint Maron, 1984, pp. 32-33; POSPISHIL, *Eastern Catholic Marriage law*, p. 372; also LG n. 29.

¹⁵¹ FARIS, *The New Latin Code*, p. 32; see also HUELS, *The Pastoral Companion*, p. 254.

¹⁵² *Ibid.*, pp. 227-228.

¹⁵³ KANIAMPARAMBIL, *Competence*, p. 187.

1. Marriage of Protestants among Themselves

The Church prohibits, in principle, civil marriage for all baptized persons, but since non-Catholic Christians are not subject to Catholic marriage law, and specifically not to the obligatory ecclesiastical marriage form (*CCEO* c. 781, 2°), the Church recognizes for such Christians the civil marriage as valid in canon law provided that the consent was valid and that there was no impediment of secular law present.¹⁵⁴

CCEO c. 781 shows a dramatic advance in acknowledging the freedom of non-Catholics to be governed by their own proper laws.¹⁵⁵ Note that since the 1917 Code (c. 1070, §1) all Western non-Catholics, baptized or not, are exempt from the diriment impediment of disparity of worship when they marry among themselves (see also *CIC* c. 1086 §1). Hence, the absence or presence of baptism is of no legal importance. The same can be said with respect to the marriage form (*CCEO* c. 781).

2. Marriage of Protestants Converted from Orthodox Churches

Those Eastern non-Catholics who joined a Protestant or any other religious denomination remain still under the obligatory marriage form, i.e., the blessing of the marriage by a priest. Consequently, a marriage entered by a former Eastern Orthodox before a civil magistrate or a minister of religion who is not a priest, will be judged invalid by a Catholic tribunal.¹⁵⁶

Attention needs to be drawn to two special groups of Eastern non-Catholic converts to Protestantism in India. One group is composed of Protestant Churches founded among Syrian Orthodox Christians of Kerala, viz., the Marthomites. Although they continue to use

¹⁵⁴ *Nuntia*, 5(1977), pp. 54-59.

¹⁵⁵ J.D. FARIS, "The Codification and Revision of Eastern Canon Law", in *Studia Canonica*, 17(1983), p. 477.

¹⁵⁶ *Ibid.*, pp. 391-392.

the name and some liturgies of the Church from which they originated, they accept the usual Protestant theological teachings, thereby rejecting those of the Eastern Churches from which they came. In as much as they retain in their names some or all indications of their provenience, they could be confused with the original Eastern non-Catholic mother Church. For our legal purposes, individuals born and directly baptized in these Protestant communities are Protestants like all other Protestants. No specific attention has to be given to them in marriage law, separating them from other Protestants.¹⁵⁷

Another category of Protestants is comprised of those Eastern non-Catholics who have joined Protestant Churches and communities as individuals for their own particular reasons. An Eastern non-Catholic remains bound to the obligation of the form and the impediments of his/her Church even when he/she has publicly “converted” to a Protestant denomination. Such an Eastern non-Catholic cannot leave his/her Church formally, in the same way an Eastern Catholic cannot leave his/her Church.¹⁵⁸ So, when a marriage nullity case of such an Eastern non-Catholic who joined a Protestant Church is to be adjudicated, the Eastern non-Catholic law is to be observed.

3. Marriage of Protestants with Catholics

Canon 780 §2, 2° of *CCEO* deals with the ecclesial community to which the non-Catholic party belongs, and which does not have a proper matrimonial juridical system. In this case, the canon says the marriage is to be regulated not only by divine law, but also by the law “*quo pars acatholica tenetur*”.¹⁵⁹ The incidental clause “*quo pars acatholica tenetur*”, applies only to those laws that formally, in one way or another, derive from the authority of the Church. The competence of the ecclesiastical authority as regards the

¹⁵⁷ Ibid., p. 231.

¹⁵⁸ Ibid., p. 232.

¹⁵⁹ KANIAMPARAMBIL, *Competence*, p. 60.

marriages of the baptized is exclusive.¹⁶⁰ In the case of an ecclesial community without marriage law, the Catholic Church recognizes civil law as valid for those faithful.¹⁶¹ It may seem that c. 780 §2 excludes also the law on observing the form. However, *CCEO* c. 834 repeats after *CIC* c. 1127 that the marriage form prescribed by the canon law is to be observed.

In any case, if the non-Catholic is a non-baptized person, the marriage with a Catholic would be invalid on the ground of disparity of cult, unless a dispensation was granted. Baptism in all mainline Protestant Churches must be considered valid when it is conferred by immersion or pouring of water accompanied by the Trinitarian formula.¹⁶² In some Protestant communities, baptism is not conferred until an adult age. Thus, a person may have been raised to adhere to some Christian beliefs and practices without having been baptized as a child.¹⁶³

D. When One who has left the Church is Involved

The policy on leaving the Church is different in the Latin and Oriental Codes. This can cause confusion when a person who has left the Church is subsequently involved in a mixed marriage. Hence, we must consider this matter.

1. Leaving the Church

The Latin Code acknowledges the possibility of a Latin Catholic withdrawing partially from the sphere of his/her marriage law by leaving the Church in a formal manner, as is mentioned in connection with the impediment of disparity of worship (c.1086 §1), with respect to the obligatory marriage form (c. 1117) and mixed marriage (c. 1124). The

¹⁶⁰ *Nuntia*, 28(1989), p. 105.

¹⁶¹ J. MIÑAMBRES, *La remisión de la ley canónica al derecho civil*, Roma, 1992, pp. 17-23 & 192.

¹⁶² LOBO, *The New Marriage Law*, p. 48; see also CORIDEN, et al., *The Code of Canon Law*, p. 768.

¹⁶³ CORIDEN, et al., *The Code of Canon Law*, p. 768; BWAMBALE, *Mixed Marriages*, pp. 102-103.

corresponding canons of the Eastern Code have no such provision. Eastern Catholics can never become disconnected from the application of Catholic marriage law, irrespective of whether they have rejected membership in the Catholic Church or not.¹⁶⁴ According to *CCEO* c. 834 §1, all those baptized in the Catholic Church are bound by the canonical form laid down by the Code if they wish their marriage to be valid in the eyes of the Church, whether or not they have been brought up as Catholics, and whether or not they have formally defected from the Catholic Church.¹⁶⁵

When a Latin Catholic withdraws by a formal act of his own, or of his parents in case of children, he/she is no longer bound by the impediment of disparity of worship or obliged to observe the marriage form. This exception does not extend to the other impediments, to which they remain subject. However, this exemption of Latin Catholics who have left the Church has legal force only since November 27, 1983. The validity of marriages entered before that date is to be judged according to the preceding law of 1917 Code, which followed the axiom “once a Catholic, always a Catholic”; i.e., someone who was baptized in the Catholic Church or, if baptized outside the Catholic Church, had joined the Catholic Church.¹⁶⁶ Rotal decisions have clarified this.¹⁶⁷ Nevertheless, note that until January 1, 1949, those who were baptized in the Catholic Church but never educated in it, were not bound by the canonical form if they were born to non-Catholic parents.¹⁶⁸

¹⁶⁴ *Ibid.*, p. 219.

¹⁶⁵ VADAKUMCHERRY, *Marriage Laws*, p. 20.

¹⁶⁶ POSPISHIL, *Eastern Catholic Marriage Law*, p. 223.

¹⁶⁷ SRRD, *coram* Ewers, vol. 63(1980), pp. 42-46; *coram* Lefebvre, vol. 63(1980), pp. 967-972; see also MENDONÇA, *Rotal Anthology*, pp. 376-377.

¹⁶⁸ *CIC/1917*, c. 1099 §2; PIUS XI, *Motu Proprio*, August 1, 1948, in *AAS*, 40(1948), p. 305; *CLD*, 3, pp. 463-464; see also MENDONÇA, *Rotal Anthology*, p. 376.

2. Marriages between Those who have left the Church and Non-Catholics

The question of whether a Latin Catholic has actually left the Catholic Church, in the precise meaning of the law, will come up when the validity of his/her former marriage is to be judged at the time this person or his/her former spouse wishes to enter a new marriage with a Catholic.¹⁶⁹ If the withdrawal from the Catholic Church was effective in the meaning of the law, such a person will not be bound by the form of marriage and impediment of disparity of cult, and the former marriage, entered outside the Catholic Church, will be valid on those grounds, thus preventing him/her from a new marriage in the Catholic Church unless other grounds exist.¹⁷⁰

3. Marriages between Those who have left the Church and Catholics

Formal defection leads to a situation of mixed marriage.¹⁷¹ The Pontifical Commission for the authentic interpretation of the Code had declared previously that, as regards marriage, those enrolled in atheistic sects are also equated with those who belong to non-Catholic sects.¹⁷² When a “former” Latin Catholic wishes to marry a Catholic, permission is to be sought from the local ordinary on the same conditions which apply to a marriage with a non-Catholic.¹⁷³ An official reply of the Commission for the Interpretation

¹⁶⁹ VADAKUMCHERRY, *Marriage Laws*, p. 20; LWANGA, *Mixed marriages*, pp. 23-24; HUELS, *The Pastoral Companion*, p. 223; CORIDEN, et al., *The Code of Canon Law*, p. 797.

¹⁷⁰ POSPISHIL, *Eastern Catholic Marriage Law*, pp. 219-223; see also VADAKUMCHERRY, *Marriage Laws*, p. 20; LWANGA, *Mixed marriages*, pp. 23-24; HUELS, *The Pastoral Companion*, p. 223; CORIDEN, et al., *The Code of Canon Law*, p. 797; GRAMUNT, et al., *Canons and Commentaries on Marriage*, p. 29.

¹⁷¹ HERVADA, *Canons and Commentaries*, p. 70.

¹⁷² PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICE INTERPRETANDOS, “*Responsa ad Proposita dubia, An ad normam Codicis*”, July 30, 1934, in *AAS*, 26(1934), p. 494; see also BWAMBALE, *Mixed Marriages*, pp. 82, 106; GRAMUNT, et al., *Canons and Commentaries on Marriage*, p. 70.

¹⁷³ CORIDEN, et al., *The Code of Canon Law*, pp. 754-755; see also GRAMUNT, et al., *Canons and Commentaries on Marriage*, p. 14; BWAMBALE, *Mixed Marriages*, p. 106; ÖRSY, *Marriage in Canon Law*, p. 83; *CIC*, 1071, 4^o; *CCEO*, c. 789, 6^o; VADAKUMCHERRY, *Marriage in Canon Law*, pp. 32, 74-75; *Ernakulam Missam*, 20(1949), p. 67.

of the Decrees of Vatican II, February 11, 1972, clarified that a bishop could also dispense from the canonical form when a Catholic marries a lapsed Catholic who has joined another Church.¹⁷⁴ A further reply of April 9, 1979, implied that bishops in granting dispensation could add certain clauses for the validity of the dispensation which, if not observed, would cause the nullity of the marriage.¹⁷⁵ The canon on mixed marriage is not applicable when both parties have notoriously abandoned the Catholic faith. In that case, the couple should not marry as Catholics.¹⁷⁶

The Eastern Catholic pastor would have to take cognizance of this provision only when such a person who had left the Latin Church wishes to have the previous marriage declared null in order to marry an Eastern Catholic. The question of the validity of the previous marriage would normally have to be resolved by a Latin marriage tribunal.¹⁷⁷

4. Marriages of Oriental Catholics who have left the Church

As we have seen, Eastern Catholics who have left the Catholic Church remain obliged to the Catholic marriage form. The clause “*neque actu formali ab ea defecerit*” found in *CIC* c. 1117 is absent in the corresponding canon of *CCEO* (c. 834). Hence, if such a person’s first marriage was entered before a non-Catholic minister who was not a priest, or before a civil magistrate, this first marriage would be invalid. Consequently, a new marriage can be permitted to the Oriental Catholic.¹⁷⁸ Thus, Catholics belonging to the Syro-Malabar Church or the Syro-Malankara Church in India who have joined Protestant sects, and their children, remain bound by canon law, and their marriages with Protestants without dispensation from canonical form would be invalid.

¹⁷⁴ *AAS*, 64(1972), p. 397.

¹⁷⁵ *AAS*, 71(1979), p. 632; see also LOBO, *The New Marriage Law*, p. 107.

¹⁷⁶ ÖRSY, *Marriage in Canon Law*, p. 83.

¹⁷⁷ POSPISHIL, *Eastern Catholic Marriage Law*, p. 391.

¹⁷⁸ See *CCEO*, cc. 828, 832, 834.

The same distinction between Eastern Catholics and Latin Catholics applies also to the impediment of disparity of worship. The marriage of one who has left the Latin Church with a non-baptized person, entered before a civil magistrate or a non-Catholic minister of religion, will be valid while such a marriage by a former Eastern Catholic will be invalid. As a consequence, the former Latin Catholic, or his/her spouse, cannot be admitted to a new marriage, while the former Eastern Catholic, or his/her spouse, can be admitted.¹⁷⁹ A marriage of an Orthodox with a former Latin Catholic would be treated as a marriage between an Orthodox and a Protestant.

Oriental Catholics who are the offspring of non-Catholics, but baptized in childhood in an Oriental Catholic Church, and then reared outside the Catholic Church, are bound to the obligatory marriage form. Eastern Catholics who as adults ceased to present themselves publicly as Catholics, who publicly left the Catholic Church, and perhaps even formally joined some other denomination, remain subject to the marriage form: “once a Catholic, always a Catholic”;¹⁸⁰ and “once an Oriental, always an Oriental”.

E. Dispensation from the Canonical Form of Marriage

A major difference between Western and Eastern legislations is that the local ordinary in the Western Church can dispense from the form of the celebration of marriage in the case of a mixed marriage, if there are serious difficulties, (*CIC* c. 1127 §2). It is reserved, according to new Eastern legislation, to the Apostolic See or the Patriarch¹⁸¹, and granted only for a most grave reason. Canon 835 of *CCEO* states that

¹⁷⁹ POSPISHIL, *Eastern Catholic Marriage Law*, pp. 219-220; see also VADAKUMCHERRY, *Marriage Laws*, p. 20; LWANGA, *Mixed marriages*, pp. 23-24; HUELS, *The Pastoral Companion*, p. 223.

¹⁸⁰ POSPISHIL, *Eastern Catholic Marriage Law*, p. 390.

¹⁸¹ Nuncios also can grant this dispensation by their faculties.

dispensation from the form for the celebration of marriage required by law is reserved to the Apostolic See or the Patriarch, who will not grant it except for a most grave reason.¹⁸²

Although the powers of Western and Eastern Catholic bishops are equal especially with regard to the general faculty to dispense, according to Vatican II decree on Bishops (*CD* n. 8), the eparchial bishops of the Eastern Churches do not enjoy the faculty to dispense from the canonical form. Hence, in the Indian situation, Latin Catholics can simply approach the local ordinary for dispensation from marriage form; Syro-Malabar Catholics have to approach the Major Archbishop in Ernakulam or the Apostolic See in Rome; and, Syro-Malankara Catholics, whose Church is a Metropolitan Church, must approach the Apostolic See in Rome for the same need.

Canon 832 of *CCEO*, following *CIC* c. 1116, clearly recognizes the possibility of a sacramental marriage without the priestly blessing in extreme and exceptional circumstances. The inclusion of §3, without a full parallel in the Latin Code, is only an effort to respect Eastern tradition of priestly blessing. It states that the spouses shall not neglect to receive this blessing as soon as possible. However, this canon prompts a question of validity: if the couple married in such circumstances neglected the priestly blessing later when it was possible, can this mixed marriage be adjudicated invalid? Note that validity accompanies the celebration of the marriage and not later when fulfilling a condition.

CONCLUSION

We have made, in this chapter, an exegetical study of the Latin and the Oriental Codes regarding canons relating to the validity of marriages of non-Catholics. Progress, as measured by the change of attitude of the Catholic Church towards the marriages of non-Catholics, is evident. In the old Codes, the Catholic Church insisted on its jurisdiction over

¹⁸² *CCEO*, c. 835.

the marriages of all the baptized. Imbued with the spirit of the Second Vatican Council, the Church now makes an attempt to allow non-Catholics to rule themselves. Both new Codes clearly state that the canons affect only their respective Catholic Churches. The Oriental Code goes further declaring that non-Catholics are to follow their own laws with regards to marriage and, if they do not have laws of their own Church, then the laws they come under, allowing even civil law for this purpose.

Nevertheless, this attempt of the Catholic Church is not yet complete. It does not have the full confidence to leave non-Catholics to their own rules when Catholics are involved in mixed marriages. The Catholic Church still wants some say over mixed marriages or the marriages of non-Catholics, claiming that only the Catholic Church has the authority to define and to stipulate divine laws. The Oriental Code, although it is more progressive than the Latin Code concerning jurisdiction over non-Catholics, is also conservative by stressing the importance of priestly blessing in marriage and reserving the faculty to dispense from the marriage form to the Apostolic See and the Patriarch. The different views of several canon lawyers indicate the current level of confusion in adjudicating marriage nullity cases of non-Catholics. —

This confusion prompts us to consider some possible solutions. In the next chapter, we shall weigh the present laws in the light of the spirit of Vatican II and ecumenical movements. We will also assess whether the present laws are adequate for modern life situations, especially with regard to the Indian situation. Finally, we will suggest, in the spirit of the law, some solutions to overcome the present confusion.

Chapter Four
EVALUATION OF THE PRESENT SITUATION
AND SOME PROPOSALS FOR THE FUTURE

INTRODUCTION

The present legislation relating to the marriage nullity cases of non-Catholics must be analyzed according to ecumenical principles and in a specific social and religious context. Hence, in this chapter, we look into the ecumenical principles drawn from the New Testament and at the Church teachings made clear in the conciliar and the post-conciliar documents. We give special consideration to Church documents published after the promulgation of the canon law Codes. Indeed, the legislation on nullity of mixed marriage and its implications have become for many Catholics as well as non-Catholics an ecumenical test for the Catholic Church's sincerity in the promotion of ecumenism.¹

Vatican II recognized certain degrees in the concept of communion of non-Catholics with the Church of Rome, against the pre-Conciliar mind set which did not allow for any levels of unity. The terms “full communion”, “imperfect communion”, “varying degrees of communion”, constantly employed in the Decree on Ecumenism, the Decree on the Eastern Catholic Churches and the first part of the Ecumenical Directory of 1967² convey a broader understanding of the nature of the Church. The Ecumenical Directory of 1993³ and the

¹ C.K. LWANGA, *Mixed Marriages in Uganda: Canonical Challenges Involved* (cann. 1124-1129) [= *Mixed Marriages*], Romae, Pontificia Universitas Urbaniana, 1994, p. 13.

² SECRETARIAT FOR PROMOTING CHRISTIAN UNITY, *Ecumenical Directory*, First Part, *Ad Totam Ecclesiam*, May 14, 1967, n. 19, in *AAS*, 59(1967), pp. 574-592.

³ PONTIFICIUM CONSILIUM AD UNITATEM CHRISTIANORUM FOVENDAM, *Directoire pour l'application des principes et des normes sur l'oecuménisme* [= *Ecumenical Directory 1993*], in *AAS*, 85(1993), pp. 1039-1119.

Encyclical letter *Ut unum sint*⁴ of Pope John Paul II explain the Catholic principles regarding Christian Unity, as deriving from the teachings of the Second Vatican Council.⁵

The social and religious context of India is multi-faceted and the promotion of ecumenism is not a simple task. The people of India are highly group-oriented with a tendency to segregate from each other in ways that cause disharmony within their society. The arranged marriage system which seems to protect caste and creed is divisive. Many social reformers and ecumenists have emerged as prophets of a new society of religious harmony and unity. We shall look into the values such reformers and ecumenists promote when analyzing the law on nullity of marriage in the context of the Indian situation. A clue to the sound development of the law lies in understanding the system of values behind it. These values can tell us what rules should be kept, what norms dropped, and how some of the structures and procedures could be improved. The legislator needs a critically correct and balanced report on the relationship of the concrete legal norms to the abstract world of values.⁶

At the present time, the number of nullity cases being adjudicated in India is still rather limited, and so not all tribunals have had to face some of the practical difficulties arising from the lack of clarity in the legislation. However, our analysis of the marriage legislation outlines some proposals that, were they adopted, might help avoid future problems that can easily be anticipated for the Indian Church.

⁴ JOHN PAUL II, encycl., *Ut Unum Sint*, May 25, 1995, in *AAS*, 87(1995), pp. 921-982.

⁵ P. GEFAELL, "Doctrinal Principles and Norms for Sharing in Sacramental Life" [= "Doctrinal Principles"], in *Eastern Church Journal*, 3/1(1996), p. 33; see also J.T. KANIAMPARAMBIL, *Competence of the Catholic Church in Mixed Marriages: The New Vision of the Oriental Code* [= *Competence of the Catholic Church*], Rome, 1997, pp. 39-40.

⁶ L. ORSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions* [= *Marriage in Canon Law*], Wilmington, Del., M. Glazier, 1986, p. 43.

I. THE PRESENT CONTEXT

To evaluate the application of law in the Indian context, we shall now discuss the present situation of social and ecclesial tolerance against the background of ecumenical dialogue and social reforms in India. For this purpose, we shall first review the principles governing ecumenism.

A. Principles Governing Ecumenism

Ecumenical principles, in the spirit of unity envisioned in the New Testament, are drawn from the Vatican II and other Church documents. We also turn to some theologians and ecclesiologists to supplement our argument.

1. The New Testament Teaching on Unity

The ecumenical spirit can be heard in Jesus' own words. He revealed to the Samaritan woman that true believers worship God, neither on the Gerizin mountain nor in the Jerusalem temple, but in spirit and truth. He made it clear that God is spirit, and those who worship must worship in spirit and truth (Jn. 4: 21-24). Further, Jesus prayed for His disciples and those who through their word should come to believe in him, that they all may be one (Jn. 17, 20-23).

The characteristic of "unity in diversity" was inseparably and fundamentally a criterion of apostolic mission. In one instance, a controversy was terminated according to the fifteenth chapter of Acts, when what is commonly known as the "Council of Jerusalem" affirmed the equality of Jews and Gentiles in the Christian Church, together with the non-necessity of circumcision as a condition of participating in its full benefits (Acts, 15:5-11). Peter proclaimed in the episode with Cornelius: "The truth I have now come to realize is that God does not have favorites, but that anybody of any nationality who fears God and does what is right is acceptable to him" (Acts, 10:34-35). When the Jewish members of the Church criticized Peter's lenient attitude towards the uncircumcised, he justified himself by

testifying that God gave them too the same gift, and, therefore, who was he to stand in God's way (Acts, 11: 17).

We cannot miss the jubilant description of this unity in the Epistle to the Ephesians, a unity which stands out so conspicuously: "One body, one Spirit, one Hope, one Lord, one Faith, one Baptism, one God and Father of us all, Who is over all and through us all, and in us all" (Eph., 4:4-6). "All you who have been 'baptized into Christ' have put on Christ [...] for you are all one in Christ Jesus" (Gal. 3:27-38). St. Paul says that Christ in His flesh has made both Jews and Gentiles into one and has broken down the dividing wall, that is, the hostility; He has abolished the law with its commandments and ordinances, that He might create in Himself one new humanity in place of the two, thus making peace (Eph., 2:14-15). Such was the spectacle of Christian unity born of the Apostolic preaching.

2. Vatican II on Ecumenism

The restoration of unity among all Christians was one of the principal concerns of Vatican II. The Council documents state that current divisions openly contradict the will of Christ, scandalize the world, and damage the cause of preaching the Gospel to every creature (*UR*, n. 1). The divisions among Christians also prevent the Church from attaining the fullness of catholicity proper to it, because those who are attached to it through baptism, are still separated from full communion (*UR*, n. 4).

The Council exhorted all the Catholic faithful to recognize the signs of the times and to take an active and intelligent part in the work of ecumenism. All in the Church must preserve unity in essentials, but enjoy freedom in their various forms of spiritual life and discipline, in their different liturgical rites, and even in their theological elaborations of revealed truth. In all things, charity should prevail (*UR*, n. 4).

Further, the Council acknowledges the possibility of salvation outside the Catholic Church, even in other religions. In the Constitution on the Church, it said, “At all times and in every race God has given welcome to whosoever fears Him and does what is right” (*LG*, n. 9). According to the Declaration on the Relation of the Church to Non-Christian Religions, “Humanity forms but one community, for God made the whole human race to live over the face of the earth; all share the same destiny, God; His providence, His manifestations of goodness, His saving design extend to all people” (*NA*, n. 1). The Pastoral Constitution on the Church in the Modern World says: “God, who has fatherly concern for everyone, has willed that all men should constitute one family and treat one another in a spirit of brotherhood” (*GS*, n. 24). The Church reproves, as foreign to the mind of Christ, any discrimination against people or harassment of them because of their race, color, condition of life, or religion (*NA*, n. 5). So the Catholic Church does not reject anything that is true and holy in these religions. It regards with sincere reverence those ways of conduct and of life, those precepts and teachings which, though differing in many aspects from the ones it holds and sets forth, nonetheless often reflect a ray of that Truth which enlightens all people (*NA*, n. 2).

The Vatican Council, through its Declaration on Religious Liberty, declares that the human person has a right to religious freedom. All are to be immune from coercion: no one is to be forced to act in a manner contrary to his or her own beliefs. The right to religious freedom has its foundation in the very dignity of the human person as revealed by the word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed; thus, it also should become a civil right (*DH*, n. 2). In all their activity, humans are bound to follow their conscience. It follows then that no merely human power can either command or prohibit acts of one’s conscience. If the free exercise of religion is denied in society, an injustice is therefore done to the human person and to the very order established by God for human life (*DH*, n. 3). Consequently, humans have the right to govern themselves according to their own norms and

to have their own juridical system and disciplines in accordance with their religious principles (*DH*, n. 4).

Christ is the universal sign of salvation; hence, the Church, as the sacrament of Christ, is the universal sacrament of salvation (*LG*, n. 1; *AG*, n. 1). Moreover, the Council teaches that true religion subsists in the Catholic and Apostolic Church (*DH*, n. 1; *LG*, n. 8). However, the Council confirms that it was Christ's intention to arouse faith in people and not to exert coercion upon them (*DH*, n. 11). Hence, the Council does not hesitate to recognize many significant elements of sanctification and of truth outside the Catholic Church, which are proper gifts of the Church of Christ (*LG*, n. 8).

It follows that the separated Churches and communities as such, though we believe them to be deficient in some respects, have been by no means deprived of significance and importance in the mystery of salvation. Their liturgical actions are capable of giving access to the community of salvation (*UR*, n. 3). The Holy Spirit is present and active, not only in the Catholic Church, but also in other churches and ecclesial communities. Vatican II's decree on ecumenism proclaims this fundamental truth repeatedly and unequivocally.⁷ Those who believe in Christ and have been truly baptized are in communion with the Catholic Church, even though this communion may be imperfect (*UR*, n. 3). The Council also confesses the imperfection of faith that exists within the Catholic Church when its members fail to live by the faith (*UR*, n. 4).

Vatican II gave special consideration to the Orthodox Churches saying that they possess true sacraments and above all, by apostolic succession, the priesthood and the Eucharist, whereby they are linked with us in closest intimacy (*UR*, 15). Far from being an

⁷ *UR*, 2,3,4,15; see also W.M. ABBOTT, ed., *The Documents of Vatican II*, New York, 1966, pp. 344,345,347,358; L.M. BERMEJO, "The Winter of Ecumenism", in *Vidyajyoti Journal of Theological Reflection* [= *VJTR*], 55(1991), pp. 24-25.

obstacle to the Church's unity, a certain diversity of customs and observances only adds to the Church's splendor, and is of great help in carrying out its mission (*UR*, n. 16).

Non-Catholics of the West also make an open confession of Jesus Christ as God and Lord and as the sole mediator between God and man, to the glory of the one God, Father, Son and Holy Spirit. There exist between Catholics and non-Catholics in the West considerable divergences from the doctrine of the Catholic Church concerning Christ Himself, the work of redemption, and consequently, concerning the mystery and ministry of the Church. But all look to Christ as the source and center of Church unity which inspires them to bear witness to faith (*UR*, n. 20). Baptism establishes a sacramental bond of unity which links all who have been reborn by it (*UR*, n. 22).

After taking many factors into consideration, the Council repeated the declaration of previous Councils and Roman Pontiffs, that for the restoration or the maintenance of unity and communion it was necessary "to impose no burden beyond what is essential" (*UR*, 18; Acts 15:28).

3. Post-Conciliar Approach to Ecumenism

Based on Vatican II's statements, ecumenical theologians such as Karl Rahner spoke about "implicit Christianity" in non-Christian religions.⁸ They moved from Christocentricity to theocentricity, and thus perceived God as the centre of the universe – a concept prevalent in the ancient philosophies of the East. W.C. Smith says, "God is as Christ reveals Him to be, always and everywhere taking the initiative to seek and save people in the historical context of their lives."⁹ In the human totality of being, God is looked upon not as the

⁸ K. RAHNER, (ed.), *Encyclopedia of Theology: The Concise Sacramentum Mundi*, London, Burns and Oates, 1975, pp. 292-293.

⁹ W. M. SMITH, *Toward A World Theology*, London, Westminster Press, 1981, p. 178.

supreme “outsider” who rules from above, but as the supreme “insider” who frees people to create their own future.¹⁰

The goal of an ecumenical vision is to search out the Spirit of God within all races and religions. The narrow vision of the “practitioner” of religion often fails to experience “religion” which is present in all. “Practicing” people often restrict their search for God to temples, scriptures, images, and traditional ceremonies and symbols. The ecumenical ministry needs to surmount this conflict between the “practice” and the “ideal”.¹¹

Raymond Panikkar says that the concept behind the phrase “non-Christian religions” is offensive and it cannot be fully accepted. “It is to be feared”, he says, “that the expression is nothing more than an unconscious outcome of what we may call ‘theological colonialism.’”¹² No special perspicacity is needed to see that often enough doctrinal differences between the Catholic Church and the other Christian churches amount to no more than a difference of emphasis on various aspects of the same truth, differences which are complementary rather than contradictory. Nevertheless, Catholics and non-Catholics strongly defend their positions in clearly contradictory ways while each one claims to be guided by the Spirit of truth.¹³

As we understand the Vatican Council, it should not be said that the Church of Christ is perfectly identified as the Catholic Church. According to many theologians, when the Council says that the Church of Christ “subsists” in the Catholic Church (*LG*, n. 8), it means that the Church of Christ is present in the Catholic Church. This necessarily implies that

¹⁰ G. BAUM, *New Horizon: Theological Essays*, New York, Paulist Press, 1972, p. 3.

¹¹ J. KANNATH, *Mixed Marriage and Married Life in a Cross-Cultural Milieu* [= *Mixed Marriage and Married Life*], Toronto, Toronto School of Theology, 1984, (ms.), p. 75.

¹² R. PANIKKAR, “Christians and So-called ‘Non-Christians’”, in *Cross-Currents*, 3(1972), pp. 281-308.

¹³ BERMEJO, “The Winter of Ecumenism”, pp. 25-26.

outside the boundaries of the Catholic Church there are also true and proper churches.¹⁴ V.I. Papez commented that the Second Vatican Council is not claiming exclusivity in the identification of the Catholic Church with the Church of Christ.¹⁵ U. Betti, in his interpretation of the word “subsists”, held the opinion that while it affirms that the Catholic Church is the realization on earth of the Church of Christ, it also recognizes the ecclesiality of other Churches and ecclesial communities as being true means of salvation which participate in the proper mission of the one Church of Christ.¹⁶ Instead of speaking of the Church in metaphors or permanence like the “Body of Christ”, the theologians are now increasingly using the “People of God” metaphor to describe the earthly journey of a pilgrim people towards fulfillment in God’s Kingdom.¹⁷

According to J. Gribomont, a person may reject one teaching of the Church and retain others. But in retaining others, he or she has retained an imperfect, but nevertheless real bond with the visible Church and its hierarchy.¹⁸ Even a Catholic might not accept certain dogmas internally; but we do not treat such a person as not having full communion with the Catholic Church. However, if such a person expresses the same externally, he/she is a heretic (*CIC*, c. 751, 1364; *CCEO*, cc. 1436, 1437).

¹⁴ Cardinal J. WILLEBRANDS, “Vatican II’s Ecclesiology of Communion”, in *One In Christ*, 23(1987), pp. 188-189; see also “Strangers within the Gates”, in A. STACPOOLE, ed., *Vatican II by Those Who were There*, London, Geoffrey Chapman, 1986, p. 176; BERMEJO, “The Winter of Ecumenism”, pp. 30-31.

¹⁵ A. GONZALEZ MONTES, *Enchiridion Oecumenicum*, vol. 1, Salamanca, Universidad Pontificia de Salamanca, 1986, pp. xvii-xx; GEFAELL, “Doctrinal Principles”, pp. 33-34.

¹⁶ *UR*, n. 4; *Acta synodalia Sacrosancti Concilii Oecumenici Vaticani Secundi*, vol. 3, pars I, Vaticanis, 1973, p. 176; see also U. BETTI, “Chiesa di Cristo e Chiesa Cattolica”, in *Antoniano*, 61(1986), p. 742; GEFAELL, “Doctrinal Principles”, p. 34; *Ecumenical Directory 1993*, n. 104b.

¹⁷ D. THOMPSON, “Interchurch Marriages: Support and Catechesis,” [= “Interchurch Marriages”], in *One in Christ*, 26(1990), pp. 219-220.

¹⁸ J. GRIBOMONT, “Du sacrement de l’Église et ses réalisations imparfaites”, in *Irenikon*, 22(1949), pp. 345-367.

Pope Paul VI, after some initial hesitation, consciously decided to go beyond Vatican II. In 1973, general agreement was reached on the deeply divisive issue of the ministry of priesthood, despite Leo XIII's bull *Apostolicae curae* (1896) which had declared Anglican Orders null and void.¹⁹ And Pope John Paul II asks: "To all who, for whatever motive, would wish to dissuade the Church from seeking the universal unity of Christians the question must once again be put: Have we the right not to do it?" (*Redemptor hominis*, 1979, no. 6.).²⁰

4. Post-Code Documents

As we evaluate the Code legislation regarding inter-Church marriages in the ecumenical context, it would be important to keep in mind other official documents of the Church published after the promulgation of the Codes.

a) Directory on Ecumenism

The Ecumenical Directory of 1993 in n. 11, confirms the Council's view that the Church is the new People of God, uniting within itself the richness of its diversity. Those who are baptized in the name of Christ are, by that very fact, called to commit themselves to the search for unity (n. 22). Note this important statement of the Directory, "Though much human culpability has damaged communion, it has never destroyed it" (n. 18).

Catholics also give value to certain elements and goods, sources of spiritual life, which are found in other Churches and ecclesial communities. Such values belong to the one Church of Christ: namely, Holy Scripture, the sacraments and other sacred actions, faith, hope, charity and other gifts of the Spirit (n. 63).²¹ These goods have borne fruit in the mystical tradition of the Christian East, in the worship and piety of Anglicans, and in the

¹⁹ BERMEJO, "The Winter of Ecumenism", pp. 27-28.

²⁰ B. LENNON, "Interchurch Marriages: Torn between divided Churches" [= "Interchurch Marriages"], in *The Furrow*, 31 (1980), p. 321.

²¹ *LG*, n. 15; *UR*, n. 3.

evangelical prayer and the diverse forms of Protestant spirituality. This appreciation should not remain merely theoretical (n. 63). According to the Directory, in certain circumstances, access to the sacraments of Eucharistic communion, penance, and anointing of the sick may be permitted, or even commended, for Christians of other Churches and ecclesial communities (n. 129).²²

Due to the growing number of mixed marriages in many parts of the world, the Church includes within its urgent pastoral solicitude couples preparing to enter, or already having entered such marriages. These marriages, even if they have their own particular difficulties, "contain numerous elements that could well be made good use of and develop both for their intrinsic value and for the contribution they can make to the ecumenical movement. This is particularly true when both parties are faithful to their religious duties. Their common Baptism and the dynamism of grace provide the spouses in these marriages with the basis and motivation for expressing unity in the sphere of moral and spiritual values" (n. 145).²³

In the interest of greater understanding and unity, both parties should learn more about their partner's religious convictions and about the teaching and religious practices of the Church or ecclesial community to which he or she belongs (n. 149). The duty of transmitting the Catholic faith to their children is to be done with respect for the religious freedom and conscience of the other parent, and with due regard for the unity and permanence of the marriage and for the maintenance of the communion of the family. If in spite of the Catholic's sincere efforts, the children are not baptized and brought up in the

²² *CIC*, c. 844 §4; *CCEO*, c. 671 §4.

²³ JOHN PAUL II, Apost. Exhort., *Familiaris Consortio*, November 22, 1981, in *AAS*, 74(1982), n. 78.

Catholic Church, the Catholic parent does not fall subject to the censure of canon law (n. 151).²⁴

The nature of the ecumenical activity undertaken in a particular region will be influenced by the particular character of the local ecumenical situation (n. 31). In a predominantly Catholic country, the ecumenical task will emerge differently from that arising in one which has a high proportion or a majority who are Eastern Christians or Anglicans or Protestants. The task is different again in countries where the majority is non-Christian (n. 32). Hence, ecumenism calls for a renewal of attitudes and for flexibility of methods in the search for unity. Thus, all those engaged in pastoral work should be able to evaluate and welcome truth wherever it is found. All truth, by whomsoever it is spoken, is of the Holy Spirit (n. 57).

b) *Ut Unum Sint*

Throughout the encyclical “*Ut unum sint*”, Pope John Paul II quotes Vatican II documents and the Ecumenical Directory of 1993 to confirm the unity of Christians by baptism. Specifically: “They are consecrated by Baptism, through which they are united with Christ. They also recognize and receive other sacraments within their own Churches or ecclesial communities. In some real way they are joined with us in the Holy Spirit, for to them also he gives his gifts and graces, and is thereby operative among them with his sanctifying power” (n. 12). “The elements of sanctification and truth present in the other Christian communities, in a degree which varies from one to the other, constitute the objective basis of the communion, albeit imperfect, which exists between them and the Catholic Church” (n. 11).

²⁴ *CIC*, c. 1366; *CCEO*, c. 1439.

“The Church is not a reality closed in on herself. Rather, she is permanently open to missionary and ecumenical endeavor, for she is sent to the world to announce and witness, to make present and spread the mystery of communion which is essential to her, and to gather all people and all things into Christ, so as to be for all an ‘inseparable sacrament of unity’” (n. 5).²⁵

It is not true to say that beyond the boundaries of the Catholic community there is an ecclesial vacuum. Many elements of great value, which in the Catholic Church are part of the fullness of the means of salvation and of the gifts of grace which make up the Church, are also found in the other Christian communities (n. 13). John Paul II is very much aware of what John XIII had observed previously: “What unites us is much greater than what divides us” (n. 14).

According to the encyclical, Christians of one confession no longer consider other Christians as enemies or strangers but see them as brothers and sisters. Again, the very expression “separated brethren” tends to be replaced today by expressions which more readily evoke the deep communion – linked to the baptismal character – which the Spirit fosters in spite of our historical and canonical divisions. Today we speak of “other Christians”, “others who have received Baptism”, and “Christians of other communities”. This broadening of vocabulary is indicative of a significant change in attitudes; there is an increased awareness that we all belong to Christ (n. 42).

It needs be reaffirmed in this regard that acknowledging our brotherhood is not the consequence of a large-hearted philanthropy or a vague family spirit. It is rooted in recognition of the oneness of baptism and the subsequent duty to glorify God in his work.

²⁵ CONGREGATION FOR THE DOCTRINE OF FAITH, *Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as Communion*, in *Communio Notio*, 28 May 1992, p. 4; see *AAS*, 85(1993), p. 840.

It is fitting to recall that the fundamental role of baptism in building up the Church has been clearly brought out (n. 42). Furthermore, the sacrament of baptism which we have in common represents “a sacramental bond of unity linking all who have been reborn by means of it.”²⁶ The theological, pastoral and ecumenical implications of our common baptism are many and important (n. 66).

The ultimate goal of the ecumenical movement is to re-establish full visible unity among all the baptized. In view of this goal, the results so far attained are but one stage of the journey, however promising and positive (n. 77). In this courageous journey towards unity, along with avoiding false irenicism and indifference to the Church's ordinances,²⁷ we have to reject a halfhearted commitment to unity and, even more, a prejudicial opposition or a defeatism which tends to see everything in negative terms (n. 79). “We must take every care to know their way of thinking and their sensibilities” (n. 87).²⁸

The Pope asks, “Could not the ‘real’ but imperfect communion existing between us persuade Church leaders and their theologians to engage with me in a patient and fraternal dialogue on this subject, a dialogue in which, leaving useless controversies behind, we could listen to one another, keeping before us only the will of Christ for his Church and allowing ourselves to be deeply moved by his plea ‘that they may all be one [...] so that the world may believe that you have sent me’ (Jn. 17:21)” (n. 96)?

It is obvious that the lack of unity among Christians contradicts the Truth which Christians have the mission to spread and, consequently, it gravely damages their witness. This was clearly understood and expressed by Pope Paul VI, in his Apostolic exhortation

²⁶ *UR*, n. 22.

²⁷ *UR*, nn. 4, 11.

²⁸ POPE JOHN PAUL II, “Address to the Cardinals and the Roman Curia”, 28 June 1985, n. 4, in *AAS*, 77(1985), pp. 1151-1152.

Evangelii nuntiandi: “As evangelizers, we must offer Christ's faithful not the image of people divided and separated by unedifying quarrels, but the image of people who are mature in faith and capable of finding a meeting-point beyond the real tensions, thanks to a shared, sincere and disinterested search for truth. The division among Christians is a serious reality which impedes the very work of Christ” (n. 98).²⁹

B. Social Reforms and Ecumenical Dialogue in India

After discussing the official teachings of the Church on ecumenism, we now want to see how this works in India, a mosaic of religions and ecclesial communities. To do so, we need to examine the teachings and approaches of eminent religious leaders and social reformers.

1. Social Reforms in India

Religious hatred has become a problem for the soul of India. Further, the Hindu caste system has prevailed in India in its most divisive forms. The reform movement, which began towards the end of last century, launched an uncompromising fight against the evils of the caste system and religious fanaticism. During this critical period of cultural renaissance, the masses of Indian peoples were awakened to a sense of worth, importance and equality.³⁰

Inspired by Vedas, Hindu reformers such as Swami Vivekananda (1863-1902), who was also a spiritual leader, considered it their duty to serve all, without distinction of caste and creed. For them, to see God in the temple is only the beginning, to love and serve all is to worship God, and to see God in all beings is the end of all religions. This presence of God

²⁹ POPE PAUL VI, Apost. Exhort., *Evangelii Nuntiandi*, 8 Dec. 1975, n. 77 in *AAS*, 68(1976), p. 69; *UR*, n. 1; *Ecumenical Directory* 1993, nn. 205-209, pp. 1112-1114.

³⁰ KANNATH, *Mixed Marriage and Married Life*, p. 37.

among all beings in the Hindu system of thought is the underlying reality, the powerful force capable of creating the Kingdom of God.³¹

A Hindu religious leader, Ramakrishna, also called Gadadhar Chatterji (1836-1886) experimented in his life with different faiths, and declared Buddha, Christ and Krishna to all as forms of the Supreme. The monks of the Ramakrishna Order join any worship and celebrate the birthdays of Buddha, Christ and Krishna. Ram Mohun Roy founded the Brama Samaj (Society of Brahma) in 1828 as a theistic movement to experience God through all religions. Over the door of Shantiniketan (Abode of Peace), a meditation centre founded and endowed in 1863 by Debendranath Tagore (1817-1905), a philosopher and religious reformer, one reads: "In this place [...] no one's faith is to be despised."³²

Sree Narayana Guru (1856 - 1928), born of the untouchable Ezhava community, worked for the eradication of inter-caste and inter-religious barriers. He rejected the distinctions of caste and religion which divided people and opposed their unity, equality, mutual reverence and love. His inspiring message "One Caste, One Religion, One God" emphasized the brotherhood of man.³³

³¹ Ibid., p. 66.

³² S. RADHAKRISHNAN, *Eastern Religions and Western Thought*, London, Oxford University Press, second ed., 1939, pp. 312-312.

³³ A.S. MENON, *Cultural Heritage of Kerala*, Cochin, East-West Publications, 1978, p. 224.

Many Yogins³⁴ of Hindu religion were liberated to see the Lord everywhere and to see everything in the Lord.³⁵ The teaching of *Bhagavatgita* contains profound thoughts and guidelines designed to build up the Kingdom of God on earth. "I am the same in (alike to) all things. None is hateful nor dear to Me. But those who worship Me with devotion they are in Me and I also in them."³⁶ Through their search for truth, non-violent love and service, they achieve salvation.

During the reform period, Mahatma Gandhi's (1869-1948) dialectical approach toward different religions, based on his interpretation of the Gita, conscientized the masses to respect the equality of people of all religions and castes. According to Gandhi, different facets of the one Truth are expressed by different religions. He said, "I could, without in any way whatsoever impairing the dignity of Hinduism, pay equal respect to the best of Islam, Christianity, Zoroastrianism, and Judaism."³⁷ Gandhi thought that it was everyone's duty to blend his/her own faith with every acceptable feature of other faiths. He accepted Jesus as a son of God, and followed him as the "highest example" in his life. But he could not accept Jesus as the only begotten son of God, as the concept "only" superseded his reason.³⁸ Gandhi

³⁴ Many of the Hindu reformers, who are also commentators of *Bhagavatgita*, are called Yogins: Sankara (8th century), Ramanuja (11th century), Madhava (12th century), Vallabha (15th century), Tilak, Aurobindo and Gandhi (this century). *Bhagavadgita* (Song of God) is one of the greatest and most beautiful of the Hindu scriptures. It forms part of Book VI of the Indian epic the *Mahabharata* (Great Epic of the Bharata Dynasty). The *Bhagavadgita* is of a later date than the major parts of the *Mahabharata* and was probably written in the 1st or 2nd century AD. The poem consists of 700 Sanskrit verses divided into 18 chapters.

³⁵ R. PANIKKAR, *The Vedic Experience*, Los Angeles, University of California, 1977, p. 97.

³⁶ S. RADHAKRISHNAN, trans., *The Bhagavadgita*, 9th impression, London, Oxford University Press, 1948, Chapter 9, verse 29.

³⁷ K.L. SESHAGIRIRAO, *Mahatma Gandhi and Comparative Religion*, Delhi, Motilal Banarisdass, 1978, p. 96.

³⁸ M.K. GANDHI, *All Men Are Brothers*, K. KRIPALANI, ed., 44th Impression, UNESCO, Columbia University Press, 1968, pp. 64-65.

said, "Jesus lived and died in vain if he did not teach us to regulate the whole of life by the eternal law of love."³⁹

According to Gandhi, Jesus belonged not only to Christianity but to all religions and races in the sense that Jesus' life on earth had the significance and the transcendency to which all must aspire in their lives.⁴⁰ Hence, a "religious" man like Mahatma Gandhi could categorize the proselytizing mission of Christianity in India as "an ugly performance and a travesty of religion".⁴¹

For a Hindu, man does not change his religion as he changes his garments. Nor does he profess his religion to oblige others.⁴² It was most effective for Gandhi to live the gospel throughout his life while remaining in his own Hindu religion. Something momentous will occur to humanity if the multi-religious communities in India cross the "guarded" boundaries of mosque, church, synagogue and temple to realize the manifold "incarnations" of the truth.⁴³ Religious truth is the function of a personal life lived in that context; not of the context itself.⁴⁴ It is ever creative in the heart of the follower striving to be born anew. The creativity of this religiousness is not measured by theological affirmations, institutionalized forms of ritual worship, expanding pyramidal structures of power and prestige, advancement in membership, and universally enforced or uniformly accepted practices of religions. On the contrary, it is generated in the quality of the fruits of the Spirit. It condemns all forms of spiritual vandalism including proselytism.⁴⁵

³⁹ SESHAGIRI RAO, *Mahatma Gandhi and Comparative Religion*, p. 99.

⁴⁰ M.K. GANDHI, *Collected Works of Mahatma Gandhi*, vol. LXXV, New Delhi, Publication Division, Government of India, 1979, p. 70.

⁴¹ *Ibid.*, vol. LXIV, p. 33.

⁴² SESHAGIRI RAO, *Mahatma Gandhi and Comparative Religion*, p. 127.

⁴³ KANNATH, *Mixed Marriage and Married Life*, p. 159.

⁴⁴ W. C. SMITH, *Questions of Religious Truth*, New York, Charles Scribners, 1967, pp. 80-81.

⁴⁵ KANNATH, *Mixed Marriage and Married Life*, p. 162.

This view is evident in the writings of several contemporaries of that time. N. Kumaran Asan (1873-1924), a poet known as the renowned patron of modern culture in Kerala, condemned many unhealthy traditions and unjust practices prevailing in Kerala society. He wrote his social protest in a religiously conciliatory tone:

Heed not the scriptures that violate the truth of man and his moral law; nor the words of men who stand to gain by interpreting them wrong. For the ignorant crowd, yesterday's error hardens into today's tradition, and today's tradition into tomorrow's law. It is in love that the world takes its birth, love nurses it to growth; his fulfilled bliss man finds in the bonds of love; life itself is love; the moment of death is when compassion dies.⁴⁶

This culturally religious movement brought revolutionary changes in India.⁴⁷ It had a strong impact especially upon the institution of marriage. The state government of Kerala had encouraged inter-caste marriage by making a lump sum payment to the partners involved. However, inter-caste and inter-religious marriages were least likely to take place among Christians.⁴⁸ Until the beginning of this century, Christians in India — as we have seen in the first chapter — were colonial by formation, whether Eastern or Western in mind. They had a superiority or inferiority complex over other Church denominations and castes. Moreover, their Church rules and the attitude of some Church authorities strengthened this segregative mentality. For Christians, this attitude became an obstacle to their participation in the religious awakening happening all around them.

2. The Ecumenical Dialogue in India

The present ecumenical situation seems to indicate that Vatican II has not yet been assimilated nor have all its principles been integrated into the totality of the Catholic system in India. The Catholic Bishops Conference of India has not given any noticeable lead in

⁴⁶ N. KUMARAN ASAN, *Chandala Bhiksuki*, (Mal.), 18th ed., Kodungalloor, Kerala, India, Devi Bookstall, 1996, p. 29; quoted by KANNATH, *Mixed Marriage and Married Life*, p. 39.

⁴⁷ MENON, *Cultural Heritage of Kerala*, pp. 226-276.

⁴⁸ A.L.K. IYER, *Social History of Kerala*, vol. II, Madras, Book Centre Publications, 1970, pp. 59-60.

ecumenical dialogue. Since divisions among Christians did not originate in India, but were rather imported from outside, the Indian Church does not seem to think it as its responsibility to find a solution to the problem.⁴⁹ The greater and the lesser among the Churches seems to apply aptly to the Indian Christian scene at several levels.⁵⁰ In addition, denominations in both Catholic and non-Catholic Churches tend to identify Christian living with the imperial-feudal structures and faith-worship expressions they inherited from the Christian colonialists whether of East or West.⁵¹

The real division or separation between Catholics and non-Catholics causes scandal and often confuses people in the missions.⁵² As long as certain leaders of the Catholic Church maintain their approach, formidable dents are being made in its body, resulting even in the leaving of some Catholics to join various Pentecostal churches.⁵³ This approach calls our attention to what George Soares Prabhu, a theologian of India, calls “the conflict between the ‘head’ of Christianity and its ‘heart’, between the intolerant truth it professes and the unrestrained love”.⁵⁴ This “head-wise” intolerance breeds communalism in an insidiously subtle way, and, regrettably, seems to be endemic to the profession of Christian religion in India.⁵⁵

⁴⁹ BERMEJO, “The Winter of Ecumenism”, pp. 26-27.

⁵⁰ J.R. NARCHISON, and D. K. KAMAL, “The Church and the Churches: the Ecumenical Task in India Today” [= “The Ecumenical Task in India”], in *Jeevadhara*, 22(1992), p. 267.

⁵¹ Ibid., p. 270.

⁵² CHEDIATH, G., and T. VELLILAMTHADAM, [= CHEDIATH], “Problems and Prospects of Evangelization in India: An Ecumenical Perspective” [= “Problems and Prospects”] in *Jeevadhara*, 13(1983), p. 256.

⁵³ NARCHISON, “The Ecumenical Task in India”, p. 271.

⁵⁴ S. AROKIASAMY, (ed.), *Responding to Communalism; The Task of Religions and Theology*, Anand, Gujarat Sahitya Prakash, 1991, p. 145.

⁵⁵ NARCHISON, “The Ecumenical Task in India”, pp. 271-272.

Increasingly secessionist tendencies and activities eat up the very unity and integrity of India as a nation. In view of this, the common ecumenical task of the Churches in India cannot merely be the unification of the churches. As a matter of historical fact, the few church unions that were achieved have proved to be somewhat ineffective. In the case of the Church of South India, its significant spokesman Samuel Amirtham has observed, “the powers that divide the society are equally strong in the Church (CSI)”. He further notes, “the quality of the inner life of the Church has not visibly changed since union, or because of union [...]; unity of churches is no guarantee for community of persons [...]; joint endeavors for mission have become additional factors for fights and rivalries [...]; the Church finds itself unable to be delivered from those problems that plague the society at large.”⁵⁶ In short, it is not uniformity that is necessary, but tolerance and mutual acceptance; i.e., unity in diversity.

Inter-faith dialogue should be a process of humanization to replace the dehumanizing experiences of exploitation which the masses have in the name of religion.⁵⁷ That is to say, inter-faith dialogue should be the means to bring together the liberating force of religions in India. Inter-faith dialogue in India should therefore lead to a certain osmosis by which the faith and religious expressions/experiences of other peoples are not only appreciated, but also mutually appropriated.⁵⁸ Ecumenism can take place only based on the principle: “unity in essentials, and diversity in all the rest.” This principle implies a readiness to accept the diverse realities within the Church. No ecumenism will thrive in an unjust and domineering life situation. Sooner or later it is bound to fail, because it does not incorporate evangelical values.⁵⁹

⁵⁶ M. ZACHARIAH, *Ecumenism in India: Essays in Honour of Rev. M. A. Thomas*, Delhi, ISPCK, 1980, p. 86.

⁵⁷ W. FERNANDES, “Social Action and Inter-religious Dialogue”, in *VJTR*, 53(1989), p. 596.

⁵⁸ NARCHISON, “The Ecumenical Task in India”, p. 274.

⁵⁹ CHEDIATH, “Problems and Prospects”, p. 257.

It is strikingly notable that on September 29, 1964, Cardinal Joseph Parecattil of the Syro-Malabar Church in India intervened during the discussion of the Decree on Ecumenism and said that in the present world situation with the danger of materialism and atheism, it was better for people to remain attached to one's own religion lest they would lose everything.⁶⁰

The Church is called to undergo a Christ-like incarnation into a culture and its tradition to become a truly efficacious means for forming and transforming the lives of its people. Christian ministry becomes authentic only when it passes beyond conventional/denominational ritualism, and makes its passage from the communal to the global, from sectarian to ecumenical in their widest sense.⁶¹ Christ is not a mere “*avatara*” (incarnation) for the worship of a particular clan; he is equally accessible to all who want to follow him.⁶² “Christianity is not yet the new mankind but its vanguard, in resistance to deadly introversion and in self-giving and representation of man's future.”⁶³ A denominational/particular church or religion becomes a movement, not a position; a process, not a result; a growing tradition, not a fixed revelation.⁶⁴

The Church cannot, therefore, effectively administer and creatively function either as an international corporation or as a model of colonialism. On the contrary, it has to be a “pilgrim church” of creativity in the specific and particular context, conveying and manifesting the attitude, “not to be served but to serve”. Its true mission is to bring people to God through the context of their living world, rather than to influence them to move from one community to another. Such an activity is incompatible with Jesus’ ministry and does a great

⁶⁰ E. THOTTAN, “The Multifaceted Personality of Cardinal Parecattil”, in J. CHIRAMEL and K. BHARANIKULANGARA, (ed.), *The Code of Canons of the Eastern Churches: A Study and Interpretation* [= *The Code of Canons of the Eastern Churches*], Alwaye, India, St. Thomas Academy for Research Publications, 1992, p. 321.

⁶¹ KANNATH, *Mixed Marriage and Married Life*, p. 16.

⁶² PANIKKAR, “Christians and So-Called Non-Christians”, p. 286.

⁶³ J. MOLTMANN, *The Church in the Power of the Spirit*, London, SCM Press, 1977, p. 196.

⁶⁴ KANNATH, *Mixed Marriage and Married Life*, p. 165.

disservice to true religion. The Church, instead of claiming monopoly, has to be the universal sign of salvation. Being open to Christ, in whom “there are no more distinctions between Jew and Greek, slave and free, male and female, but all are one” (Gal. 3: 28) is very essential in the Indian Church today.

C. The Context in Which Mixed Marriages are Celebrated

The laws on mixed marriage in the Indian context must be evaluated in the context of social and ecclesial tolerance among the different Christian denominations in India.

1. Social Acceptance or Tolerance

In India, there is the dominant social tradition of arranged marriages in which the bride and groom normally have little say, if any. The consent of the parties to the marriage is of little importance in such a tradition. The main criteria in arranged marriages are – among others – the size of the dowry and caste and creed of the prospective partners. Endogamous marriage practices are designed to protect the dominant culture’s social pre-eminence.⁶⁵

Anantha Krishna Iyer, an Indian anthropologist, writing of the Syrian Christians of the Malabar Coast, said: “The average Indian Christian is a staunch observer of castes. There are a large number of Christians in the Southern Districts of the Madras Presidency who even boast of being firmer and truer adherents of the caste system than the Hindus.”⁶⁶ Caste adherence gave social stability to the Christians especially in Kerala where they occupied higher rungs in the caste hierarchy. Later on, when the Portuguese came and the conversion to Christianity which so far had been restricted to upper castes⁶⁷ was extended to lower

⁶⁵ Ibid., p. 2.

⁶⁶ A.L.K. IYER, *Anthropology of Syrian Christians*, Ernakulam, The Cochin Government Press, 1926, p. 218; see also E.J. THOMAS, “Caste and the Syrian Rite in Keralam”, in *Jeevadhara*, 23(1993), p. 228.

⁶⁷ THOMAS, “Caste and the Syrian Rite in Keralam”, p. 228.

castes, the Syrian rite became a protective cover for the Thomas Christians. The rite became a means of defining and guarding their superior rank in the caste hierarchy of Kerala. Even if there had been some conversions from the lower castes, only after a period of three generations were those converts accepted as equals with the earlier converts.⁶⁸

People in India, as a whole, show a negative attitude toward mixed marriage. The Christians' culture apparently dominated the nascent culture of social integration, and it has promoted a communally enforced and traditional resistance towards heterogeneous mixture in marriage.⁶⁹ Despite their intellectual individualism and their predilection for political change, even the people of Kerala are highly group-conscious and, in their own way, traditionalists.⁷⁰ However, we note that mixed marriages are on the increase in modern India due to a variety of factors, including the social movements discussed previously.

2. Ecclesial Acceptance or Tolerance

Ecumenical outreach and participation have so far not been part of Christianity in India.⁷¹ One of the common traits of the Church's ministry as it functions within the Indian mosaic is that it appears more concerned with expanding each particular Church's "kingdom" than with enhancing the "Kingdom of God." While Church officials are often broad-minded at the level of theory, at the same time they are often rather narrow-minded at the practical level. An observation made by L. Bwambale, when speaking of Africa, is also true for the Indian situation: faced with a potential case of mixed marriage, there is a temptation, on the

⁶⁸ Ibid.

⁶⁹ KANNATH, *Mixed Marriage and Married Life*, p. 143.

⁷⁰ G. WOODCOCK, *Kerala: A Portrait of the Malabar Coast*, London, Faber and Faber, 1967, p.

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⁷¹ KANNATH, *Mixed Marriage and Married Life*, p. 41.

part of religious leaders, to oblige one of the partners involved to change his or her religious allegiance.⁷² Such a change under pressure is an abuse of personal freedom and integrity.

The situation which confronts us is that marriage is increasingly seen to be more regulated by law than by friendship. An overall pastoral approach to mixed marriages is sadly lacking in parts of India. The Church seems more concerned about following the rules. The Catholic partner, faced with tremendous rejection, often marries in the non-Catholic Church or before a civil authority, and leaves the Church permanently. Moreover, there is a high and growing rate of civil marriage outside the Church, a high divorce rate and an unknown but growing number of cohabitations outside marriage.

II. EVALUATION OF THE LEGISLATION

Against the background of what we have discussed above, we can now evaluate the canon law on inter-Church marriages, noting the confusion and difficulties in interpreting the laws, while keeping in mind both the positive and the negative approaches the Codes hold regarding ecumenism and inter-Church marriages.

A. Difficulties in Interpreting the Legislation

The principal difficulty in interpreting the law on inter-Church marriage is the confusing approaches of the Codes towards ecumenism. They are positive with regard to certain matters, but negative on others.

1. Positive Approach Towards Ecumenism

It is praiseworthy that the Codes try to incorporate the spirit of Vatican II regarding ecumenism, although they do not appear to have done so completely. An ecumenical spirit

⁷² L. BWAMBALE, *The "Bonum Coniugum" and "Bonum Proles" in Mixed marriages: With a Special Reference to the Diocese of Kasese [= Bonum Coniugum]*, Romae, Pontificia Universitas Urbaniana, 1994, p. 136.

is obvious in the general approach of the canons, especially regarding the permission to marry a non-Catholic.

a) Ecumenical Approach in the Codes

One of the important novelties of the present Codes, especially the *CCEO*, is the importance given to ecumenism. Accordingly, in *CCEO*, an entire title (XVIII) is devoted to ecumenism or fostering the unity of Christians (cc. 902-908). Throughout this Code, one notes the respect for Orthodox Christians and other non-Catholic ecclesial communities. Canons 780 and 781 of *CCEO* are of particular ecumenical importance when adjudicating marriage nullity. According to these new regulations, marriage between a Catholic and a baptized non-Catholic is governed by divine law for both parties and by canon law for the Catholic party and also by the law of the Church or community to which the non-Catholic party belongs. Moreover, when the Catholic tribunal has to judge the validity of a marriage of baptized non-Catholics, the law to which they were subject at the time of the marriage is applied.⁷³

The Latin Code also, although it does not specifically treat this matter of ecumenism, has many norms scattered here and there concerning it. Being more attentive to the terminology of Vatican II in general, it speaks of the “Churches and the ecclesial communities” which are not in “full communion” with the Catholic Church (cc. 383 §3, 463 §3, 908, 933, 1124). The concept of communion was integrated into the body of the Code in Book II on the People of God, which has an eminently ecclesiological content. In fact, Book II opens with c. 204 §1 which develops the notion of Christ’s faithful: “Christ’s faithful are those who, since they are incorporated into Christ through baptism, are constituted the people of God.”

⁷³ D. SALACHAS, “The Ecumenical Significance of the New Code” [= “The Ecumenical Significance”], in *The Code of Canons of the Eastern Churches*, p. 273.

In referring to baptized non-Catholics, the new Codes avoid the terminology of the 1917 Code and *Crebrae allatae*. “Heretics and schismatics”⁷⁴ become those “who are not in full communion with the Catholic Church,”⁷⁵ or “brethren”;⁷⁶ “heretical and schismatic sects”⁷⁷ become “Churches and ecclesial communities.”⁷⁸ The previous law held that baptized non-Catholics, as well as Catholics, were bound by ecclesiastical laws. The difficulties raised by this norm were sometimes avoided by agreeing that persons in good faith belonging to non-Catholic Churches were, for all practical purposes, excused from the obligations of the law.⁷⁹ We see a more positive attitude demonstrated in the new Codes towards baptized Christians who are not Catholics, and the fruit of a mutual rediscovery favoured by the contemporary ecumenical movement.⁸⁰

b) Law on Permission for Mixed Marriage

Matrimonia mixta, n. 1, stated that a marriage between two baptized persons, of whom one is a Catholic, while the other is a non-Catholic, is by its nature an obstacle to the full spiritual communion of the married parties.⁸¹ But the new Codes dropped any comment on the possible consequences of a mixed marriage, declaring simply that the situation must be carefully examined by the ordinary before permission is granted to go ahead with the marriage if a “just and reasonable cause” exists (c. 1125). This goes a long way from the

⁷⁴ *CIC/1917*, c. 731, § 2.

⁷⁵ *CIC*, cc. 383, § 3 and 844, § 4.

⁷⁶ *CIC*, c. 825, § 2.

⁷⁷ *CIC/1917*, cc. 765, §2; 1240, §1, 1°; 1060.

⁷⁸ *CIC*, cc. 908, 933.

⁷⁹ A. TACHÉ, “The Code of Canon Law of 1983 and Ecumenical Relations” [= “Ecumenical Relations”] in *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, p. 406.

⁸⁰ *Ibid.*

⁸¹ PAUL VI, *Motu proprio, Matrimonia Mixta*, n. 1, in *AAS*, 62(1970), pp. 260-261.

“*severissime Ecclesia [...] prohibet*” (c. 1060), or the “*fideles a mixtis nuptiis [...] absterreant*” (c. 1064) of the 1917 Code.⁸²

The new Codes treat a mixed marriage between the baptized as subject to a “prohibition” in need of the proper permission of the ordinary, rather than as an “impediment” in need of a dispensation.⁸³ Dispensation is considered to be a *vulnus legis* (wounding of the law) given in toleration for something (e.g., canonical form, disparity of cult) which is forbidden according to the law, yet cannot easily be prevented. Permission is not a *vulnus legis*; it is given not because something is prohibited and cannot be avoided, but rather because the law wishes to make sure that everything is in order before a permission is granted.⁸⁴ If the permission is not obtained, the marriage is still presumed valid though illicit.⁸⁵

Although the expression “just cause” is reinforced by the term “reasonable”, a “just and reasonable cause” is among the least demanding of the causes or motivations required by canon law. In the sequence of causes or motivations, we may categorize them according to the following ascending order: i) *causa iusta*; ii) *causa gravis*; iii) *causa gravior*; iv) *causa gravissima*. Sometimes the law uses the expressions *iusta et necessaria causa* (CIC, cc. 1308; 1310; CCEO, c. 1054) and *iusta et rationabilis causa* (CIC, cc. 90, §1; 831, §1; 906; 1125; CCEO, cc. 660; 814). We should note that if the cause is just, it is also always reasonable. Therefore, the word “reasonable” adds little to the expression “just cause”, but

⁸² TACHÉ, “Ecumenical Relations”, p. 416.

⁸³ CIC, c. 1124; CCEO, c. 813; TACHÉ, “Ecumenical Relations”, p. 414.

⁸⁴ BRIA, *The Development of Mixed Marriage Legislation Through Missionary Law from 1622 to the Present [= The Development]*, (Doctoral Thesis), Ottawa, Saint Paul University, 1993, p. 253. For more comments on c. 1124, see also ÖRSY, *Marriage in Canon Law*, pp. 183-185; B. A. SIEGLE, *Marriage According to the New Code of Canon Law*, New York, NY, Alba House, 1986, pp. 149-153; L. CHIAPPETTA, *Il codice di diritto canonico: Commento giuridico-pastorale*, Napoli, Edizioni, Dinoniane, 1988, vol. II, pp. 252-253.

⁸⁵ BRIA, *The Development*, p. 253.

this corresponds to the traditional juridical use of the same expression. Whereas, as far as the expression “just and necessary cause” is concerned, we must note that a just cause is not always a necessary one.⁸⁶

A “just and reasonable cause” should not be interpreted only in a negative sense of addressing the danger of a civil marriage, or the danger of the Catholic party's lapsing from the faith, or the danger of the parties living in concubinage. While these are just and reasonable causes for granting such a permission, the spiritual maturity of the couple, their ability to face up together to the difficulties of a mixed marriage, and their commitment to their respective Churches are also just and reasonable causes in the positive sense. A just and reasonable cause may also include a founded hope that through the marriage, the non-Catholic might be attracted to join the Catholic Church, or the situation that arises when the celebration of a mixed marriage is the only moral possibility of exercising the natural right to marry due to the scarcity or lack of Catholics in a given place, or, finally, when it is a question of formalizing a concubinous union or to secure a regular family for the children.⁸⁷ The honest desire of the parties to marry is a just and reasonable cause; no more is required; this interpretation is confirmed by practice.⁸⁸

2. Negative Approach Towards Ecumenism

If the Codes had been published shortly after Vatican II, undoubtedly they would have been regarded as an honest attempt on the canonical level to reflect the achievements of that Council. Today, however, they look somewhat outdated. Several canonists are already suggesting alterations. Moreover, on some points, in spite of technical rephrasing, a lack of

⁸⁶ BWAMBALE, *Bonum Coniugum*, p. 108.

⁸⁷ Ibid., p. 110.

⁸⁸ ÖRSY, *Marriage in Canon Law*, p. 186.

clarity persists. In fact, the future of these Codes will be determined by the evolution of Catholicism itself.⁸⁹

To designate the non-Catholic faithful and their Churches and communities, *CCEO* uses in general the adjective *acatholici*. Keeping in mind the words of Pope John Paul II noted above, the term *acatholici* does not seem to be the most adequate, either from the theological or from an ecumenical point of view. In fact, other Churches and ecclesial communities, by virtue of baptism, profess the Church in the Creed as one, holy, catholic and apostolic. Similarly, the way in which the Orthodox Churches habitually designate Catholics as *heterodox* is not acceptable since those who profess the Chalcedonian faith are fully *Orthodox*.⁹⁰

We recall Pope Paul VI's observation that the Pope is, in the minds of many, the greatest obstacle to ecumenism;⁹¹ specifically, the papal title of "Vicar of Christ" used in the Codes (*CIC*, c. 331; *CCEO*, c. 43), the dogma on papal infallibility (*CIC*, c. 749; *CCEO*, c. 597), and the fact that the Holy See can be judged by no one (*CIC*, c. 1404; *CCEO*, c. 1058), etc., still pose problems for other Christians.⁹²

Marriages between Christ's followers remain an important area of ecumenical challenge in canon law. While the present legislation, on the one hand, calls upon the entire college of Bishops and the Apostolic See to promote and restore Christian unity by the will of Christ (*CIC*, c. 755; *CCEO*, c. 904), on the other hand, it still prohibits marriages between

⁸⁹ P. L'HUILLIER, "An Eastern Orthodox Viewpoint on the New Code of Canon Law", in *The Jurist*, 46(1986), p. 393.

⁹⁰ SALACHAS, "The Ecumenical Significance", p. 261.

⁹¹ PAUL VI, "Allocution to the Secretariat for Christian Unity", April 28, 1967, in *AAS*, 59(1967), p. 498.

⁹² Y. CONGAR, "Titres donnés au pape", in *Concilium*, n. 108, octobre, 1975, pp. 55-64; see also TACHÉ, "Ecumenical Relations", p. 407.

Catholics and baptized non-Catholics (*CIC*, c. 1124; *CCEO*, c. 813).⁹³ It might be strange and sociologically confusing to some if we take the institution of marriage according to the Catholic Church and then apply it to the whole Church, while ignoring the positive values of marriages and families embodied in other Churches.⁹⁴

Unlike *Matrimonia mixta* which stated that a mixed marriage “may not be contracted,” the present legislation uses the phrase “is forbidden.” This is based on the presumption that a marital relationship between persons of different denominations will impede their spiritual communion.⁹⁵ However, there should be a balance struck between the cause and the effect. Without a grave cause, the ordinary should not issue a grave prohibition. To forbid marriage is a grave interference with the fundamental freedoms of a person.⁹⁶ To deny permission could alienate the offended party from the Church.

The justification for the negative response to the sacramentality of a marriage with a non-believer is usually summed up in the principle: *sacramenta non possunt claudicare*, “sacraments cannot limp,” meaning there must be an evenness in the reception of the sacrament: if one party cannot receive it, the other cannot have it either. The correctness of this principle, however, has not been critically established. It is an issue that requires more study. The point of departure of such a future inquiry may well be the doctrine of St. Paul in I Cor. 7:14: “The unbelieving husband is consecrated through his wife, and the unbelieving wife is consecrated through her husband. Otherwise, your children would be unclean, but as it is, they are holy.” St. Paul leaves no doubt that there is a new sanctifying power in a union

⁹³ LWANGA, *Mixed marriages*, p. 12.

⁹⁴ THOMPSON, “Interchurch Marriages”, p. 219.

⁹⁵ CORIDEN, *The Code of Canon Law*, p. 801.

⁹⁶ ÖRSY, *Marriage in Canon Law*, p. 92.

where one of the spouses is “holy.” This sanctifying power is very close to what we call today the “effect” of a sacrament.⁹⁷

A mixed marriage contracted without permission is unlawful but valid. However, such a marriage is unlikely to take place because no priest, deacon, or duly authorized lay person is entitled “to assist” at the marriage if permission has not been granted.⁹⁸

B. Filling the “Lacuna” in the Law

While exempting baptized non-Catholics from the merely ecclesiastical laws by c. 11, the Latin Code does not give any law to regulate their marriages. According to many canonists, this creates a *lacuna legis* suggesting a problem in applying the law in the marriage nullity cases of non-Catholics. Likewise, in practice, a problem can arise whenever a baptized non-Catholic wants to marry a Catholic. In fact, this canon does not speak about what is contrary to the valid and licit celebration of the marriage in the Catholic Church.⁹⁹

On the other hand, many other authors consider that c. 1059 states an exception to the stipulations of c. 11; therefore, they do not see any *lacuna legis* in the Latin Code. For them, the marriage of a Catholic always comes exclusively under the authority of the Catholic Church, even in the case of a mixed marriage. Hence, in mixed marriages with Catholics, non-Catholics also come under canon law of the Catholic Church.¹⁰⁰

⁹⁷ Ibid., p. 113.

⁹⁸ Ibid., p. 184.

⁹⁹ J. PRADER “*Il diritto matrimoniale latino e orientale*”, in GHERRO, S., ed., *Studi sul Codex Canonum Ecclesiarum Orientalium*, Padova, Dehoniane, 1994, p. 69; KANIAMPARAMBIL, *Competence of the Catholic Church*, p. 25.

¹⁰⁰ H. HEIMERL and H. PREE, *Kirchenrecht, Allgemeine Normen und Eherecht*, Wien, Springer-Verlag, 1983, p. 175; H. ZAPP, *Kanonisches Eherecht*, Auflage, Verlag Rombach, 1988, p. 50; H.J.F. REINHARDT, “Hat can. 11 CIC/1983 im Bereich des Eherechts Konsequenzen für die Verwaltungskanonistik?”, in W. SCHULZ, *Recht als Heildienst, Festschrift für Prof. Dr. Mathäus Kaiser*, Paderborn, 1989, pp. 218-220; A. ABATE, *Il matrimonio nella nuova Legislazione canonica*, Roma, Urbaniana University, 1985, pp. 27-28; F. BERSINI, *Il nuovo diritto canonico matrimoniale, commento*

However, according to L. Örsy, there is a possible conflict between canons 11 and 1059. If it can be demonstrated that the subject of c. 1059 is “marriage” and not the parties in the marriage, then the non-Catholic is brought indirectly under the Church’s jurisdiction when marrying a Catholic. However, if it can be shown that marriage is not the primary subject of c. 1059, then it might be said that the canon is consistent with the principle of c. 11. But for Örsy, that is very difficult to prove.¹⁰¹

Likewise, L. Bogdan while recognizing the general provision of c. 11, at the same time maintains that it does not apply to marriage due to the provision of c. 1059. He is convinced that c. 1059 suspends sections of c. 11 by way of exception. In his interpretation of c. 1059, he states that the competence of the Church is exercised over the marriage contract (*regitur*) whenever the marriage involves at least one Catholic. The Church can claim this competence only if c. 1059 suspends, in the relevant areas, the prescriptions of c. 11. In this argument, Bogdan gives more priority to the sacrament of marriage rather than to the persons involved, although he expresses himself differently than Örsy. To support his position, he draws on the statement of P. Gasparri that *matrimonium claudicare non potest*.¹⁰² Bogdan concludes this to be the reason for the inclusion of c. 1059 in the new Code.¹⁰³

giuridico - teologico pastorale, Leumann, Torino, Editrice Elle di Ci, 1985, p. 20; T. P. DOYLE, “Title VII: Marriage”, in J. CORIDEN, et al. (ed.), *The Code of Canon Law: A Text and Commentary*, New York, Paulist, 1985, p. 824; KANIAMPARAMBIL, *Competence*, pp. 25, 28.

¹⁰¹ ÖRSY, *Marriage in Canon Law*, pp. 64-65; see also KANIAMPARAMBIL, *Competence*, p. 26.

¹⁰² “Impedimentum *disparitatis cultus* directe attingit partem baptizatam in Ecclesia Catholica aut ad eandem conversam ex haeresi vel schismate, ipsam inhabilem reddens ad nuptias ineundas cum parte non baptizata, indirecte autem afficit ipsam partem infidelem, quae licet per se habiles sit, non potest contrahere cum alia parte, quae est inhabiles. Id consequitur ex individua contractus matrimonialis natura; matrimonium enim, sicut alii contractus, claudicare non potest.” See P. GASPARRI, *Tractatus Canonici de Matrimonio*, n. 567, vol. I, Parisiis, Secrétariat de l’Institut catholique, 1904, p. 350.

¹⁰³ L. BOGDAN, “Simple Convalidation of Marriage in the 1983 Code of Canon Law”, in *The Jurist*, 46(1986), p. 516.

In the same vein, Urbano Navarrete holds that the phrase "*etsi una pars tantum sit catholica*" in c. 1059 implicitly includes the case of the marriage between a Catholic and a baptized non-Catholic. As *CIC* failed to legislate how the validity of the previous marriage of an Occidental non-Catholic baptized party is determined, those norms in force until November 27, 1983 must be retained to address difficulties arising in this area. The earlier norms treat of marriage between two baptized persons, and the marriage, therefore, falls under the exclusive competence of the Catholic Church.¹⁰⁴

Luigi Chiappetta holds that when c. 1059 is examined alongside c. 11, a double principle is evident. According to him, the marriage of Catholics, which comes under the exclusive competence of the Church, is regulated by canon law, while others are regulated by divine law. However, the marriage of two persons, of which even if only one is Catholic, is also subject to canon law.¹⁰⁵

On the other hand, Joseph Prader, refuting the position of these authors, states that such a consideration of exclusive competence of canon law in a marriage with a non-Catholic party is no longer sustainable in the new legislation. If *CIC* admits that baptized non-Catholics are exempted from merely ecclesiastical laws as sanctioned in c. 11, from this it necessarily follows that their proper law can also regulate marriages among themselves or with Catholics. If this canon maintains that those who are exempted from merely

¹⁰⁴ U. NAVARRETE, "*La giurisdizione delle Chiese Orientali non-Cattoliche sul matrimonio* (c. 780 CCEO)" [= "*La giurisdizione*"], in AA.VV., *Il matrimonio nel codice dei Canon delle Chiese Orientali*, Vatican, 1994, p. 117.

¹⁰⁵ "In conformità col can. 11, il can. 1059 stabilisce un duplice principio: 1° Il matrimonio dei cattolici, di esclusiva competenza della Chiesa, è retto dalla legge canonica, oltre che da quella divina. 2° È soggetto alla legge canonica anche il matrimonio di due persone di cui una sola sia cattolica, poiché si tratta di un solo e medesimo matrimonio." See L. CHIAPPETTA, *Il matrimonio, nella nuova legislazione canonica e concordataria - manuale giuridico - pastorale*, Roma, Dinoniane, 1990, p. 51.

ecclesiastical laws are also exempted from proper law, it would be necessary in that case to say that they are bound only by the natural or divine law.¹⁰⁶

The situation is not that clear. For, if *CIC* is claiming exclusive authority on marriage and not accepting the competence of non-Catholics to legislate in regard to their marriages, it does not seem to do justice to the ecclesiological teachings of the Second Vatican Council (*UR*, n. 16). Note in this context that c. 780 §2 of *CCEO* goes much further in this matter, applying the teachings of Vatican II by explicitly accepting the competence of non-Catholics in legislating for marriage.¹⁰⁷ The Catholic Church accepts that the power of jurisdiction of Oriental non-Catholic Churches is the proper, ordinary power of jurisdiction, and not delegated, mandated, vicarious or supplied jurisdiction.¹⁰⁸ Some authors call this power generally as *potestas sacra quae est efficax*.¹⁰⁹

Nevertheless, some authors think that c. 780 §1 contains a certain incoherence with what is stated in §2 of the same canon. According to them, the second paragraph establishes that such a marriage is “also” regulated by the law of the respective Churches or non-Catholic ecclesial communities, and this would be inconsistent with the first paragraph. On the contrary, they conclude, *CIC* c. 1059 is coherent and complete, as it states that those marriages are governed only by Catholic law.¹¹⁰ Other authors see no inconsistency. For them, c. 780 §1 states that the marriage of a Catholic is regulated by canon law even if only one party is a Catholic. canon law includes, of course, the laws contained in c. 780 §2 that should be followed in the case of mixed marriages. Hence, in the case of a mixed marriage

¹⁰⁶ PRADER “*Il diritto matrimoniale latino e orientale*”, p. 71.

¹⁰⁷ KANIAMPARAMBIL, *Competence*, p. 29.

¹⁰⁸ I. ŽUŽEK, “*La giurisdizione dei vescovi ortodossi dopo il Concilio Vaticano II*”, in *La Civiltà Cattolica*, 122(1971), p. 550.

¹⁰⁹ W. BERTRAMS, “*De gradibus communionis in doctrina Concilii Vaticani II*”, in *Gregorianum*, 47(1966), p. 287.

¹¹⁰ NAVARRETE, “*La giurisdizione*”, pp. 115, 117.

in which a Catholic party is involved, they say that the canon law to be followed is that found in c. 780 §2.¹¹¹ However, this complicated explanation fails to justify the conflict of laws.

The 1980 *Schema* of the *CIC* stated explicitly that those baptized in Churches or ecclesial communities separated from the Catholic Church were not directly bound by the merely ecclesiastical laws of the latter. But, as Cardinal R. Castillo Lara remarks, since the Code did not wish to legislate for non-Catholics, this part of c. 11 of the 1980 *Schema* was dropped from the final text of the Code.¹¹² Looking at c. 11 of *CIC*, it is not proper to say that the non-Catholic Churches are now devoid of a marriage law because they are exempted from merely ecclesiastical laws of the Catholic Church. It is not the duty of the Catholic Church to formulate the law for non-Catholics. The Catholic Church must show readiness to respect the proper laws and customs of non-Catholics if they are not against natural law. Further, c. 781 of *CCEO* is an attempt to legislate for non-Catholics. It is to be noted that for the *CIC*, the proposed interdicasterial instruction for the adjudication of marriage nullity cases (February 22, 1999) provides in art. 3, a text similar to that of *CCEO* c. 781.¹¹³ In any case, there is lack of consistency and clarity in these provisions, which allows canonists to hold contrary opinions. Obviously, this brings confusion in adjudicating marriage nullity cases.

C. The Canonical Form and Consequences for the Validity of Marriage

Even if we accept the ecumenical spirit of *CIC* and *CCEO*, we find restrictions when it comes to mixed marriages, especially regarding the form of marriage. The marriage form of non-Catholics of the Western fold is not acceptable if a Catholic is involved; as a consequence, when such a form is followed in a mixed marriage involving a Catholic, the

¹¹¹ KANIAMPARAMBIL, *Competence*, p. 55.

¹¹² TACHÉ, "Ecumenical Relations", pp. 404, 406.

¹¹³ COMMISSIO INTERDICASTERIALIS «PER IL PRIMO PROGETTO DI UNA ISTRUZIONE SUI PROCESSI MATRIMONIALI» (1996-1999), *Primum Schema*, a Commissione Approbatum, (Reservatum), 1999, vii, 83p.

marriage would be invalid unless a dispensation was obtained. However, the marriage form of Oriental non-Catholics is accepted as valid, but illicit if a mixed marriage is conducted without proper permission.¹¹⁴

To evaluate the laws relating to the canonical form and their consequences for the validity of marriage, we now look into the Church's view of marriage as a sacrament. We will also study the possibility of accepting a civil marriage form in mixed marriages and dropping the law on dispensation from canonical form.

1. Concept of Marriage as a Sacrament

In canon law, the Church claims competence over the marriages of the baptized, based on the fact that marriage is a sacrament and for the baptized, the contract is inseparable from the sacrament. The mixed marriage of a Catholic officiated with the Orthodox form is recognized by canon law as valid but not when the Protestant form is followed. The argument is that the Orthodox consider marriage a sacrament but Protestants do not. Of course, this does not always hold true.

What makes marriage a sacrament? *CIC*, c. 1055 §2 says that a matrimonial contract cannot validly exist between baptized persons unless it is also a sacrament. According to *CCEO*, c. 776 §2 a valid marriage between baptized persons is by that very fact a sacrament. Some authors, such as R.J. Ryan, attribute two separable dimensions to marriage: a natural dimension and a sacramental one. For them, marriage does not automatically become a sacrament for the baptized; there could theoretically be a marriage without the benefit of the sacrament. However, this is in conflict with traditional theology, which holds that contract and sacrament are inseparable in the marriages of the baptized.¹¹⁵

¹¹⁴ *CIC*, c. 1127 §1; *CCEO*, c. 834 §2.

¹¹⁵ R.J. RYAN, *The Canonical Status of Marriages Attempted Before Civil Authorities: Historical Analysis from the Council of Trent to the 1983 Code* [= *The Canonical Status*], Ann Arbor, MI, UMI, 1991,

The separation of sacrament and contract in marriage may be the result of a lack of understanding of sacrament. Further, it may follow from the separation of the civil and religious aspects of marriage. Contract is identified with the civil nature of marriage, and sacrament with its religious nature. It must be accepted that a person can marry without any religious ceremony; but, whenever a marriage is contracted, it is a sacred reality when genuine consent is present with marital affection and commitment, provided all other requirements of law are satisfied. In various cultures and religions, marriage is considered a sacred and religious reality because of the commitment which is involved. If it is between two baptized, this sacred reality is understood as a sacrament in Catholic theology, again, provided the other requirements of law are met. However, if there is no marital affection and no genuine consent, there is no marriage at all, and it is not a sacrament even with a priestly blessing. Such marriages can be adjudicated as invalid. To avoid confusion, it seems, the present canon law uses “covenant” when speaking of marriage, although “contract” is mentioned occasionally.

Vatican Council II, wishing to break away from the rigidly limited conception of marriage as a contract, used the term *foedus* to describe the marital agreement. Covenant has become the standard translation of *foedus*. In Roman law, *foedus* was used for agreements which transcended the ordinary categories of contract by giving religious significance to it without creating strict right-and-duty situations. This word is eminently suitable for bringing out the sacred dimensions of marriage. The Council wanted the legal elements to be incorporated into a sacred context.¹¹⁶

Thus it is not the merely ecclesiastical and man-made form that makes the sacrament, but the ongoing and growing commitment of two persons to each other in the dynamic presence of God. Theodore Davey puts it beautifully when he says: “Marriage as a sacrament

p. 218.

¹¹⁶ ÖRSY, *Marriage in Canon Law*, p. 50.

makes more clear what is already implicit and imperfect in every marriage of man and woman, namely that God is with his people, and human love is the sign of this total, exclusive and permanent grace of God's presence."¹¹⁷ According to Samuel Rayan, S.J., "love transcends all barriers of religion, race, and culture. It is the one human and humanizing culture. All human love and just relationships are sacraments of the One who is love. Love is the heart, life and meaning of all the Sacraments."¹¹⁸

The long-standing Western concern to root the sacrament of marriage in the consent of the two parties is certainly evident in canon law. The consent of those who are marrying is sufficient for marriage.¹¹⁹ The council of Trent taught: "It is not to be doubted that clandestine marriages, made by free consent of the contractant, are true and sacramental marriages."¹²⁰ Both matrimonial consent and marital affection are presumed to be present in mixed marriages, even when the canonical form is not observed.¹²¹ A marriage between a Catholic and a Protestant before a Protestant minister can also be a very visible sign of love, fidelity and consent.

Another argument for not accepting the Protestant marriage form is that Protestant ministers are not ordained ministers to officiate at the sacrament of marriage. However, in the Latin Church, any theory of the priest as minister of the sacrament has diminished. The

¹¹⁷ As quoted by A.L. GAJIWALA, "Searching for the Lost Coin: The 'sacrament' in interfaith marriage", in *VJTR*, 59(1995), p. 55.

¹¹⁸ As quoted by A.L. GAJIWALA, "My Marriage is not a Sacrament", in *VJTR*, 53(1989), p. 381.

¹¹⁹ INNOCENT III, letter, July 15, 1198, in *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum* [= *Enchiridion*], H. DENZINGER, A. SCHONMETZER, (ed.), 35 emendata, Friburgi Brisgoviae, Herder, 1973, n. 766, p. 244; NICHOLAS, I, response, November 13, 866, in *Enchiridion*, n. 643, p. 244; Council of Florence: EUGENE IV, bull *Exultate Deo*, November 22, 1439, in *Enchiridion*, n. 1327, p. 336.

¹²⁰ Council of Trent, sess. XXIV, November 11, 1563, *Canones super reformatione circa matrimonium*, cap. 1 (*Tametsi*), in *Enchiridion*, n. 1813, p. 417; see also F.R. McMANUS, "The Ministers of the Sacrament of Marriage in Western Tradition" [= "The Ministers of the Sacrament of Marriage"], in *Studia Canonica*, 20(1986), p. 88; T.P. DOYLE, "Title VII: Marriage", p. 89.

¹²¹ RYAN, *The Canonical Status*, p. 187.

explicit teaching of Pope Pius XII in his encyclical letter on the Church clarified the matter: “The contracting parties are the ministers of grace to each other.”¹²² The priest (or, in more recent discipline, the deacon) is considered to be the “assistant” or principal and official witness on behalf of the Christian community.¹²³ So, this is an argument that has no basis.

Even the Oriental Code in c. 832, as in *CIC* c. 1116, clearly recognizes the possibility of a sacramental marriage without the priestly blessing in extreme and exceptional circumstances. If it had not been included in the Oriental Code, this would have been a denial of the natural right of the parties to marry in such exceptional circumstances;¹²⁴ it would also have been the denial of the theology of sacrament.

Though traditions and practice can vary, the basic theology on sacrament should not be contradictory for different ritual Churches. If variations of traditions create confusion regarding the validity of mixed marriages, we have to reconsider the enforcement of one culture on a different culture. Further, it must be noted that until the ninth century the Church did not have any specific rite for marriage. Normally, after entering a civil marriage, the Christian couple partook of the Eucharist, and this communion was, according to Tertullian, the seal of marriage.¹²⁵ The requirement of the priestly blessing as necessity for a valid marriage is an ecclesiastical law which developed later.

¹²² McMANUS, “The Ministers of the Sacrament of Marriage”, p. 88.

¹²³ Ibid., pp. 85-86; see also A.G. MARTIMORT, *The Signs of the New Covenant*, Collegeville, Liturgical Press, 1963, p. 299.

¹²⁴ J. VADAKUMCHERRY, “Marriage Laws in the Eastern and Latin Codes” [= *Marriage Laws*], in *The Code of Canons of the Eastern Churches*, p. 19.

¹²⁵ McMANUS, “The Ministers of the Sacrament of Marriage”, pp. 86-87; see also J. MEYENDORFF, *Marriage: An Orthodox Perspective*, New York, St. Vladimir’s Seminary Press, 1975, p. 27.

It can be said that the Latin Code fails notably to demand or mention the blessing or sacred rite in this context of the canonical form of the sacrament.¹²⁶ However, it is wrong to say that the Latin Code failed in this matter. As we have seen, the priestly blessing is not the essential part of the sacrament of marriage; it developed as part of a culture. When Orientals emphasize that the Holy Spirit works only through the ritual priestly blessing, it may seem that they limit the power and freedom of the Holy Spirit. Humans have no power to limit God. Sacrament, the saving mystery, should not depend on mere man-made regulations or customs. Yet it does with law of form.

Another reason cited for rejecting the Protestant law on marriage form when a Catholic is involved in marriage is that Protestants do not have “true” faith. In other words, they do not believe all that Catholics believe. This argument that marriage is a sacrament only for those who have faith is also not acceptable. The 1980 Synod of Bishops on the Family, assuming that at least a minimal intention of believing with the Church and its baptismal faith would be required for sacramental marriage, called for the reconsideration of the principle: “a valid marriage between baptized persons is always a sacrament” in the case of those who have lost the faith.¹²⁷ However, according to the Apostolic Exhortation, *Familiaris consortio*, November 22, 1981 (n. 68), only those who reject explicitly and formally what the Church intends to do are to be excluded from the sacramental celebration of marriage.¹²⁸

Since the law provides that the contract and the sacrament cannot be separated, as we have discussed, if a baptized unbeliever wants to marry, the Church should either impose the sacrament on him/her, or should tell him/her not to marry at all because he cannot marry

¹²⁶ DOYLE, “Title VII: Marriage”, p. 741; McMANUS, “Marriage in the Canons”, p. 63.

¹²⁷ R.G. CUNNINGHAM, “Marriage and the Nescient Catholic: Questions of Faith and Sacrament”, in *Studia Canonica*, 15(1981), pp. 263-284; LOBO, *The New Marriage Law*, p. 17.

¹²⁸ LOBO, *The New Marriage Law*, p. 18.

other than by receiving the sacrament.¹²⁹ According to Church law, a Catholic who does not have any faith in Christ, but at the same time, has not notoriously rejected his/her faith in a formal way, contracts a valid marriage if he/she marries in the church. But a Protestant, who has strong faith in Christ, when marrying a Catholic, contracts an invalid marriage if Catholic form is not kept. This creates an anomaly.

Nobody can claim the “fullness” of faith. We all are pilgrims to faith. The imperfection in our faith should not affect the sacred reality of marriage which is a path in the journey. No human community is ever perfect, not even the Catholic Church. It must progress in its understanding of the evangelical message; it must fulfill in its deeds the evangelical mandate. The Church, as it is, must continuously search for values that enrich the community and give growth to its members.¹³⁰

It is argued that the lack of full ecclesial communion among the spouses is an obstacle for the perfect and complete sharing of the whole life of marriage, which is a sacrament.¹³¹ However, both Latin and Oriental Codes define marriage as “*consortium totius vitae*,”¹³² though an earlier draft (SCH/80) defined marriage as “*communio*.” Literally, “*consortium*” means a close association of persons sharing the same fortune, fate, and destiny. It is less than “*communio*”, which is the closest of intimate relationships and, in the realm of matrimonial rights, is less precise.¹³³ Yet, it is more than “*societas*”, which can be a loose partnership for business purposes. In choosing the word “*consortium*”, canon law tries to strike a middle course between the ideal of a perfect union of minds and hearts with

¹²⁹ ÖRSY, *Marriage in Canon Law*, p. 56.

¹³⁰ Ibid., p. 42.

¹³¹ SALACHAS, “The Ecumenical Significance”, p. 270.

¹³² *CIC*, c. 1055; *CCEO*, c. 776.

¹³³ J. M. SERRANO RUIZ, “Le droit à la communauté de vie et d'amour conjugal comme objet du consentement matrimonial”, in *Studia Canonica*, 10(1976), pp. 271-301; U. NAVARRETE, “*De iure matrimonii*”, in *Periodica* 66(1977), pp. 249-270; Z. GROCHOLEWSKI, “*De communione vitae*”, in *Periodica*, 68(1979), pp. 439-480.

the same faith and culture (*communio*), and the unsatisfactory state of a merely external association (*societas*), so that the legitimate marital customs and traditions and different levels of faith of various peoples could be accommodated.¹³⁴ *Consortium* is the juridico-social matrix containing also the elements signified by the *communio*.¹³⁵ So, in mixed marriage also there can be *consortium* and hence, it should not be rigidly restricted. Moreover, in mixed marriages, both persons belong to Churches that share in the one Church of Christ. Each administers the sacrament of matrimony to the other.¹³⁶

Further, the Church's caution regarding mixed marriage is often explained in terms of the high percentage of Catholics who enter mixed marriages and eventually stop practicing their faith.¹³⁷ There are also arguments that many mixed marriages end in divorce because of irreconcilable differences and difficulties. However, perhaps the intolerant attitude of the community and of certain Church authorities might also explain how people come to lose faith, or end their relationship with the Church. If proper pastoral support and guidance are given, they will grow in faith.

2. Acceptance of Civil Marriage Form in Mixed Marriages

It can rightly be argued that the Codes show a lack of ecumenical sensitivity to a non-Catholic who, in good faith, enters a civil marriage with a Catholic. Such marriages are considered null and void. Despite the non-Catholic party's good faith, the children of such unions are, nevertheless, considered illegitimate.¹³⁸ Civil marriage between baptized non-Catholics is recognized by the Church as valid. Between two Catholics or between a Catholic

¹³⁴ ÖRSY, *Marriage in Canon Law*, p. 51.

¹³⁵ V. PALATHINGAL, "The Meaning And Relevance of *Consortium Totius Vitae*", in *The Code of Canons of the Eastern Churches*, p. 216.

¹³⁶ LENNON, "Interchurch Marriages", p. 315.

¹³⁷ CORIDEN, *The Code of Canon Law*, p. 802.

¹³⁸ RYAN, *The Canonical Status*, p. 257.

and a non-Catholic, such marriages are not recognized as valid because of defect of form. The canon law not only disavows those marriages, it also appears to ignore the good faith of the non-Catholic party.¹³⁹

During the revision process, there was a request that the civil form of marriage be accepted as valid in canon law, but this request was rejected. The basis of the rejection was the modern tendency to secularization:¹⁴⁰ the Church does not want its people to lose sight of the sanctity and the mystery of Christian marriage.¹⁴¹ However, the history of marriage in the pre-Tridentine era clearly demonstrates that the mutual and free exchange of consent can alone be sufficient to constitute a valid marriage.¹⁴² As we have discussed in the second chapter, in the early centuries of the Church, the State exercised legislative power over marriage, and the Church exercised only a moral control, and, presumably, this situation did not affect the sacrament of marriage negatively.

In the Apostolic Exhortation on the Family, *Familiaris consortio*, Pope John Paul II said: "There are increasing cases of Catholics who for ideological or practical reasons prefer to contract a merely civil marriage and who reject or at least defer religious marriage. Their situation cannot of course be likened to that of people simply living together without any bond at all, because in the present case there is at least a certain commitment to a properly defined and probably stable state of life even though the possibility of a future divorce is often present in the minds of some on entering a civil marriage. By seeking public recognition of their bond on the part of the state such couples show that they are really ready to accept not only its advantages but also its obligations."¹⁴³ The approach of the present

¹³⁹ Ibid., p. 244.

¹⁴⁰ F. VOTO, "De Iure Matrimoniali", in *Communicationes*, 10(1978), p. 97.

¹⁴¹ RYAN, *The Canonical Status*, pp. 230, 265.

¹⁴² Ibid., p. 259.

¹⁴³ JOHN PAUL II, Apost. Exhort., *Familiaris Consortio*, November 22, 1981, in *AAS*, 74(1982), English translation from *Origins*, 11(1981-1982), p. 464; see also J.A. SCHMEISER, "Welcomed Civil

Codes to this matter is rather disappointing because they do not directly address the issue of marriages attempted before civil officials.¹⁴⁴

According to De Smet, both matrimonial consent and marital affection are presumed to be present in civil unions. Bank argues that whenever the civil act of marriage is mentioned in the Code, it is always in the context of marriage rather than concubinage.¹⁴⁵ Heinrich Flatten is of opinion that there is a major difference between civil marriage and concubinage. Concubinage is a sexual relationship, which exists *de facto*, without any intention of marriage or any commitment, but with the reservation that either party is free to opt out at any time. On the contrary, true matrimonial consent and commitment could be present in civil marriage.¹⁴⁶

W. Bertrams and G. Vans explain that naturally sufficient consent is constitutive of marriage. When naturally sufficient consent is exchanged, a marriage is established in its inner structure with all of its rights and duties. Thus, civil marriages of non-Catholics are constituted in their inner structure when naturally sufficient consent is exchanged.¹⁴⁷ Lalaguna discusses the merely instrumental character of the canonical form and suggests that the matrimonial bond already has an objective existence from the moment that naturally sufficient consent is exchanged.¹⁴⁸

Marriage and the 1980 Synod of Bishops", in *Studia Canonica*, 17(1983), p. 195.

¹⁴⁴ RYAN, *The Canonical Status*, p. 241.

¹⁴⁵ Ibid., p. 187.

¹⁴⁶ H. FLATTEN, "De matrimonio civili catholicorum", in *Periodica*, 67(1976), pp. 218-219.

¹⁴⁷ W. BERTRAMS, "De effectu consensus matrimonialis naturaliter validi", in *Apollinaris*, 33(1960), pp. 119-138; G. VASS, "Is the Canonical Form Expendable?", in *The Clergy Review*, 50(1965), p. 599.

¹⁴⁸ RYAN, *The Canonical Status*, p. 255.

3. Law on Dispensation from Canonical Form

Since 1908, the Church has used the threat of an invalid marriage as a way of securing observance of its laws. Today, it could be asked whether this coercion is contrary to the spirit of religious liberty.¹⁴⁹ Even now, this threat is continued regarding marriage with Protestants, though when a non-Catholic of an Eastern rite is involved, the canonical form is required only for the liceity of the marriage (*CIC*, c. 1127, §1; *CCEO*, c. 834 §2).

In June 1966, Pope Paul VI issued the *motu proprio*, *De episcoporum muneribus* which reserved dispensations from canonical form to the Holy See. The power of local Ordinaries to dispense from canonical form came with the *motu proprio* *Matrimonia mixta* in March 1970. Article 9 provided that if serious difficulties stood in the way of the observance of the canonical form in a mixed marriage, local Ordinaries had the right to dispense from it so long as there was some public form of celebration.¹⁵⁰ *CIC* has maintained this law in c. 1127 §2. The Ordinary could, however, refuse to grant the dispensation unless a determined public form of marriage was employed.¹⁵¹ The Conference of Bishops is to establish norms for the dispensation to be granted uniformly and licitly in a region or territory. Since the law demands nothing more than “some public form of celebration,” it is now possible for the parties who have obtained the dispensation to be validly married in a civil ceremony. However, Oriental canon law reserves this power of dispensing from the form to the Patriarch or the Holy See (c. 835) and only for “most grave” reasons.

There are some grave difficulties concerning mixed marriages with non-Catholics in India, a common situation in almost all mission territories. The persistent refusal of abiding by the canonical form by the non-Catholic party or his or her family is the main one. A

¹⁴⁹ E. De BHALDRAITHE, “Mixed Marriages in the New Code: Can We Now Implement the Anglican-Roman Catholic Recommendations?”, in *The Jurist*, 46(1986), p. 445.

¹⁵⁰ RYAN, *The Canonical Status*, p. 206.

¹⁵¹ *Ibid.*, p. 207.

serious conflict of conscience in either of the parties also can arise. Most of all, the group-oriented mentality of society and conservatism on the part of certain Church authorities result in rejection of parties to mixed marriages who often then seek a civil form for their marriage.

The present law on canonical form is a cause of tension between the Churches. Merely ecclesiastical law is man-made law in the Church; it is less than an ecclesiastical law proclaiming divine law. Unless we can show that the norm is of divine law, we have to make a human conjecture about the origin of that law.¹⁵² No bishop or ordinary has the right to infringe on the legitimate freedom of the persons who intend to marry.¹⁵³ Archbishop Ramsey says: "It is notorious that non-Catholic Christians have been affronted by the Roman Catholic canon law which treats mixed marriages in our churches (Anglican) as invalid."¹⁵⁴

We must recognize the sacredness of marriage in the genuine consent and commitment of parties; it does not rest in priestly blessing or any other ritual of canonical form. A form makes the marriage legal and public; the priestly blessing is part of "solemnizing" it. Hence, for the validity of a mixed marriage, any public form should meet the purpose, although the Church may encourage the solemnization of marriage in a religious setting in order to make the sacramental aspect of marriage clear.

¹⁵² ÖRSY, *Marriage in Canon Law*, p. 65.

¹⁵³ *Ibid.*, p. 84.

¹⁵⁴ As quoted by LENNON, "Interchurch Marriages", p. 315.

III. PROPOSALS FOR THE FUTURE

As it is clear from the evaluation, the Codes need to be revised in matters relating to laws to be observed in marriage nullity cases of non-Catholics and in regard to the canonical form. Hence, we propose some possible changes in this regard.

A. Relating to the Law to be Observed in Nullity Cases of Non-Catholics

The Church's ministry in mixed marriage is effective to the degree it genuinely fosters the growth of identity and enriches the lives of the mixed marriage partners. A ministry that is ecumenical in the widest sense is concerned with making it possible for such couples to serve one another in a humanly creative manner, to live with one another in freedom, dignity and love. At the inter-faith level, the Church's ministry is to facilitate their approaching ever closer to God and to the truth. For the partners in mixed marriages, the Church's ministry leads to personal enrichment, ecumenical respect for other religions and cultures, and to a deeper bond between husband and wife.¹⁵⁵

In the spirit of ecumenism and modern social reform, we propose for consideration a revision of the laws related to the nullity of marriage of a baptized non-Catholic in which a Catholic is involved. For instance, 1059 of *CIC* and c. 780 §1 of *CCEO* should leave out the clause "even if only one party is Catholic." This will clear up many confusions. Thus, it would now read: "The marriage of Catholics is regulated not only by divine law but also by canon law, with due regard for the competence of civil authority concerning the merely civil effects of such a marriage." canon law is promulgated only for Catholics as is made clear in c. 1 of both Codes. This change in phrasing would bring the canon in total agreement with both c. 11 of *CIC* and c. 1490 of *CCEO*.

¹⁵⁵ KANNATH, *Mixed Marriage and Married Life*, p. 2.

To remove the confusion in the law on mixed marriage with baptized non-Catholics, *CIC* may also consider adding to c. 1059 a second paragraph following c. 780 §2 of *CCEO* in order to fill the alleged *lacuna legis*. We again note here that this has already been proposed in the draft of interdicasterial instruction on February 22, 1999.¹⁵⁶

B. Relating to Dispensation from the Canonical Form of Marriage

According to c. 781 of *CCEO*, if the Church must judge the validity of a marriage between baptized non-Catholics with regard to the form of the celebration, the Church recognizes any form prescribed or admitted by the law to which the parties were subject at the time of the celebration of the marriage, provided that the consent was expressed in a public form and, when at least one of the parties is a baptized member of an Eastern non-Catholic Church, the marriage is celebrated with a sacred rite. We consider this canon as an attempt to continue legislating for non-Catholics which is against the spirit of Vatican II. Once it is made clear that the canon law binds only the Catholics, non-Catholics are placed beyond the jurisdiction of canon law. It might even be considered by some that c. 781 is *ultra vires*. However, the recognition of non-Catholic marriage form will become fully meaningful in the context of the ecumenical movement if this law is revised to make it applicable when a Catholic is involved in a mixed marriage and by dropping c. 834 §1. This provision could also be incorporated into the *CIC* by dropping c. 1127 §1.

As we have seen, unlike the Latin Code, the Oriental Code does not allow a Catholic to leave the Church by a formal act. This is against the religious freedom envisioned by the Second Vatican Council. In the Indian situation, this causes many marriages to be entered invalidly, because a number of Oriental Catholics leave the Church to join Protestant Churches or to become members of atheist groups. *CCEO* needs to follow *CIC* in this regard

¹⁵⁶ COMMISSIO INTERDICASTERIALIS «PER IL PRIMO PROGETTO DI UNA ISTRUZIONE SUI PROCESSI MATRIMONIALI» (1996-1999), *Primum Schema*, a Commissione Approbatum, (Reservatum), 1999, vii, 83p.

by leaving them outside the orbit of canon law. This can be done by omitting the second part of canon 789 and by omitting c. 834 §1 altogether or revising it by adding at the end of it the phrase “and has not left it by a formal act.” Basic principles should be the same in both Codes.

The sacred rite connected with marriage form is part of Eastern culture. Although it can be accepted as such in a mixed marriage when an Eastern Catholic marries an Eastern non-Catholic, it seems strange to enforce it in Western culture where the sacred rite is not always an important factor with regard to canonical form. Accordingly, the second part of *CCEO* c. 781 §2 and that of *CIC* c. 1127 §1 should be omitted. “Dispensation from form” mentioned in *CCEO* c. 835 and *CIC* c. 1127 §2 could be changed to “permission”, and the “reservation to Holy See and Major Archbishop” mentioned in *CCEO* discarded.

To involve the Ordinary in each mixed marriage seems an unnecessary administrative complication. There are at least two alternatives. In the case of mixed marriages, one alternative is to reduce the penalty for failure to observe canonical form from invalidity to unlawfulness and to replace the word “dispensation” with the word “permission”. Ministers of other Churches could also be accepted as appropriate representatives of the community in inter-Church marriages. These ideas have already been suggested before, by the Protestant members of the Lutheran, Reformed-Roman Catholic Dialogue, and in the Joint Report of the Anglican-Roman Catholic International Commission.¹⁵⁷ Several canonists also have proposed that the observance of the canonical form of marriage be made a condition for the lawfulness but not for the validity of the marriages of baptized Catholics.¹⁵⁸ Secondly, permission for mixed marriages could be handled on the parish level, exactly as marriages

¹⁵⁷ LENNON, “Interchurch Marriages”, pp. 317-318.

¹⁵⁸ RYAN, *The Canonical Status*, p. 208.

among Catholics are.¹⁵⁹ A step toward such development of a universal law is already in practice in some countries, including England and Wales and New Zealand.¹⁶⁰

Francis G. Morrissey suggests that the primary importance in this regard is to remove the adjudication of marriage cases from any civil context. According to him, each diocese could have an office for the family, a section of which would be entrusted with the study of requests for declarations of nullity. The solemn court apparatus would neither be required nor opportune.¹⁶¹

When the non-Catholic marriage form is recognized for the validity of marriage, dispensation has no relevance. However, permission for mixed marriage can remain as part of the law to remind the parties of the difficulties in such unions and to show the concern of the Church for the parties to such a marriage. The law of the Church becomes meaningful and fruitful when *salus animarum* is the supreme law, and pastoral care – not control – becomes the method of executive power.

In adjudicating marriage nullity cases, it would be better to stress “how” rather than “where” the mixed marriage took place. It is also proposed that any public form accepted by proper Churches or ecclesial communities could be recognized for validity of mixed marriage. The key question is whether the public ceremony is a matter for pastoral care, as it was until the sixteenth century, or for strict legislation as it has become after the Council of Trent.¹⁶²

¹⁵⁹ ÖRSY, *Marriage in Canon Law*, p. 196.

¹⁶⁰ BRIA, *The Development*, p. 286.

¹⁶¹ F.G. MORRISSEY, “The Revision of the Code of Canon Law”, in *Studia Canonica*, 12(1978), p. 197.

¹⁶² ÖRSY, *Marriage in Canon Law*, p. 281.

Many advantages would result from introducing the proposed changes in canonical legislation. Those who married in good faith outside the Church would henceforth be considered as validly married. The recognition of the validity of civil marriages and the easier re-admittance of the Catholic party to the sacraments would have a good effect on the non-Catholic party; consequently, it would benefit the children of such a marriage.¹⁶³ In India where the possibility of mixed marriages outside the Church is all the greater, the proposed change would be of benefit. The children of parents who contracted a civil marriage in violation of the Church's law of canonical form would not be regarded as illegitimate. It would prevent the growing use of civil unions as trial marriages on the part of those bound to canonical form, a practice that is a source of scandal to well-intentioned Catholics who marry in Church and struggle to keep unhappy unions alive in very difficult circumstances. Further, the proposed change would prevent the perpetration of a perceived injustice on the innocent party who intends an absolutely permanent union.¹⁶⁴ It would also end the situation that occurs when those who have contracted numerous civil marriages, divorced and left children irresponsibly, are able on canonical grounds to contract another marriage in Church while other far more responsible people are refused the sacraments for less justifiable reasons.¹⁶⁵ On the other hand, we are aware that it would increase the tribunal work load considerably. But some other arrangements might be made in this matter.

By such a revision of the law, the validity of the matrimonial covenant and its sacred reality would cease to depend on technical formalities. canon law could be seen to uphold the obligations born from a true although informal covenant. The validity of a marriage could be judged more on the basis of true facts; that is, whether or not the couple had come together with marital commitment. And, finally, those who have not married in the church

¹⁶³ RYAN, *The Canonical Status*, p. 210.

¹⁶⁴ *Ibid.*, p. 211.

¹⁶⁵ *Ibid.*, p. 212.

would not feel themselves to be cut off from the Church; nor would the community regard them as such.¹⁶⁶

The Indian Church can be lead to recognize that after the 1983 Code, a new historical period of development has begun. Since that time, the particular Churches, by the law itself, have been granted larger powers to enact particular laws.¹⁶⁷ For instance, the Codes have laid down some norms on mixed marriages, but the manner of implementing these norms is left to the particular Churches. Hence, the Indian Church has the freedom and opportunity to become more open to the ecumenical movement, and we propose that it modify its regulations concerning mixed marriage to adjust them better to the Indian situation and needs.

In the case of mixed marriages between baptized persons of different religious confessions, the risk of religious indifferentism or of losing of faith can be more easily avoided if they are properly helped by their respective Church authorities to have a sound knowledge of the Christian nature of marital partnership. Any pastoral care of inter-Church families needs to proceed from the assumption that there is more that we share in common than what divides us, that each minister should try to strengthen the Christian commitment of the partners and foster the unity of the couple. When there is a real conflict of beliefs or mentality, the partners should be helped to develop a sympathetic understanding of each other's point of view.¹⁶⁸ Certainly, a proper pre-marriage course for these couples would challenge them to face the differences between themselves.¹⁶⁹

¹⁶⁶ ÖRSY, *Marriage in Canon Law*, pp. 281-282.

¹⁶⁷ BRIA, *The Development*, p. 282.

¹⁶⁸ LOBO, *The New Marriage Law*, p. 110.

¹⁶⁹ LENNON, "Interchurch Marriages", pp. 319-320.

CONCLUSION

Jesus' ministry is a model for the Church's ministry, where people serve one another, emptying themselves in the freedom of the love of God and of their fellow humans. Christian ministry is authentic when it passes beyond conventional and denominational ritualism, and transforms the sectarian into the ecumenical in its broadest sense.¹⁷⁰ As a teacher, the Church constantly exposes the truth to humanity; but as a mother, she recognizes human frailties and stands always ready to help her children, in whatever circumstances they find themselves. For this reason, the Church changes and adjusts ecclesiastical laws to help its members attain the supreme goal of the law, i.e. the salvation of souls.¹⁷¹ The *salus animarum* is always the supreme law of the Church (*CIC*, c. 1752).

In this chapter, the teachings of the Church and the statements of some theologians and canonists demonstrate that Church order and structures are not ends in themselves but rather the means established to serve the spiritual well being of individuals and of the faith community. The Church is the universal “sign” of salvation, rather than a monopoly on salvation.

In this ecumenical perspective, it is important that the Church of Christ considered as a whole, as well as each particular Church, acknowledge its human and pilgrim condition, and therefore, its constant need for reform. For a law, which was useful and, perhaps excellent one hundred years ago, is not necessarily useful and excellent today; as a matter of fact, it could become unreasonable and even harmful. Therefore, discipline in the Catholic Church must be accommodated to changed circumstances, evaluating the origin and purpose of each particular piece of legislation.

¹⁷⁰ KANNATH, *Mixed Marriage and Married Life*, p. 16.

¹⁷¹ THUNDATHIL, *Mixed Marriage Promises and Religious Liberty in the Light of the New Code*, Rome, Pontificia Universitas Urbaniana, 1986, p. ix.

In an age of well-accepted paternalism and of a general lack of religious maturity among the laity, the system of controls has a far broader scope than in an age of general education and of a particular call to maturity in view of a pluralistic, dynamic society and Church. When the Church is realized as the continuation of Christ's ministry, the emphasis would be much more on education for maturity and trust in the upright conscience of the faithful.¹⁷² It would be based on "hope" which is the outcome of "faith" rather than on "protection" because of "fear". The Church is built on faith and not on fear.

¹⁷² B.HÄRING, "A Theological Appraisal of Marriage Tribunals," in L.G. WRENN, *Divorce and Remarriage in the Catholic Church*, New York, Newman Press, 1973, p. 22.

GENERAL CONCLUSION

The objective of this study was to examine whether there might be some confusion in adjudicating marriage nullity cases in India due to observance of two different canon law Codes for Catholics. We anticipated this confusion and the problems it might create in the Indian subcontinent because there Christianity is a mosaic of rites and cultures. The reason for this anxiety was the different approaches of the Codes toward the very basic principles of validity of marriage for the baptized. While it is natural that different cultures have different concepts and practices related to marriage, and in the Church, rituals and practices may vary due to varieties of *sui juris* Churches, we conclude that the basic principle must be the same in all Catholic Churches, and this unity must be reflected in the different Codes. This is particularly important when adjudicating marriage nullity cases in a multicultural and inter-ritual context.

Human society is based on the family which originates from the institution of marriage. If different societies and religions consider validity of marriage differently, it will have repercussions in society. However, this is not disastrous where divorce is a way out allowed by many religions and the civil governments. However, the Catholic Church considers marriage indissoluble due to its sacramental nature, and hence, divorce is not

permitted by canon law. The only remedy for failed marriages within the Church is a declaration of nullity. Consequently, if the law on nullity of marriage is not clear and if the application of Codes are different, difficulties are created in the tribunals adjudicating nullity cases.

Prima facie, the laws regarding nullity of mixed marriage look different in the Latin and Oriental Codes. These apparent differences caused us to look more closely at the provisions in the Codes in order to study this matter thoroughly. Being aware of the particular situations in India regarding plurality of rites and denominations and a lack of unity and ecumenism among them, we examine the application of both Codes by creating scenarios for mixed marriages between members of different Christian communities in India.

To accomplish this, we looked first at different ecclesial communities in India. Examining the origin and development of different Christian communities there, we saw how the juridical situations of the Church fluctuated due to the influence of different cultures and political powers, and how those influences caused divisions and segregation in the Church, leading to different denominations. As a matter of fact, we considered the influences exerted in the Indian Church by the Persians, the Portuguese, the Antiochenes, the British and the Americans in bringing about the present divisions, religious prejudice, racial bias and different ideologies within the Church. It is crucial to recognize the diversity of cultures and

religions in India. These existing rivalries among different Christian denominations and conflicts among religions and cultures have had a significant impact on their society.

The main reasons for all these rivalries are ethnic consciousness and racial pride among the diverse peoples of India. The Malabar Christians maintained the caste system so that they could move along with upper castes. They still consider the Latin Catholics and Protestants, who were mostly converted from lower castes, degraded Christians. Knanaya Christians, the descendants of the Persian immigrants to Kerala, segregate themselves from all other Christians in India to keep “purity of blood”. They consider it abominable to marry outside their ethnic group. Even within the Catholic Church itself, there are rivalries because of differences of rites and ethnicity. Within one rite, for example, Syro-Malabar, there is segregation between reformists and restorists. In short, the ecumenical spirit is at the bare minimum.

Next, we explored the ways in which the concept and law on validity of marriage developed in the Church. We examined various factors that contributed to the evolution of law on the validity of marriage with reference to mixed marriage. For this, we studied the development of laws regarding mixed marriages, priestly blessing for the validity of marriage and canonical form, etc. We observed that all these factors had their own importance in connection with particular situations which existed in the time frame of history, and we noted how they were incorporated into the system of law to solve the particular problems of their

time. For instance, a priestly blessing was insisted from the 9th century in order to stop segregating against slaves in the Church. Canonical form was introduced in the 16th century in order to stop the abuse created by clandestine marriages and to affirm the Church's jurisdiction over marriage in the context of the Protestant Reformation. We conclude that all these laws and regulations were not permanent, and that they could be changed according to the needs of the community of a particular time and place.

We also explained certain concepts of marriage that have crystallized over the centuries, most noteworthy being the concepts of marriage as a sacrament and an institution. Marriage took its rightful place among the seven sacraments. The strong articulation of the sanctity of marriage was a rejection of a revived form of Manicheism to develop a healthy doctrine of marriage. This doctrine of sacramentality of marriage also helped to establish the Church's jurisdiction in conflict with civil authorities. Nevertheless, if the Church and the theologians had simply insisted that marriage is a graced covenant and not a contract, Catholic rulers might have been more disposed to limit their own supervision to the strictly civil effects of marriage, as was done in the early days of the Roman Empire.¹

However, the primary concern of Church authorities would appear at times to be more with the nature of the institution than it was for the spiritual welfare of Christian

¹ P.F. PALMER, "Christian Marriage: Contract or Covenant," in *Theological Studies*, 33(1972), pp. 638-639; J.A. NOWAK, "Inseparability of Sacrament and Contract in Marriages of the Baptized", in *Studia Canonica*, 12(1978), pp. 332-333.

persons. The main architect of the law of marriage in the first Code, Pietro Gasparri wanted to uphold and to protect the institution of marriage. The Code drafted under his direction paid less attention to the legitimate desires and needs of individual persons. Hence, in mixed marriages, the conscience of the non-Catholic could not be taken into account. This attitude extended into the field of judicial procedures.

We demonstrated how canon law developed differently in the East and the West. Differences between the two Codes were the result not only of the wish of the Church to uphold genuine Oriental tradition, but also because of the differences in the actual situation of non-Catholic Orientals compared with that of Western non-Catholics. Further, Church law developed in India in a different fashion because the situations were totally different there. We conclude that in modern life situations, and in a world of mobility of people, ecumenism is essential and there must be unity in canon law Codes.

When Pope John XXIII decided to open the windows of the Church to freshen the air, and thus convoked Vatican II for this purpose, there was hope for unity expressed in every corner of the Church. Further, when the canon law Codes were being revised in the context of renewed ecclesiologies, we expected a solution to the confusion created by the old laws. Although the revised Codes present an ecumenical approach regarding the validity of inter-Church marriages, it can be shown that they have at times failed to incorporate the spirit of

Vatican II comprehensively. Some confusion still remains, and new confusion has been created by revisions in the Codes.

We took a closer look at the provisions in the new Codes as we progressed, observing the work of Canon Law Commissions in revising the canons and their outcome. Clearly listing the new provisions of law relating to the validity of inter-Church marriages, we brought to light the conflicts between different provisions in different Codes. We then applied those laws in the specific situations of mixed marriage in India to see how they fit, and to see what problems they might create in the future.

The present Codes manifest a remarkable change in the attitude of the Church towards mixed marriages. The central idea of communion informs the outlook of the new Codes on non-Catholic Churches and communities. Its source is in *Lumen gentium*, nn. 14-15 and *Unitatis redintegratio*, n. 3. The new Codes are intimately bound to that ecclesiology. While revising the law, the Commission mentioned maintaining the "fundamental unity" of the Church in the plurality and diversity of its rites, and also "the ecumenical movement" whose positive effects were clearly manifested at the Council. The Commission also seemed to postulate that the Catholic Church clarify in its law its relationships with non-Catholic Churches and communities.² The recognition of the Orthodox form of marriage by Vatican

² A. TACHÉ, "The Code of Canon Law of 1983 and Ecumenical Relations" in M. THÉRIAULT and J. THORN, (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law*, vol. I, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, pp. 401-403.

II is incorporated in the Codes. Canon 11 of *CIC* and c. 1490 of *CCEO* speak about persons who are baptized or received into the Catholic Church as the subjects of merely ecclesiastical laws. Rules dealing with marriage between a Catholic and a non-Catholic have been given significant attention nowadays because, in the context of a pluralistic society, such marriages cannot be regarded as a marginal problem.

However, we exposed a conflict of laws in the new Codes concerning the validity of inter-Church marriages expressed through the differences between c. 1059 of *CIC* and c. 780 of *CCEO*. According to *CIC*, even when only one party is Catholic, the marriage is governed by canon law. *CCEO* goes further and incorporates the non-Catholic marriage laws into canon law. On the other hand, although the powers of the Western and Eastern Catholic bishops are equal with regard to the faculty to dispense, the eparchial bishops of the Eastern Churches do not enjoy the faculty to dispense from canonical form; such faculty is reserved to the Holy See or the Patriarch. Further, the Patriarch can dispense only if there is a very serious reason.

The results of this study affirm that our anxiety with regard to conflicts between Oriental and Latin Codes has some basis; the problems were crystallized in the scenarios for mixed marriages. In the final analysis, we examined the theology and purpose of those laws in the light of Scriptures, Vatican II, post-Code documents on ecumenism and the Indian context of social reforms and ecumenical movements. As a result, we realized that making

some changes in certain canons might bring unity and harmony between the Codes and clarity to the laws in adjudicating marriage nullity cases. This realization led us to propose certain changes in the Codes regarding the laws to be observed, the canonical form and the priestly blessing necessary for the celebration of marriage rites. The specific purpose of these changes is to make it possible to adjudicate the marriage nullity cases of non-Catholics without confusion.

Theology of the East and the West regarding what makes the marriage is different from each other. In the East, an ordained priest is the minister of the sacrament, and his blessing is that which makes the marriage. In the West, it is the parties themselves who are the ministers, and the blessing of an ordained priest is irrelevant. This difference is a potential problem in marriage nullity cases as the mobility of people increases. The main theme of theology on which our arguments depend is the sacramental nature of the marriage of the baptized. Marriage is a sacramental covenant if it reflects the great covenant, the union between Christ and his Church.³ The issue of the relationship between the contract and the sacrament of marriage arose in widely different historical circumstances. Many theologians were in agreement that the contract itself was the form of the sacrament; therefore, the two could not be separated. This view prevailed, and the canon on marriage echoes it.⁴ Hence, the argument is: any public form recognized by the non-Catholics must be acceptable in

³ B. HÄRING, "A Theological Appraisal of Marriage Tribunals", in L.G. WRENN, (ed.), *Divorce and Remarriage in the Catholic Church*, New York, Newman Press, 1973, p. 19.

⁴ L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions [= Marriage in Canon Law]*, Wilmington, Glazier, 1986, p. 55.

mixed marriage. Several authors would even accept the canonization of the civil form of marriage in this regard.⁵

Acceptance of the sacramental nature of the marriage of all the baptized would promote ecumenism and unity within the Church. The insertion of the term “consortium” instead of “communion” in the canon that defines marriage, manifests this ideal in mixed marriages. The change in ecclesiological emphasis from the Church as a perfect society to the Church as the people of God embodying various levels of communion has also affected the official attitude toward members of other Christian denominations in many areas including marriage.⁶ There are many elements of unity compared to disunity with non-Catholic Christians.

We are all born into different cultures — such as Western or Eastern. A particular culture inevitably has a deep, formative effect on everything we become. However, whenever culture limits our love and communion, it becomes an obstacle to our growth as a faith community. We must go beyond the influences of culture by liberating ourselves from the “traditions” of our individual culture. Clinging to history for the sake of traditions is detrimental to growth. Jesus Christ warned people to look beyond their traditions and

⁵ R.J. RYAN, *The Canonical Status of Marriages Attempted Before Civil Authorities: Historical Analysis from the Council of Trent to the 1983 Code*, Ann Arbor, MI, UMI, 1991, pp. 251-255.

⁶ J.A. CORIDEN, et al., (eds.), *The Code of Canon Law: A Text and Commentary*, Mahwah, Paulist Press, 1985, p. 801.

customs of the culture in order to enter the Kingdom of God which is a wider perspective of humanity. For Him, “the Sabbath is for man, and man is not for Sabbath.”

As is well known, Pope Paul VI had insisted that the new law must be based on doctrine, thus bringing about a closer relationship between theology and law. The Pope reminded us that the norms of the Code were not to be taken as ends in themselves, but as means, instruments of grace, which must have a spiritual character, distinguishing the Code from every purely human legislation.⁷ However, the doctrinal inspiration is not the same throughout the text. There seems to be a lack of unity among the various parts. Perhaps the strongest objection raised in some circles during the revision of the Latin Code was that the *schemata* were settling disputed theological points before the doctrine was sufficiently elaborated; among such questions we could mention the requirement of faith for a sacramental marriage.⁸

Theologians and canonists have proposed that Church order and structures are not ends in themselves but are established instead to serve the spiritual well being of individuals and the faith community. If structure gets in the way of a spiritual good, then one must attend to the spirit of the law and not its letter. The clue to understanding canon law lies in the realization that in this body of norms, the complex nature of the Church is manifest. Some

⁷ PAUL VI, Allocution of February 4, 1977, in *The Pope Speaks*, 22(1977), p. 178; see also F.G. MORRISEY, “The Revision of the Code of Canon Law”, in *Studia Canonica*, 12(1978), p. 185.

⁸ MORRISEY, “The Revision of the Code of Canon Law”, pp. 194-196.

rules have their origin in divine revelation, others in human deliberations, but many have both in varying proportions. Once this realization dawns, it is easy to see the on-going need to adjust the laws as the Church progresses in understanding divine mysteries, or, as humanity progresses in wisdom, in organization and in government.⁹

The purpose of law in the Church is the salvation of souls. Salvation is a process of liberation through maturation in faith. Maturation in faith happens not by the enforcement of laws or traditions but by spiritual guidance and pastoral care. It means that man-made laws and traditions are indeed subordinate to a superior law, the law of love proclaimed by Christ. Our historically conditioned and man-made laws must always be subject to the grace-filled and timeless norms of the evangelical message.¹⁰ It is worth noting here the revealing statement of Walbert Buhlmann:¹¹ Nothing damages the Church and its mission more than the desire to cling to historically conditioned forms; if we have the courage to let go of structures that are out of date, God will enable us to find new structures through observing the signs of the times. In doing this, we have to allow for a certain insecurity. It is not necessary to have a map of the Promised Land before we leave Egypt.

⁹ ÖRSY, *Marriage in Canon Law*, p. 260.

¹⁰ Ibid., p. 325.

¹¹ W. BÜHLMANN, *The Coming of the Third Church: An Analysis of the Present and Future*, New York, Maryknoll, Orbis Books, 1976, p. 407.

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BIOGRAPHICAL NOTE

Berchmans Kodackal was born in Kerala, India on November 9, 1951. He is the second son of Souru and Mary Kodackal, Kodanad. The late Cardinal Joseph Parecattil, Archbishop of Ernakulam and President of the Pontifical Commission for the Revision of the Oriental canon law administered first Communion and the sacrament of Confirmation to him in 1960, admitted him in the seminary in 1968, and then ordained him to the priesthood on March 10, 1978.

Rev. Kodackal secured a B.A. (Hons.) degree in Theology in 1978 from the St. Thomas Apostolic Seminary, Kottayam, India which was then affiliated to the Gregorian University of Rome. He has a B.A. degree in Psychology from the Kerala University (1983), a LL.B degree in Civil Law from the Mahatma Gandhi University, Kottayam (1990), a Masters (M.C.L.) degree in Canon Law from the University of Ottawa and a Licentiate (J.C.L.) in Canon Law from Saint Paul University, Ottawa (1993).

He served as an associate parish priest for two years, and then as a parish priest in several parishes for eleven years in the archdiocese of Ernakulam. Fr. Kodackal is the first person to be ordained from his home parish, Kodanad, and the first priest in the archdiocese of Ernakulam to enroll as a civil lawyer before the Bar Council of Kerala (1991). He also had the opportunity to work as a Defender of the Bond in the Canadian Appeal Tribunal, Ottawa (1993-1995), and then to help the Judicial Vicar of Memphis, Tennessee, as a consultant.

Presently, Fr. Kodackal serves as an associate pastor at Sacred Heart Church in Memphis and as a chaplain at the Veterans' Affairs Hospital in Memphis.