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THE DUAL RELIGIOUS MARRIAGE CELEBRATION IN INDIA

by

Rev. James D'Mello

A dissertation submitted to the Faculty of Canon Law of Saint Paul University, Ottawa, Canada, in partial fulfillment of the requirements for obtaining the degree of Doctorate in Canon Law.

Ottawa, Canada, 1985



Rev. Ignatius (James) D'Mello, Ottawa, Canada, 1985.



UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

J

DEDICATED

to

my Mother and Father

who taught me

by

word and example

to love the Church.

C

R

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ABBREVIATIONS

<u>A.A.S.</u>	Acta Apostolicae Sedis
<u>A.C.</u>	L'Année canonique
<u>A.F.E.R.</u>	African Ecclesiastical Review (until April 1978) African Ecclesial Review (June 1978 onwards)
<u>A.S.S.</u>	Acta Sanctae Sedis.
<u>C.B.</u>	Collationes Brugenses
<u>C.I.C.</u>	Codex Iuris Canonici
<u>C.L.D.</u>	Canon Law Digest
<u>C.M.</u>	The Clergy Monthly
<u>C.P.R.</u>	Commentarium pro Religiosis et Missionariis
<u>C.R.</u>	The Clergy Review
<u>Comm.</u>	Communicationes
<u>D.C.</u>	La Documentation catholique
<u>E.T.</u>	Ecumenical Trends
<u>I.M.E.</u>	Il monitore ecclesiastico
<u>M.E.</u>	Monitor ecclesiasticus
<u>O.C.</u>	One in Christ
<u>P.L.</u>	Patrologia Latina
<u>Periodica</u>	Periodica de re morali canonica liturgica
<u>R.D.C.</u>	Revue de Droit canonique
<u>T.P.S.</u>	The Pope Speaks
<u>W.W.</u>	Word and Worship

TABLE OF CONTENTS

	Page
INTRODUCTIONS.....	i
CHAPTER I. THE CELEBRATION OF MARRIAGE IN INDIA.....	1
A. HINDUISM.....	3
1. Varnadharma (The Caste System).....	5
2. Asramadharma (The Stages of Life).....	8
3. Procuring a Bride - The Hindu Way.....	14
4. The Hindu Marriage Rites.....	22
5. The Sacramentality of Hindu Marriage.....	26
6. The Essence of Hindu Marriage.....	28
7. Evaluation.....	31
B. ISLAM.....	34
1. Marriage in Islam.....	35
2. Evaluation.....	43
C. BUDDHISM.....	45
1. Buddhist Marriage.....	47
2. Evaluation.....	50
CHAPTER II. THE CANONICAL PROHIBITION AGAINST THE DUAL RELIGIOUS MARRIAGE CELEBRATION.....	54
A. PRE-CONCILIAR MIXED MARRIAGE LEGISLATION.....	55
1. The Mind of the Catholic Church.....	55
2. Ecclesiastical Writers.....	56
3. The Early Councils.....	58
4. The Councils from the Sixth to the Twelfth Century.....	61
5. The Twelfth to the Sixteenth Century.....	68
6. The Council of Trent.....	71
B. THE PRESCRIPTION AGAINST THE DUAL RELIGIOUS MARRIAGE CELEBRATION.....	74
C. THE ECCLESIASTICAL PENALTY FOR INFRACTIONS OF THE LAW.....	78
D. THE SOURCES OF CANON 1063, PAR. 1 (CIC 1917).....	80
a) Curial Texts.....	82
b) Papal Text.....	104

CHAPTER III.	CHANGES IN THE LEGISLATION.....	107
	A. RESPONSES OF THE HOLY SEE.....	107
	B. POST-CONCILIAR MIXED MARRIAGE LEGISLATION.....	118
	C. THE PREPARATION OF CANON 1127 (CIC 1983).....	138
	D. THE NATURE OF THE LEGISLATION.....	145
CHAPTER IV.	THE AUTHORITY OF THE EPISCOPAL CONFERENCE AND THE DIOCESAN BISHOP OVER THE CELEBRATION OF MARRIAGE ACCORDING TO THE 1983 CODE.....	153
	A. THE EPISCOPAL CONFERENCE.....	153
	1. Legislative Power.....	156
	2. Dispensing Power.....	161
	B. THE DIOCESAN BISHOP.....	161
	1. The Office of the Diocesan Bishop.....	161
	2. Legislative Power of the Diocesan Bishop.....	168
	3. Dispensing Power of the Diocesan Bishop.....	169
	a) Conciliar Teaching.....	169
	b) Implementing Conciliar Teaching.....	179
	C. THE DEVELOPMENT OF CANON 87 (CIC 1983).....	182
	D. THE SIGNIFICANT CHANGES IN THE LAW.....	189
	CONCLUSION.....	195
	BIBLIOGRAPHY.....	204

INTRODUCTION

While remote preparations were under way for the fifth general session of the Synod of Bishops in Rome, Pope John Paul II announced on December 16, 1978, the theme to be discussed: "The Role of the Christian Family in the Modern World."¹

Indeed, in their correspondence with the Synod Secretariat, the various Conferences of Bishops, Synods of the Eastern Churches and Dicasteries of the Roman Curia had indicated the opportuneness and urgency of the subject of the family as a fitting topic for a synodal session. Moreover, in recent years, the Holy See, some Conferences of Bishops and individual prelates had issued significant documents on the family.²

1. John Paul II, "Allocution au conseil du secrétariat général du synode épiscopal", in D.C., 76(1979), p. 16.

2. Paul VI, Address, "The Family in Contemporary Society", in T.P.S., 21(1976), pp. 77-79. cfr. also: Paul VI, Allocution aux Equipes Notre-Dame, in D.C., 73(1976), pp. 852-854; Lettre de l'épiscopat du Québec sur la famille, in D.C., 72(1975), pp. 517-523; Commission épiscopale française de la famille, "Amour, famille et société", in D.C., 73(1976), pp. 1014-1021; Lettre pastorale de l'épiscopat polonais sur le respect des valeurs morales, in D.C., 75(1978), pp. 118-119; Lettre pastorale des évêques suisses, "Oui à l'enfant", in D.C., 75(1978), pp. 180-182; The Committee for the Family, Rome "The Marriage-Sacrament -- The Church's Answer to the Appeal of the Family", in A.F.E.R., 18(1976), pp. 368-376; J. Quinn, "Toward a Pastoral Plan for the Family", in Origins, 7(1977-78), pp. 374-375; J. Jadot, "The Problem of Communication", in Origins, 7(1977-78), pp. 314-315; J. Jadot, "Implementation of the Family Pastoral Plan", in Origins, 8(1978-79), pp. 337-341; Ontario Conference of Catholic Bishops, Guidelines for Family Life Education, Toronto, 1977, 21 p.

Little wonder, then, that the announcement of the Holy Father was received with enthusiasm. On June 19, 1979,³ the Synod secretariat announced that it had sent a preliminary study document on the Synod's theme to Episcopal Conferences throughout the world.⁴ Its purpose according to Cardinal Wladyslaw Rubin,⁵ head of the Secretariat, was to invite comment from the world's bishops and, to the extent possible, from others in the Church. After having completed the period of consultation, and as the time for the opening of the 1980 Synod of Bishops drew near,⁶ the Synod Secretariat distributed a working paper based on the consultation with the Episcopal Conferences.⁷

But this text was not presented as a schema, that is, a text to be discussed and amended by the bishops during their deliberations. Rather, it was presented as a stimulus for discussion.⁸

3. Synod Secretariat, "The Role of the Family in the Modern World", Editorial Note, in Origins, 9(1979-80), p. 113.

4. The Role of the Christian Family in the Modern World, English translation, Canadian Conference of Catholic Bishops, Ottawa, 1979, 52 p.

5. Synod Secretariat, op. cit., p. 113.

6. Synod Secretariat, "The 1980 Synod on the Family", Editorial Note, in Origins, 10(1980-81), p. 225.

7. The Role of the Christian Family in the World of Today, English translation, Canadian Conference of Catholic Bishops, Ottawa, 1980, non-paginated, 118 p.

8. Synod Secretariat, "The 1980 Synod on the Family", loc. cit., p. 225.

The Catholic Bishops' Conference of India entrusted the study of the synodal theme to its Commission for Family and Laity. In its turn, this commission organized a national consultation at the grassroots level which was held at Dhyana Ashram in Madras, July 28-30, 1979.

The participants in this consultation numbered 108 persons: 46 laymen and women, 17 women religious, 41 priests and 4 bishops. All had received in advance a background paper on each of the seven themes of family life which the episcopal commission considered to be of major importance. One such theme was mixed marriages: by "mixed marriages" was meant marriages between Catholics and other Christians as well as marriages between Catholics and non-Christians.

The National Consultation prepared a Service Document, embodying⁹ observations and recommendations, fruit of its efforts during the sessions. This document was presented at the general meeting of the Catholic Bishops' Conference in Ranchi, October 17-25, 1979.

The findings of the National Consultation were very positive. The participants articulated the problems created by the rapid increase of mixed marriages. In India's pluralistic society this phenomenon was particularly evident in urban and industrial areas. Further, the National Consultation was of the opinion that this delicate situation of mixed marriages would become

9. Catholic Bishops' Conference of India Commission for Family and Laity, National Consultation on Family, Bangalore, National Family Secretariat, 1979, vi, 113 p.

more complex in the years to come. To meet this challenging situation, some timely and pertinent recommendations were made to the bishops. Among these, was the proposal of a dual religious marriage ceremony so that the religious convictions of the non-Christian party could also be respected. ¹⁰ Such a proposal was seen as even more important in the light of the numerous cultural and popular customs surrounding the Indian celebration of marriage.

Thus, at the Ranchi meeting the bishops received the following texts to facilitate their deliberations:

1. the preliminary study document prepared by the Synod Secretariat;
2. "The National Consultation on Family" prepared by the Catholic Bishops' Conference of India Commission for the Family and the Laity;
3. the first draft of the Communication to the Synod prepared in Bombay, with the help of experts, by the Secretariat of the Catholic Bishops' Conference of India, and based on the two above-mentioned documents;
4. the Instrumentum Laboris, a further working document prepared by the Synod Secretariat for use by members of the fifth general assembly of the Synod of Bishops.

The proposed solution to the problem of mixed marriages was well articulated by the National Consultation, and received favourably by the bishops who realized that India's religious and cultural pluralism had to be considered. Many complex and diverse factors -- sociological, geographical, socio-economic, political -- are at play in India: the Bishops' Conference was

10. Ibid., p. 101.

made acutely aware of how these factors and indeed, their ever-changing interplay, are responsible for the shifting patterns of family life constantly seen in this country. Since Catholics are a minority, hardly 2% of the entire population, the bishops agreed with the National Consultation that it would be impossible to avoid mixed marriages. No person could be denied the natural right to marry the chosen partner if all other legal requirements were met.

The bishops were in a delicate situation. On the one hand, divine law called for the safeguarding of the faith of the Catholic partner. On the other, Vatican II declared that "the human person has a right to religious matters in private or in public, alone or in association with others."¹¹

In this light, the first draft of the communication to the Synod from the Catholic Bishops' Conference of India was considered to be rather negative and polemic in tone.¹² It underwent certain revisions, drawing more copiously from the Service Document of the National Consultation. The recommendation regarding the double religious marriage ceremony was incorporated and the final version of the draft released on October 25, 1979.¹³ Only then was the text dispatched to the Synod Secretariat.

11. Vatican II, Declaration, *Dignitatis humanae*, December 7, 1965, in A.A.S., 58(1966), p. 930, no.2: "[...] personam humanam ius habere ad libertatem religiosam. ... in re religiosa neque aliquis cogatur ad agendum contra suam conscientiam neque impediatur, quominus iuxta suam conscientiam agat privatim et publice, vel solus vel aliis consociatus, [...]".

12. D. S. Amalorpavadass, "India's Communication to the Synod on Family", in *W.W.*, 12(1979), pp. 395-396.

13. C. B. C. I. Communication to the Synod of Bishops 1980 on its theme, "The role of the Christian Family in the Modern World", New Delhi, C. B. C. I. Secretariat, 1979, 21 p.

The Synod was held in Rome from September 26 to October 25, 1980. The Catholic Bishops' Conference of India deputed four delegates in addition to the papal nominee. During a general session, one of the delegates, Archbishop Henry D'Souza asked whether the impediment of disparity of worship was to be removed in the forthcoming revised Code of Canon Law. To which Cardinal Felici replied in the negative.¹⁴

Archbishop D'Souza pressed the issue:

A double religious celebration is not permitted in mixed marriages in the current legislation. The Episcopal Conference of India wished that permission be granted for a dual religious celebration. I would like to know whether this desire of the bishops of India will be fulfilled in the new law.¹⁵

Cardinal Felici's answer was couched in these words:

I do not think that it will be granted in the new law. The new law that is being prepared has assumed the norms of the Motu Proprio, Matrimonia Mixta, in which no such concession is found, although something is allowed; this however, does not essentially enter into the celebration of matrimony itself.¹⁶

14. P. Felici and H. D'Souza, in Comm., 12(1980), p. 452.

15. Ibid., "In praesenti legislatione non permittitur duplex celebratio religiosa in matrimoniis mixtis. Conferentia Episcopalis Indiae voluit ut permissio detur ut duplex religiosa celebratio detur. Vellem scire utrum hoc desiderium Episcoporum Indiae implebitur in nova legislatione".

16. Ibid., "Non censeo in nova legislatione id concessum iri. Nam nova quae praeparatur legislatio desumsit normas a MP Matrimonia mixta, in quo talis concessio non datur, quamvis aliquid permittatur, quod tamen essentialiter non ingreditur in celebrationem ipsius matrimonii".

This response did not deter the bishops of India from pursuing what they considered to be one of the most practical and pastoral solutions to a most difficult problem.

This was not the first time the delicate question of mixed marriages had been formally considered. Indeed, it had been debated during the 126th and 127th general assemblies of Vatican II.¹⁷ The discussion then centred mainly on marriages between Catholics and Christians of other persuasions, focussing only on the pre-nuptial guarantees and the canonical form. There were, however, interventions from three different Council Fathers relating to a second marriage celebration, be it religious, traditional, or civil.

The first such intervention was made by Bishop John Julien Weber, Archbishop-Bishop of Strasbourg, France. He proposed an addition to the Draft on the Sacrament of Matrimony at line 28 of page 11 in the following words:

Should the non-Catholic spouse demand, for the peace of his/her conscience, that a celebration be had before a non-Catholic minister, this should be tolerated.¹⁸

The next reference was by Archbishop Herman Schallfele of Freiburg im Breisgau, Germany:

17. Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, In Civitate Vaticana, Typis Polyglottis Vaticanis, 1970, Vol. 3-3-8, pp. 1089-1097, 1108-1115, 1123-1137.

18. Ibid., p. 1090: "Si coniux non-catholicus exigit, pro satisfactione suae conscientiae, celebrationem etiam coram ministro acatholico fieri, res toleranda est".

I rejoice that the Draft does not speak about the possibility of going to a non-Catholic minister to give matrimonial consent (as some dreamed for), but rather upholds totally Canon 1063 of the Code of Canon Law.¹⁹

Bishop Dominic Fukahori of Fukuoka, Japan, put forward some difficulties to be found in his country, among them the following:

There are the faithful who think marriage begins from the moment consent is manifested according to local customs, or from the moment a marriage is registered before the civil authority, and not from the moment it is completed in the Church and before the priest. Therefore, some do not give true consent when the religious ceremony is performed before the priest, but only when the so-called "traditional" ceremony is performed later.²⁰

The outcome of these interventions is obvious: they were merely placed on record for the time being. As a matter of fact, during the Conciliar assemblies, little mention was made of marriages involving disparity of worship, one of the delicate problems facing the bishops of India.

19. Ibid., p. 1093: "Gaudeo quod Schema non loquitur de possibilitate adeundi ministrum acatholicum ad matrimonialem consensum praestandum (uti quidam somniabant), sed potius sustinet ex toto can. 1063 C. I. C.".

20. Ibid., p. 1094: "Adsunt fideles qui putant matrimonium incipere a momento quo consensus manifestatur secundum consuetudines locales, vel a momento quo matrimonium registratur apud Auctoritatem civilem, non autem a momento quo caeremonia in Ecclesia et coram sacerdote perficitur. Quapropter, nonnulli verum consensum non praebent quando caeremonia religiosa perficitur coram sacerdote, sed tantum quando caeremonia, sic dicta 'traditionalis' perficitur postea".

Following the Council, both Matrimonii sacramentum, an instruction on mixed marriage issued by the Sacred Congregation for the Doctrine of the Faith on March 18, 1966, and the 1967 Synod were silent on this subject. The Apostolic Letter on mixed marriages, Matrimonia mixta, issued by Paul VI on March 31, 1970, claims that the Church always gave careful attention to mixed marriages in pursuance of its duty.²¹ Still, no immediate solution to this particular problem was in sight. Referring to article 77 of Sacrosanctum concilium which expresses the desire of the Council to retain all the praiseworthy customs and ceremonies of a given culture,²² Matrimonia mixta provided for the possibility of dispensing from canonical form, and of incorporating elements of a national marriage celebration into the Catholic rite. This, however, would appear to be inadequate, as it does not take into account the respect Catholics must have for other religions, according to the conciliar declaration on the relation of the Church to non-Christian religions.²³

21. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), P. 257: "Matrimonia mixta ... Ecclesia pro suo munere magna semper sollicitudine prosecuta est.[...]".

22. Vatican II, Constitution, Sacrosanctum concilium, December 4, 1963, in A.A.S., 56(1964), p. 119, no. 77: "Si quae provinciae aliis laudabilibus consuetudinibus et caeremoniis in celebrando Matrimonii Sacramento utuntur, eas omnino retineri Sancta Synodus vehementer optat.[...]".

23. ID. Declaration, Nostra aetate, October 28, 1965, in A.A.S., 58(1966), p. 741, no. 2: "Ecclesia catholica nihil earum, quae in his religionibus vera et sancta sunt, reicit. ... Filios suos igitur hortatur, ut cum prudentia et caritate per colloquia et collaborationem cum asecclis aliarum religionum, fidem et vitam christianam testantes illa bona spiritualia et moralia necnon illos valores socio culturales, quae apud eos inveniuntur, agnoscant, servent et promoveant".

The bishops of India are of the opinion today that one answer to this problem lies in authorizing a double religious marriage ceremony. They decided to probe the matter further. Believing that the study of this question would be easier and more manageable if handled by a smaller group of bishops, they entrusted it to the Western Regional Council of Bishops who accepted to undertake this task.

This regional council appointed a committee of eight priests, among them two canonists, to delve into the matter. After some study and reflection, this committee was of the opinion that the bishops of the Western Region, if not all the bishops of India, should petition the Holy See for the faculty to permit, in mixed marriages, a double religious marriage ceremony. This, in their opinion, would:

remove the anguish of the Catholic partner; render a marriage between a Catholic and a non-baptized person more acceptable in non-Christian circles; be on par with a civil marriage, as envisaged in the 1917 Code; show that we respect the sentiments of the non-Christian spouse, thus giving further effect to the provisions of Dignitatis humanae.²⁴

The 1983 Code maintains the prohibition of the 1917 Code against a double religious marriage ceremony. The scope of this work, then, is to pursue the quest for a solution.

24. Catholic Bishops' Conference of India Special Committee, Double Religious Marriage Ceremony, a Study and a Note, pp. 1-2.

Since plurality of religions is a special feature of Indian life, the observance of marriage in India's chief religions will be examined. It should serve our purpose if we study the marriage celebrations in Hinduism, Islam and Buddhism. Since Hindus constitute 82.7 percent of the total Indian population, and since Hinduism is a system of beliefs put together over the centuries, the Hindu marriage celebration will receive special treatment. Moslems and Buddhists form, respectively, 11.2 and 0.7 percent of the total population of India.²⁵ Their marriage celebrations will be considered, though not at such length as the Hindu wedding ceremony.

The perspective of this study will focus on two pivotal aspects of a marriage celebration:

1. the religious character of the rite;
2. the exchange of matrimonial consent.

Once the analysis of the various India rites of marriages is completed, the origins of current Church legislation concerning mixed marriages can then be investigated, examining the reasons and historical circumstances for such legislation.

Next, the nature of the prescriptions against dual ceremonies - is it constitutive or disciplinary? - will be explored and explained. Exceptions will be examined and the reasons for them studied. If the law prohibiting a

25. D. R. Pendse, Statistical Outline of India 1984, p. 38.

dual ceremony is not constitutive, then double religious marriage ceremonies could be objects of dispensation provided the conditions for such are clearly met.

Further, with a view to finding a means of applying the precepts of Canon 1127 par. 3 (C.I.C. 1983) in the Indian context, that is, allowing a dual religious celebration, the role of the Episcopal Conference as delineated in the law will be reviewed. Then, finally, an attempt will be made to see whether this law could be applied by the diocesan bishop without the necessity of recourse to higher authorities.

CHAPTER I

THE CELEBRATION OF MARRIAGE IN INDIA

Marriage is God's gift to humanity. After creating man, God saw the need for human love. "It is not good that man should be alone. I will make him a helpmate."¹ Man's companion, woman, his alter ego,² is the gift of the living God. Ever since, the sons and daughters of the "wandering Aramaean"³ have married and will continue to do so until the end of time.

But while marriage is a divine institution, the laws on marriage and the rituals for its celebration that we have inherited or enacted in our day are the product of society which, as it grew and developed, formulated laws governing matrimony. Ceremonies and rituals to embellish its celebration were also developed. It is quite reasonable to expect that marriage laws, ceremonies and rituals would differ from place to place, country to country, because of the social dimension of the celebration. These laws, ceremonies and rituals were influenced, if not dictated by place, circumstances and needs. Each tribe, community and nation could lend its own colour and flavour to the celebration of marriage.

1. Genesis, II, 18.

2. E. Schillebeeckx, Marriage: Human Reality and Saving Mystery, p. 19.

3. Deuteronomy, XXVI, 5.

India is no exception in the matter. Being a fusion of races, traditions and influences -- Dravidian, Aryan, Persian, Arabic, Greek and finally British -- India has always been remarkable for its diversity of peoples, of religions, languages and cultures. It would therefore be logical to expect that this diversity would make its dent on the celebration of marriage, that institution for the founding of the family, the basis of society.

The birthplace of Hinduism, Buddhism, Jainism and Sikhism, India has also been a home for Christianity, Islam and Zoroastrianism. "We have all the religions in the world. But we believe in giving them equal respect."⁴ Each of these religions has its own doctrine and beliefs. Rituals are proper to each one of them. The ceremonies that surround various stages of life are exclusive and even peculiar to each different religious persuasion. All this variety contributes to the formation of a fascinating mosaic.

While it is not within the scope of this study to trace the origins and eventual development of the different religious rites, rituals and ceremonies, much less to examine the customs of the different peoples, it is important to analyse the different forms of marriage and ceremonies that were and are in use in India.

Since canon law prohibits a dual religious ceremony for the purpose of exchange or renewal of marital consent,⁵ any analysis of the different forms of Indian marriage must be carried out from two perspectives: is the marriage rite, ritual or ceremony religious in character? Is consent involved in the

4. I. Gandhi, Eternal India, p. 7.

5. Canon 1127, par. 3.

rite, ritual or ceremony under scrutiny? Answers to these two questions will form the subject matter of this chapter. However, we shall restrict ourselves to the three major religions of India: Hinduism, Islam and Buddhism.

A. HINDUISM

Strange but true, the name "Hinduism" itself is not of Indian origin. The term "Hindu" is a Persian form of "Sindhu", which was used originally to designate the region watered by the Indus River and the people who inhabited it.⁶ But it was probably Moslem invaders who referred to India in Arabic as "Hindustan", and first called the religion of these people "Hinduism" and the people themselves "Hindus".⁷

In defining religion, Lactantius said that it was a bond of piety between man and the Divinity. It is this conception of religion into which Hinduism will not fit.⁸ Hindus themselves would be among the first to say that Hinduism is not a religion but a medley of faiths, "an amalgam, perhaps not so unified or cohesive as it might be, of five or six types of religions ranging from animism to pantheism, from polytheism to philosophic monism, and from fervent devotion to a single personal god to that refined form of mysticism which claims that the nature of the ultimate reality cannot possibly be described, let alone anthropomorphized."⁹ Jawaharlal Nehru spoke of it as follows, in 1946:

-
6. Collier's Encyclopedia, Vol. 12, p. 128.
 7. Encyclopedia Americana, Vol. 14, p. 196.
 8. N. C. Chaudhuri, Hinduism: A Religion to Live, p. 2.
 9. Encyclopedia Americana, Vol. 14, p. 196.

Hinduism, as a faith, is vague, amorphous, manysided, all things to all men. It is hardly possible to define it, or indeed to say definitely whether it is a religion or not, in the usual sense of the word. In its present form, and even in the past, it embraces many beliefs and practices, from the highest to the lowest, often opposed to or contradicting each other. Its essential spirit seems to be live and let live.¹⁰

Mahatma Gandhi characterized Hinduism in this way:

If I were asked to define the Hindu creed, I should simply say: 'search after truth through non-violent means. A man may not believe in God and still call himself a Hindu. Hinduism is a relentless pursuit after truth [...] Hinduism is the religion of truth. Truth is God. Denial of God we have known. Denial of truth we have not known.'¹¹

In our own decade, Indira Gandhi, the daughter of Nehru had this to say:

Like India herself, Hinduism is incapable of confinement or description in words. It is a philosophy, all-embracing, all-accepting, tolerant of other thoughts, giving vast freedom of choice in worship.¹²

Hindus like to refer descriptively to their "religion" as sanatana, best translated as perennial, at once eternal and ancient. Hinduism places little or no importance on beliefs, but the observance of certain rules of life is of the essence.³ These rules embrace all human activity, both individual as well as social:

Let a man meditate always: "I am sacrifice." That which is the first twenty-four years of his life is the morning libation.¹³

10. J. Nehru, The Discovery of India, p. 64.

11. Ibid.

12. I. Gandhi, op. cit., p. 9.

13. B. D. Basu, The Sacred Books of the Hindus, Vol. III, p. 238.

When the aspirant hungers, thirsts and abstains from pleasures, let him meditate (imagine) that he is undergoing the travails of initiation. When an aspirant eats or drinks or enjoys pleasures, let him meditate that he is performing the Upasadas. When an aspirant amuses another or feeds another or gives delight to another by his company, let him meditate that he is singing the stutas and reciting the sastras. Austerity, charity, simplicity, kindness and truthfulness form his fee. Let the aspirant have these as his fee in the mental sacrifice. Therefore, when they say "she will give birth" or "she has given birth", that is his rebirth. His death is the last sacrificial bath.¹⁴

The sum total of such ~~rules~~ best described by the synthetic Sanskrit expression, Varna-Asrama-Dharma. Translated it would mean: norms concerning the castes (varna) and the stages or conditions of the life of man (asrama). Dharma means the ethical mode of life:

The writers of Dharmasastra meant by dharma not a creed or religion but a mode of life or a code of conduct, which regulated a man's work and activities as a member of society and as an individual and was intended to bring about the gradual development of a man and to enable him to reach what was deemed to be the goal of human existence.¹⁵

Varnadharma (the caste system) and Asramadharma (the stages of life) constitute the two pillars on which rests the amorphous collection of Hindu doctrine. The former lends Hinduism its external structure; the latter provides it with a spiritual flavour.

1. VARNADHARMA (THE CASTE SYSTEM)

The word "caste" is a term deriving from the Portuguese word "casta" which is the equivalent of breed, race, kind.¹⁶ In contemporary society, the

14. Ibid., pp. 243-245.

15. P. V. Kane, History of Dharmasastra, Vol. II, Part I, p. 2.

16. J. H. Hutton, Caste in India, Its Nature, Function, and Origins, p. 42.

word is used to define a concept of Hinduism for which several indigenous words are current but no specific word exists. One Sanskrit word for caste is varna, which means colour. From this it is argued that the main castes were originally distinguished on the basis of complexion. A second Sanskrit word is jata, which means race. From this scholars have deduced a racial or tribal origin for castes. The caste system and its origins are interesting; however, its very existence has bearing on this work.

While the Constitution of India makes no distinction between Indians on the basis of caste and colour, the caste system is very much an integral part of Hindu life. Almost defying belief, it has permeated all levels of Indian society, irrespective of religious persuasions. It is found among Moslems (e.g., the Musali, a convert from a lower caste group, carries the taint of his origin even after embracing Islam), Sikhs (e.g., Mazhabi Sikhs do not have full equality with other Sikhs), and even Christians (such as certain Catholics who, contrary to Church teaching, do not admit low caste converts to a status of equality with high caste converts).¹⁷ This attitude is clearly evident in the choice of a marriage partner. Inter-caste unions are frowned upon and would invite immediate ostracism.

There are about 3,000 castes in India, and over 25,000 subcastes, some with millions of members, others with a few hundred.¹⁸ All these castes fall into four large groups. The first group are the Brahmins, who form the priestly caste. Next come the Kshatriyas, who constitute the rulers and the

17. B. Walker, Hindu World, Vol. I, p. 201.

18. Ibid., p. 203.

warriors. Then come the Vaishyas, who make up the business community, and finally, the Sudras who are the servants, the menials. The untouchables, who are the "outcastes", are described as Panchamas.¹⁹

The Brahmins, the Kshatriyas and the Vaishyas are also called dviya, which means twice-born.²⁰ They alone undergo a second, spiritual birth during an initiation ceremony called Upanayana in which they are invested with the sacred thread which they wear all their lives.²¹

The actual thread is just ordinary cotton, but it must have been spun by a Brahmin virgin and twisted by a Brahmin. In the old days it is believed that the Brahmins wore cotton cords, the Kshatriya woolen, and the Vaishya linen. Nowadays, all who wear the sacred thread wear one made of cotton, but the colours vary--for the Brahmins wear white, the Kshatriya red, and the Vaishya yellow to correspond, it is said, with the colours of the mind of the wearers.²²

The Sudras are aborigines admitted to the Hindu community. The Panchamas are the unclean aborigines and the progeny of mixed alliances. These last two groups are called once-born and are not eligible for the sacred thread or other initiation ceremonies.

19. Encyclopedia Americana, Vol. 6, p. 1.

20. M. S. Stevenson, The Rites of the Twice-Born, p. xv.

21. Ibid., p. 27.

22. Ibid., p. 32.

This was expressed in the decree of Manu, the law-giver:²³

The Brahmin, the Kshatriya, and the Vaishya castes (varna) are the twice-born ones, but the fourth, the Sudra, has one birth only; there is no fifth (caste).²⁴

Manu also explained the purpose of the four-fold division of the castes:

But for the sake of the prosperity of the worlds, he caused the Brahmin, the Kshatriya, the Vaishya, and the Sudra to proceed from his mouth, his arms, his thighs, and his feet.²⁵

(The personal pronoun "he" used by Manu refers to the embodied spirit, the soul and the source of the Universe. This incarnate spirit is known as Purusha.)

As has been previously mentioned, inter-caste marriages are frowned upon. However, such are the subtle shadings of this system, that a Brahmin is permitted to take a wife from any of the four castes, the Kshatriya from three, the Vaishya from two and the Sudra from one only, that is, his own.²⁶

2. ASRAMADHARMA (THE STAGES OF LIFE)

With reference to the second pillar of Hindu life, tradition teaches that there are four stages the twice-born has to pass through to reach spiritual perfection: Brahmacharya, the life of a student; Grahastya, the life of a householder; Vanaprasthya, the life of a hermit or recluse; and Sannyasa, the

23. Encyclopedia Americana, Vol. 18, p. 239.

24. F. M. Muller, The Sacred Books of the East, Vol. XXV, p. 402.

25. Ibid., pp. 13-14.

26. B. Walker, op. cit., p. 205.

life of an ascetic.²⁷ These stages or asramas are not mentioned in the Rigveda and are only casually referred to in some late Upanishadic texts.²⁸ In contemporary Hindu society, the asramas are no longer de rigueur.

Manu codified this tradition and so gave it the flavour of law. A brief explanation of these four asramas will serve to underline how pervasive their influence was on Hindu life.

Brahmacharya

Having performed the (rite of) initiation, the teacher must first instruct the (pupil) in (the rules of) personal purification of conduct, of the fire-worship, and of twilight devotions.

But (a student) who is about to begin the study (of the Veda), shall receive instruction, after he has sipped water in accordance with the Institutes (of the sacred law), has made the Brahmagali, (has put on) a clean dress, and has brought his organs under due control.²⁹

This stage, as previously indicated, begins with the sacrament of initiation called Upanayana. A Brahmin boy is initiated at age 8, a Kshatriya boy at age 11, and a Vaishya lad at age 12. This period ends at age 20 to 24. During this time the young lad lives in the house of his guru or teacher, under whose guidance he studies the sacred books. Continnence, frugality and discipline regulate his life:

27. R.N. Dandekar, "The Role of Man in Hinduism", in K. W. Morgan, ed., The Religion of the Hindus, p. 136.

28. B. Walker, op. cit., p. 84.

29. F. M. Muller, op. cit., pp. 42-43.

Let him abstain from honey, meat, perfumes, garlands, substances (used for) flavouring (food), women, all substances turned acid, and from doing injury to living creatures.

From anointing (his body), applying collyrium to his eyes, from the use of shoes and of an umbrella (or parasol), from (sensual) desire, anger, covetousness, dancing, singing, and playing (musical instruments).

From gambling, idle disputes, backbiting, and lying, from looking at and touching women, and from hurting others.

Let him always sleep alone, let him never waste his manhood; for he who voluntarily wastes his manhood, breaks his vow.³⁰

Grahastya: This, the second asrama, (the only one available to the lower castes) is the period during which a man enters the married state:

(A student) who has studied in due order the three Vedas, or two, or even one only, without breaking the (rules of) studentship, shall enter the order of householders.³¹

Celibacy does not find much favour within Hinduism. At a certain age a man must marry and become the head of a family. According to Hindu scriptures, marriage mutually completes the partners.³² Even the Hindu gods are not celibate -- nor are their goddesses virgins. But while marriage is imperative, it is also a sacred state, fraught with many responsibilities:

As all living creatures subsist by receiving support from air, even so (the members of) all orders subsist by receiving support from the householder.

30. Ibid., pp. 62-63.

31. Ibid., p. 75.

32. D. Acharuparambil, Induismo, vita e pensiero, p. 222: "Seconde le scritte, il matrimonio completa vicendevolmente i 'partners'".

Because men of the three (other) orders are daily supported by the householder with (gifts of) sacred knowledge and food, therefore (the order of) householders is the most excellent order.³³

However, those young men who feel called to religious life pass from the first stage, Brahmacharya, directly to the third stage, Vanaprasthya, omitting the intervening asrama, Grahastya.

Vanaprasthya, the third stage, means life in a forest:

When a householder sees his (skin) wrinkled, and (his hair) white, and the sons of his sons, then he may resort to the forest.³⁴

When parents have completed their duties in life towards the children and have grown old gracefully, surrounded by their grandchildren, they are expected to retire from the world. Husband and wife together, or husband alone, leave hearth and home and become recluses in the forest where they spend the rest of their lives in prayer, austerity and in the performance of sacrifices. However, this life is not yet one of total renunciation.

Sannyasa: Manu describes this fourth and final stage as follows:

But having passed the third part of (a man's natural term of) life in the forest, he may live as an ascetic during the fourth part of his existence, after abandoning all attachment to worldly objects.³⁵

This is the most perfect asrama in the life of a Hindu. The candidate seeks out a guru and humbly begs of him to be initiated into Sannyasa. This stage

33. F. M. Muller, op. cit., p. 89.

34. Ibid., p. 198.

35. Ibid., p. 204.

forms the immediate preparation for moksha, the liberation of the soul:

When he has paid the three debts, let him apply his mind to (the attainment of) final liberation: he who seeks it without having paid (his debts) sinks downwards.

Having studied the Vedas in accordance with the rule, having begot sons according to the sacred law, and having offered sacrifices according to his ability, he may direct his mind to (the attainment of) final liberation.

A twice-born man who seeks final liberation, without having begotten sons, and without having offered sacrifices, sinks downwards.³⁶

The man who embraces this state of life is called a sannyasi. He lives as a wandering mendicant, totally unconcerned about his physical being:

He shall neither possess a fire, nor a dwelling, he may go to a village for his food, (he shall be) indifferent to everything, firm of purpose, meditating (and) concentrating his mind on Brahman.³⁷

The sannyasi (ascetic) is directed by his guru in the performance of Sradha, obsequies to the sannyasi's own soul. This symbolized the sannyasi's death to this world. Hence, when a sannyasi dies, no funeral rites are performed for him, because they were already done when he was initiated. Also, he is not cremated but buried, because he has nothing to expiate.

Given the changed circumstances of modern life, the four traditional asramas have become an anachronism. Their full observance is hardly practical in the context of today's life. For example, Brachmacharya has been reduced to a few symbolic days following Upanayana, the initiation. As for the third

36. Ibid., p. 205.

37. Ibid., p. 206.

and fourth stages, viz., Vanaprasthya and Sannyasa, they have been relegated to oblivion.

Nonetheless, the second stage, Grahastya, still holds pride of place. It is considered to belong to the divine order. It is necessary for human perfection, and also offers regeneration for the woman:

The nuptial ceremony is stated to be the Vedic sacrament for women (and to be equal to initiation), serving the husband (equivalent to) the residence in (the house of the) teacher and the household duties (the same as) the (daily) worship of the sacred fire.³⁸

In summation, the plan for the organization of Hindu society is the caste system, called Varnadharma, and the pattern for individual life is known as Asramadharma, the four stages of life.³⁹ Every man was held to have his proper place with its rights and duties determined largely by his position in the framework of the caste system. The happiness both of the individual and of society was held to depend on the observance of Dharma, and the whole of human society was held to be subject to divine law; thus, all human activity, economic, social, political and religious, was given a divine sanction.

Hindu thinkers have recognized that man possesses a complex personality. He expresses this personality through four channels: his instincts and natural desires, his craving for power and property, his social aims and his spiritual urge. And the four ends of man are: the aesthetically pleasing expression of his desires and natural instincts (Kama), material prosperity (Artha), the ethically sound life (Dharma), and the spiritually free life (Moksha).

38. Ibid., p. 42.

39. R. N. Dandekar, op. cit., p. 136.

The first three ends are related to man's empirical life, while the fourth refers to his otherworldly life. A truly integrated personality and an essentially full life are possible by the proper correlation of these four ends, or purposes, of man. A person's natural desires and material welfare can so be regulated by the righteous principles of Dharma, that these three are subordinated to the ultimate purpose, Moksha, liberation of his soul. Hindu theory and practice relating to the organization of man's individual life and his social existence can, therefore, be best understood in the light of these four ends of man.⁴⁰

3. PROCURING A BRIDE - THE HINDU WAY

Marriage is held in great esteem in Hindu society. Manu, generally accepted to be the first law-giver of India,⁴¹ has high praise for this state, the state of the "householder". It indeed is the basis of society and the support of the other three states:

The student, the householder, the hermit, and the ascetic, these (constitute) four separate orders, which all spring from (the order of) householders.

And in accordance with the precepts of the Veda and of the Smitri, the housekeeper is declared to be superior to all of them; for he supports the other three.

As all rivers, both great and small, find a resting-place in the ocean, even so men of all orders find protection with householders.⁴²

40. Ibid., p. 135.

41. F. M. Muller, op. cit., p. 30: "Whatever law has been ordained for any (person) by Manu, that has been fully declared in the Veda: for that (sage was) omniscient."

42. Ibid., pp. 214-215.

These laws pertaining to marriage and householders, and other laws, believed to have been enacted, enunciated or codified by Manu, are contained in 2,685 verses spread over 12 chapters in the book Laws of Manu.⁴³ Verse 21 in chapter III lists eight separate and distinct methods or styles by which a bride can be acquired: Brahma, Daiva, Arsa, Prajapatya, Asura, Gandharva, Raksasa, Paisaca.⁴⁴

In the West, prospective suitors make their own free selection and have a period of courtship before actually marrying. Among the Hindus, courtship as known in the West, does not exist. The bride is procured through one of the methods listed by Manu. In our day, only two of these methods are in vogue, viz., Brahma and Daiva. The other six are now obsolete. However, for purposes of comparison, all the methods prescribed by Manu are presented here, pointing out the salient features of each.

Brahma:

The gift of a daughter, after decking her (with costly garments) and honouring (her by presents of jewels) to a man learned in Veda and of good conduct, whom (the father) himself invites, is called the Brahma rite.⁴⁵

The special elements in this method are:

- (a) the daughter is gifted away by her father or legal guardian;
- (b) the eligible groom has to be proficient in the Vedas and of good moral character;
- (c) the eligible groom is invited by the father (or legal guardian) of the bride and honoured by him;

43. F. M. Muller, op. cit., pp. 1-513.

44. Ibid., p. 79.

45. Ibid., p. 80.

- (d) experts pronounce on the opportuneness, auspiciousness and suitability of the projected marital union;
- (e) the dowry is in the form of costly clothing and jewelry;
- (f) the bride is outside any matrimonial transaction -- she is considered the object of the transaction.

There is a noble aspect to this method in as much as there is no use of physical force, no carnal appetite, no imposed conditions, and no lure of money. Social decency is rigorously observed and religious considerations are taken into account. This respectable way of acquiring a bride is very much in vogue in contemporary Hindu society.

Daiva: This is what Manu prescribes for this second method of obtaining a bride, "of the gods":

The gift of a daughter who has been decked with ornaments, to a priest who duly officiates at a sacrifice, during the course of its performance, they call the Daiva rite.⁴⁶

A close look at this piece of Manu's legislation reveals the following features:

- (a) there is the gift of the daughter made to a priest who then officiates at a sacrifice;
- (b) this gift is considered as the offering for the sacrifice;
- (c) the priest is the important figure in the whole affair and he receives the sentiments of the girl's father and offers the same to the divinity;
- (d) a sacrifice has to be offered to the gods -- hence the name of this method of acquiring a bride.

46. Loc. cit.

The striking feature of this method is that the priest himself receives as a bride the daughter of the worshipper. By offering propitiatory sacrifice, the priest has "merited" this gift of a bride as recompense.

Arsa: The third method according to Manu is described thus:

When (the father) gives away his daughter according to the rule, after receiving from the bridegroom, for (the fulfillment of) the sacred law, a cow and a bull or two pairs, that is named the Arsa rite.⁴⁷

The characteristics of this third method are:

- (a) the barter between the father of the bride and the prospective groom;
- (b) the daughter is given away by the father.

So the bull and the cow, or the pair of kine, do not constitute the bride price. These are intended as gifts exclusively earmarked for a sacrifice.

Prajapatya: This method invokes the protection of Prajapati, believed to be the deity who presides over procreation:

The gift of a daughter (by her father) after he has addressed (the couple) with the text, "May both of you perform together your duties", and has shown honour (to the bridegroom), is called in the Smitri the Prajapatya rite.⁴⁸

The distinctive elements in this method can be summed up as follows:

- (a) the girl is gifted to the groom who solicits her hand for life;
- (b) it is the groom who, of his own accord, takes the initiative, by asking the father of the girl for her hand;

47. Loc. cit.

48. Ibid., pp. 80-81.

- (c) before giving away his daughter, the father exacts a solemn promise from his future son-in-law that he will be faithful to his wife till death;
- (d) at the end of the marriage rite, the bride acquires the title of consort.

Those who choose this method intend to discharge their debts to Prajapati. In other words, they desire to beget and raise offspring.

Asura: Manu teaches:

When (the bridegroom) receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called Asura rite.⁴⁹

These special features emerge from Manu's description:

- (a) there is a sale of the girl;
- (b) her father is gratified with money;
- (c) the girl becomes not a consort after marriage, but a slave.

This method of obtaining a bride bears a striking resemblance to the Roman coemptio.⁵⁰ In both cases, the girl has no say in the choice of her marriage partner. Thus, Asura is a sale of a girl in the guise of marriage. Manu admits that the Vaishyas and the Sudras were allowed the Asura form of marriage which was openly a sale, though he condemns the practice.⁵¹

49. Ibid., p. 81

50. Encyclopedia of Religion and Ethics, Vol. 8, p. 464.

51. F. M. Muller, The Sacred Books of the East, Vol. XXV, pp. 79-80.

But those (male) relations who, in their folly, live on the separate property of women, (e.g. appropriate) the beasts of burden, carriages, and clothes of women, commit sin and will sink into hell.⁵²

Gandharva:

The voluntary union of maiden and her lover one must know (to be) the Gandharva rite, which springs from desire and has sexual intercourse for its purpose.⁵³

This method of acquiring a bride is employed by a groom and bride who had previously come to enjoy one another's company in the course of ordinary village life, or in various other places of festivals and fairs where their free choice and mutual attachment were generally approved by their kinsmen. Since it was believed that this type of finding of life partners originated in lust, the marriage was to be performed without the sacred rituals. Manu does not approve of this method:

The nuptials texts are applied solely to virgins, (and) nowhere among men to females who have lost their virginity, for such (females) are excluded from religious ceremonies.⁵⁴

It would appear that cupidity as a determining factor in the selection of a spouse is frowned upon.

Raksasa:

The forcible abduction of a maiden from her home, while she cries out and weeps, after (her kinsmen) have been slain or wounded and (their houses) broken open, is called the Raksasa rite.⁵⁵

52. Ibid., p. 84.

53. Ibid., p. 81.

54. Ibid., p. 294.

55. Ibid., p. 81.

In this method, the groom did not wait for the consent of the father or of the girl herself. The marriage was accomplished by capture and elopement. In the process, violence was carried out: neither the girl's tears nor the resistance of her relatives was of any avail. The question of consent, therefore, does not arise.

Paisaca: This is the method that Manu describes as the worst:

When (a man) by stealth seduces a girl who is sleeping, intoxicated, or disordered in intellect, that is the eighth, the most base and sinful rite of Paisaca.⁵⁶

Fraud and deceit, not free consent, are involved in this basest of all methods. The bride is ravished while she is asleep or under the influence of liquor. Although this form is recognized, Manu does not tolerate it.

There is yet another method, not listed by Manu: it is regarded as a variant of Gandharva. This method is termed Svayamvara and is believed to be Austric in origin. Mention of it is made in the Mahabharata:

Fair the sister slender waisted,
dowered with beauty rich and rare,

And like fragrance of the blue lotus,
perfumes all the sweetened air,

She will choose from noble suitor
gathered from West and East,

Bright and fair shall be the wedding,
rich and bounteous the feast.⁵⁷

56. Ibid.

57. R. C. Dutt, The Ramayana and the Mahabharata, p: 181.

Svayamvara means self-choice. It is a ceremony in which a girl picks her husband from a number of assembled suitors. When a girl attains marriageable age, her father invites all suitors, duly qualified as to caste and rank, to attend a Svayamvara. Before the appointed day, she would perform certain rites, pray and watch for omens to obtain guidance in making the correct choice: meanwhile, each suitor would hand in a description. On the appointed day each suitor, his retinue in attendance, was seated on a separate throne and his deeds and accomplishments would be announced by a herald to the bride's family and the assembled guests. To the sound of trumpets, the girl was carried in a palanquin and was herself seated in a special, conspicuous place. When she had made up her mind, she would place a garland on the neck of the man of her choice. The nuptials were often celebrated immediately by priests in attendance.

While Manu does not include Svayamvara in his eight methods of marriage, he nevertheless enacts legislation regulating its performance:

Three years let a damsel wait, though she be marriageable;
but after that time let her choose for herself a bridegroom
(of) equal (caste and rank).

If, being not given in marriage, she herself seeks a husband,
she incurs no guilt, nor (does) he whom she weds.⁵⁸

He also imposes certain restrictions which do not impede the girl's freedom in the Svayamvara:

A maiden who chooses herself, shall not take with her any
ornaments, given by her father or her mother, or her
brothers: if she carries them away, it will be theft.⁵⁹

58. F. M. Muller, op. cit., p. 343.

59. Ibid.

4. THE HINDU MARRIAGE RITES

All the rites in the Hindu marriage ceremony can be grouped under three convenient headings -- pre-marital, principal, and post-marriage rites. Alternately, these may be classified as preliminary, essential and subsequent rites. Our focus here is on the first two categories.

Pre-marital rites and their number differ from place to place according to custom and practice. But three are fairly common, Gatra-harida, Arghya and Kanyadana.

On the day fixed for the marriage, the prospective bride has to perform various ablutionary rites. Her helpers for this occasion all have to be married women who are not widows and who have borne a male child. The body of the bride is dusted with turmeric powder in a body-turmericking ritual called Gatra-harida, in order to generate sexual desire. The bride then has a special hygienic bath, after which her body is anointed with fragrant oils.

The bridegroom is also prepared by dusting with turmeric and a lust-bestowing bath. He is anointed with cosmetic oils, and his neck, arms, wrist, head and ears are adorned with jewels. Then, the bridegroom's party which includes his male relatives and friends, makes its way to the bride's house. In this procession led by a band of musicians, the bridegroom, garlanded with flowers, rides a caparisoned horse while his attendants hold the ceremonial umbrella and fly whistle.

At the gate of the bride's house, which has been suitably decorated with arches of greenery, flowers and coloured lights, the bride's father receives the groom. This ceremony is called Arghya. The father receives him with due

honour and presents him with perfumed water and madhuparka, a drink of honey and curds. In ancient times the Arghya was not complete without sacrificing a cow in honour of the guest, but such a sacrifice is now obsolete.

The next ceremony is Kanyadana, which means virgin-giving, or the formal gift of the daughter to the man about to become her husband. At this stage, in some communities, a yoke is placed lightly on the girl's neck by the groom, symbolizing his authority over her; a gold chain is placed on the yoke for luck and prosperity, and bangles are put on the girl's wrist.⁶⁰

The word dana, i.e. gift, is important. Its meaning indicates ownership. The daughter is considered one of the possessions of her father and can be given away at his volition, without taking into account her choice or opinion.⁶¹

The essential marriage rite, which immediately follows the Kanyadana, can be divided into five parts:

- (1) Panagrahana or Hastagrabha, the grasping of the hand;
- (2) Asmarohana, the stepping on the stone;
- (3) Agni pradakshina, the circumambulations of the holy fire;
- (4) Lajahoma, the offering of the roasted grain;
- (5) Saptapadi, the seven steps.⁶²

60. R. Walker, Hindu World, Vol. II. p. 42.

61. U. M. Apte, The Sacrament of Marriage in Hindu Society, p. 173.

62. Ibid., p. 175

The celebration of this ritual takes place before a sacrificial fire. The fire symbolizes the god Agni (similar to the Latin, ignis) and speaks of the excellence of the marriage bond. It is to this sacrificial fire that the couple pledge undying fidelity.

After an offering to the sacred fire, the essential rite begins with panigrahana, "hand-grasping". This acceptance of the bride is symbolized by the man taking hold of the girl's hand over the sacred fire. While doing so the groom says, "I seize thy hand that I may gain fortune; this am I, thou art that; I am the words, thou the melody; I the seed, thou the bearer; the heaven I, the earth thou."⁶³ During this part of the ceremony, the ends of the nuptial garments of the bride and groom are tied together.

In the next part of the rite, asmarohana, the bride, resting her hands on the shoulders of the groom, ascends with her right foot a millstone placed beside the sacred fire. She is enjoined to be faithful and steadfast like the stone; furthermore, she is to be untiring in domestic duties, obedient to the commands of her husband, determined and devoted in all she does.

At this stage there is one more offering to the sacrificial fire, consisting of clarified butter. The couple hold hands as the groom says, "O my bride, be thou pleasant to the members of my family and to the cattle we possess; give birth to heroic children; never miscarry and never have an empty lap."⁶⁴

63. B. Walker, op. cit., p. 42.

64. Ibid., p. 42. }

Now the couple is ready for agnipradakshina. The bride is led by the hand around the nuptial fire in a clockwise direction. During this circumambulation, the lajahoma is also performed. It is an offering of grains made by the bride to the sacred fire while the groom recites this prayer: "May this women, strewing grains, bring bliss to her husband."⁶⁵ Then, the groom unties the two locks of the woman's hair, signifying her release from the fetters of her virgin state. As a token of his responsibility to maintain her through life, he gives her two pieces of clothing, one for the upper part of her body and one for the lower.

The final stage in the principal marriage ceremony is saptapadi, which transliterated means "seven steps". Seven small heaps of rice are arranged in a straight line from south to north of the fire. The south-north axis is significant because it is believed that the seven rishis, that is, the wise men, the seers, are in the north. Each heap of rice is decorated with seven areca (betel) nuts, seven coins and seven dates. The groom prays: "I will worship these seven heaps, which represent the seven ancient mountains, with the five-fold worship."⁶⁶

Then the bride and groom together take seven steps before the sacred fire. Each step denotes a particular blessing: food, strength, wealth, happiness, cattle, progeny, devotion.⁶⁷ At each step, the couple call upon the god Vishnu as witness. He is believed to be the protector of the universe and has the interest of young married couples at heart.

65. Loc. cit.

66. M. S. Stevenson, The Rites of the Twice-Born, p. 90.

67. B. W. Walker, op. cit., p. 42.

While the couple take the seven steps the groom says the following:

Take one step with me, and I promise to feed you as long as you live: Vishnu is witness.

Take a second step with me, and I promise to behave in such a way that your face will always shine with inward health: Vishnu is witness.

Take a third step with me, and I will give you wealth, prosperity, and the luxuries that can be brought with wealth: Vishnu is witness.

Take a fourth step with me, I will be answerable for your well-being: Vishnu is witness.

Take a fifth step with me, I will see you have cattle: Vishnu is witness.

Take a sixth step with me, I promise to pay my dues as your husband at the right seasons: Vishnu is witness.

Now comes the climax -- the groom utters these sublime words:

O friend, take the seventh step with me and become my friend in reality and follow me.⁶⁸

5. THE SACRAMENTALITY OF HINDU MARRIAGE

Catholics believe that the marriage of baptized persons is a sacrament and that there can be no valid matrimonial contract between baptized persons unless it is also a sacrament by that fact.⁶⁹

In their economy of liberation (moksha) as previously described, Hindus claim the existence of a system of sacraments. For the Hindu, a sacrament (in Sanskrit, samskara) is "a sacred rite prescribed in the Vedas for the purification and perfection of the soul and body." This definition, short and

68. M. S. Stevenson, op. cit., p. 90.

69. Canon 1055.

to the point, is found in the digest Samskaraprakasa of Mitramisra, a seventeenth century Hindu author.⁷⁰

There is a great divergence of views among Hindu writers as to the number of samskaras. However, the Dharamsutra of Gautama speaks of forty samskaras.⁷¹ Only sixteen of these are popular.⁷² The samskaras most frequently performed today are those surrounding birth, death, initiation, and marriage. This study will now focus on the samskara of marriage, known as vivaha.

According to Manu, vivaha has three main goals. The first of these is generation of offspring. A male child is always man's greatest desire. His liberation seems linked to his fathering a son:

Through a son he conquers the worlds, through a son's son he obtains immortality, but through his son's grandson he gains the world of the sun.

Because a son delivers (trayate) his father from hell called Put, he was therefore called put-tra (a deliverer from Put) by the Self-existent Svayambu himself.⁷³

The implication is quite clear: man becomes complete in marriage and qualifies for his liberation by begetting a son. It is this son who will perform the sacrifices for his ancestors and thus win favour for his father.

70. C. Papali, Hinduism: Religion and Philosophy, Vol. I, p. 183.

71. P. V. Kane, History of Dharmasastra, Vol. II, Part I, p. 193.

72. R. B. Pandey, Hindu Samskaras, p. 23.

73. F. M. Muller, op. cit., p. 354.

The second goal of married life is the deepening of religious life which is brought about by the offering of sacrifices. It is only in marriage that a man can, duly assisted by his wife, carry out the sacrificial rituals. A bachelor has neither the competence nor the need to offer sacrifice.⁷⁴

Sexual satisfaction is the last of the ends of marriage in the Hindu scheme of life:

Let (the husband) approach his wife in due season being constantly satisfied with her (alone); he may also, being intent on pleasing her, approach her with a desire for conjugal union (on any day) except the Parvans [the phases of the moon].⁷⁵

6. THE ESSENCE OF HINDU MARRIAGE

This elaboration of the thinking and philosophy behind the concept of Hindu marriage is intended to form the backdrop against which the actual marriage will be viewed. It can now be asked: is there an expression and mutual exchange of marital consent in Hindu marriage?

To answer this question one must take cognizance of the fact that, according to Hindu metaphysics, the entire universe, material and human is subordinate to a cosmic norm termed Rita from which no one and nothing is exempt:

Wise, with your law through the Asura's magic power ye guard the ordinances, Mitra-Varuna. Ye by eternal order (Rita) govern all the world. Ye set the Sun in heaven as a refulgent car.⁷⁶

74. Ibid., p. 87.

75. Ibid., p. 83.

76. R. T. H. Griffith, trans., The Hymns of the Rigveda, p. 273.

Nobody escapes the force of this inviolable law -- not even the gods. Man submits to this eternal decree by his obedience to the laws of Dharma. As mentioned earlier, dharma finds its expression in varnadharma (the caste system) and asramadharmā (the stages of life). Hence, man works out his liberation by scrupulously accepting his lot as it is within the framework of society built on these two pillars. Since the married state, grahastya, pertains to a stage of life on the path of liberation, man has no choice but to embrace this state. Indeed, it must be underlined that it is for his human perfection, salvation, and for his ultimate liberation. And, for a woman, according to Manu, the married state from nuptial ceremony to performance of household duties is her means for regeneration.⁷⁷

In our attempt to answer the question posed earlier, we had recourse to Hindu metaphysics. To complete the picture, it is necessary to draw a canonical distinction between matrimonium "in fieri" and matrimonium "in facto esse" and apply the same to Hindu marriage.

Matrimonium "in fieri" would correspond to one of the eight methods of securing a bride as well as to Svayamavara. Matrimonium "in facto esse" would be that state of life spanning the period from the moment of the wedding to the moment of death in conformity with the divine decrees.

Hence, vivaha, the Sanskrit word for marriage, fits in well with matrimonium "in fieri". Vivaha means, etymologically, "to take away". Closely related to the word vivaha is the term udvaha, which denotes the act

77. F. M. Muller, op. cit., p. 42.

of taking away and escorting about. There is yet a third expression used in this connection, upayama, which means to approach with a view to appropriating. Finally, there is panigrahana, taking the girl by the hand.

From an analysis of the various methods of obtaining a bride, the Hindu matrimonium "in fieri", there emerges a significant and striking fact: the groom is the persona agens. He is given importance. The bride merely acquiesces in the matter. She does not manifest her own will. All that she does is to follow the prescribed ceremonies. Consent, then, is tantamount not to a mutual exchange as an act of the will, but only to an acceptance of the religious institution that is marriage. This is very evident from the "sacramental" rite itself in which the bride goes through the rituals to attain the status of wife or consort, but without declaring her intention to the groom.

This is true even in the case of Svayamvara where the girl supposedly chooses her own spouse. In his book, Kane entertains his own doubts about the freedom of choice on the part of the girl.⁷⁸ Another author, J. D. M. Derrett, seems to indicate that the presence of the father of the girl is the decisive element for the wedding -- he is the proof of guardianship and guarantee of the young woman, a kind of support, a prop lest the daughter make a wrong choice.⁷⁹

Matrimonium "in facto esse" is the stable, on-going union of marriage for

78. P. V. Kane, op. cit., p. 523.

79. J. D. M. Derrett, "An Aspect of the Arranged Marriage in Dharmasastra", in Annals of the Bhandarkar Oriental Research Institute, Pune, Diamond Jubilee Number, 1977, pp. 107-120.

Hindus, in which the partners seek more to fulfill their obligations than to claim marital rights. This is the state wherein the subsequent rites of marriage are practised. The main obligation of the couple is their submission to the established divine order by, as outlined by Manu, striving to achieve the three-fold purpose for which marriage was instituted:

Offspring, (the due performance of) religious rites, faithful service, highest conjugal happiness and heavenly bliss for the ancestors and oneself ...⁸⁰

However, when all is said and done, one cannot overlook that, for the Hindu, "success and happiness in the married state was assumed to be completely under astral control."⁸¹ The compatibility of the partners, the time and date of their union and all other relevant details were decided by the matching of their respective horoscopes. Therefore, in practice, this aspect of Hindu belief left even less opportunity for young people of marriageable age to choose their own mates.

Further, it must be noted that the time-honoured custom or system of arranged marriages is not obsolete. Derrett maintains that nine marriages out of ten currently are arranged -- the opinions of the spouses hardly count.⁸²

7. EVALUATION

From all that has been discussed above, a deduction can now be made. Matrimonium "in fieri" in the case of Hindus is not a contract, in the sense that there is no exchange of consent "in personam". Rather the entire

80. F. M. Muller, op. cit., p. 332.

81. N. C. Chaudhuri, Hinduism: A Religion to Live, p. 202.

82. J. D. M. Derrett, Religion, Law and State in India, p. 365.

ceremony consists of the acceptance of the rite as the operative factor in bringing about the married state of a couple within the institution of marriage. Manu's dictum -- wifehood begins where the seventh step ends -- captures that essence. The accent thus is on the rite, not on consent.

Further, the passive role of the bride is also very clear from the different methods by which she is acquired. She is an object, a gift, and does not play an active role in choosing her life partner. The rite of kanyadana only confirms this view.

The father of the bride and groom are the ones who make the moves in a wedding. This being so, the matrimonium "in fieri" is nothing more than a "liturgical action" or a samskara (sacrament) in which the unexpressed consent⁸³ of the bride has as its ~~object~~ not the person of her husband-to-be, but the very institution of marriage and its ends.

Consequently, matrimonium "in facto esse" is the actual living out the union of the couple that was in store for them as part of the long process of the liberation of their souls. It is something they have to accept as inevitable, even as their means to the attainment of moksha.

There is an aspect of Hindu marriage that cannot be emphasized enough. It has already been pointed out that raising a family is of paramount importance to the man in Hindu society. So too, motherhood excels wifehood for the Hindu woman. In this way, one's ancestors are immortalized. In this

83. D. Composta, "Il matrimonio secondo la legislazione classica indù", in M. E., 105(1980), p. 261.

way, the spouses in a marriage are bound by ties of affection and respect not only to the living of their respective families, but also to those who have gone to another life. It is believed that this link with the deceased lasts 42 generations.⁸⁴

It now remains to determine if there are any religious overtones to the Hindu marriage ceremony. The essential elements of this ceremony are three: acquiring the bride; the ritual celebration of the samskara of marriage; and the juridical status of married life. The first two pertain to the matrimonium "in fieri", the third is actually the matrimonium "in facto esse". Since the nuptial ceremonies originated from religious beliefs, it is generally believed Hindu marriage is a religious institution.⁸⁵ Above all, since the Hindus believe that marriage for them is a samskara bringing with it the possibility of purification and perfection of life, it must be admitted that Hindu marriage has a religious character.

In summation, therefore, given the structure of the entire Hindu marriage ceremony including the preliminary and subsequent rites, and viewed against the light of Hindu philosophy, the celebration of Hindu marriage:

- (1) is a religious ceremony,
- (2) but does not involve an explicitation of marital consent.

84. Ibid., p. 262.

85. B. Bhattacharya, "Hindu Samskaras: A Theological Perspective", in C. D. McMullen, Rituals and Sacraments in Indian Religions, p. 34.

B. ISLAM

Islam is a system of belief and practice established by Muhammad⁸⁶ who was born in Mecca into an illustrious family of the tribe of Quraish⁸⁷ on April 20, 571⁸⁸ and died at Medina on June 8, 632⁸⁹ of the Christian era.

The word Islam literally means "peaceful submission to the will of God -- without resistance".⁹⁰ It occurs several times in the Qu'ran in its literal as well as technical meanings. The form is an infinitival noun from a stem used in the Qu'ran in connection with the submission of Abraham and his son, at the attempted sacrifice by the father, to the divine will.⁹¹

Its followers do not worship Muhammad, their prophet, but regard him as man who was God's messenger, and they prefer to be known as Muslims, a name which is often anglicized into Moslems.⁹² In this study, the term Muslim will be used to cover all the sects among the followers of Muhammad.

There are five tenets in Islam. The first is expressed in the formula; no God but Allah. Closely joined with this dogma is the second: Muhammad is

86. Encyclopedia Americana, Vol. 15, p. 412.

87. L. Gardet, Mohammedanism, trans., W. Burridge, p. 19.

88. Mohammed Abd Allah Draz, "The Origin of Islam", in K. W. Morgan, ed., Islam -- The Straight Path, p. 6.

89. Encyclopedia Americana, Vol. 19, p. 294.

90. Mohammed Abd Allah Draz, op. cit., p. 1.

91. Encyclopedia Americana, Vol. 15, p. 412. See also, R. Bell, trans., The Qu'ran, Vol. I, Verse 18, p. 46; Vol. I, Verse 5a, p. 94; Vol. II, Verse 103, p. 446.

92. Colliers's Encyclopedia, Vol. 13, p. 310.

the messenger of God. The third dogma relates to the Qu'ran. This book is the uncreated word of God. It was dictated piece by piece in Arabic through Gabriel. Belief in angels, arranged hierarchically and headed by Gabriel, the bearer of revelation, is the fourth dogma. The fifth dogma consists of the belief in a day of judgment, immortality of the soul, reward for the righteous and punishment for the wicked.⁹³

Islam enjoins its followers to practise five religious duties, often termed the pillars of the faith. The first pillar involves a verbal profession of the unity of God and the prophethood of Muhammad. The second religious duty is prayer. Almsgiving is the third, and fasting is the fourth. The fifth duty is the pilgrimage to Mecca and Medina.⁹⁴

Muslim marriage, the element of direct interest and relevance to this study, can be examined with this brief synopsis of Islam as the background. Keeping the theme of our study before us, i.e., the dual religious celebration of marriage, we shall endeavour to discover whether Muslim marriage takes place during a religious ceremony and whether there is an explicit exchange of marital consent.

1. MARRIAGE IN ISLAM

The Arabic word for marriage is Nikah which in its literal sense signifies conjunction, but which in the language of law implies the marriage contract.⁹⁵

93. Encyclopedia Americana, Vol. 15, pp. 412-413.

94. Ibid., pp. 413-414.

95. T. P. Hughes, A Dictionary of Islam, p. 433.

Marriage in Islam is a sacred contract which every Muslim must enter into, unless there are special reasons why he should not.⁹⁶ Even poverty is not a sufficient excuse for not marrying, for the indigent are guaranteed help from on High, as is witnessed by this quotation from the Qu'ran:

And marry the single amongst you, and the righteous among your servants and your hand-maidens. If they be poor, God will enrich them of His grace, for God both comprehends and knows.⁹⁷

Another text states:

And He it is who has created man from water, and has made for him blood relationship and marriage relationship; for the Lord is mighty.⁹⁸

These two texts support the view that marriage is necessary for every Muslim. Celibacy, although not absolutely condemned by Muhammad, is held to be a lower form of life to that of marriage.⁹⁹

According to Islamic law as taught by the Prophet Muhammad himself, a Muslim man is permitted to marry four free women, and to have as many slaves for concubines as he may acquire.¹⁰⁰ Apropos of this teaching, this is what we find in the Qu'ran:

96. M. M. Ali, The Religion of Islam: a Comprehensive Discussion of the Sources, Principles and Practices of Islam, p. 602.

97. F. M. Muller, The Sacred Books of the East: The Qu'ran, Part II, trans., E. H. Palmer, p. 77.

98. Ibid., p. 88.

99. T. P. Hughes, op. cit., p. 50.

100. Ibid., p. 314.

[...] marry what seems good to you of women by twos or threes or fours; and if ye fear that ye cannot be equitable, then only one, or what your right hands possess.¹⁰¹

While polygyny is legal for a Muslim, it would appear from the above injunction that monogyny is recommended in the interests of a good marriage.

Further, though a Muslim married man can be polygynous, a Muslim married woman cannot be polyandrous. On the face of it, this would seem to be discriminatory. But when one examines the reasons for this seeming discrimination it becomes clear: Nature has so divided the duties of man and woman in the preservation and raising of the human species, that while one man can raise children from more than one wife, one woman can have children only from one husband. This explanation, chauvinistic to the core, is one that is offered by a reputed author in this field.¹⁰²

Marriage is simply a civil contract according to Islamic law. Its validity depends not on any religious ceremony, but upon the mutual consent of the man and woman who are the parties to the contract. This consent has two aspects, ijab, meaning "declaration", and qabul, which means "acceptance". The consent is to be expressed or exchanged in the presence of two male witnesses (or one male and two female witnesses).¹⁰³

The expression of consent is in the preterite tense, e.g. the parties would say, "I have accepted" or "I have taken as my mate or partner", but no

101. F. M. Muller, The Sacred Books of the East: The Qu'ran, Part I, trans., E. H. Palmer, p. 71.

102. A. M. R. Muhajir, Islam in Practical Life: The Religion of Islam, p. 97.

103. T. P. Hughes, op. cit., p. 314.

particular form or particular words are essential. Any declaration which conveys the intention of the parties in clear words is sufficient. It is not necessary that the proposal should come from one party and the acceptance from the other, or that the one should precede the other. The words of mutual consent may be addressed to each other by the parties, but it is generally the person who delivers the wedding sermon who puts the proposal before the man and the woman, who then both consent to the proposal.¹⁰⁴

Another important item in a Muslim marriage is the nuptial gift or mahr. According to the Qu'ran, the mahr is given as a gift by the husband to the wife at the time of contracting the marriage:

And give women their dowries freely.¹⁰⁵

It would, therefore, seem obligatory for a husband to settle the mahr on his wife. This mahr is not paid to the bride's father as the price of the bride. It is the woman's property. No one else has any right to it. She can spend it as she likes or she can will it away. Once given to the wife, the husband has no claim to it, even when he marries another woman:

But if ye wish to exchange one wife for another, and have given one of them a talent, then take not from it anything.¹⁰⁶

The mahr may be paid in instalments. It should be within the means of the husband. If a man marries a woman with no intention of paying the mahr, the marriage itself is vitiated and he will be committing adultery. The mahr is a

104. M. M. Ali, op. cit., p. 314.

105. F. M. Muller, op. cit., p. 71.

106. Ibid., p. 75.

very effective weapon in redressing or mitigating the wrongs and injustices done to a woman and in protecting her rights.¹⁰⁷

Liberty is allowed a woman who has attained puberty, to marry or refuse to marry a particular man, independent of her guardian who has no power to dispose of her in marriage without her consent or against her will.¹⁰⁸ As previously indicated, the marriage contract is effected by the mutual consent of the man and woman: since the man is expressly told to satisfy himself about the woman by looking at her, it would seem that the woman has the same right to satisfy herself before giving her assent. The law respects the modesty of women -- their consent may be expressed by indirect means and even may be wordless. In the case of virgins, silence is taken as consent, and so is a smile or a laugh.

With regard to the consent of the woman, Syed Ameer Ali comments:

No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it. A contract of marriage also implies mutual consent, and when the parties see one another, and of their own accord agree to bind themselves, both having the capacity to do so, there is no doubt as to the validity of marriage. Owing, however, to the privacy in which Eastern women generally live, and the difficulties under which they labour in the exercise of their own choice in matrimonial matters, the Mohammedan law, with somewhat wearying particularity, lays down the principle by which they may not only protect themselves from the cupidity of their natural guardians, but may also have a certain scope in the selection of their husbands.¹⁰⁹

107. A. M. R. Muhajir, op. cit., p. 314.

108. T. P. Hughes, op. cit., p. 314.

109. Ibid., p. 318.

When a man decides to marry, he looks around the matrimonial market and selects a prospective bride. He then initiates a series of discreet inquiries about the girl who has fascinated him. When he is satisfied that all is in order, he makes a proposal of marriage either to the girl herself or to her parents or guardians. Once he has made his proposal, intending suitors are barred from proposing to the same woman, until the first suitor has abandoned his prior claim, or has been rejected.

A Muslim woman may also make a proposal of marriage to a man; or, a man may offer his daughter or sister in marriage to another man. However, it is generally the man who proposes to his future wife.

When assent has been given to the proposal of marriage, it becomes an engagement. Usually, a certain period of time is allowed to pass before nikah, the marriage, is solemnized. This interval between the engagement and the nikah affords the parties an excellent opportunity to get to know one another. Should they discover they were not made for each other, the engagement may be broken off and the parties are no longer bound to each other.¹¹⁰

It must be noted that there is no specific religious ceremony prescribed by law for a Muslim wedding. Also, no religious rites are necessary for the celebration of a valid Muslim marriage. In the eyes of the law, a marriage entered into by two persons capable of the marriage contract, is valid and binding because of the mutual consent exchanged in the presence of two witnesses.¹¹¹

110. M. M. Ali, op. cit., p. 618.

111. T. P. Hughes, op. cit., p. 318.

However, this does not mean that there are no religious rites or ceremonies. There are, but these have nothing to do with the validity of the marriage.

In India, there is hardly any difference between the rites that are practised at the marriage ceremonies of the Shias and the Sunnis.¹¹² The religious ceremony, however, is left entirely to the discretion of the Qazi, the Muslim priest, or the person who performs the ceremony. Hence, there is no uniformity of ritual. Some Qazis merely recite the Fatihah, which is the first chapter of the Qu'ran, and impart the blessing, called durud.¹¹³

Usually the wedding ceremony takes the following pattern. The Qazi, the bridegroom, and the bride's attorney, with the witnesses, assemble in some convenient place, but not in a mosque. The wedding sermon which is standard for all Muslim weddings, is delivered by the Qazi.¹¹⁴ At the conclusion of the sermon, it is announced that the man and woman, both named, are to be united in wedlock. At this juncture, the mahr, or nuptial gift, is settled.¹¹⁵

Then, the couple are asked if they accept the relationship they are about to enter into. In India, the consent of the woman is generally obtained through her father or other guardian or relative.¹¹⁶ After the reply has been

112. Ibid.

113. Loc. cit.

114. Ibid., p. 314.

115. M. M. Ali, op. cit., p. 628.

116. Ibid.

given in the affirmative, the marriage ceremony proper proceeds to its conclusion.

The bridegroom repeats after the Qazi the following:

- (1) the Istighfar: "I desire forgiveness from God."
- (2) the four Quls: the four chapters of the Qu'ran commencing with the words "Qul" (chapters 109, 112, 113, 114). These chapters have nothing in them connected with the subject of marriage, and appear to be selected on account of their brevity.
- (3) the Kalimah or Creed: "There is no Deity but God, and Muhammad is the Prophet of God."
- (4) the Sifwatu 'l-Iman: A profession of belief in God, the Angels, the Scriptures, the Prophets, the Resurrection, and the Absolute Decree of good and evil.¹¹⁷

The Qazi then calls the bride's attorney to grasp the bridegroom's hand and to repeat after him: "Such an one's daughter, by the agency of her attorney and by the testimony of two witnesses, has, in your marriage with her, had such a dower settled upon her; do you consent to it?" To which the bridegroom replies: "With my whole heart and soul, to marriage with this woman, as well as to the dower already settled upon her, I consent, I consent, I consent."¹¹⁸

This done, the Qazi, with hands uplifted prays:

117. T. P. Hughes, op. cit., p. 318.

118. Ibid.

O great God! grant that mutual love may reign between this couple, as it existed between Adam and Eve, Abraham and Sarah, Joseph and Zalikha, Moses and Zipporah, his highness Muhammad and 'Ayishah, and his highness 'Ali al Murtaza and Fatima 'z-Zahra.¹¹⁹

With this, the wedding ceremony is concluded. Festivities follow. Congratulations and good wishes are bestowed on the couple according to the customs of the place.

2. EVALUATION

From what has been discussed, it is easy to see that the Muslim wedding ceremony as usually practised in India, is a religious ceremony. The delivery of the sermon before the announcement of the marriage serves a double purpose of giving it a sacred aspect and making it an occasion for the education of the community.¹²⁰ The recitation of prayers based on the teachings of the Qu'ran further imbues the entire ceremony with a religious character. And the final blessing leaves no doubt as to the religious overtones surrounding the wedding ceremony of Muslims. Hence, marriage in Islam has always been looked upon as a sacred contract.¹²¹

The mutual consent alone of two parties to live as husband and wife does not constitute an Islamic marriage, unless that consent is expressed publicly and in the presence of witnesses. It is thus an essential feature of Islamic marriage that there be a gathering, in a public place preferably, before which consent is expressed.¹²²

119. Loc. cit.

120. M. M. Ali, op. cit., p. 626.

121. Ibid., p. 602.

122. Ibid., p. 625.

There is no restriction placed on the liberty of either a Muslim man or woman in the exercise of marital consent. A Muslim woman enjoys complete freedom in the choice of her future spouse. However, Islamic law allows the woman to express her consent without words, or through an agent.¹²³ The agent is empowered by the woman, in the presence of competent witnesses, to convey her consent to the bridegroom during the wedding ceremony. This is indeed the normal practice. The agent, if a stranger, need not see her: it is sufficient that the witnesses who see her, satisfy him that she, expressly or implicitly, consents to the proposal which he bears.

In sum, therefore, it would appear that matrimonial consent is expressed and exchanged during a Muslim wedding ceremony, which, as has been shown, has intense religious overtones.

This being the case, if there is to be a Muslim wedding in addition to a canonical wedding, it comes within the purview of Canon 1127, par. 3 (C.I.C. 1983), which prohibits a second religious celebration of the one and the same marriage for the purpose of exchanging or renewing consent. Thus, in the case of a Catholic-Islamic mixed marriage, we have a problem to which a solution has to be found.

123. T. P. Hughes, op. cit., p. 314.

C. BUDDHISM

Buddhism is the great oriental religion founded by Gautama Buddha in the sixth century B.C.¹²⁴ The word Buddha is not a proper name, but a descriptive adjective in Sanskrit meaning "the enlightened one".¹²⁵

According to Buddhist legend, the Buddha was born as the son of a king, and was named Siddharta Gautama. The traditional dates of his birth and death are 563 and 483 B.C. His birthplace was near Kapilavastu, north of Varanasi, India.¹²⁶

Buddhism is not a strictly logical dogmatic system of beliefs and practices in the Western sense. Beginning as a discipline for human deliverance from pain, it came to embrace various cults and sects. Two main branches flourished side by side: the Hinayana (Little Vehicle) and Mayahana (Great Vehicle).¹²⁷

Most of the essentials of Buddhism are found in the Discourse on the Turning of the Wheel of Law, or Sermon of Varanasi, the first sermon preached by the Buddha after his enlightenment.¹²⁸ The Buddha condemned two extremes: (1) sensual indulgence he saw as low, vulgar, worldly, unspiritual and useless; (2) self-torture he perceived as painful, unspiritual and useless. Having avoided these extremes, the Buddha discovered the Middle Way (Madhyama

124. Collier's Encyclopedia, Vol. 4, p. 659.

125. Encyclopedia Americana, Vol. 4, p. 672.

126. Ibid.

127. New Catholic Encyclopedia, Vol. 2, p. 847.

128. Encyclopedia Americana, Vol. 4, p. 673.

Pratipad) which leads to enlightenment (Bodhi) and release from limitations of existence (Nirvana). This Middle Way is also known as the Holy Eightfold Path, comprising:

right views,
 right intentions,
 right speech,
 right action,
 right livelihood,
 right effort,
 right mindfulness, 129
 right concentration.

In enunciating his Way, Madhyama Pratipad, the Buddha unfolded Four Holy Truths:

the truth of suffering (birth, decay, illness, death, conjunction with the hated, and separation from the dear -- in short, Form, Feeling, Conception, Dispositions, and Consciousness are suffering);

the truth of the source of suffering (thirst or craving for sensual pleasure, for coming to be and for ceasing to be);

the truth of the cessation of suffering (when craving ceases entirely through dispassion, renunciation and nondependence, then suffering ceases);

the truth of the path leading to cessation of suffering (the Holy Eightfold Path). Suffering must be thoroughly understood. The source of suffering must be forsaken. Cessation must be realized, made actual. The Eightfold Path must be cultivated. 130

129. R. H. Robinson, The Buddhist Religion: A Historical Introduction, p. 26.

130. Ibid.

Implied in all of this is a deep satisfaction with ordinary worldly life, but also a deep sense of its impermanence and endless change. There is expressed a desire for peace and serenity of mind, a belief in something permanent beyond the circle of rebirth, and a feeling that this goal may be reached by ethical and moral means, that is, by way of a chosen personal conduct in this life.

The Buddha discarded sacrifice and ritual, and the mediation of a privileged class of priests with their old sacred books.¹³¹ Buddhism as a system of beliefs emphatically denied a personal God as Creator and Ruler of the world. In the place of God there was an emphasis on law and order, on the inevitability of cause and effect. There can be no God who is superior to this working of cause and effect.¹³²

1. BUDDHIST MARRIAGE

With this brief but sufficient exposition of Buddhist beliefs, we shall now proceed to examine the marriage ceremony of the Buddhists, the topic of immediate interest to this study.

Although marriage amongst the Buddhists is not a sacrament as Hindu marriage is for the Hindus, it occupies no less an important position in the

131. Encyclopedia Americana, Vol. 4, p. 673.

132. Ibid.

life of Buddhists: they look upon marriage as a golden link between two suffering souls for the betterment of their socio-religious life.¹³³ The Buddhist monk cannot solemnize a marriage. But every pious Buddhist thinks that the nuptial celebration would not be valid or complete unless a monk blesses the bride and groom before their marriage. Thus it is inevitable that it has become customary to invite a monk to grace the marriage ceremony.¹³⁴

The actual wedding ceremony is performed by a competent person selected from the general public. There is no hard and fast rule for the selection of such a person. He may be of any age, from any group or locality.¹³⁵

For three days before the marriage, both the bride and the groom have to perform certain rites in the company of friends. The bride specifically has to spend a few critical hours before her marriage observing various customary rites and ceremonies which underline her obligations: as a daughter she is a member of her father's family; as a wife she will be one of the members of the family of her father-in-law. She is about to leave the guardianship of her father to enlist herself as a member of her intended husband's family. The bride is then brought to the groom's house for the celebration of the marriage. Generally, her brothers and prospective brothers-in-law will accompany her to the groom's house.

133. R. B. Barua, "The Marriage Ceremony of the Buddhists", in Maha Bodhi, 73(1965), p. 245

134. Ibid., p. 246.

135. Loc. cit.

An auspicious day according to Buddhist belief is chosen for the wedding. On the appointed day the bride and groom meet in a decorated marriage pandal. The father or guardian of the bride and other relatives grace the occasion. The bride and groom are adorned with ornaments and garlands and a special headdress. They are seated side by side in front of the person appointed to unite them in marriage. Two auspicious pots are then placed before them.

After a short topical speech the person who will perform the marriage ceremony declares ritually that it is about to take place. The father or guardian of the bride honours the groom with gifts of scents, flowers and clothes. The marriage performer asks the father to hand over his daughter to the groom ceremoniously.

The father of the young woman does this, saying:

I am offering my daughter to you; accept this girl for long life and prosperity. From now on you will be the virtual guardian of my daughter. You will live with my daughter as god and goddess. You are like the two hands of a man. You will perform worldly duties together.¹³⁶

Turning to his daughter he says:

Oh my daughter, from now on you will be one of the virtual members of your bridegroom. You will act in such a way that the family of your father-in-law will prosper whereby the prestige of my family will increase.¹³⁷

This part of the ceremony over, the person performing the nuptials instructs one of the bride's relatives to tie the forefinger of the bride's

136. Ibid., p. 247.

137. Ibid.

right hand with the little finger of the groom's left hand, and also to place one foot of the bride on the corresponding foot of the groom. At this stage the bride and groom are made to stand face to face so that they may see each other. The marriage performer besmears his forefinger with vermillion and places it on the forehead of the bride. In the final ritual the bride walks around the groom, showing him respect with folded hands and, at the seventh round, she bows profoundly and completely surrenders herself to the groom. Now the person officiating declares their marriage valid.¹³⁸

2. EVALUATION

That the marriage celebration of the Buddhists is a "family ceremony and not a religious one"¹³⁹ is easy to deduce from the description given above. Further, since it is a person chosen from the public who officiates at the nuptials, Buddhist marriage "is regarded as a purely civil rite, and the Buddhist clergy, as such, take no part in it."¹⁴⁰ If invited, the Buddhist monks perform their role before the actual marriage celebration.

It must be observed that, in the celebration of a Buddhist wedding, both the bride and the groom exchange not a word. It is the father of the bride (or, in his absence, the guardian) who gives away his daughter (ward) as the bride, in a ceremonious fashion, to the groom. He further instructs her to do him proud. In all the ritual, even when the fingers of the bridal couple are tied together, no word escapes the lips of either the bride or groom.

138. Loc. cit.

139. B. Ananda Maitreya Nayaka Thero, "Buddhism in Theravada Countries", in K. W. Morgan, The Path of the Buddha: Buddhism Interpreted by Buddhists, p. 138.

140. Encyclopedia of Religion and Ethics, Vol. V, p. 728.

On the face of it, there is no verbal expression of marital consent. But if, as the Buddhists believe, "marriage is a social contract for the betterment of human life,"¹⁴¹ there has to be consent to make it a contract. Buddhists believe that matrimonial consent is implied in the gesture of the bride walking around the groom and prostrating herself before him. The groom reciprocates by his silent acceptance of his partner in life. That is the philosophy of the Buddhists -- the Buddhist way of life. It always has to be understood in the light of their religious beliefs. Thus, there is matrimonial consent involved in the celebration of a Buddhist marriage, though not in the way the West understands it. It is there, nonetheless.

The canonical prohibition is directed towards a second religious celebration of the same marriage for the purpose of expressing or renewing matrimonial consent, and not towards a second full ceremony which could be civil.¹⁴² Since the marriage ceremony of the Buddhists clearly is not a religious ceremony, there should be no problem from that angle. Since it is not, the renewal of matrimonial consent does not fall within the canonical prohibition. Thus, the Buddhist marriage being only a civil rite, poses no canonical problem as to a second celebration in a mixed Catholic-Buddhist union.

141. R. B. Barua, op. cit., p. 248.

142. Canon 1127, par. 3.

CONCLUSION

We have examined but three of the marriage celebrations of the different religions that flourish in India. It is not our intent to bypass Jainism, Sikhism and Zoroastrianism which are treated with equal respect in India. But experience shows that, firstly, Catholic-Jain, Catholic-Sikh or Catholic-Zoroastrian marriage are rather rare in comparison with Catholic-Hindu marriages; secondly, in the event of such mixed marriages, there is hardly ever a demand for a dual celebration.

In revision, it must be observed that a Catholic-Buddhist marriage would pose no canonical problem. The reasons are, as we have demonstrated:

- (a) the Buddhist wedding ceremony is not a religious one;
- (b) there is no exchange of marital consent during the ceremony.

A Catholic-Moslem marriage in which the Catholic spouse would ask for and be allowed a Catholic wedding, along with the nikah, is unthinkable -- the tenets of Islam itself militate against such an improbability. Thus, the problem of such a marriage would be "solved" only by forcing the Catholic bride to embrace Islam, if the couple were to remain Moslem and in a Moslem region after the marriage. Similarly, in the event the intended bride is and remains a Moslem, there could be problems with a Catholic-Moslem marriage, for "a female Moslem cannot under any circumstances marry a non-Moslem."¹⁴³

143. T. P. Hughes, op. cit., p. 318; cfr. also Marriage in Islam and Roman Catholicism, Commission on Ecumenical & Interreligious Affairs, Archdiocese of Los Angeles and Islamic Center of Southern California, p. 3.

We are now left with the fact of Catholic-Hindu marriages. Since about four-fifths of India's population is Hindu, such alliances are frequent. In fact, their frequency is increasing at a surprising rate.

It would seem that, strictly speaking, a Catholic-Hindu marriage would not come within the canonical prohibition against dual religious ceremony. There is no expression of marital consent within the context of a Hindu wedding ceremony, though the ceremony itself has religious overtones.

But it remains a mixed marriage. We must, therefore, investigate this particular aspect of such unions with a view to finding a solution or compromise, if such is possible. This will be done in the following chapters.

CHAPTER II
THE CANONICAL PROHIBITION AGAINST
THE DUAL RELIGIOUS MARRIAGE CELEBRATION

The 1917 Code carried an express prohibition against a dual religious marriage celebration:

Even though a dispensation from the impediment of mixed religion has been obtained from the Church, the parties may not, either before or after the celebration of the marriage before the Church, apply also, either in person or by proxy, to a non-Catholic minister in his religious capacity, in order to express or renew matrimonial consent.¹

This canonical prohibition has been maintained in Canon 1127, par. 3 (C.I.C. 1983), though its tone, in keeping with the ecumenical climate generated by Vatican II, has been somewhat subdued:

Before or after the canonical celebration held in accord with the norm of par. 1, it is forbidden to have another religious celebration of the same marriage to express or renew matrimonial consent [...]²

1. Canon 1063, par. 1 (C.I.C.1917): "Etsi ab Ecclesia obtenta sit dispensatio super impedimento mixtae religionis, coniuges nequeunt, vel ante vel post matrimonium coram Ecclesia initum, adire quoque, sive per se sive per procuratorem, ministrum acatholicum uti sacris addictum, ad matrimonialem consensum praestandum vel renovandum."

2. Canon 1127, par. 3 (C.I.C. 1983): "Vetatur, ne ante vel post canonicam celebrationem ad normam #1, alia habeatur eiusdem matrimonii celebratio religiosa ad matrimonialem consensum praestandum vel renovandum [...]"

Since the impediment of mixed religion has been dropped in the 1983 Code, there is no mention in Canon 1127, par. 3, of a dispensation.³

The task before us is to attempt to discover the reasons for this canonical prohibition. The process of its development has been a rather long and complicated one. To do so, it will first be necessary to review certain aspects of the Church's legislation on mixed marriages as expressed in the writings of the Fathers and the decrees of the early Councils. From there, we shall proceed to examine the development of the practice of prohibiting a dual religious marriage ceremony. Finally, we shall review a number of particular responses and instructions that led to the formulation of Canon 1127, par. 3 (C.I.C. 1983). This will enable us to understand the reasons for these prescriptions.

A. PRE-CONCILIAR MIXED MARRIAGE LEGISLATION

1. The Mind of the Catholic Church

From its early days, the Catholic Church looked unfavourably on marriages with pagans: this attitude finds its source in contemporary Jewish legislation. Like today, the early Church maintained that mixed marriage posed a proximate danger to the faith of the Catholic spouse; it constantly repeated the warnings of Scripture.⁴

3. P. Huizing, "De matrimoniis", Comm., 9(1977), p. 134: "Impedimentum mixtae religionis in novo Codice melius praesentaretur, non formaliter qua impedimentum, sed simpliciter ut prohibitio ne matrimonium celebretur [..;]"

4. Exodus, 34, 16; Deuteronomy 7, 1-4; Joshua 23, 12-13; I Cor. 7, 39; II Cor. 6, 14-16; cfr. also E. Schillebeeckx, Marriage: Human Reality and Saving Mystery, pp. 94-101; 170-171.

For the Church, heresy or apostasy, apart from the hatred of God, was considered the most serious of sins.⁵ While other sins deprived the soul of the life of grace,⁶ faith, which is the root of life, still remained.⁷ "The upright person finds life through faith."⁸ But, in cases of heresy or apostasy, even the faith itself was denied partially or totally.

It must be noted that, in mixed marriage situations, the partners do not share the Catholic Faith. While, in a formal sense, we are not dealing with heretics or apostates, the danger is nonetheless real that in a mixed union a Catholic might leave the faith to espouse the beliefs of his partner.

2. Ecclesiastical Writers

The early Fathers were especially concerned with the problem of mixed marriage. Tertullian, writing in the second century (circa 200), regarded mixed marriage as an affront to the Christian community.⁹ Saint Cyprian, bishop of Carthage from 249-258, characterized marriage between Christians and unbelievers as a sign of moral decadence.¹⁰ Saint Ambrose (339-397) though not as harsh as Cyprian, looked upon mixed marriages uncompromisingly as a

5. St. Thomas Aquinas, *Summa Theologica*, IIa-IIae, q. 10, art. 3; J. Van Malderen, *De virtutibus theologicis et iustitia et religione commentaria ad Secundam Secundae D. Thomae*, q. 10. art. 3, p. 133.

6. H. J. Schroeder, *Canons and Decrees of the Council of Trent*, Sess. VI, Canon 27, p. 45.

7. *Ibid.*, Sess. VI, Canon 28, p. 45.

8. Romans 1, 17.

9. Tertullian, *Ad uxorem*, Lib. II, Cap. II, in P. L., ed., J.-P. Migne, Pars I, Tom. I, col. 1290: "Igitur cum quaedam istis diebus nuptias suas de Ecclesia tolleret, id est, gentili coniungeretur, idque ab aliis retro factum recorderer, miratus aut ipsarum petulentiam, quod nulla scriptura eius facti licentiam profert."

10. St. Cyprian, *De Lapsis*, Cap. 6, in *Corpus Scriptorum Ecclesiasticorum Latinorum*, Vol. III, Pars I, col. 240: "[...] iungere cum infidelibus vinculum matrimonii prostituere gentibus membra Christi."

real danger to the Faith.¹¹ Saint Jerome (354-419) was also forthright in his denunciation of mixed marriages. For him they could be compared with prostitution of the Christian partners who are the "temples of Christ".¹² Saint Augustine of Hippo (354-430) also condemned mixed marriage in strong terms¹³ -- according to him the very faith that binds the Catholic to the Church and to Christ is endangered in a mixed marriage.¹⁴ Furthermore, when

11. St. Ambrose, Ad Virgilium, Epist. XIX, n. 7, in P. L., ed., J.-P. Migne, Vol. 16, col. 984-985: "Sed prope nihil gravius quam copulari alienigenae, ubi et libidinis et discordiae incentiva, et sacrilegii flagitia conflantur. Nam cum ipsum coniugium velamine sacerdotali, et benedictione sanctificari oporteat; quomodo potest coniugium dici, ubi non est fidei concordia? Cum oratio communis esse debeat, quomodo inter dispaes devotione potest esse coniugii communis charitas?"

12. St. Jerome, Adversus Jovinianum, Lib. I, n. 10, in P. L., ed. J.-P. Migne, Vol. 23, col. 223: "[...] At nunc pleraeque contemntes Apostoli iussionem, iunguntur gentilibus, et templa Christi idolis prostituunt; nec intelligunt se corporis eius partem esse, cuius et costae sunt."

13. St. Augustine, De fide et operibus, Lib. I, Cap. XIX, n. 35, in P. L., ed. J.-P. Migne, Vol. 40, col. 220-221: "Sed quoniam malorum christianorum mores, qui fuerunt antea etiam pessimi, habuisse non videntur hoc malum, ut alienas uxores ducerent viri, aut alienis viris feminae nuberent; inde fortasse apud quasdam Ecclesias negligentia ista subrepsit, ut in catechismis Competentium nec quaererentur nec percuterentur haec vitia; atque inde factum est, ut inciperent et defendi: quae tamen in baptizatis rara sunt adhuc, si ea nos negligendo non densa faciamus. Talem quippe in quibusdam negligentiam, in aliis imperitiam, in aliis ignorantiam probabiliter Dominus somni nomine significasse intelligitur, ubi ait: Cum autem dormirent homines, venit inimicus, et superseminavit zizania (Matth. XIII, 25). Hinc autem existimandum est non ea primum apparuisse in moribus quamvis malorum christianorum, quoniam beatus Cyprianus in epistola de Lapsis, cum deplorando et arguendo multa commemoraret, quibus merito dicit indignationem Dei fuisse commotam, ut intolerabili persecutione Ecclesiam suam sineret flagellari, haec ibi omnino non nominat: cum etiam illud non taceat, et ad eosdem mores malos pertinere confirmet, jungere cum infidelibus vinculum matrimonii, nihil aliud esse asserens, quam prostituere Gentilibus membra Christi: quae nostris temporibus jam non putantur esse peccata; quoniam revera in Novo Testamento nihil inde praeceptum est, et ideo aut licere creditum est, aut velut dubium derelictum."

14. St. Augustine, Epist. XXIII, n. 5, in Corpus Scriptorum Ecclesiasticarum Latinorum, Vol. 34, col. 69-70: "[...] nonne ingemiscemus, quod vir et uxor, ut fideliter coniungant corpora sua, iurant sibi plerumque per Christum et ipsius Christi corpus diversa communione dilaniant? Hoc tantum scandalum, tantus diaboli triumphus, tanta pernicietas animarum si per tuam modestiam et dilectionem, quam debemus ei, qui pro nobis suum sanguinem fudit [...]."

there was a departure from the bonded unity, Augustine felt that husband and wife tore asunder the body of Christ by belonging to different communions, even though they vowed to each other in Christ to have their bodies united in one.

These and many similar examples suffice to show that the fact of mixed marriage was a common one and that the thinking on the practice was generally developing in the same line.

3. The Early Councils

In the East, the Council of Laodicaea (343-344), decreed that the members of the Church should not unite their children "indifferently" with heretics in matrimony.¹⁵ The Council in Trullo, which took place in Constantinople in 691 at the instance of Emperor Justinian II (685-711), established in Canon 72 a diriment impediment to the marriage of the Orthodox (i.e. Catholics of the Byzantine rite) with heretics (i.e. heterodox or non-Catholics).¹⁶ The Roman See acknowledged the decrees of this Council after long hesitation and not without restrictive clauses.¹⁷ At the Council of Troyes (878), Pope John VIII (872-882), when approving the canons of the Council in Trullo, declared:

15. Commissio ad redigendum codicem iuris canonici orientalis, Codificazione canonica orientale, Fonti, fascicolo IX, pp. 134-135: "Quod non oporteat indifferenter ecclesiasticos ad foedera nubtiarum hereticis suos filios filiasque coniungere."

16. I. D. Mansi, ed., Sacrorum concilium nova et amplissima collectio, Vol. 11, col. 975, Canon 72: "Non licere virum orthodoxum cum muliere haeretica coniungi, neque vero orthodoxam cum viro haeretico copulari; sed et si quid eiusmodi ab ullo ex omnibus factum apparuerit, irritas nuptias existimare, et nefarium coniugium dissolvi; neque enim ea quae non sunt miscenda misceri, nec ovem cum lupo nec peccatorem partem cum Christi parte coniungi oportet. Si quis autem ea quae nobis decreta sunt transgressus fuerit, segregetur. [...]"

17. cfr. Apostolic Signatura, decision of July 1, 1972, in Canon Law Digest, Vol. 8, p. 3.

Therefore, although the main See admits in this synod the regulations which the Greeks use as issued by the sixth synod, yet those regulations which are opposed to the previous canons or decrees of the holy pontiffs of this See, or certainly, to good morals, are in no way accepted.¹⁸

Canon 72 was eventually, then, received into the body of the law and obtained the force of law for the entire Byzantine Church.¹⁹

In the Latin Church, the earliest council to deal with mixed marriages was held at Elvira, Spain, in 305. A large and influential Jewish population occasioned a problem of inter-marriage. As a preventive measure, the council declared that if the male non-Catholic partner -- Jew or heretic -- would not convert to the Catholic Faith, a Catholic girl must not be given to him in marriage.²⁰ It would today seem reasonable to think that the converse would also apply, that is, a Catholic boy must not be given in marriage to a non-Catholic woman who refused to embrace the Catholic Faith, but the problem was not posed in these terms.

In its eleventh canon, the Council of Arles (314) decreed that Christian girls who had married pagans, were to be denied Holy Communion for a period of

18. I. D. Mansi, op. cit., Vol. 12, col. 982: "[...] Ergo regulas, quas Graeci a sexta synodo perhibent editas, ita in hac synodo principalis sedes admittit, ut nullatenus ex his illae recipiantur, quae prioribus canonibus vel decretis sanctorum sedis huius pontificum, aut certe bonis moribus inveniuntur adversae [...]"

19. cfr. Apostolic Signatura, loc. cit., p. 5.

20. I. D. Mansi, op. cit., Vol. 3, Col. 7, Canon 16: "Haeretici si se transferre noluerint ad ecclesiam catholicam, nec ipsis catholicas dandas esse puellas: sed neque Judaeis, neque haeticis, dare placuit; eo quo nulla possit esse societas fidei cum infidei. Si contra interdictum fecerint parentes, abstineri per quinquenium placet."

time.²¹ It seems that because of the prevailing cultural conditions, the penalty was not applied to males. Canon 11 of the Council of Arles seems to be closely allied with Canon 16 of the Council of Elvira. What is new is the addition for the first time of a specific ecclesiastical penalty.

This legislation, in condemning the marriage of Christians with Jews, initiated a policy that in the course of time seems to have assumed the force of an invalidating impediment.

By the end of the fourth century, then, marriages with non-Catholics were forbidden without any distinction made between mixed religion and disparity of worship, and no common provision of dispensation seemed available.

Surprisingly, the last ecumenical council before Vatican II to legislate directly on the marriages of the faithful with those outside the Catholic Church,²² was the fourth ecumenical council held at Chalcedon from October 8 to October 31, 451, under Pope Leo I (440-461).²³

21. I. D. Mansi, *op. cit.*, Vol. 2, Col. 472, Canon 11: "De puellis fidelibus quae gentilibus iunguntur, placuit ut aliquanto tempore a communione separentur."

22. H. J. Schroeder, *Disciplinary Decrees of the General Councils; Text, Translation, and Commentary*, Canon 14, p. 105: "Since in some provinces it has been granted to readers and cantors to marry, the holy council has decided that it is not permitted to any of them to marry an heretical woman; those, however, who already have children from such unions, must, if they already had them baptized among heretics, bring them into the communion of the Catholic Church. If they are not yet baptized, they must not permit them to be baptized among the heretics, nor must they give them in marriage to a heretic, a Jew or a pagan, unless the person to be thus united to the orthodox party promises to adopt the orthodox faith. If anyone transgresses this ordinance of the holy council he shall be subject to canonical penalties."

23. P. T. Camelot, "Council of Chalcedon", in *New Catholic Encyclopedia*, Vol. 3, p. 423.

The Council of Chalcedon forbade clerics, who in particular churches were allowed to enter marriage, to marry women who had severed their relations with the Christian Faith. Where inter-faith marriages had already taken place, the children who were baptized in a non-Catholic sect were to be returned to the Church, and those not yet baptized could be baptized only in the Church. This also provided that the only exception to the general prohibition against marriage with pagans and Jews, and with those who had defected from the Church, would be when a promise of conversion of the non-Catholic spouse was made. Violation of these restrictions warranted ecclesiastical penalties which were not specified by the Council.

4. The Councils from the Sixth to the Twelfth Century²⁴

The councils of the VI-XII centuries, which we shall review in chronological order, do not particularly refer to the prohibition against marriages of the faithful with pagans and infidels. Rather, because of the diaspora in the Mediterranean countries, the attention of these councils was focussed mainly on marriage between Catholics and Jews.

The nineteenth canon of the Second Council of Orleans (533) represents, it would seem, the clearest evidence of the probable development of the prohibition into a diriment impediment. This canon forbade outright Christian-Jewish marriages, spoke of them as illicitas and asserted that the penalty for a Christian who entered such a union and refused to separate from it, was excommunication.²⁴

24. I. D. Mansi, op. cit., Vol. 8, Col. 838, Canon 19, "Placuit ut nullus Christianus Judaeam, neque Judaeus Christianam in matrimonio ducat uxorem, quia inter hujusmodi personas illicitas nuptias esse censemus. Qui si commoniti a consortio hoc se separare distulerint, a communionis gratia sunt sine dubio submovendi."

Binterim seems to imply that the word illicitas has the force of irritas since the faithful who enter such marriages are excommunicated if they will not separate from their Jewish consorts.²⁵ While the separation may, perhaps, be understood in the sense of a separation from bed and board, the context of the canon seems to favour Binterim's interpretation, the very denial of the ius coniugale. The Second Council of Orleans in 533 appears, therefore, to offer the first instance of a diriment impediment to the marriages of Christians with Jews.

The Council of Auvergne (535) also decreed that Christians were not to marry Jews under penalty of excommunication.²⁶ While the relevant canon does not appear to indicate that such marriage was regarded as invalid, the severity of the penalty and the council's proximity in time and place to the Second Council of Orleans (533), may point out that the invalidity of Christian-Jewish marriages was indeed taken for granted. Though the inference is somewhat hazardous, the argument from silence must not be pressed too far.

The Third Council of Orleans (538), held but five years after the second one, does not repeat the decree of the preceding one to the extent of

25. A. J. Binterim, Die vorzuglichsten denkwurdigkeiten der christkatholischen kirche aus den ersten, mittleren und letzten zeiten, Vol. 6, pp. 441-442.

26. I. D. Mansi, op. cit., Vol. 8, Col. 861, Canon 6 "Si quis Judaicae pravitati jugali societate jungitur, & seu Christiana Judaeo, seu Judaeus Christianae mulieri carnali consortio misceatur, quicumque horum tantum nefas admisisse dignoscitur, a Christianorum coetu atque convivio, & communione ecclesiae, cujus sociatur hostibus, segregetur."

declaring such unions invalid.²⁷ But its silence does not mean a revocation of the discipline already established.

A further indication of an accepted diriment impediment is derived from the thirty-first canon of the Fourth Council of Orleans (541). A Jew, by marrying his Christian female slave, was considered to have emancipated the woman by that act. "Mancipiorum amissione multetur" -- he no longer could hold her as a slave.²⁸ This decree of separation does not derive its force from the fact that the woman was a slave, but from the fact that she was a Christian.

About half a century later, the Third Council of Toledo (589) in its fourteenth canon forbade marriages with those outside the Church, but its main

27. I. D. Mansi, *op. cit.*, Vol. 9, Col. 15, Canon 13: "De mancipiis Christianis, quae in Judaeorum servitio detinentur, si eis quo Christiana religio vetat, a dominis imponitur; aut si eorum, quo de ecclesia excusatos tollent, pro culpa quae remissa est, affligere aut caedere fortasse praesumpserit et ad ecclesiam iterato confugerint, nullatenus a sacerdote reddantur, nisi pretium offeratur et detur, quod mancipia ipsa valere pronuntiaverit iuxta taxatio. Christianis quoque omnibus interdiximus, ne Judaeorum coniugiis misceantur: quod si federint, usque ad sequestrationem, quisquis ille est, communionem pellatur. Item Christianis convivia interdiximus Judaeorum; in quibus si forte fuisse probantur, annuali excommunicationi pro huius modi contumacia subiacebunt."

28. I. D. Mansi, *op. cit.*, Vol. 9, Col. 118, Canon 31: "Hoc etiam de cetero observandum, ut quicumque Judaeus proselytum, qui advena dicitur, Judaeum facere praesumpserit, aut Christianum factum ad Judaicam superstitionem adducere; vel si Judaeus Christianam ancillam suam sibi crediderit sociandam: vel si de parentibus Christianis natum, Judaeum sub promissione fecerit libertatis, mancipiorum amissione multetur. Ille vero qui de Christianis natus Judaeus factus est, si in ritu Judaico permanens habeat libertatem, talis conditio non valebit; quia iniustum est, ut ei libertas maneat, qui de Christianis parentibus veniens Judaicis vult cultibus adhaerere."

focus was again on such unions with Jews.²⁹

In the early seventh century, the situation in England with regard to mixed marriages was much the same as in the Mediterranean countries, with the notable exception that the greatest danger to the Faith arose from the impact of paganism. For, in the fifth century, the Roman province of Britannia had been invaded by Germanic tribes of Angles, Saxons and Jutes who, before long, brought Christianity under the strong influence of their pagan practices. But after years of struggle, this tension began to subside, and, by the seventh and eighth centuries, there was once again a notable adherence to the principles of Christianity throughout England.³⁰

Clear evidence of the practice of Christians regarding marriage in seventh century England is found in a letter from King Eadbald of Kent to the pagan King Edwin of Northumbria in 625. Edwin wished to marry Aethelburh, a Christian and the sister of King Eadbald. Eadbald responded to the request by stating that "it was not lawful for a Christian maiden to be given in marriage to a heathen for fear that the Faith and mysteries of the Heavenly King might be profaned by a union with a king who was an utter stranger to the worship of

29. I. D. Mansi, op. cit., Vol. 9, Col. 996, Canon 14: "Suggestente concilio, id gloriossimus dominus noster canonibus inserendum praecipit, ut Judaeis non liceat Christianas habere uxores vel concubinas, neque mancipia Christiana comparare in usus proprios: sed et si qui filii ex tali coniugio nati sunt, assumendos esse ad baptismum. Nulla officia publica eos opus est agere, per quae eis occasio tribuatur poenam Christianis inferre. Si qui vero Christiani ab eis Judaico ritu sunt maculati, vel etiam circumcisi, non reddito pretio, ad libertatem et religionem redeant Christianam."

30. K. Bihlmeyer, Church History, Vol. I, pp. 235-236.

the true God."³¹

But the marriage was permitted since Edwin "promised that he would put no obstacles of any kind in the way of Christian worship which the maiden practised; on the other hand, he would allow her and all who came with her, men and women, priests or retainers, to follow the Faith and worship of their religion after the Christian manner; nor did he deny the possibility that he might accept the same religion himself if, on examination, it was judged by his wise men to be a holier worship and more worthy of God."³²

Pope Boniface V (619-625) eventually became involved in the matter and exhorted King Edwin by letter to embrace the Faith.³³ This Pope also wrote to Aethelburh, urging her to do all in her power to bring King Edwin to the Christian Faith.³⁴ Though his words do not in any way insinuate the invalidity of the marriage, (the condition for its licit celebration had already been fulfilled), it is significant that the Pope in an individual instance deemed it opportune to write to King Edwin and his queen-to-be concerning their marriage.

31. Bede's Ecclesiastical History of the English People, p: 162:
"[...] non esse licitum Christianam virginem pagano in coniugem dari, ne fides et sacramenta coelestis, regis consortio profanarentur regis qui veri Dei cultus esset prorsus ignarus.[...]"

32. Ibid.: "[...] promisit se nil omnimodis contrarium Christianae fidei, quam virgo colébat, esse facturum; quin potius permissurum ut fidem cultumque suae religionis cum omnibus, qui secum venissent, viris sive feminis, sacerdotibus seu ministris, more Christiano servaret. Neque abnegavit se etiam eandem subiturum esse religionem, si tamen examinata a prudentibus sanctior ac Deo dignior posset inveniri."

33. Ibid., pp. 166-171.

34. Ibid., pp. 172-174.

In 633 AD, the Fourth Council of Toledo added a new element to the discipline enacted in 589. Canon 63 decreed that converted wives of Jewish husbands were to be separated from them unless the men also became Christians. In any event, the children were to follow the faith of their Christian mother.³⁵ Sanchez is of the opinion that the seeming discriminatory reference of the canon to wives is because of the fact of the greater danger of perversion due to the subjection of wives to their husbands.³⁶

The renewed and vigorous condemnations in subsequent councils of Toledo of marital or any other association with Jews, served as a basis for the establishment of a diriment impediment to the marriages of Christians with Jews.³⁷

The First Council of Rome (743) held under Pope Zacharias anathematized a Christian who gave his daughter in marriage to a Jew. The same censure was decreed for a widow who would marry a Jew, unless the Jew would be converted

35. I. D. Mansi, op. cit., Vol. 10, Col. 634, Canon 63: "Judaei qui Christianas mulieres in conjugio habent, admoneantur ab episcopo civitatis ipsius, ut si cum eis permanere cupiunt, Christiani efficiantur. Quod si admoniti noluerint, separentur: quia non potest infidelis in ejus permanere conjugio, quae jam in Christianam translata est fidem. Fili autem qui ex talibus nati existunt, fidem atque conditionem matris sequantur. Similiter & hi qui procreati sunt de infidelibus mulieribus & infidelibus viris, Christianam sequantur religionem, non Judaicam superstitionem."

36. T. Sanchez, De sancto matrimonio sacramento disputationum tomi tres, Lib. VII, Disp. 73, n. 11, p. 241.

37. The Tenth Council of Toledo (656) in I. D. Mansi, op. cit., Vol. 11, Col. 37, Chap. 7; The Twelfth Council of Toledo (681) ibid., Vol. 11, Col. 1035-1036, Chap. 9; The Sixteenth Council of Toledo (693), ibid., Vol. 12, Col. 68-69, Chap. 1; The Seventeenth Council of Toledo (694), ibid., Vol. 12, Col. 101-102, Chap. 8.

and baptized.³⁸

In 785, Pope Hadrian I (772-795) addressed his letter Institutio universalis to the Spanish bishops, lamenting the fact that some Christians in Spain did not think it sinful to mingle with Jews and the unbaptized.³⁹

The Council of Meaux (845) recapitulated the previous disciplinary measures decreed against the Jews. It referred to the sixth canon of the Council of Auvergne, to many of the enactments of the Fourth Council of Toledo and to several decrees of Roman civil law.⁴⁰

In conclusion, therefore, it would seem that the Councils in Spain, France and Italy enacted rigorous laws to deter the faithful from entering marriage with Jews. In France, there is sufficient evidence to postulate the existence of a diriment impediment in the sixth century. In Spain, in the seventh century, such marriages were on the verge of being regarded as invalid. In Italy, the prohibition against Christian-Jewish marriages was given the sanction of an anathema. The discipline of this period is characterized by its severity.

38. I. D. Mansi, op. cit., Vol. 12, Col. 384, Canon 10: "Si quis Christianus filiam suam Judaeo in coniugio copulare praesumpserit, nisi perfecte crediderit Christo, et baptizatus fuerit; vel servum aut ancillam eidem Judaeo Christianus venundare praesumpserit, et si vidua Christiana Judaeum duxerit virum, vel consentientibus ei, anathema sit."

39. Ibid., Col. 813-819; cfr. also Codicis Iuris Canonici Fontes, hereinafter cited as Fontes, Vol. I, n. 24, p. 23.

40. I. D. Mansi, op. cit., Vol. 14, Col. 836-839, Canon 73.

It would appear quite reasonable, therefore, to infer that the impediment of disparity of worship had its origin in an impediment against the marriages of Christians with Jews.⁴¹

5. The Twelfth to the Sixteenth Century

With the advent of the twelfth century, new dangers threatened the Christian Church as the Moors, Saracens and Moslems invaded Europe. The aversion that for many centuries had been confined largely to the marriages of Catholics with Jews now came to embody every marriage that the faithful might contract with those alien to the Faith. In the opinion of most authors of this century, the marriage of a Catholic with any non-Catholic, whether an infidel, Jew or heretic, was invalid, based on a universal custom rather than on any positive written law of the Church.⁴²

In his concordance, Gratian prefaced a passage from St. Ambrose with the dictum:

Therefore, by that authority, they are ordered to be separated, namely unbelievers from believers, blood relatives from blood relatives, or those related by marriage from their similar relatives. All these, if they are united in marriage, must be separated.⁴³

The wording and content of the dictum seem to justify the opinion that Gratian deemed the marriages of the faithful with infidels to be invalid. He offered

41. St. Thomas Aquinas, Summa Theologica, IIIa suppl., q. 59, art. 3, ad 2.

42. F. J. Schenk, The Matrimonial Impediments of Mixed Religion and Disparity of Cult, p. 37.

43. C. 15, C. XXVIII, q. 1: "Illa itaque auctoritate iubentur separari, utpote infideles cum fidelibus, consanguinei cum consanguineis, vel affines cum affipibus. Hi omnes, si sibi invicem copulati fuerint, separandi sunt."

no alternative but separation (iubentur separari . . . separandi sunt).

Replying to Bishop Ugo of Ferrara (1190-1210) as to whether a lapse into heresy constituted a canonical ground for the Catholic's entering another marriage, Pope Innocent III, on May 11, 1199, called attention for the first time to the fundamental difference between marriages of the baptized and those of the unbaptized. He clearly asserted the doctrine that while a marriage of the unbaptized was a matrimonium verum, a marriage of the baptized was in addition a matrimonium ratum, effected through the sacrament of baptism. Because of the sacramental character of baptism, a marriage of the baptized could not be dissolved on the ground of a lapse into heresy.⁴⁴

The response of Pope Innocent III (1198-1216) served as a guide for the great scholastics of the thirteenth century who sought to determine the requirements for the sacrament of matrimony. Since a parity based on the reception of baptism was required for the existence of a matrimonium ratum, it followed that the sacrament of faith became more fundamental than the profession of faith. A marriage between the baptized and the unbaptized represented a disparity that frustrated the realization of a matrimonium ratum. In the teaching of St. Thomas Aquinas,⁴⁵ this notion of disparity of worship served as the ultimate basis for the establishment of a diriment impediment.

44. C. 7, X, de divortis, IV, 19.

45. St. Thomas Aquinas, Summa Theologica, IIIa suppl., q. 59, art. 1, ad 5.

On the other hand, the requirements of a matrimonium ratum were fulfilled in the marriage of two baptized persons even though a disparity of profession of faith existed. This latter disparity was regarded as constituting a prohibitive impediment. Thus, it seems that during the thirteenth century, disparity of worship came to be generally recognized as a diriment impediment, distinct from the prohibitive impediment of mixed religion.

The fact that the Church in the thirteenth century accepted these theological conclusions, seems to be clearly implied in a decree of Pope Innocent IV (1243-1254) concerning the dowry of a woman who had knowingly married a heretic: the dowry was confiscated, yet the existence of a valid marriage was supposed.⁴⁶

With the missionary activity of the Church in the following centuries and the religious revolt of the sixteenth century, the question of some form of dispensation became urgent. What was the relationship of converts to spouses who were still pagans? Could marriages between Christians and pagans be tolerated? As severe as had been its discipline regarding such marriages in the Middle Ages, the Church took cognizance of missionary conditions and granted faculties to the Vicars Apostolic of these regions to dispense from the impediment of disparity of worship. Such marriages, however, were to be contracted according to the norms set down by the Church and the children were to be educated as Catholics. While provision for the security of the faith of the Catholic partner and of the children was strictly enjoined, this was realized more in the form of a general principle of observance than in the form of a definite and specific guarantee. There seems to be no mention at

46. C. 14, de haereticis, V, 2, in VI°.

the time of an exclusive method of observance to assure the fulfillment of the condition.⁴⁷

The first evidence of the Apostolic See's granting a dispensation from the impediment of mixed religion is in the case of sovereigns. In the hope that the conversion of a ruler might bring his people back to the Faith, dispensations were granted under special conditions. These conditions took the form of a treaty with stipulations, exactions, guarantees and signatures required. This arrangement seems to be at the origin of the written guarantees demanded by the Church in later times in all mixed marriages.⁴⁸

6. The Council of Trent

The nineteenth ecumenical council began at Trent on December 13, 1545, and closed on December 4, 1563.⁴⁹ This council enacted the famous decree Tametsi, during its twenty-fourth session, on November 11, 1563.⁵⁰ While the decree itself aimed at thwarting clandestine marriages, it indirectly touched the question of mixed marriages. By demanding that all marriages be celebrated "in the presence of the parish priest or of another priest authorized by the parish priest or by the Ordinary and in the presence of two or three witnesses,"⁵¹ the decree essentially established a form which affected the very validity of marriage. It became effective after thirty days

47. Fontes, Vol. III, n. 749, p. 28; n. 790, p. 70.

48. F. J. Schenk, op. cit., pp. 51-53.

49. H. Jedin, "Council of Trent", in New Catholic Encyclopedia, Vol. 14, p. 271.

50. H. J. Schroeder, op. cit., pp. 183-184.

51. Ibid., p. 184.

in parishes wherein it was promulgated.⁵² The decree was both territorial and personal. Even in a place where it had not been promulgated, all were bound to observe it -- even those who to defraud the law had left a place in which it had been promulgated. This was true whether such parties could purge themselves of malicious intent or not.⁵³

This method of promulgation resulted in confusion, because there were many places where the decree was not promulgated. In determining whether a given region was subject to the form established by the decree, certain rules came to be accepted:

- (a) in Catholic regions where the decree had, without doubt, been promulgated, it bound all the baptized to the stated form of marriage;
- (b) where Catholic and non-Catholics lived in a common territory wherein non-Catholics lacked a clear parochial organization, the same norm held, namely that all the baptized were bound to the form of marriage;
- (c) finally, when the number of Catholics in a given region was clearly insignificant, the decree did not bind unless it could be demonstrated beyond doubt that it had been promulgated in that region.⁵⁴

Mixed marriages continued to increase in number. For lack of observance of the decree Tametsi, many of these unions were invalid. Therefore, on November 4, 1741, Pope Benedict XIV (1740-1758) issued the Declaration, Matrimonia, wherein he determined that all mixed marriages contracted in Holland and in the Federated Provinces of Belgium were no longer subject to

52. J. A. Abbo & J. D. Hannan, The Sacred Canons, Vol. II, p. 335.

53. Ibid.

54. Ibid.

the Tridentine form laid down by the decree Tametsi.⁵⁵ This Benedictine Declaration was subsequently extended to other areas.⁵⁶ It was extended to the regions of Canada by Pope Clement XIII (1758-1769) on November 29, 1764.⁵⁷

The Holy See then began to fashion a universal discipline for mixed marriages. On July 13, 1782, Pope Pius VI (1775-1799) sent a rescript to Cardinal John Henry von Frankenberg (+1804), Archbishop of Malines. In this document, the Pope granted permission to Catholic parish priests in Belgium to assist at mixed marriages as the new civil law required. He stipulated that the parish priests must obtain written guarantees to the effect that the faith of the Catholic spouse would not be endangered and that the children would be baptized and raised as Catholics.⁵⁸ Later regulations for mixed marriages prescribed a grave cause for dispensation and omission of liturgical rites.⁵⁹

In the light of these circumstances and developments, we can now examine more particularly the instructions and responses of the Holy See which established a pattern that eventually evolved into legislation regarding the possible dual religious celebration of matrimonial consent.

55. Fontes, Vol. V. n. 3527, pp. 967-970.

56. J. A. Abbo & J. D. Hannan; op. cit., p. 335.

57. H. Tetu & C.-O. Gagnon, Mandements, lettres pastorales et circulaires des évêques de Québec, Vol. 3, p. 360.

58. Fontes, Vol. II, n. 471, p. 655.

59. Fontes, Vol. IV, n. 1013, pp. 317-319; n. 1039, p. 355; n. 1262, pp. 538-539 are some instances.

B. THE PRESCRIPTION AGAINST THE DUAL RELIGIOUS MARRIAGE CELEBRATION

The problem of the dual religious marriage celebration first appeared after the promulgation of the decree Tametsi. This was due not so much to the rapid spread of Protestantism after the Reformation in various countries of Europe, as to the law of the canonical form prescribed by the decree Tametsi.⁶⁰ Because of the admixture of religious convictions in many populations, mixed marriages were less and less infrequent. It was but a logical consequence that many non-Catholic spouses in these marriages requested, if not pressed for, a second wedding ceremony before their own minister. Thus the practice of having a dual marriage ceremony gradually evolved.

Moral theologians had already addressed this problem in the seventeenth century. They were of the opinion that a dual religious marriage celebration would be unlawful because it would somehow involve profession of the non-Catholic faith and a compromise of the Catholic Faith.⁶¹

For instance, Archdekin posed the following question:

Is matrimony contracted licitly before a heretical minister, after it was legitimately contracted before a priest?⁶²

60. H. J. Schroeder, op. cit., p. 184.

61. R. Archdekin, Theologia tripartita universa, Tom. II, Pars II, Trac. IV, Cap. VIII, De Sacramentis, Art. II, n. VII, p. 287; C. Lacroix, Theologia moralis, Tom IV, Lib. VI, Pars III, De Matrimonio, n. 775, p. 191; A. Piette, Elucidationis difficiliorum, theologiae quaestionum, Vol. VI, p. 441; cfr. also F. M. Cappello, Tractatus canonico-moralis de sacramentis, Vol. III, Pars I, De Matrimonio, n. 317, pp. 403-404; P. Gasparri, Tractatus canonico de matrimonio, Vol. I, n. 466.4^o, pp. 310-312.

62. R. Archdekin, op. cit., p. 287: "Quaestio est, an Matrimonium licite contrahatur coram Ministro haeretico, postquam legitime contractum fuit coram Sacerdote?"

Quoting Lessius, he gave the answer:

In Auctario Cas. 24, Lessius replies in the negative in this case, because it appears to be some kind of profession of Religion, or of a heretical rite, in so far as the Minister in this act uses the semblance of a sacred person.⁶³

Lacroix also based his thinking on the opinion of Lessius. He maintained that only if the minister intervened because of some political or civil reason, would it be lawful for the Catholic spouse to go through the second ceremony.⁶⁴

The first recorded case of recourse to the Holy See on the subject of the dual religious marriage celebration appears to have emanated from post-Reformation Ireland. The Holy See was told that in many places in Ireland, because of a prevailing custom and in order to avoid grave harm, Catholics who were married before their parish priest and Catholic witnesses, were now wont to go before a non-Catholic minister to repeat their consent. This custom could not be broken by the clergy. It was then asked whether these Catholics committed sin, and if so what one, and how should the local Ordinary conduct

63. Ibid.: "Respondet ad hunc casum negative Lessius in Auctar. Cas. 24 quia apparet esse professio quaedam Religionis, aut ritus haeretici, eo quod Minister videatur in hoc actu instar sacrae personae adhiberi.[...]"
Since the work of Lessius referred to by Archdekin is not available to us, we have to rely on the latter.

64. C. Lacroix, op. cit., p. 191.

himself in the matter.⁶⁵ The practice arose because many Catholic priests were not authorized under the British laws to function as marriage commissioners.

The Holy Office, in its reply of November 29, 1672, declared that in so far as the minister officiated at the marriages of Catholics as a political officer, the Catholics would not sin; if, however, he acted in his religious capacity, it was not lawful and the Catholic partners committed mortal sin; they had to be warned accordingly.⁶⁶

Pope Benedict XIV (1740-1758) supported the views of authors such as Archdekin, Lacroix, Lessius, Piette, and Verjuys. According to them, if the non-Catholic minister, be he Protestant or heretic, officiated in his religious capacity, it was unlawful for Catholics to go through a second wedding ceremony. If, on the other hand, the non-Catholic minister's role was merely civil or political, then Catholics could participate in the second wedding ceremony. Besides lending his support to these authors, Pope Benedict XIV also alluded to the reply of the Holy Office of November 29, 1672 to the bishops of Ireland.⁶⁷

65. Fontes, Vol. IV, n. 751, p. 29, n. 3: "Catholici qui matrimonio iuncti sunt coram parocho ac testibus catholicis, in pluribus locis (ita invaluit consuetudo) solent coram ministro haeretico seu protestante rursus coniungi ad evitanda gravia damna, neque potest consuetudo haec a clero corrigi. Peccantne, et quo peccato catholici sic denuo coniuncti coram ministro haeretico, et quomodo se gerere debeat ergo illos Ordinarius loci?"

66. Ibid., Ad. 3: "Quaetenus minister assistat matrimoniis catholicorum uti minister politicus, non peccare contrahentes; si vero assistat uti minister addictus sacris, non licere, et tunc contrahentes peccare mortaliter et esse monendos."

67. Benedict XIV, De synodo diocesana, Lib. VI, Cap. VII, n. 2, p. 165.

On February 2, 1744, the same Pope issued a decree, Inter omnigenas, to correct the many disciplinary irregularities found among the inhabitants of Serbia, a former Balkan kingdom, and in the neighbouring regions. In no way did Benedict XIV allow a Moslem wedding ceremony after the Catholic celebration of marriage, even when the bride was a Moslem woman taken captive by her Catholic husband. This second ceremony could not licitly take place even to please the Turks and not even by proxy. But if the Moslem wedding was to be a merely civil affair, without the invocation of the name of Mohammed, or any other superstition, then there would be no problem.⁶⁸

Wernz tells us that it was the practice of the Holy Office to add the following clause to rescripts of dispensations from the impediment of mixed religion:

Provided that neither before nor after the marriage entered into before the Catholic parish priest, the couple go before a non-Catholic minister.⁶⁹

68. Benedict XIV, Bullarium, Tom. I, p. 304, n. 10: "Matrimonio autem a Fidelibus rite contracto, eisdem minime permittimus, ne quidem ob causam Uxorum a Turcarum raptu servandarum, idem coram Caddi per Procuratores Turcico Ritu renovare; nisi tamen Mahumetanus nuptiarum ritus fit mere civilis, et nullam Mahumetis invocationem, aut aliud quodcumque superstitionis genus includat. Etsi enim non per se ipsos, sed per Procuratores id peragant; nunquam tamen illius delicti insontes haberi debent, quod ipsorum auctoritate, vel mandato committitur."

69. F. X. Wernz, Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium, Tom. IV, Pars II, n. 588, p. 448: "Denique Sedes Apostolica (S. C. Inq.) rescriptis dispensationum super matrimoniis mixtis solet apponere clausulam: 'Dummodo neque ante neque post matrimonium coram parochio catholico initum partes adeant ministrum acatholicum'."

The Holy Office adopted this practice in 1865,⁷⁰ after giving directives to the Bishop of Osnabrück.⁷¹ These directives will be studied later. The prescription against the dual religious marriage celebration which came into force in 1865 was canonized in the 1917 Code.

C. THE ECCLESIASTICAL PENALTY FOR INFRACTIONS OF THE LAW

Pope Benedict XIV wrote abundantly on mixed marriage, touching upon the abuses that followed in the aftermath of the Protestant Reformation. In warning Catholics against the celebration of their marriage before a non-Catholic minister acting in his role of religious minister, this Pope described the action of these Catholics as a profession of heresy and apostasy, because they recognized the non-Catholic minister as a lawful minister of Christ.⁷² But there seems to be no threat of a censure on the guilty partners.

However, in a reply of the Holy Office, March 2, 1842, we do find an explicit mention of a censure which awaits those Catholics who defy the law and venture to go before a non-Catholic religious minister either for renewal

70. Ibid.

71. Fontes, Vol. IV, n. 976, pp. 248-249.

72. Benedict XIV, De synodo diocesana, Lib. VI, Cap. VII, n. 2, p. 165: "[...] tunc siquidem viderentur Catholici eum agnoscere tamquam legitimum Christi Ministrum, ritumque haereticum approbare, et profiteri."

or exchange of marital consent.⁷³ What the censure actually was, this reply does not specify. It may be worth noting that this reply emanated from the Holy Office almost a hundred years after the teaching of Pope Benedict XIV.

The reply of the Holy Office to the Bishop of Osnabrück, February 17, 1864, repeats the teaching of Benedict XIV and contains a warning about the censure that could be incurred by Catholics who acted contrary to the teaching of the Church on mixed marriages.⁷⁴

Wernz is of the opinion that Catholics who present themselves, with their non-Catholic partners, before a non-Catholic minister for the renewal or exchange of matrimonial consent during a religious ceremony, qualify to be condemned as apostates and heretics. This is because they recognize in the non-Catholic minister a lawful minister of Christ and share in his religious rites. In expounding this view, he is in line with the teaching of Benedict.

73. S. C. S. Off., Reply, March 2, 1842: "Utrum in contractis matrimoniis (cum haereticis) pastores animarum partem poenitentem, dummodo seclusum sit scandalum tuta conscientia ad sacramentorum receptionem admittere possint? Quoad matrimonia valida, ad sacramenta percipienda posse admitti sine praevia renovatione consensus; sed ab iisdem percipiendis arcendos, donec vera dederint resipiscentiae signa, et promiserint executores totis viribus tam conversionem partis haereticae quam educationem in religione catholica prolis universae natae et forsan nasciturae, et tandem donec obtinuerint absolutionem a censuris incursis una cum poenitentiis salutaribus casu, quo contraxerint coram ministro haeretico. Quoad matrimonia vero invalida, cum sit nullum eorum matrimonium vitio clandestinitatis, non esse admittendos ad receptionem sacramentorum, nisi prius promiserint post impetratam dispensationem super impedimento mixtae religionis se fideliter executores eas omnes condiciones, quae exiguntur in praefata dispensatione, et dein nisi consensum renovaverint coram catholico parrocho, et duobus testibus, et tandem nisi obtinuerint prius absolutionem a censuris una cum poenitentiis salutaribus casu, quo matrimonium attentaverint coram ministro acatholico."

Since the original is not available to us, we rely on P. Gasparri, Tractatus canonicus de matrimonio, Vol. I, n. 471, pp. 315-316.

74. Fontes, Vol. IV, n. 976, pp. 248-249; A.S.S., 5(1869), pp. 287-301.

Wernz proceeds to argue⁷⁵ that since these Catholics are guilty of apostasy and heresy, they come within the purview of par. 1, section 1 of the Apostolic Constitution, Apostolicae Sedis of Pope Pius IX (1846-1878), issued on October 15, 1869,⁷⁶ which provides for a latae sententiae excommunication reserved speciali modo to the Roman Pontiff.⁷⁷

While there was mention of some censure by the Holy Office in earlier documents, this 1864 response would seem to be the first time the censure has been defined by law for the universal Church.

From our study of the Church's legislation on mixed marriages, from the beginnings to the Council of Trent, of the canonical prescription against the dual religious marriage celebration, and of the legislation of the censure, there emerges very clearly one predominant fact: the overriding concern of the Catholic Church to protect the faith of its members. Nothing that could compromise the faith could be allowed.

D. THE SOURCES OF CANON 1063, PAR. 1 (C.I.C. 1917)

The Reformation of the sixteenth century alienated Germany, Denmark, the Baltic and the Scandinavian countries from allegiance to the Catholic Church. Soon the preaching of Zwingli (1484-1531) and Calvin (1509-1564) captivated Switzerland. Calvinism and similar teachings spread rapidly through France,

75. F. X. Wernz, op. cit., Tom. IV, Par II, pp. 449-450.

76. Pii IX Pontificis Maximi Acta, Vol. 5, pp. 55-72.

77. A.S.S., 5(1869), p. 288: "Omnes a christiana fide apostata, et omnes ac singulos hereticos, quocumque nomine censeantur, et cuiuscumque sectae existant, eisque credentes, eorumque receptores fautores, ac generaliter quos libet illorum defensores."

England, Scotland, the Netherlands and even across to Poland and Hungary. Western Christendom separated into two opposing camps -- Catholic and Protestant.

In many regions Catholics now found themselves in a minority, surrounded by those who had broken away from the Church. When the question of marriage came up in their lives, they were faced with a rather delicate and difficult situation. It was then that the authorities of the Catholic Church in particular regions had recourse to the Holy See for some type of relief. The responses that emanated from the Holy See were directed to situations prevailing in a given region at a particular time. They dealt with specific problems that arose in various Church circumscriptions and were not directly intended for the universal Church. Nevertheless, when canon law was first codified, these various responses formed the components of Canon 1063 (C.I.C. 1917), which is the major source of Canon 1127, par. 3 (C.I.C. 1983).

These responses may be generally divided into two groups: papal writings and curial texts. The single papal writing is an Apostolic letter of St. Pius X. The curial pronouncements take the form of letters, instructions and replies from the Congregations of the Holy Office and for the Propagation of the Faith. These Roman documents span the period 1748-1906, a term of 158 years.

(a) Curial Texts1. S. C. S. Off., Reply, November 14, 1748⁷⁸

The Holy Office was asked whether a Catholic, duly married to a non-Catholic before the parish priest, could lawfully go before a non-Catholic minister, at the instance of the non-Catholic, to have the marriage ratified. It was made clear in the query that this second ceremony was in no way to be understood as a belief in the faith of the non-Catholic and that the non-Catholic minister was acting solely as a civil and political officer.

The reply of the Holy Office was in the affirmative. Since an assurance was given in the query that there would be no religious involvement nor any danger to the faith of the Catholic, the second ceremony was allowed as a purely civil affair. This reply is in line with the previous response of the Holy Office, November 29, 1672, to the bishops of Ireland.⁷⁹

2. S. C. S. Off., Reply, (Saxony), January 29, 1817⁸⁰

A further query was placed before the Holy Office: is it lawful for a Catholic to ask for or to receive the nuptial blessing from a non-Catholic minister, when it is the non-Catholic partner who makes this demand on the Catholic partner?

78. Fontes, n. 799, p. 79: "Utrum catholicus coram proprio catholico parochi cum haeretica contrahens licite possit, urgentibus haereticis, matrimonium hoc ratificare coram ministro haeretico, si nulla hinc ritus haeretici professio habeatur aut colligatur, et quidquid minister haereticus in casu peragit, civilis dumtaxat et politica gratulatio sit ac censeatur. R. Affirmative." cfr. also Collectanea S. C. de Prop. Fide, hereinafter cited as Collectanea, Vol. I, n. 367, p. 211.

79. Fontes, n. 751, p. 29, ad 3.

80. Ibid., n. 852, p. 134: "An licitum sit catholico petere vel accipere benedictionem nuptialem a ministro acatholico, licet pars acatholica illud exigat. R. Negative." cfr. also A.S.S. 27(1894-1895), p. 455.

Two points are to be kept in mind. First, this was to be merely a nuptial blessing, not a nuptial ceremony either religious or civil. Second, the non-Catholic spouse was asking for this and the Catholic partner accepted the idea.

The reply of the Holy Office was in the negative. In the present climate of ecumenism, it would be harder to accept. But, when placed in its proper context and era, it is understandable. The blessing of the non-Catholic minister could be seen in the wrong light and hence give rise to some form of scandal, or pose a danger to the faith of the Catholic partner. This had to be carefully avoided.

Would the blessing of the non-Catholic minister jeopardize the sanctity of the Catholic wedding ceremony? Would it place the non-Catholic minister and his ministry on par with the Catholic minister and his ministry? These questions were not answered directly, but their response would be rather evident.

It would seem that the Holy Office had no intention of compromising the sanctity of a Catholic marriage ceremony. For Catholics, there was only the one way to be married: according to the Tridentine form where it was in effect.

3. S. C. S. Off., instr., (ad Archiep. Quebecen.), September 16 1824⁸¹

The Archbishop of Quebec, Joseph Octavius Plessis (1806-1825), had sought

81. Ibid., n. 866, pp. 146-152; cfr. also Collectanea, Vol. I, n. 784, pp. 452-456.

clarification from the Holy Office on various matters arising in the diocese. One of the replies of the Holy Office falls within the scope of this study.

An unbaptized woman, married to a non-Catholic man, asked to be baptized. While her husband did not wish to become a Catholic, he raised no objection to her receiving baptism and professing the Catholic Faith. The Catholic missionary was confronted with a situation to which there were three options:

- (1) Were he to baptize this woman, would she go before a non-Catholic minister to regularize her marriage with this man?
- (2) Were he to deny her baptism, would he be pushing her to receive baptism from the husband's minister?
- (3) By baptizing her and officiating at her marriage with this man, would he be creating a case of communicatio in sacris?

In its reply to the Archbishop, which took the form of an instruction, the Holy Office directed the missionary to inform the woman of the invalidity of her present marriage. Since this man was baptized, he was presumed subject to the laws of the Church. In this case, the marriage was impeded by the diriment impediment of disparity of worship which, apparently, was not dispensed. If the woman accepted this situation, the missionary could proceed with her baptism. Should this woman choose after her baptism to remain married to this same man, it was for the bishop to see that the regular norms of the Holy See regarding marriages were observed -- that is, the norms

regarding the manner of celebration and the requirement of guarantees.⁸²

The Holy Office wanted to make it possible for the unbaptized woman to receive baptism and at the same time safeguard her faith. In fact, the Holy Office accommodated, within the parameters of the law then in force, this woman's request for baptism. Then, to forestall any possible perversion of her faith, the missionary was instructed to marry the woman to the same man according to the laws of the Church.

4. S. C. de Propaganda Fide, instr., (ad Ep. Graeco-Rumen.) a. 1858⁸³

Bishops of the oriental regions under Austrian rule approached the Apostolic Nuncio on the question of mixed marriages. He, in turn referred the matter to the Sacred Congregation "De Propaganda Fide".⁸⁴

In its reply, the Congregation for the Propagation of the Faith recalled the directives given by Gregory XVI (1831-1846) -- his Apostolic Letter of April 30, 1841 to the bishops of Hungary⁸⁵ as well as his Instruction of the same date to the primate, archbishops and bishops in the Hungarian Kingdom on

82. Ibid., pp. 150-151: "[...] Atque in primis prae oculis habeat Episcopus, ac, prout fieri potest, servari curet praxim S. Sedis, regulasque ab ea praescribi solitas cum ob graves causas in huiusmodi matrimoniis dispensat, nimirum; ut matrimonium coram parocho et testibus celebretur extra ecclesiam, et omnia nuptiali benedictione, omnique ritu sacro; ut pars catholica gravissime moneatur de obligatione quam habet, quaeque numquam ei cessat, curandi conversionem coniugis et educationem prolis, utriusque sexus in catholica religione; ac demum ut catholica prolis educatio etiam in pactum iuramento firmatum deducatur."

83. Ibid., Vol. VII, pp. 358-372; cfr. also Collectanea, Vol. I, n. 1154, pp. 619-627.

84. The S. C. for Oriental Churches had not yet been established: it was created under Pius IX (1846-1878) by the Apostolic Constitution, Romani Pontifices, January 6, 1862; cfr. Pii IX Pontificis Maximi Acta, Pars I, Vol. III, pp. 402-416.

85. Gregory XVI, Apostolic Letter, Quas vestro, April 30, 1841, in Acta Gregorii Papae XVI, Vol. III, pp. 122-124.

the subject of mixed marriages.⁸⁶ Gregory himself relied on Benedict XIV, whose teaching on mixed marriages has been carefully preserved in his work De synodo diocesana.⁸⁷ Gregory also drew from Litteris altero, March 25, 1830,⁸⁸ an Apostolic Letter of Pius VIII (1829-1830), his immediate predecessor.

The substance of the teachings of these three Popes was summarized by the Congregation for the Propagation of the Faith as follows:

- (1) mixed marriages were not to be encouraged;
- (2) such marriages posed a danger to the faith of the Catholic spouse;
- (3) to avoid a greater evil, the Catholic priest could officiate at a mixed marriage. His role was only to receive matrimonial consent. There was to be no sacred rite, no nuptial blessing and the whole ceremony was to take place outside a church;
- (4) scandal was to be avoided;
- (5) proclamation of banns was to take place but without mention of the religion of the non-Catholic partner;
- (6) the guarantees of the Catholic upbringing of all offspring and the removing of dangers to the faith of the Catholic had to precede the dispensation from the impediment of mixed religion;
- (7) there was to be no exchange of marital consent before the marriage nor renewal thereof after the canonical wedding before a non-Catholic minister who played a religious role.

86. Gregory XVI, Instruction, De matrimoniis mixtis, April 30, 1941, in op.cit., pp. 125-126.

87. Benedict XIV, De synodo diocesana, in Opera omnia, Tom. XI, Lib. VI, Cap. VI, pp. 160-164.

88. Fontes, Vol. II, n. 482, pp. 733-736.

The bishops and priests were urged to see that these directives were strictly adhered to.

This instruction enshrines the traditional teaching of the Church. A second exchange of marital consent in a ceremony presided over by a non-Catholic religious minister was not authorized.

5. S. C. S. Off., Reply, (Hong Kong), May 7, 1860⁸⁹

The Prefect Apostolic of Hong Kong, Louis Ambrosi (+1867), posed the following query to the Holy Office: a Catholic married a non-Catholic in accordance with the laws of the Catholic Church and before a Catholic priest. This marriage was recognized as valid by civil law. Would it be lawful for the Catholic spouse to present himself along with the non-Catholic spouse before a Protestant minister?

The Holy Office replied in the negative and referred the Prefect Apostolic to its rescript of November 29, 1672, addressed to the bishops of Ireland.⁹⁰

The reply of 1860 also contained a reference to the teachings of Benedict XIV mentioned above.⁹¹

89. Ibid., Vol. IV, n. 959, p. 234: "Se contratto un matrimonio misto alla presenza del ministro cattolico secondo le regole della Chiesa, e considerato valido dalle legge civile, sia lecito alla parte cattolica di presentarsi dopo coll'altra parte all ministro protestante. R. Negative, et detur rescriptum S. O. diei 29 Novembris 1672 et Praefectus Apostolicus consulat Benedictum XIV, De Syn. Dioec., lib. VI, c. 7." cfr. also Collectanea, Vol. IV, n. 1192, p. 653.

90. Ibid., Vol. IV, n. 751, p. 29.

91. Benedict XIV, op. cit., Tom. XI, Lib. VI, Cap. VII, pp. 165-166.

It is worthy of note that in its reply to the Prefect Apostolic of Hong Kong, the Holy Office referred to a rescript which was almost two hundred years old. The continuity of practice is quite evident here. Conscious of its dual duty to safeguard the faith of Catholics and to remove all possible dangers that could bring about a weakening or loss of faith, the Holy Office exercised the same prudence and caution.

6. S. C. S. Off., litt., (ad Vic. Ap. Myssurien.), November 26, 1862⁹²

The letter of November 26, 1862 from the Holy Office dealt with mixed marriages and concomitant problems in reply to questions raised by the Vicar Apostolic of Mysore, Louis Stephen Charbonneau (+1873). This was some ten years before the Indian Christian Marriage Act (No. 15 of 1872) came into force on July 18, 1872⁹³ and therefore there were at the time doubts about the civil validity of the marriages of Christians.

The first part of the letter of the Holy Office concerned the nuptial blessing. According to this letter, the Holy Office would tolerate the imparting of the nuptial blessing in mixed marriages only to avert the greater evil which could flow from its refusal. The possible greater evil was listed under three categories:

- (1) complaints against Catholics and hatred of them and the laws of the Church by non-Catholics;
- (2) fear that the Catholic spouse would go to the non-Catholic minister for his blessing; or worse still, that the Catholic would leave the Church;

92. Fontes, Vol. IV, n. 971, pp. 242-244; cfr. also Collectanea, Vol. I, n. 1232, pp. 680-681.

93. The Indian Christian Marriage Act, 1872 (No. 15 of 1872) with subsequent amendments, Allahabad, Central Law Agency, 1980, 24 p.

- (3) fear that any offspring be brought up as non-Catholics with consequent danger to their salvation.

The Holy Office insisted that it made this ruling not by way of indulgence or concession of any kind, but purely as a tolerance of the lesser evil. Hence the Vicar Apostolic should be cautious in the matter observing all the conditions and prescriptions regarding mixed marriages. Norms laid down by Pius IX (1846-1878) were also invoked. These centred around the guarantees to be necessarily and properly elicited from the non-Catholic spouse, and certain regulations concerning mixed marriages which, for example, required that the union be solemnized outside the church building and without the nuptial blessing.⁹⁴

In order to detect any trickery on the part of a non-Catholic who having abandoned his spouse, would now wish to marry a Catholic, the missionary should publish the banns of marriage without, however, making any mention of the religious conviction of the non-Catholic spouse.

The Vicar Apostolic also wanted to know whether the sacraments could be administered to a Catholic who for certain would go to a non-Catholic minister for his wedding. Here again, the Holy Office distinguished between the roles of the minister. If the Catholic spouse wanted merely to comply with the civil law and the non-Catholic minister acted in a purely civil capacity, then all was well. The Vicar Apostolic's attention was drawn again to the ruling of Benedict XIV.⁹⁵

94. Collectanea, Vol. I, n. 1169, pp. 637-639.

95. Benedict XIV, op. cit., Tom. XI, Lib. VI, Cap. VII, p. 165.

Finally, instructions were issued on the convalidation of irregular marriages. The Holy Office envisaged two types:

- (1) a Catholic married to a non-Catholic, before a minister;
- (2) baptized converts who were already married.

In the first case, the marriage of a Catholic with a non-Catholic before a non-Catholic minister was considered valid, by virtue of the extension of the Benedictine declaration which exempted the marriages of baptized non-Catholics among themselves or with Catholics from the observance of the Tridentine form.⁹⁶ In such cases, the couple were not to renew their marital consent, because their former marriage was considered valid and indissoluble. Nor could the officiating priest pronounce the formula, "I join you in matrimony."

In the second case, however, the nuptial blessing could be imparted to the couple in a mixed marriage, when the Catholic spouse repented of any wrong action in marrying irregularly. Before the blessing, the censure had to be lifted and a salutary penance imposed. However, the nuptial blessing was to be given outside the celebration of Mass. Nevertheless, if the convert so requested, the nuptial blessing could be given within the Eucharistic celebration. However, the parish priest had to inform the couple concerned that this blessing pertained only to the external solemnity of the marriage rite and did not in any way affect the validity of their marriage.

96. J. A. Abbo & J. D. Hannan, op. cit., p. 335.

It is consent that makes marriage. The nuptial blessing is considered as a supplementary grace. It does not affect the validity of marriage in any way. If the denial of the nuptial blessing in a mixed marriage would result in harm to the Catholic spouse, pastoral prudence would dictate that it be imparted. This would seem to be a slight relaxation of the rigidity of the law.

The distinction between the two roles of the non-Catholic minister could be considered a convenient reality for a Catholic involved in a mixed marriage. Civil law had to be obeyed and so, if the non-Catholic minister was acting merely as a civil officer, then the Catholic could comply with the law. But if the non-Catholic minister were to perform a religious ceremony it would be unlawful for the Catholic to go before him to renew marital consent.

7. S. C. S. Off., Reply, (Helvetiae), January 21, 1863, n. 1⁹⁷

The reply of January 21, 1863 issued by the Holy Office offers pastoral guidelines to the bishops of Switzerland. Also faced with the problem of Catholics contracting marriage before a non-Catholic minister according to the custom of the place, these bishops had recourse to the Holy Office.

97. Fontes, Vol. IV, n. 973, p. 247, n. 1: "Nei luoghi ov'è il costume di contrarre il matrimonio innanzi al ministro eretico, i parrochi istruiscano i cattolici sul grave peccato che commettono nel seguire questo costume, e sulle gravi pene ecclesiastiche che sono perciò comminate, e le infliggano pure all'occorrenza i Vescovi, ove credano che ciò sia espediente; e che nel darsi le dispense si ponga l'espressa condizione che nè dopo il matrimonio i contraenti vadano avanti al ministro eretico." cfr. also Collectanea, Vol. I, n. 1236, pp. 683-684.

The reply, of which only paragraph 1 falls within the scope of this study, deals with what is to be avoided and what is to be observed in dealing with mixed marriages. The Holy Office appears to have departed somewhat from its normal practice of summarizing the substance of the query before stating its reply. But from the response, the problem that caused concern to the bishops of Switzerland can easily be deduced: it was the custom in some places for all marriages to be celebrated before a non-Catholic minister. No hint was given whether this was a requirement of civil law.

To give clear directions to the bishops in their attempts to guide the faithful, the Holy Office issued the following directives to be transmitted in turn by the bishops to the parish priests within their jurisdiction. The parish priests were to:

- (a) admonish the Catholics in the parish about the serious sin they would commit in following the prevailing custom;
- (b) warn their parishioners about the ecclesiastical penalties provided in canon law;
- (c) make it known to their parishioners that the bishop of the diocese could inflict the appropriate penalty, should he deem it expedient;
- (d) inform their parishioners that a dispensation from the impediment of mixed religion is possible on the express condition that the couples concerned will not present themselves before a minister, either before or after the Catholic wedding.

It is significant that the final part of these pastoral directives of the Holy Office to the bishops of Switzerland carry an express prohibition against giving or renewing matrimonial consent before a non-Catholic minister. The conditio sine qua non for a dispensation from the impediment of mixed religion

seems to be the assurance by the couple that they would not violate this law.

8. S. C. S. Off., Reply, (ad Ep. Osnabrugen.), February 17, 1864⁹⁸

The bishop of Osnabrück in the Kingdom of Hanover, Paul Melchers, who governed the diocese until June 22, 1866, sought directives from the Holy Office on two practices that prevailed in his diocese:

- (1) Non-Catholic ministers were also civil magistrates before whom couples had to be married. This was a requirement of civil law both for the legal recognition of the marriage and for the legitimacy of the children.
- (2) Because of the civil law, partners in a mixed marriage also had to comply by presenting themselves before the minister-magistrate, either before or after the Church wedding ceremony.

In answering the bishop of Osnabrück, the Holy Office referred to its rescript of November 14, 1748⁹⁹. As already mentioned, by this rescript the Holy Office permitted a second marriage ceremony when the law of the land called for a civil marriage provided the presiding officer was discharging a purely civil duty. This ruling could be applicable to the situation in Osnabrück.

98. Fontes, Vol. IV, n. 976, pp. 248-249; cfr. also Collectanea, Vol. I, n. 1247, pp. 689-690; A.S.S., 16(1906), ('Propaganda edition'), pp. 207-208.

99. Ibid., Fontes, n. 799, p. 79.

The Holy Office also took note of the fact that this custom was harmful to Catholic marriages; furthermore, it was next to impossible for the clergy to put an end to it.

Reference was made once again to the instruction of Benedict XIV on mixed marriages.¹⁰⁰ The Holy Office urged the bishop to exhort his priests to be vigilant in the matter of mixed marriages and to uphold always the teachings of the Church in this especially difficult matter.

Before convalidating a mixed marriage contracted before a minister without due dispensation, the parish priests were to exact from the guilty persons an act of repentance, impose a salutary penance and lift the censure which was not described in the rescript.

The problem confronting the bishop of Osnabrück was identical to previous ones raised earlier by other bishops. Hence, the reply of the Holy Office was in line with its centuries-old thinking: the faith of the Catholic partner had to be protected and there could be no participation in the religious rites of the non-Catholic spouse.

Consistent with its traditional stand, the Holy Office did not have any objection to a double matrimonial consent, provided it was not exchanged or renewed in the presence of a non-Catholic minister acting as a representative of his church. It was at this point that the Holy Office made it a practice to append the clause, "provided that neither before nor after the marriage entered into before the Catholic parish priest, do the couple go before a non-

100. Benedict XIV, op. cit., Tom. XI, Lib. VI, Cap. VI, pp. 160-164.

Catholic minister."¹⁰¹

9. S. C. de Prop. Fide, Letter (ad Archiep. Westmonsterien.), June 13, 1864¹⁰²

The Archbishop of Westminster, Cardinal Nicholas Wiseman (+1865), contacted the Holy See regarding a situation prevailing in England: Catholic spouses in mixed marriages were being coerced into renewing their marital consent before a minister.

The letter of June 13, 1864, from the Congregation for the Propagation of the Faith in reply, carried the following resolution of the Cardinals Inquisitors-General, passed and adopted at their session of June 8, 1864:

This abuse which is being discussed must be eradicated, especially because of the scandal which arises from it; the faithful are to be suitably taught, as and when the occasion presents itself, about the sin that is committed and of the censures that are incurred by renewing their matrimonial consent before a heretical minister who assumes a sacred role. As for particular cases, let the instruction given on Wednesday, February 17, 1864, to the bishops of the Hanoverian Kingdom, be conveyed to the bishops of England.¹⁰³

101. F. X. Wernz, op. cit., p. 448: "Dummodo neque ante neque post matrimonium coram parocho catholico initum, partes adeant ministrum acatholicum."

102. Fontes, Vol. VII, n. 4861, pp. 399-400; cfr. also Collectanea, Vol. I, n. 1255, pp. 691-692.

103. Ibid., Collectanea, p. 692: "Tollendum esse abusum de quo est sermo, praesertim ob scandalum quod inde oritur; opportune instruendos esse fideles, quando se offert occasio, de peccato quod committitur, et de censuris quae contrahuntur ob renovationem consensus coram ministro haeretico ut sacris addicto. Pro casibus vero particularibus communicetur Episcopis Angliae instructio data sub fer. IV die 17 Februarii huius anni Episcopis Regni Hannoveriani."

Coming as it did just about four months after the reply of the Holy Office to the bishop of Osnabrück, this reply to Cardinal Wiseman would naturally be along the same lines. In fact, the same instruction given to Bishop Melchers of Osnabrück was to be conveyed to Cardinal Wiseman. It is clear that the injunction was directed not so much against a dual matrimonial consent, as against renewal or exchange of marital consent before a non-Catholic minister who assumed a religious role. The censures referred to in this reply were probably the same ones threatened by the Holy Office in 1842.¹⁰⁴

Since the wording of the resolution of June 8, 1864 speaks of "bishops of the Hanoverian Kingdom" and "bishops of England" (episcopis regni Hannoveriani and episcopis Angliae), it may be surmised that the problem of the dual religious marriage celebration was not confined to the individual dioceses of Osnabrück and Westminster, but was rather widespread.

10. S. C. S. Off., Reply, January 17, 1872, ad II¹⁰⁵

As mentioned above, it became the practice of the Holy Office in 1865 to add the clause "provided that neither before nor after the marriage entered into before the Catholic parish priest, do the couple go before a non-Catholic minister" to its rescripts of dispensations in cases of mixed marriages.¹⁰⁶

This clause raised one of the two doubts we are about to consider:

104. P. Gasparri, op. cit., pp. 315-316.

105. Fontes, Vol. IV, n. 1020, pp. 325-326; cfr. also Collectanea, Vol. I, n. 1255, pp. 691-692.

106. F. X. Wernz, op. cit., p. 448.

- (1) Whether the clause "however, always without the celebration of Mass"¹⁰⁷ applies only to the nuptial Mass or to any other Mass;
- (2) With regard to the clause "provided that neither before or after the marriage entered into before the Catholic parish priest, do the couple go before a non-Catholic minister,"¹⁰⁸ it is asked:
- (a) whether a bishop, before granting a dispensation, must inquire into the dispositions of the spouses and warn them about the prohibition of going before a non-Catholic minister; or whether the bishop may refrain from any inquiry;
- (b) whether a bishop who knows or suspects that the spouses probably intend going before a non-Catholic minister, is bound to exact a withdrawal of this proposal by the spouse, under pain of refusal of the dispensation.

It is this second doubt, formulated in two separate queries, and the reply thereto, that come within the scope of this study.

In reply to the first part of that doubt, the Holy Office stated that, generally speaking, the warning must be given. The instructions issued to the bishop of Osnabrück in 1864 were to be the guidelines.¹⁰⁹

107. Fontes, Vol. IV, n. 1020, p. 325: "exclusa tamen semper Missae celebratione."

108. Ibid.: "dummodo sponsi neque ante neque post matrimonium initum coram parochio catholico, ministrum adeant acatholicum."

109. Ibid., p. 326: "Ad 1. generatim loquendo monitionem esse faciendam, et detur Instructio anni 1864 pro R. P. D. Episcopo Osnabrucensi."

To the second query, the answer of the Holy Office was terse: refer to the first reply.¹¹⁰

It seems that the ruling of February 17, 1864 was becoming the standard norm.

11. S. C. S. Off., Reply, March 17, 1874¹¹¹

On April 4, 1871, a doubt had been presented before the Holy Office in the following fashion:

Is the present practice of including in the rescripts of dispensations the absolution of censures incurred by those marrying before a civil magistrate or a Protestant minister, considered regular?¹¹²

The Holy Office resolved this doubt thus:

The absolution of the censures is to be omitted.¹¹³

However, shortly afterwards, the Apostolic Penitentiary was asked by Pope Pius IX (1846-1878) in December 1873 to re-examine this issue. This time the doubt was formulated in the following words:

110. Ibid.: "Ad 2. Provisum in 1."

111. Ibid., Vol. IV, n. 1029, pp. 339-340; cfr. also Collectanea, Vol. II, n. 1412, p. 340.

112. Ibid., p. 340: "Se sia regolare le prassi tenuta sin qui nei rescritti di dispensa nei casi in cui siasi contratto il matrimonio avanti il magistrato civile o il ministro protestante, di assolvere le parti contraenti dalle censure incorse."

113. Ibid.: "Ommittendam esse absolutionem a censuris."

Should the absolution from censures be omitted or retained in the rescript granting the dispensation from the impediment of mixed religion, in cases of marriage already celebrated before a heretical or schismatical minister acting as a sacred minister?¹¹⁴

After due consideration, the Apostolic Penitentiary decided to retain the absolution of censure in the rescript of dispensation. It also resolved that when the faculty to dispense from the impediment was conceded to bishops, the following clause was to be added:

The absolution from censures must always precede, and salutary penances be imposed, if the marriage were contracted before a heretical minister.¹¹⁵

Since the absolution of censures formed the subject of discussions in the Holy Office and later in the Apostolic Penitentiary after the promulgation of the Apostolic Constitution Apostolicae Sedis by Pius IX on October 15, 1869,¹¹⁶ it would appear to be reasonable to suspect that the censures are those foreseen in this document. These were latae sententiae excommunications specially reserved to the Roman Pontiff.¹¹⁷

114. Ibid., pp. 339-340: "[...] nei rescritti per dispensa dall'impedimento di mista religione dovesse omettersi o conservarsi nella formola l'assoluzione dalle censure quando trattasi di matrimonio contratto già innanzi al ministro eretico o scismatico uti sacris addicto [...]."

115. Ibid.: "[...] praevia semper absolutione a censuris, et impositis poenitentis salutaribus, si matrimonium contractum fuerit coram ministro haeretico [...]."

116. A.S.S., 5(1869), pp. 287-301.

117. Ibid., p. 288: "Itaque excommunicationi latae sententiae speciali modo Romano Pontifici reservatae subiacere declaramus: 'Ommes a christiana fide haereticos, quoque nomine censeantur, et cuiuscumque sectae existant, eisque credentes, earumque receptores, fautores, ac generaliter quoslibet illorum defensores.'"; ibid., p. 289: "Schismaticos et eos qui a Romani Pontificis pro tempore existentis obedientia pertinaciter se subtrahunt, vel recedunt."

Event¹¹⁸, the latae sententiae censure of excommunication specially reserved to the Roman Pontiff was reduced to a latae sententiae censure of excommunication reserved to the Ordinary. That was the position in the 1917 Code.¹¹⁸

Pope Pius XII (1939-1958) introduced an amendment to the law according to which any attempted marriage by a Catholic before a non-Catholic minister was subject to the excommunication.¹¹⁹

As a gesture of good will in the name of ecumenism, the Congregation for the Doctrine of the Faith abrogated the excommunication with retroactive effect on May 19, 1966.¹²⁰

12. S. C. S. Off., instr., (ad omnes Ep. Ritus Orient.), December 12, 1888¹²¹
nos. 7 & 8

Mixed marriages between Catholics and baptized non-Catholics were found not only in the Latin Church, but also in the Eastern Churches. Accordingly, the Holy See deemed it opportune to issue appropriate instructions to all bishops of the Oriental rites.

118. Canon 2319, par. 1: "Subsunt excommunicationi latae sententiae Ordinario reservatae catholici: 1°. Qui matrimonium ineunt coram ministro acatholico contra praescriptum can. 1063 #1."

119. A.A.S., 46(1954), p. 88.

120. A.A.S., 58(1966), p. 238.

121. Fontes, Vol. IV, n. 1112, pp. 440-444; cfr. also A.S.S., 22(1889-1890), pp. 636-640; Collectanea, Vol. II, n. 1696, pp. 232-234.

The instruction of December 12, 1888 contains twelve paragraphs. It opens with the Pauline teaching that the marriage of Christians expresses the union of Christ and the Church. From this the deduction is made that the marriage bond for Christians is holy. Since faith is the root and foundation of all sanctity, it is desirable, when possible, that both spouses profess the same faith. That is why mixed religion was added to the list of impediments.¹²²

Paragraphs 7 and 8 are relevant to our case. Paragraph 7 repeats the prohibition against Catholics exchanging or renewing marital consent before a heretical or schismatical minister acting in a religious capacity. There would be no problem had this minister been performing a purely civil role.¹²³

Paragraph 8 outlines guidelines for priests having care of souls, dealing with situations involving mixed marriages. If asked by the contractants, or if they know for sure that the intending spouse planned to exchange matrimonial consent before a minister, the priests cannot keep silent but have

122. Ibid., p. 441: "[...] Cum autem fides sit omnis sanctitatis radix atque fundamentum, pariter nemo non videt, coniuges ut mutua sese unione sanctificent, sicut in reliquis, ita et potissimum fide cohaerere debere. Mirum proinde non est, si inter cetera quae matrimonium impediunt, etiam illud accensetur quod mixtae communionis impedimentum proprio nomine appellatur."

123. Ibid., p. 442: "Illicitum porro ac sacrilegum est se sistere coram haeretico seu schismatico ministro ante vel post contractas mixtas nuptias, quoties ipse ut minister sacris addictus adsistat, et quasi parochi munere fungens; nam pars catholica ritui haeretico aut schismatico se consociaret, ex quo vetita omnibus haberetur cum haeticis in eorum sacris communicatio. Quare ita contrahentes mortaliter peccarent, ac monendi sunt. Si vero, ut in nonnullis locis evenit, haereticus seu schismaticus personam agat magistratus mere civilis, et quidquid ipse praestat, civilis dumtaxat et politicus actus sit, ac civiles effectus respiciat, et nulla prorsus acatholici ritus professio habeatur, aut inde colligi possit, non improbatur quod pars catholica, urgentibus schismaticis seu haeticis, aut civili lege imperante, eundem ante vel post initum matrimonium adeat."

to warn the couple of the serious sin they would be committing.¹²⁴ If, on the other hand, couples do not ask the priests about marrying before a minister, or if there is no open declaration from the couple to this effect, but the priest foresees that there will be a mistake made by the couple, then in order to avoid greater harm, he may refrain from intervening, provided there be no scandal and the other conditions of the Church for a mixed marriage (guarantees of freedom of religion for the Catholic partner and the Catholic upbringing of the children) be satisfied.¹²⁵

As for the convalidation of irregular mixed marriages, the Catholic spouse must show signs of penitence and be absolved from the censure; the priest can then regularize the marriage in accordance with the laws of the Church.¹²⁶

124. Ibid.: "[...] sed monere easdem debere sponso de gravissimo peccato quod patrant."

125. Ibid., p. 443: "Sciant insuper animarum pastores, si interrogentur a contrahentibus, vel si certe noverint eos adituros fore ministrum haereticum sacris addictum ad nuptialem consensum praestandum, silere se non posse, sed monere eosdem debere sponso de gravissimo peccato quod patrant. Verumtamen, ad gravia praecavenda mala, si in aliquo peculiari casu sacerdos seu parochus non fuerit interpellatus a sponso, an liceat nec ne adire ministrum haereticum vel schismaticum, et nulla fiat ab iisdem sponso explicita declaratio de eodem adeundo, praevideat tamen eos forsan adituros ad matrimonialem praestandum vel renovandum consensum, atque insuper ex adiunctis in casu concurrentibus praevideat monitionem certo haud esse profuturam, imo nocituram, indeque peccatum materiale in formalem culpam vertendum: tunc sileat, remoto tamen scandalo, et dummodo aliae ab Ecclesia requisitae conditiones atque cautiones rite positae sint, praesertim de libero religionis exercitio parti catholicae concedendo, nec non de universa prole in religione catholica educanda."

126. Ibid.: "Quod si sponsi ad parochum, seu sacerdotem catholicum pro benedicendis nuptiis accedant postquam eas coram ministro haeretico seu schismatico celebraverint, idque publice notum sit, vel ab ipsis sponso notificetur, catholicus sacerdos huic matrimonio non intererit nisi, servatis, uti supponitur, ceteroquin servandis, pars catholica facti poenitens praeviis salutaribus poenitentiis a patrata culpa absolutionem rite prius obtenerit."

Once again, the mind of the Holy Office is quite clear. There can be no compromise either on the sanctity of a Catholic marriage or on the faith of the Catholic spouse. But there is also room for the exercise of pastoral prudence and discretion in the case of those spouses in a mixed marriage who neither intimate to their priest nor expressly declare their intention, but who all the same go before a minister to exchange or renew their marital consent. There is, finally, the possibility of regularizing a mixed marriage which was celebrated "outside the Church". What is required is that the Catholic spouse receive absolution from the censure after repentance and performance of a salutary penance. The priest could then proceed according to the laws of the Church.

13. S. C. S. Off., Reply, December 10, 1902, ad 3¹²⁷

Three queries were placed before the Holy Office, but no specific reference is given to the source of the questions. Queries nos. 1 and 2 asked what was to be done when serious difficulties stood in the way of obtaining the requisite guarantees before celebrating mixed marriages. These queries and their answers are not of immediate interest to us here.

Question no. 3, however, in following from the first two questions, asks about the possibility under certain conditions of having dual celebrations of the same wedding. It was asked this time whether it would be lawful for the Catholic spouse (in a mixed marriage) to go before a non-Catholic minister, either before or after the wedding to exchange or renew matrimonial consent, if the Catholic spouse declared in writing that the gesture was merely passive and that there was no intention whatsoever of adhering to the Protestant rite.

127. Ibid., Vol. IV, n. 1262, pp. 538-539; cfr. also Collectanea, Vol. II, n. 2155, p. 438; A.S.S., 36(1903-1904), pp. 164-165.

The response of the Holy Office was in the negative and the questioner was again directed to the reply of the Holy Office, February 17, 1864.¹²⁸ Pope Leo XIII (1879-1903) gave his approval to this response (December 12, 1902).¹²⁹

It must be observed that the spontaneous declaration in writing of the Catholic spouse that (s)he is playing only a passive part before the non-Catholic minister, without any desire of participating in any way in the Protestant rite, did not constitute a mitigating circumstance for the Holy Office to alter its stand with regard to a celebration of marriage before a non-Catholic minister.

The reason is understandable. Any cause for scandal or even astonishment on the part of non-Catholics is to be eliminated. While, subjectively, the Catholic who gives the undertaking could be at peace with his conscience, his action would always be open to possible misunderstanding, to the detriment of the Catholic cause.

(b) Papal Text

1. Pius X, litt. ap., Provida, January, 18, 1906¹³⁰

Pope Pius X (1903-1914) promulgated his Apostolic Letter, Provida, on January 18, 1906 and ordered that it take effect on Easter Sunday, April 15,

128. Ibid., Vol. IV, n. 976, pp. 248-249.

129. A.S.S., 36(1903-1904), p. 165.

130. Fontes, Vol. III, n. 670, pp. 659-660; cfr. also Pius X, Apostolic Letter, Provida, in Pii X Pontificis Maximi Acta, Vol. III, pp. 9-12; A.S.S., 39(1906), ("Tolentino edition"), pp. 81-84.

1906.¹³¹ This document required specifically the observance throughout Germany of the Tridentine form for regular Catholic marriages.

Mixed marriages between Catholics and those who were alienated from the Church were prohibited, unless there was sufficient and serious canonical reason to merit a dispensation from the impediment of mixed religion and such a dispensation was actually obtained before the marriage.

Even in this Apostolic Letter, the aversion of the Church towards mixed marriages is evident, because of the risk involved for the faith of the Catholic partner.

SUMMARY

At the end of this chapter, we would like to highlight three features which emerged during our study. In the first place, we have observed that the Church was consistent in its attitude of disfavour regarding mixed marriage. The reason behind this was the potential danger to the faith of the Catholic spouse. This same attitude found its way into the 1917 Code.¹³²

It must also be noted that a second marriage celebration was not forbidden, provided it was only a civil celebration to comply with the law of the land. In this respect, the Church manifested some tolerance and flexibility. What, however, was expressly forbidden was a dual religious

131. Fontes, Vol. III, p. 660.

132. Canon 1060: "Severissime Ecclesia ubique prohibet ne matrimonium ineatur inter duas personas baptizatas, quarum alter sit catholica, altera vero sectae haereticæ seu schismaticæ adscripta; quod si adsit perversionis periculum coniugis catholici et prolis, coniugium ipsa etiam lege divina vetatur."

celebration of marriage wherein the second marriage took place before a non-Catholic minister. Here again, the reason is easy to find: any involvement with non-Catholic celebration of marriage which would be a compromise of the faith, or would undermine it in any way, or would take away from the sanctity of Catholic marriage as a sacrament, had to be scrupulously avoided.

Finally, the prohibition of the dual religious marriage ceremony was linked to the aversion of the Catholic Church toward mixed marriage. While the policy was formally established in the seventeenth century, it did not take the form of law until about two centuries later. Eventually this policy, which has been the object of our study in this chapter, was codified in the 1917 Code in Canon 1063, par. 1.

CHAPTER III
CHANGES IN THE LEGISLATION

In his well-publicized address of January 25, 1959,¹ at the Basilica of St. Paul Outside the Walls, Rome, Pope John XXIII stated:

We propose to call a diocesan synod for Rome, and an ecumenical council for the Universal Church. [...] They will lead to the desired and long awaited modernization of the Code of Canon Law [...]²

When asked by an ambassador what he expected from the Council, Pope John XXIII moved towards a window and made a gesture as if to open it and said: "I expect a little fresh air from it [...]"³ In this chapter we shall look for that "fresh air" in mixed marriage legislation as it evolved since the time of Vatican II with particular reference to the norm regarding a dual marriage celebration.

A. RESPONSES OF THE HOLY SEE

While Vatican II was in progress, Church authorities departed, somewhat from the previous practice on the matter of a double religious celebration of the same marriage. Four recently publicized cases indicative of this

1. John XXIII, Solemn Allocution, Questa festiva ricorrenza, in A.A.S., 51(1959), pp. 65-69.

2. Ibid., p. 68: "Pronunciamo [...] il nome e la proposta della duplice celebrazione: di un Sinodo Diocesano per l'Urbe, e di un Concilio Ecumenico per la Chiesa universale. [...] Esse condurranno felicemente all'auspicato e atteso aggiornamento del Codice di Diritto Canonico, [...]"

3. H. Fesquet, Wit and Wisdom of Good Pope John, p. 157.

departure can serve as a basis of our analysis, as well as uniform norms issued on July 13, 1965 and July 25, 1965.

1. Congregation for Oriental Churches, Rescript, October 26, 1964⁴

Basing itself on a decision of the Holy Office, October 22, 1964, which granted the faculty for having both the Catholic rite and the Greek Orthodox rite observed in the celebration of a mixed marriage, the Congregation for the Oriental Churches, even before the enactment of the conciliar decree Orientalium Ecclesiarum, November 21, 1964, and the publication of the instruction Crescens matrimoniorum, February 22, 1967, communicated to Bishop James L. Connolly of Fall River, Massachusetts, U.S.A., a special indult.

The facts of the case are as follows: a Catholic woman was to marry a Greek Orthodox man. Her mother had addressed a petition to the Congregation for the Oriental Churches requesting that the marriage of her daughter might also be celebrated before an Orthodox priest.

The rescript stated that her request had been granted by the Congregation of the Holy Office "provided that the marriage be first celebrated before the Catholic priest, that the promises of the man, prescribed by the Code be secured, and that the danger of scandal be removed." We note three specific conditions in this reply:

- (1) celebration in the Catholic Church first;
- (2) the promises are to be made;
- (3) no scandal.

4. X. Ochoa, Leges Ecclesiae, Vol. 3, n. 3225, col. 4555; S. C. pro Eccl. Or., Rescript, October 26, 1964, in C.L.D., Vol. 6, p. 607.

2. Congregation of the Holy Office, Rescript, February 9, 1965⁵

The next case also came from the diocese of Fall River. The diocesan bishop addressed a further request on December 26, 1964. Referring to the first rescript of October 26, 1964, he noted that the Greek Orthodox man in this case wanted to follow by all means the rules of his church, and further, in no way, wished to offend his parents. Moreover, the young man refused to enter marriage without the blessing of his own Orthodox priest.

The rescript of February 9, 1965, came from the Holy Office and not from the Congregation for the Oriental Churches. The faculty for using both the Catholic rite and the Greek Orthodox rite in the celebration of this mixed marriage was granted this time under two conditions:

- (1) the marriage must first be celebrated in the Catholic form;
- (2) the danger of scandal is to be removed by avoiding external pomp of every kind.

We could note that the concluding words in the second condition were not attached to the previous rescript. The text did not state what would constitute scandal and external pomp; the judgement was left to the good pastoral sense of the priests and sensibilities of the people concerned. Discretion and pastoral prudence should be the guide in such instances.

5. X. Ochoa, *op. cit.*, n. 3257, col. 4629; Holy Office, Rescript, February 9, 1965, in C.L.D., Vol. 6, pp. 607-608.

3. Congregation of the Holy Office, Rescript, July 13, 1965⁶

A few months after these two rescripts were granted, norms regarding mixed marriage ceremonies were issued by the Holy Office on July 13, 1965, and transmitted by the Apostolic Delegate to all the local Ordinaries of the U.S.A. The normative part reads as follows:

1. When all the conditions set down in the sacred canons have been fulfilled, the marriage must be celebrated in the Catholic Church. The Ordinary has the faculty to permit the celebration of Mass also.

2. After the celebration of the marriage, a non-Catholic minister may be called to the home of the couple to impart a blessing there (without any renewal of consent). If it is desired, a prayer may be added petitioning good fortune for the spouses.

3. If, in an extraordinary case, for the avoidance of greater evil, it will be altogether necessary to tolerate having some religious ceremony in a non-Catholic church itself (always with the exclusion of renewal of matrimonial consent), it must be done without pomp; every precaution is to be used to avoid scandal or wonderment on the part of the people. The Ordinary has a serious obligation in conscience and he must keep in mind the danger of spreading religious indifferentism and relativism.

Your Excellency is empowered to act strictly within these limits and always on the supposition that there is a proportionately grave cause and that the danger of scandal and "admiratio" is avoided.

In his letter of July 13th (N. 985/65) the Cardinal secretary further explains that, if there is grave reason for a second (non-Catholic) ceremony, this cannot take place in a Catholic church. It must be clearly stated that the only ceremony is that celebrated in the presence of the Catholic priest.

It must be insisted in every case that, instead of a second ceremony in a non-Catholic church, the part of a non-Catholic minister is limited to the imparting of a blessing and a sermon in the home of the parties immediately after the Catholic rite.

6. Holy Office, Rescript, July 13, 1965, in C.L.D., Vol. 6, pp. 608-609.

For any case that departs from the above directives in any way, the Ordinary must have recourse to the Holy Office.

4. Congregation of the Holy Office, Rescript, July 25, 1965⁸

Between the date of issue of the norms of the Holy Office (July 13, 1965) and their transmission to the bishops of the U.S.A. (July 31, 1965), the same Dicastery sent a private rescript to a bishop in the United States who had sought the faculty to permit a Catholic to go before an Orthodox priest to contract marriage with an Orthodox. The rescript reads as follows:

1. When all the conditions set down in the sacred canons have been fulfilled, the marriage must be celebrated in the Catholic Church. The Ordinary has the faculty also to permit the celebration of Mass and the blessing of the bride within the Mass. Even if other ceremonies follow, it must be expressly declared that the marriage celebrated in the Catholic Church is the only true marriage.

2. If, after the celebration of the marriage, the non-Catholic party absolutely plans to have a non-Catholic rite follow, the parties may summon a non-Catholic minister to their home in order to have him impart a blessing (without any renewal of consent); if desired, he may also add a prayer petitioning good fortune for the spouses.

3. If, however, in an extraordinary case it will be necessary to tolerate having some religious ceremony in a non-Catholic church in order to avoid greater evil, (e.g., marriage before a non-Catholic minister only), the Ordinary should take care that this be done without external pomp; that scandal be removed and that a previous declaration be made that the only true marriage is that which was celebrated in the Catholic Church.

The Ordinary shall take care that the above-mentioned norms be observed in the best way possible.⁹

7. Ibid.

8. Holy Office, Rescript, July 25, 1965, in C.L.D., Vol. 6, p. 609.

9. Ibid.

In essence, the tone of the letter as well as its contents are similar to the norms of July 13, 1965 issued by the Holy Office. However, in paragraph 3 of this rescript, slight differences from paragraph 3 of the norms are to be found. While allowing a second religious ceremony before a non-Catholic minister in an extraordinary case, in order to avert greater evil, the Holy Office held the Ordinary responsible to see that there was no external pomp, that the danger of scandal was remote and that a prior declaration was made to the effect that the only true marriage is that which was celebrated in the Catholic Church. Further, it is interesting to note that this rescript contains no ban on renewal of matrimonial consent, while this was prohibited in the corresponding paragraph 3 of the norms. No direct reasons were given for the diverging policy. However, the concluding paragraphs in both these documents provide us with a clue. While the earlier document makes it mandatory for the Ordinary to have recourse to the Holy Office if there are departures from the directives laid down, the subsequent document of July 25, 1965, merely hopes that the Ordinary shall take care to see that the norms are observed in the best way possible.

5. Congregation for the Doctrine of the Faith, Rescript, June 16, 1966¹⁰

About one year after the promulgation of the Norms regarding mixed marriages and the double marriage ceremony, there arose a case of a proposed marriage between a Catholic man and Greek Orthodox woman in the Diocese of Peoria, Illinois, U.S.A. These persons were validly married at St. Joseph Catholic Church, Waukegan, Illinois.

10. S. C. pro Doct. Fidei, Rescript, June 16, 1966, in C.L.D., Vol. 6, pp. 22-23.

However, the Greek Orthodox priest requested that he be allowed to bless this marriage to enable the Greek Orthodox woman to rectify her marital status in her Church and receive the sacraments.

The discipline of the Greek Orthodox Church generally requires the blessing of the Orthodox priest for the validity of a marriage in which at least one partner is Orthodox. Herein lies the crux of the problem. In any other mixed marriage between a Catholic and a baptized non-Catholic, the non-Catholic may still maintain proper ecclesiastical standing and be admitted to the sacraments in his/her respective church. But with the Orthodox there is a clear conflict between their canonical requirements and those of the Catholic Church.

Paragraph 3 of the norms of July 13, 1965, makes provision for such extraordinary cases. To avoid greater evil, a second form of religious ceremony is permissible, but marital consent must not be renewed.

This mixed marriage is an extraordinary case, because it seems to involve a conflict between the disciplines of the Catholic Church and of the Greek Orthodox Church.

The Apostolic Delegate had recourse to the Holy Office on behalf of this couple who, it would seem, had approached him with the request that the wife be allowed to correct her marital status in the eyes of her Church according to its prevailing discipline. The Apostolic Delegate declared that there need be no real concern about the possibility of scandal, for he was assured there would be none.

There was an exchange of letters between the Apostolic Delegate and the Greek Orthodox priest. The Apostolic Delegate indicated that there was expressed in this correspondence uncertainty as to whether the Catholic spouse, or even both together, must receive the blessing "cum scientia vel opinione nullitatis matrimonii Catholici". In his letter to the Holy Office, the Apostolic Delegate expressed the hope that the Greek Orthodox priest would not force the issue of renewal of consent. He also went on to state that as long as the Catholic spouse was assured his marriage in the Catholic Church was valid and would remain so, and that both his wife and the Greek Orthodox priest respected his conscience in this matter, there would be no theological difficulty. Thus, the Apostolic Delegate recommended that permission to allow the Greek Orthodox priest to bless the marriage and to rectify the marital status of the wife, be granted, in view of the principles enunciated in paragraphs 18, 26, 27, 28, and 29 of Orientalium Ecclesiarum.

In its reply, the Holy Office granted the desired permission on condition that there be no renewal of consent and that every precaution be taken to avoid scandal or wonderment. The required blessing could be given. This reply is in line with the general directives of July 13, 1965 issued to the bishops of the U.S.A.

These various responses of the Holy See are indicative of a number of similar ones that were issued during the same period.¹¹ We could make the following observations on the basis of the analysis of the cases where a double religious marriage ceremony was permitted and of the norms of July 13,

11. Ibid., p. 608: We wrote to them on January 31, 1984. Replying on February 7, 1984, the present editor informed us that all the other documents had been destroyed.

1965 from the Holy Office:

- (1) In all four cases, as well as in the norms of July 13, 1965, the Catholic marriage ceremony had to precede the Orthodox marriage rite. The reason is easy to discover. Since for Catholics matrimony is a sacrament,¹² it must be celebrated, according to the thinking of the time, in the Catholic Church before a duly authorized Catholic priest, lest it indicate a compromise, if not a lack of faith on the part of the Catholic.
- (2) While there is evident consistency on the part of the two Dicasteries with regard to the precedence of the Catholic marriage ceremony, there seems to be a slight disparity with respect to the ruling about the renewal of marital consent. The response of the Congregation for Oriental Churches, October 26, 1964 and that of the Holy Office, February 9, 1965, make no mention of renewal of matrimonial consent. In both cases, the prohibition of Canon 1063, par. 1 (C.I.C. 1917) was lifted. It is pertinent to note that these two responses were issued before the norms of July 13, 1965 which specifically prohibited renewal of marriage consent in an Orthodox ceremony, not once but twice -- in paragraph 2 "without any renewal of consent"¹³ and again in paragraph 3 "always with the exclusion of renewal of matrimonial consent".¹⁴ Yet, it must be observed, the Holy Office did not place a prohibition on the renewal of marital consent in its reply of July 25, 1965. Later, however, when on June 16, 1966, this same Holy Office under its new name of the Congregation for the Doctrine of the Faith, issued particular directives

12. H. J. Schroeder, Canons and Decrees of the Council of Trent, p. 181.

13. C.L.D., Vol. 6, p. 608.

14. Ibid.

regarding a specific dual marriage celebration, the renewal of matrimonial consent was expressly forbidden.

- (3) In all four responses as well as in the norms of July 13, 1965, mention is made of scandal. To remove any danger of scandal, the Holy See directed that there be no pomp accompanying the second celebration in the Orthodox Church. Since scandal is relative and subjective, it would perhaps have been difficult in those days to determine exactly what could constitute scandal in such cases. The assurances regarding this aspect of the cases appeared satisfactory. Nevertheless, the permission granted by the Holy See to have a second marriage celebration in the Orthodox Church could be viewed as a good gesture on the part of the Catholic Church, a mark of tolerance and understanding, drawing the families involved together more closely in bonds of Christian charity. Any element of scandal, and bewilderment could probably be obviated by suitable explanation in sermons and also by the printed word. Catholics would gradually come to realize that the only true marriage rite was the first one, performed in the Catholic Church, and that the subsequent intervention of a non-Catholic Church, and that the subsequent intervention of a non-Catholic minister of religion was a matter of tolerance.

The relaxation of the discipline of the Church in the area of a double marriage celebration as evidenced in the cases we have studied, and in the norms regarding the mixed marriage ceremony is indeed significant. But there still remained three major problems which were left unsolved.

The prohibition against renewal of consent in the subsequent non-Catholic religious ceremony created practical difficulties. These were resolved more easily when it was a case of a subsequent Protestant wedding. But when it was a question of a second celebration by Eastern Orthodox priests, the problem remained. Adhering to the principles of liturgy which they share with the Catholic Church, they tend to perform the entire marriage rite, especially, as mentioned earlier, since most Orthodox Churches consider invalid the marriage of one of their faithful contracted outside their Churches.¹⁵

Another problem was that a double wedding ceremony could well be the source of invalid marriages. Should the non-Catholic parties consider that the rite celebrated in their church, which followed the Catholic marriage ceremony, to be the only valid one, from their point of view, they may not have given a true consent during the first celebration before the Catholic priest. The same could be maintained about the Catholic partner who is firm in the resolve to consider only the Catholic wedding a true marriage ceremony. Thus marital consent would not be joined in either church, and the full exchange of consent would not take place before either priest.¹⁶

Finally, the question of communicatio in sacris in the double celebration of marriage was raised. Pospishil holds that double wedding ceremonies, such as the ones we have studied are permissible. He agrees that participation in non-Catholic worship is forbidden for Catholics. But he argues that once a

15. C.L.D., Vol. 6, p. 22; V. J. Pospishil, Orientalium Ecclesiarum: the Decree on the Eastern Churches of the II Council of Vatican. Canonical-Pastoral Commentary, p. 47; "Boston Agreement on Orthodox-Roman Catholic Marriage", in E.T., 10(1981), p. 124; V. J. Pospishil and J. D. Faris, The New Latin Code of Canon Law and Eastern Catholics, p. 39.

16. V. J. Pospishil, op. cit., p. 45.

baptized couple has exchanged the marriage consent before a Catholic priest, they have received the sacrament of matrimony. Hence the rites performed in the Orthodox Church cannot lead to a sacrament. As such, they amount to an extra-sacramental communicatio in sacris.¹⁷ This would apply if the Orthodox ceremony took place after the Catholic one.

In spite of these difficulties, the cases which we have examined¹⁸ indicate a certain openness on the part of the Church. It would seem that the Church wanted to be a little more accommodating than it was in the past. Thus there might eventually be some hope for a solution to the problem posed here. The common law did not yet provide for a dispensation from canonical form in such cases.

B. POST-CONCILIAR MIXED MARRIAGE LEGISLATION

To understand the evolution of the Church's mixed marriage legislation, it is both necessary and helpful to begin by studying the evolution of matrimonial law with respect to mixed marriages since the 1917 Code. Indeed, a dual religious marriage celebration, which is the subject of our research, is conceivable only in the context of a mixed marriage.

In common English parlance any marriage of a Catholic with a non-Catholic is called a mixed marriage. In canonical literature, however, the term was strictly used concerning marriage between a Catholic and a validly baptized

17. Ibid.

18. C.L.D., Vol. 6, p. 608.

non-Catholic.¹⁹ After extensive debates in the 1967 Synod of Bishops,²⁰ Paul VI broadened the meaning of mixed marriage to include all marriages of Catholics with non-Catholics, baptized or otherwise.²¹

Before a Catholic enters into marriage with a baptized non-Catholic, the present-day prohibition must be lifted by the local Ordinary. In the former discipline, a dispensation had to be obtained. When a Catholic wishes to enter marriage with an unbaptized person, a dispensation must be requested and granted. Failure or omission to observe the proper canonical procedure renders a marriage between a Catholic and a baptized non-Catholic unlawful, and between a Catholic and a non-baptized person invalid.

In order to obtain the required permission or dispensation, certain conditions have to be fulfilled. Under the 1917 Code, those conditions were rather stringent and demanding on both spouses. In brief, there had to be a just and serious reason, adequate guarantees to safeguard the faith of the Catholic spouse and the Catholic upbringing of the children, and a moral

19. T. L. Bouscaren, et al., Canon Law: A Text and Commentary, 1966, pp. 525-526.

20. U. Navarrete, "Matrimonia mixta in synodo episcoporum", in Periodica, 57(1968), pp. 658-661; ID., "Commentarium canonicum ad litt. ap. motu proprio datas 'Matrimonia mixta'", in Periodica, 59(1970), pp. 425-426; F. X. Murphy and G. MacEoin, Synod '67: A New Sound in Rome, p. 125; P. Hebblethwaite, "Inside" the Synod, Rome, 1967, pp. 71-83; ID., Understanding the Synod, pp. 79-93.

21. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., "Matrimonia mixta, id est matrimonia inita a parte catholica cum parte non catholica sive baptizata sive non baptizata [...]."

certainty that the guarantees would be fulfilled.²² There seemed to be little consideration for the religious sensitivity of the non-Catholic partner.

But Vatican II brought in a new spirit. This change is reflected in a number of documents to be considered here. The Catholic Church recognized the ecclesial reality of the other Christian churches and their role in the divine plan of salvation.²³ Promoting the restoration of unity among Christians was one of the chief themes of Vatican II.²⁴ Also, some six years before, Pope John XXIII had expressed his desire to bring all Christians into one single fold.²⁵ Vatican II likewise urged all Christians to be tolerant toward non-Christians and to esteem what is good and true in their beliefs.²⁶

1. Matrimonii sacramentum

As the discussion on mixed marriage at the Council on November 19-20, 1964 (126th and 127th general assemblies) proved to inconclusive, the question was entrusted to the Pope "so that he may make the necessary provisions, with

22. Canon 1061 (C.I.C. 1917):

1. "Ecclesia super impedimento mixtae religionis non dispensat, nisi:

1. Urgeant iustae ac graves causae;

2. Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo, et uterque coniux de universa prole catholice tantum baptizanda et educanda;

3. Moralis habeatur certitudo de cautionum implemento."

2. Cautiones regulariter in scriptis exigantur."

23. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S. 57(1965), no. 15, pp. 19-20.

24. ID., Decree, Unitatis redintegratio, November 21, 1964, in A.A.S., 57(1965), no. 1, p. 90.

25. John XXIII, Encyclical, June 29, 1959, in A.A.S., 51(1959), pp. 511-512.

26. Vatican II, Declaration, Nostra aetate, October 28, 1965, in A.A.S., 58(1966), nos. 1 and 2, pp. 740-741.

the help of appropriate bodies."²⁷ To meet the desires of the Council Fathers, the Congregation for the Doctrine of the Faith issued an instruction on mixed marriages on March 18, 1966, entitled Matrimonii sacramentum.²⁸

This instruction takes its source from the conciliar decree on ecumenism, Unitatis redintegratio, which would seem to suggest a mitigation of the discipline of the 1917 Code on mixed marriages, not in those matters which pertain to divine law, but in some norms introduced by ecclesiastical law by which non-Catholic Christians often thought their religious convictions were not respected.²⁹

The first remarkable and major change made by Matrimonii sacramentum was that the non-Catholic was no longer bound to give a guarantee regarding the Catholic baptism and education of the children. The greatest objection to the exaction of this guarantee from the non-Catholic was that it risked violating his conscience, since at times he was coerced to do something against his moral judgment. This was contrary to the principles enunciated in the declaration on religious liberty, Dignitatis humanae.³⁰ Hence Matrimonii

27. P. Hebblethwaite, Understanding the Synod, p. 78.

28. S. C. pro Doct. Fidei, Instruction, Matrimonii sacramentum, March 18, 1966, in A.A.S., 58(1966), pp. 235-239.

29. Ibid., p. 236: "Quod suadere videtur, ut mitigetur rigor vigentis disciplinae de matrimoniis mixtis, non quidem in iis quae ad ius divinum pertinent, sed in quibusdam normis ecclesiastico iure inductis, quibus haud raro seiuncti fratres se offendi arbitrantur."

30. Vatican II, Declaratio, Dignitatis humanae, December 7, 1965, in A.A.S., 58(1966), no. 2, p. 930: "Haec Vaticana Synodus declarat personam ius habere ad libertatem religiosam. [...] in re religiosa neque aliquis cogatur ad agendum contra suam conscientiam neque impediatur, quominus iuxta suam conscientiam agat privatim et publice, vel solus vel aliis consociatus, intra debitos limites."

sacramentum only invited (invitetur)³¹ the non-Catholic party to promise sincerely and openly that he would not hinder the Catholic partner in the practice of the Faith and in baptizing and educating all the children in the Catholic Faith.

By this invitation, the Catholic Church recognized the co-responsibility of the parents in raising the children in the Catholic Faith.³² Here we have a departure from Canon 1061 (C.I.C. 1917) which demanded the strict guarantee from the non-Catholic partner. According to Matrimonii sacramentum, in the event the non-Catholic thought that he could not make the promise requested without violating his conscience, then the diocesan bishop was asked to refer the case with all its circumstances to the Holy See.

In fact, when various cases were referred,³³ the Congregation for the Doctrine of the Faith replied that the dispensation from the impediment could be granted provided:

- (1) that the Catholic party formally promised that (s)he would bring up all the children in the Catholic Faith;
- (2) that the diocesan bishop had moral certitude about the fulfillment of this promise;
- (3) that the non-Catholic party was made aware (certior fiat)³⁴ of the obligations in conscience of the Catholic partner;

31. S. C. pro Doct. Fidei, Instruction, Matrimonii sacramentum, March 18, 1966, in A.A.S., 58(1966), p. 237.

32. A. Silvestrelli, "Sacra Congregatio pro doctrina fidei: Instructio de matrimoniis mixtis. Adnotationes", in M.E., 91(1966), p. 232.

33. "Recent Roman Replies", in The Jurist, 28(1968), pp. 197-205.

34. Ibid., p. 198.

(4) and that the parish priest saw that the obligations were fulfilled by the Catholic partner.

While the 1917 legislation provided that the guarantees were to be given in writing both by the non-Catholic and the Catholic spouse, by virtue of Matrimonii sacramentum, the local Ordinary was now empowered to determine, either in general or in individual cases, the mode of obtaining these promises. Thus, in a case where either or both partners objected to written promises, insisting that their word alone was good enough, the local Ordinary could accept their word.³⁵

In the 1917 legislation, providing Catholic baptism and education of the children was something absolute and indispensable for the spouses. Matrimonii sacramentum brought in a new element: if the Catholic spouse was unable to provide for the baptism and to raise the children in the Catholic Faith for reasons independent of his/her will, such as the laws and customs of the place which forbid Catholic education, then in this case (s)he was required to do everything possible to provide for the Catholic baptism and education of the children.³⁶ Unlike the 1917 Code, Matrimonii sacramentum did not demand moral certitude that the promise would be fulfilled.

Likewise, in the pre-conciliar discipline, the matrimonial guarantees were a condition sine qua non for the validity of the dispensation from the

35. T. Davey, "Mixed Marriages: a Note on the 'Promises'", in C.R., 54(1969), pp. 562-563.

36. J. Bernhard and H. Legrand, "L'instruction 'Matrimonii Sacramentum' sur les mariages mixtes", in R.D.C., 16(1966), pp. 64-65.

impediment of mixed religion.³⁷ But in Matrimonii sacramentum, there was no evidence that the pre-nuptial guarantees were required for the validity of the dispensation. Navarrete holds that according to the norms of this decree, the guarantees were not needed for the validity of the dispensation and he argues as follows:

- (1) According to Canon 11 (C.I.C. 1917), only those laws which explicitly or equivalently³⁸ state that an act is null and void, or that a person is incapacitated from acting, are to be considered as invalidating or inhabilitating.
- (2) The Instruction, Matrimonii sacramentum, has the nature of a law which, according to Canon 22 (C.I.C. 1917), takes and readjusts the entire subject matter of the former law. Thus the law contained in this instruction derogates from the former law, even though it does not expressly say so. Since the new law does not say anything about the necessity of guarantees for the validity of the dispensation from the impediment, the necessity of the guarantees for validity cannot be upheld.
- (3) Navarrete points out that the whole tendency of the new law is to mitigate the former one and render it more flexible. If Matrimonii sacramentum were to require the pre-nuptial guarantees for the validity of the dispensation, then it would clash with such a benign tendency.³⁹

37. Canon 1061 (C.I.C. 1917): "Ecclesia super impedimentum mixtae religionis NON dispensat, NISI [...]" (emphasis added).

38. The term aequivalenter does not appear in the corresponding Canon 10 (C.I.C. 1983).

39. U. Navarrete, "Responsum Patris U. Navarrete, S.I.", Periodica, 56(1967), p. 589-504.

Norm V of Matrimonii sacramentum brings in a new element in mixed marriage legislation.

It is absolutely forbidden to celebrate marriage before a Catholic priest and a non-Catholic minister, each of them performing his own rite, at the same time.

However, when the religious ceremony has been finished, there is no reason why the non-Catholic minister should not deliver an address of the congratulation and encouragement and recite some prayers with the non-Catholics. All this, however, needs the approval of the local ordinary, and care must be taken to avoid the danger of provoking comment.⁴⁰

It envisages the possibility of a non-Catholic minister, officiating, side by side, with the Catholic priest at one and the same wedding. However, the non-Catholic minister may not perform his role in the wedding ceremony at the same time as the Catholic priest. His part is restricted to an address of congratulation and encouragement and some prayers with the non-Catholics. All this needs the approval of the local Ordinary, and care must be taken to avoid the danger of provoking comment. In effect, this is an explicit prohibition against a simultaneous dual religious marriage celebration.

The very first clause of norm I of Matrimonii sacramentum is a reminder that the faith of the Catholic partner must be safeguarded and the Catholic education of the children must be ensured.⁴¹

40. S. C. pro Doct. Fidei, Instruction Matrimonii sacramentum, March 18, 1966, in A.A.S., 58(1966), n. V, p. 238: "Quaelibet matrimonii celebratio coram sacerdote catholico et ministro acatholico qui simul suum quisque ritum peragunt, prorsus vitanda est. Tamen nihil obstat, quominus, postquam religiosa caeremonia est absoluta, minister acatholicus nonnulla gratulatoria et hortatoria proferat verba, et quaedam preces una cum acatholicis recitentur. Quae omnia fieri licet approbante Ordinario loci et opportunis cautionibus adhibitis, ad periculum admirationis avertendum."

41. Ibid., p. 237: "Prae oculis semper habeatur periculum fidei a coniuge catholico propulsandum esse atque prolis educationem in religione catholica sedulo curandam."

This has always been the consistent policy of the Church. But the explicit ruling against a dual religious wedding ceremony, either antecedent or subsequent to the canonical wedding (and, by inference, concomitant) was formulated by the then Holy Office in 1865.⁴²

In summation, then, taking an overall look at Matrimonii sacramentum, it must be noted that it reflects the spirit of ecumenism in so far as it did not demand of the Catholic partner to work prudently for the conversion of the non-Catholic,⁴³ but to take care to strengthen and increase the gift of Faith and to give continually to the non-Catholic spouse and their children a shining example of Christian virtues.

Matrimonii sacramentum emphasized the Catholic point of view that there is an obligation arising from divine law for the Catholic spouse to see to the baptism and education of all the children in the Catholic Faith; but its tone was different from that of the 1917 Code. It took into account the particular cases in which the Catholic education may not be possible without any fault on the part of the Catholic partner.⁴⁴

Matrimonii sacramentum tried to show greater respect for the conscience of the non-Catholic partner who is no longer positively bound to baptize and

42. F. X. Wernz, Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium, Tom. IV, Pars II, p. 448.

43. Canon 1062 (C.I.C. 1917): "Coniux Catholicus obligatione tenetur conversionem coniugis acatholici prudenter curandi."

44. F. Timmermanns, "Instruction 'Matrimonii sacramentum'", in C.M., 30(1966), p. 230.

educate all the children in the Catholic religion.⁴⁵

It is important to observe that, despite the relaxation of some laws of ecclesiastical origin concerning mixed marriage, Matrimonii sacramentum did not remove the prohibition contained in Canon 1063, par. 1 (C.I.C. 1917) against a dual religious marriage ceremony. In fact, it reinforces this prohibition by adding a new aspect to the existing law. In this matter, the Church has maintained a remarkable consistency both in its teaching and in its discipline.

2. The 1967 Synod of Bishops

One of the main themes of the first Synod of Bishops held in Rome, from September 29 to October 29, 1967 was mixed marriage. The Synod addressed eight questions in this regard: two dealing with terminology, two with the guarantees, two with the canonical form and two with pastoral aspects.⁴⁶ The dual religious celebration of marriage was not discussed as such.

The 1967 Synod decided to retain the impediments of mixed religion and disparity of worship. That done, the logical question was: what are the criteria for granting dispensation by the competent authority?⁴⁷

45. J. Denis, "L'instruction 'Matrimonii sacramentum' de la congrégation pour la doctrine de la Foi sur les mariages mixtes", in A.C., 11(1967), pp. 154-163.

46. F. X. Murphy and G. MacEoin, Synod '67; A New Sound in Rome, p. 125.

47. The "competent authority" is usually the local Ordinary; it is the Holy See if the conditions of Matrimonii sacramentum cannot be fulfilled.

The Synod replied according to the double question formulated in the preparatory document.⁴⁸ To grant a dispensation from the impediment, the "competent authority" must have the moral certainty that the Catholic partner runs no risk to his/her own faith and that (s)he is ready to do everything, as far as possible, to ensure that the children are baptized and raised as Catholics. Then the same authority must have moral certitude that the non-Catholic partner knows the obligation in conscience of the Catholic and, at least, does not exclude the Catholic baptism and education of the children.

It is interesting to note the vocabulary used to describe the danger to the Catholic partner. Canon 1060 (C.I.C. 1917) spoke of "perversionis periculum" (danger of perversion). The 1967 Synod preferred the expression "periculum deficiendi a propria fide" (danger of leaving one's faith). This expression is less harsh and shows respect for the non-Catholic partner.

Also, there was no direct reference to guarantees. It would appear that neither the Catholic nor the non-Catholic was asked to make any juridical commitment regarding the baptism and education of their offspring. As the text reads, all that was required for dispensation was that the competent authority have the moral certitude that the Catholic party was ready to do everything, as far as possible, to see to the baptism and to raise all the children in the Catholic Faith; the non-Catholic was to be made aware of the

48. "Utrum ad dispensandum super impedimento sufficiat quod auctoritas competens certitudinem moralem habeat:

(1) partem catholicam nullum pati periculum deficiendi a propria fide, et praeparatam esse omnia, pro posse, faciendi ut proles catholice baptizetur et educetur;

(2) partem autem non catholicam cognoscere obligationem conscientiae alterius et baptismum educationemque prolis in Ecclesia catholica saltem non excludere?" quoted by U. Navarrete, "Matrimonia mixta in synodo episcoporum", in Periodica, 57(1968), pp. 661-662.

above obligation in conscience of the Catholic partner and not, at least, reject the Catholic baptism and education of the children.

Moral certitude, the key phrase, means positive evidence that laws which govern the inclinations and actions of people in a given set of circumstances are operative.⁴⁹ The priest should have this evidence that the couple are aware of their divine law obligations and show good will in fulfilling them.

Furthermore, the Synod specified the ways in which the priest was to acquire this moral certitude. He could reach it through pre-nuptial guarantees. But they were not the only means. There are other ways by which a priest could attain moral certainty. For example, a dialogue with the couple, an exchange of correspondence, the report of the priest who prepared them for marriage, remarks from the parents, relatives and from those closely associated with them, an attentive examination of all the circumstances,⁵⁰ can all be equivalent to guarantees.

That the competent authority can form moral certitude from the guarantees of the partners or from a prudent and careful study of their particular

49. St. Thomas Aquinas, *Summa Theologica*, IIa-IIae, q. 70, art. 2: "In actibus enim humanis, super quibus constituuntur iudicia et exiguntur testimonia, non potest haberi certitudo demonstrativa: eo quod sunt circa contingencia et variabilia. Et ideo sufficit probabilis certitudo, quae ut in pluribus veritatem attingat, etsi in paucioribus a veritate deficiat. Est autem probabile quod magis veritatem contineat dictum multorum quam dictum unius. Et ideo, cum reus sit unus quo negat, sed multi testes asserunt idem cum actore, rationabiliter institutum est, iure divino et humano quod dicto testium stetur."

50. U. Navarrete, "Matrimonia mixta in synodo episcoporum", in *Periodica*, 57(1968), pp. 662-663.

circumstances is evident from a reply of the Holy Office.⁵¹

Summing up, therefore, it would seem that the 1967 Synod tended towards liberalization. It did not openly exact the guarantees from the partners of a proposed mixed marriage, but rather it stressed their personal responsibility. It merely said that the Catholic should be ready to do everything, so far as it is possible, to baptize and to educate the children as Catholics and that the non-Catholic be aware of (cognoscere and not agnoscere) the obligation of the Catholic.

This progress does not mean that the Church insisted less on the divine law obligation, or that it was less desirous of helping the Catholic practise the Faith and transmit it to the children. The progress consisted precisely in the new attitude and the way in which this obligation was insisted upon and the Catholic was helped. It lay in the transition from a set of juridical formulae and promises more or less external to the individual, to the arousing of conscience and of personal responsibility.⁵²

51. S. C. S. Off., Att. (S. Germani), February 17, 1875, in Fontes, Vol. IV, p. 355, n. 1039: "La condizione del giuramento (da prestarsi nei matrimoni misti dalla parte eterodossa nel permettere le solite cauzioni) è una prescrizione veramente ecclesiastica dalla quale può talvolta prescindersi se le circostanze lo consentano. Chè per farsi luogo alla dispensa nei matrimoni misti è essenziale solamente la promessa delle solite cauzioni, la quale dev'essere così seria, che il Vescovo riesca a formarsi la certezza morale che sarà dal coniuge eterodosso osservata ed adempiuta fedelmente; e dove egli o per le qualità del soggetto, o per altre circostanze non potesse acquistare simile certezza, può a buon diritto domandare che la promessa sia munita di giuramento."

52. R. Beaupère, "Mixed Marriages at the Synod of Bishops", in O.C., 4(1968), pp. 176-177.

It appears that the 1967 Synod did not stress the co-responsibility of the parents in the religious education of the children. Rather, there is an impression of specifically excluding the non-Catholic from their religious formation. Less and less was asked of the non-Catholic and it could end by asking nothing at all. Yet the non-Catholic partner (especially if it is the mother) has a very significant role to play in the religious education of the children and we can never sufficiently emphasize it.

3. Matrimonia mixta

The two impediments of mixed religion and disparity of worship as found in the 1917 Code were also retained in the Apostolic Letter, Matrimonia mixta, of March 31, 1970⁵³ and could be dispensed from for a just cause. In analysing this decree, it is interesting to note that a significant development was introduced in the notion of the impediment of mixed religion. Marriage here was presented in a personalistic way;⁵⁴ that is, it was seen essentially as "an intimate union of persons". The impediment was no longer presented simply as a legal reality, nor was it based on the danger to the faith of the Catholic partner, or to the Catholic education of the children. Rather, it was presented as an obstacle to the full spiritual communion of the spouses.⁵⁵ Thus the notion of the canonical impediment was presented in a

53. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), pp. 260-261.

54. Vatican II, Pastoral Constitution, Gaudium et spes, December 7, 1965, in A.A.S., 58(1966), n. 48, p. 1068: "[...] intima unio, utpote mutua duarum personarum donatio [...]."

55. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), pp. 260-261: "Matrimonium inter duas personas baptizatas, quarum altera sit catholica, altera vero non catholica, cum natura sua plenae spirituali coniugum communionis obstet [...]."

more human and personalistic way and was very helpful from a pastoral point of view.⁵⁶

The Catholic Church was prepared to grant a dispensation from these impediments, provided that there was a just cause and there arose a spiritual benefit to the intending spouses. A just cause may be:

- (a) the small number of Catholics in a given area;
- (b) a serious promise by the non-Catholic to embrace the Catholic Faith or a well-founded hope to that effect;
- (c) the necessity of regularizing an illegal union and avoiding scandal and defamation;
- (d) the securing of the education of the children in the normal family atmosphere;
- (e) the only way of exercising one's natural right of getting married and having children.⁵⁷

Canon 1061 (C.I.C. 1917) prescribed "just and grave causes" for dispensation. But Matrimonia mixta required only "just causes". The just, proportionate and reasonable cause was to be estimated from a due consideration of the circumstances of times, places and persons.

The legislation of Matrimonia mixta demanded a declaration and a promise from the Catholic partner as a prerequisite to a dispensation:

56. K. T. Kelly, "A New Deal for Interchurch Marriages - Comments on the Recent Motu Proprio", in C.R., 55(1970), pp. 638-639.

57. L. L. McReavy, "Canonical causes for mixed marriage dispensations", in C.R., 52(1967), pp. 473-475.

To obtain from the local Ordinary dispensation from an impediment, the Catholic partner shall declare that (s)he is ready to remove dangers of falling away from the Faith. (S)He is also gravely bound to make a sincere promise to do all in his/her power to have all the children baptized and educated in the Catholic Church.⁵⁸

Let us comment on this norm. The declaration by the Catholic spouse called for by Matrimonia mixta is a new and significant requirement. However, the obligation of the Catholic spouse to preserve the faith is evidently not new for, by divine law, the Catholic partner has the duty of persevering the faith and must not place it in jeopardy.⁵⁹ The Catholic spouse also has the obligation, from divine law, to see to it that, as far as possible, the children are baptized and brought up in the Church as practising Catholics. (S)He should also bear witness to the gift of faith and rebirth by a life of generous and loving integrity.⁶⁰

All that is required by Matrimonia mixta are sincere efforts in the fulfillment of the promise. In the words used, it is implicitly acknowledged that the efforts to baptize and raise the children in the Catholic Faith will

58. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 261.

59. Ibid., p. 259: "Edoceantur ergo fideles Ecclesiam, numquam tamen posse partis catholicae obligationem auferre, quae lege divina, ipso videlicet ordine salutis per Christum instituto, pro variis casuum adiunctis imponitur. Ideo fideles commoneantur officium esse penes catholicum coniugem propriae fidei conservandae, ac propterea ipsi numquam licere proximo illam amittendi sese offerre."

60. Ibid.: "Praeterea in matrimonio mixto pars catholica obligatione tenetur non solum perstandi in fide, sed etiam quantum fieri potest, curandi, ut proles baptizetur et in eadem fide educetur atque omnia salutis aeternae accipiat subsidia, quae Ecclesia catholica filiis suis suppeditat."

not always and everywhere be successful, due to external factors.⁶¹ Thus, this obligation did not bind absolutely, but only relatively.

The obstacles may come, as it sometimes happens in certain regions, from the civil laws and customs of the people which the couple were forced to observe. Likewise, the non-Catholic who also had the right and the duty to educate all the children in his/her own faith, could also be part of that obstacle.⁶² Even so, the Holy Office emphatically confirmed its position:

[...] For, the divine law, by which the parents are bound to the Catholic education of all their children, does not intend to bind them to what is impossible. And if they sincerely do what they can, they are not the cause of their children's deprivation of baptism and catholic education. [...] Therefore, though on the one hand the very serious obligation of the parents to educate their children as Catholics must be impressed upon the faithful, and catechumens, on the other hand they must not be charged with a greater burden than God Himself, the author of nature and of grace, has laid upon them; and it cannot be required of them that, if after having done all in their power to secure Catholic education they are unable to secure it, they must either remain unmarried or be deprived of the sacraments and graces of the Church.⁶³

61. J. Tomko, "De litteris apostolicis 'Matrimonia mixta'", in M.E., 95(1970), pp. 180-181.

62. A. Abate, Il matrimonio nell'attuale legislazione canonica, p. 99.

63. Sylloge praecipuorum documentorum recentium Summorum Pontificum et S. Congregationis de Propaganda Fide necnon aliarum SS. Congregationum Romanarum ad usum missionariorum, Reply of the Holy Office to the Ordinary of Lesser Sunda, Indonesia, on February 19, 1936, pp. 565-566: "[...] Dei enim lex, qua parentes ad catholicam omnis proles educationem obligantur, non ad impossibilia illos ligare intendit. Neque, si faciunt sincere quod possunt facere, ipsi sunt causa, cur proles catholico baptisate et catholica educatione privetur. [...]

"Quapropter quantumvis ex una parte fidelibus ac catechumenis gravissima parentum obligatio prolem catholicam educandi inculcari debeat, ex altera parte eis non gravius onus imponendum est, quam auctor naturae et gratiae, Deus Ipse, imposuit; neque ab iis exigendum est, ut si, postquam quae facere potuerunt fecerunt, ad catholicam educationem in tuto collocandam, eam obtinere non potuerunt, aut inuupti maneant aut exstent sacramentis et gratiis Ecclesiae privati."

Further, the norm "to do all in his/her power" did not mean that the Catholic must exert pressure or undue strain on the non-Catholic which would destroy the harmony of conjugal life and contribute to the breaking up of the marriage.⁶⁴ These norms seemed to imply that the sincerity, the attitude and intention of the Catholic was more important for obtaining the dispensation than the actual raising of the children as Catholics. No moral certitude was needed that the children would be actually brought up in the Catholic Faith. This drastic but realistic change had taken place in respect to the sincere conscience of the non-Catholic partner.⁶⁵

With regard to the non-Catholic, Matrimonia mixta had this directive:

At an opportune time, the non-Catholic partner must be informed of these promises which the Catholic partner has to make, so that it is clear that he is cognizant of the promise and obligation on the part of the Catholic.⁶⁶

Since the obligations which the Catholic partner assumes affect the conjugal life, the non-Catholic partner should be informed of them. But no promise or declaration, be it positive or negative, was required from the non-Catholic partner. Also, no mention was made of the Catholic's obligation to seek the conversion of the non-Catholic spouse, though it does not follow that such an obligation no longer exists.

64. B. A. Siegle, Marriage Today. A Commentary on the Code of Canon Law, p. 96.

65. Ibid.

66. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 261.

In norm 13, Matrimonia mixta enacts a twofold prohibition against a dual religious celebration of the same marriage. The first prohibition is similar to the one found in norm V of Matrimonii sacramentum:

The celebration of marriage before a Catholic priest or deacon and a non-Catholic minister, performing their respective rites together, is forbidden.[...]67

The second prohibition is substantially the same as in Canon 1063, par. 1 (C.I.C. 1917), though couched in different words:

[...] nor is it permitted to have another religious marriage ceremony before or after the Catholic ceremony, for the purpose of giving or renewing matrimonial consent.68

It is to be noted that Matrimonia mixta does not speak of the role of the non-Catholic minister permitted in norm V of Matrimonii sacramentum. However, in our opinion, this does not necessarily exclude the offering of good wishes and prayers by the non-Catholic, provided that this is done without prejudice to the twofold prohibition of norm 13 of Matrimonia mixta and in conformity with the principles of the Directory, Ad totam Ecclesiam, issued by the Secretariat for Promoting Christian Unity on May 14, 1967.⁶⁹ The Liturgy of the Word would be about the ideal time to include the intervention of the non-Catholic minister.

67. Ibid., p. 262: "Matrimonii celebratio coram sacerdote vel diacono catholico et ministro non catholico, qui simul suum ~~que~~ ritum peragant, vetatur [...]."

68. Ibid., "[...] neque admittitur, ante vel post catholicam celebrationem, alia matrimonii celebratio religiosa ad matrimonialem consensum praestandum vel renovandum."

69. Secretariatus ad Christianorum Unitatem Fovendam, Directorium, May 14, 1967, in A.A.S., 59(1967), pp. 574-592.

It would seem, to us that this involvement of a non-Catholic minister in a mixed marriage would not require the prior approval of the local Ordinary. Indeed, it would be opportune if the Episcopal Conference could draw up suitable norms along with the norms by which a dispensation from canonical form may be granted, to ensure a uniform practice throughout the country or region.

Summing up, therefore, we have to state that Matrimonia mixta is the fruit of post-conciliar thinking. Since marriage is an intimate and total communion of life and love,⁷⁰ the Church discourages the contracting of mixed marriage, for it is most desirous that Catholics be able to attain perfect union of mind and full communion of life in matrimony.⁷¹ But the Church also recognizes the natural right to marry,⁷² and to marry the person of one's choice, a choice freely made and consented to.⁷³ Accordingly, the Church liberalized the laws governing mixed marriage in such a way that on the one hand the principles of divine law were scrupulously observed and on the other hand the natural right to contract marriage was respected.⁷⁴

70. Vatican II, Pastoral Constitution, Gaudium et spes, December 7, 1965, in A.A.S., 58(1966), n. 48, pp. 1067-1069.

71. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 258: "[...] Ecclesia, sui officii conscia, dissuadet matrimonia contrahi mixta, quia valde exoptat, ut catholici in coniugio perfectam animorum concordiam atque plenam vitae communionem assequi possint."

72. Ibid.: "[...] ius est homini a natura datum inire matrimonium [...]"

73. Vatican II, Pastoral Constitution, Gaudium et spes, December 7, 1965, in A.A.S., 58(1966), no. 48; p. 1067.

74. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 258: "[...] Ecclesia suis legibus, quae sollicitudinem eius pastorem plane ostendunt, ita res curat disponendas, ut hinc iuris divini praescripta religiose serventur, illinc autem praedictum ius matrimonii contrahendi in tuto collocetur."

At the close of this study of the documents on mixed marriage and the deliberations of the 1967 Synod on the same theme, what emerges clearly is the overriding concern of the Church for the faith of its members and for the prevention of any lapse in this regard that underlies the significant changes in matrimonial legislation. The Church can change laws enacted by it; but it can never change divine law. In the final analysis, this is the one item to be watched for carefully in processing a case of mixed marriage.

C. THE PREPARATION OF CANON 1127 (C.I.C. 1983)

The topic of the dual religious celebration of marriage did not figure on the agenda of the conciliar debates during Vatican II. Nor did it figure in the conciliar draft "On the Sacrament of Matrimony" which Pope Paul VI ordered to be transmitted to the Conciliar Fathers on July 19, 1963.⁷⁵ Pursuant to this 1963 conciliar draft, there was only one written intervention which dealt with this subject: it came from Archbishop Herman Schauffele of Freiburg im Breisgau, Germany, who rejoiced that such a provision was not even contemplated in the 1963 conciliar draft and that, on the contrary, the norms of Canon 1063 (C.I.C. 1917) were upheld.⁷⁶

The draft canons of 1975 were forwarded to the bishops of the world for their remarks, observations and suggestions. In this draft it was proposed to replace Canon 1063 (C.I.C. 1917) with Canon 279 reproduced below:

75. Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, Vol. 3-3-8, pp. 1068-1083.

76. Ibid., p. 1093: "Gaudeo quod Schema non loquitur de possibilitate aequandi ministrum acatholicum ad matrimonialem consensum praestandum (uti quidam somniabant) sed potius sustinet ex toto can. 1063 C.I.C."

Local Ordinaries and other pastors having care of souls shall see to it that the Catholic husband or wife and the children born of a mixed marriage do not lack spiritual assistance in fulfilling their duties of conscience. They are to aid the married couple, to foster the unity of their conjugal and family life. To these ends, it is hoped that these pastors establish relationships of sincere openness and enlightened confidence with ministers of other religious communities.⁷⁷

In their meeting of April 29, 1977 the Consultors of the Commission for the Revision of the Code of Canon Law reported that several members had asked that the latter part of the proposed Canon 279 be suppressed because it contained only a pastoral exhortation.⁷⁸ We are of the opinion, however, that the whole of the proposed Canon 279 cleverly evaded the issue of the dual religious marriage celebration raised by Canon 1063 (C.I.C. 1917).

On May 16, 1977, as part of their review of the 1975 draft canons on mixed marriage, the Commission resumed the study of Canon 1063 (C.I.C. 1917), keeping in mind the observations and suggestions made in the previous meeting. This study related to one particular aspect of mixed marriages: the dual religious marriage celebration. Canons 1063 and 1099 (C.I.C. 1917) were taken together for a revision in the light and spirit of conciliar teaching. Canon 1063 prohibited a second religious ceremony for the purpose of renewing or exchanging matrimonial consent; Canon 1099 listed those who were bound by the canonical form of marriage.

77. Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur, 1975, p. 79: "Locorum Ordinarii alique animarum pastores curent, ne coniugi catholico et filiis e matrimonio mixto natis, auxilium spirituale desit ad eorum officia conscientiae adimplenda, atque coniuges adiuvent ad vitae coniugalis et familiaris fovendam unitatem. Qua de re, optandum est, ut iidem pastores relationes instituant cum ministris aliarum communitatum religiosarum, easque sincera probitate et sapienti fiducia conforment."

78. Pont. Comm. C.I.C. Recognoscendo, De matrimoniis mixtis, in Comm., 9(1977), p. 356.

The Commission fused these canons into one single proposed Canon 4, subdivided into four parts:

1. As for the form to be observed in a mixed marriage, the prescriptions of Canon 311 are to be followed.

2. When a Catholic marries a non-Catholic of an oriental rite, the canonical form of celebration is to be observed for liceity only; for validity, however, the presence of a sacred minister is required, other provisions of the law having been observed.

3. With regard to the marriage of a Catholic with a non-Catholic as mentioned in Canon 1, if there be serious difficulties in the observance of the canonical form it is the right of the local Ordinary to dispense from it in each case, keeping however, some public form of celebration; it is for the Episcopal Conference to establish norms by which dispensation from canonical form may be granted in a licit and orderly manner.

4. Before or after the canonical celebration held in accord with the norm of #1, it is forbidden to have another religious celebration of the same marriage to express or renew matrimonial consent; it is likewise forbidden to have a religious celebration in which a Catholic priest or deacon and a non-Catholic minister together, each performing his own rite, ask for the consent of the partners.⁷⁹

79. Ibid., p. 358.

1. "Ad formam quod attinet in matrimonio mixto servandam, servantur praescripta can. 311.

2. Si pars catholica matrimonium contrahit cum parte non catholica ritus orientalis, forma canonica celebrationis servanda est ad liceitatem tantum, ad validitatem autem requiritur praesentia ministri sacri, servatis aliis de iure servandis.

3. Quoad matrimonium inter partem catholicam de qua in can. 1 et partem non catholicam, si graves difficultates formae canonicae servandae obstant, loci Ordinatio ius est ab eadem in singulis casibus dispensandi, salva tamen aliqua publica forma celebrationis; Episcoporum Conferentiae est normas statuere quibus praedicta dispensatio concorditer ratione et licite concedatur.

4. Vetatur ne ante vel post canonicam celebrationem ad normam 1, alia habeatur eiusdem matrimonii celebratio religiosa ad matrimonialem consensum praestandum vel renovandum; itemque ne fiat celebratio religiosa, in qua sacerdos vel diaconus catholicus et minister non catholicus insimul, quisque ritum suum peragentes, partium consensum exquirant."

The salient features of this proposed Canon 4 were the following:

- (1) it had a legal thrust;
- (2) it retained the law on the observance of canonical form;
- (3) it incorporated the provisions of Crescens matrimoniorum regarding:
 - (a) the faculty granted to local Ordinaries to dispense from canonical form;⁸⁰
 - (b) the ruling on the necessity of the canonical form only for liceity in the case of a mixed marriage between a Catholic and an Orthodox;⁸¹
- (4) it retained the prohibition of Canon 1063 (C.I.C. 1917) and incorporated the norms of Matrimonii sacramentum⁸² and of Matrimonia mixta⁸³ against a joint celebration of a mixed marriage by a Catholic minister and a non-Catholic minister. The "Catholic minister" referred to in this proposed canon could also be a deacon,⁸⁴ according to norm V, 4 of the Motu Proprio, Sacrum diaconatus ordinem, June 18, 1967;⁸⁵
- (5) it authorized the Episcopal Conference to draw up norms according to which dispensation from canonical form could be granted both licitly and in an orderly manner. This is an application of the principle of

80. S. C. pro Eccl. Or., Decree, Crescens matrimoniorum, in A.A.S., 59(1967), p. 166.

81. Ibid.

82. S. C. pro Doct. Fidei, Instruction, Matrimonii sacramentum, March 18, 1966, in A.A.S., 58(1966), p. 238.

83. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 262.

84. Pont. Comm. Decretis Concilii Vaticani II Interpretandis, Response, March 26, 1968, in A.A.S., 60(1968), p. 363; ID., Response, April 4, 1969, in A.A.S., 61(1969), p. 348.

85. Paul VI, Apostolic Letter, Sacrum diaconatus ordinem, June 18, 1967, in A.A.S., 59(1967), p. 702.

subsidiarity. In fact, this concession of power to the Episcopal Conference was discussed by the Commission for the revision of the Code four years earlier.⁸⁶

This proposed Canon 4 was absorbed substantially, in four parts, into the 1980 Draft and renumbered 1081.⁸⁷ It was placed among the canons on mixed marriage. However, there were minor changes introduced in sections 3 and 4. The change in section 3 has a canonical effect: the "local Ordinary" has been specified as the Ordinary in whose territory the mixed marriage is to be celebrated (Ordinario loci in quo matrimonium celebratur). This clause withdraws competence from the local Ordinary of the Catholic spouse. The change in section 4 is cosmetic as well as canonical. Instead of saying "Catholic priest or deacon" (sacerdos vel diaconus catholicus), the term "assistens catholicus" (the Catholic person assisting) is used, thus taking into account the possibility of lay persons acting as witnesses.⁸⁸

The Consultors who worked on the final draft, before submission to the Holy Father, suggested some further modifications to section 3. For instance, Archbishop Bernardin wished to empower the local Ordinary of the place where the Catholic spouse lived, subject to the prior permission of the local Ordinary of the place where the marriage was to occur, to grant the dispensation.

86. Pont. Comm. C.I.C. Recognoscendo, "De Matrimonio", in Comm., 5(1973), p. 73.

87. Codex iuris canonici: Schema Patribus Commissionis reservatum, 1980, p. 247.

88. Pont. Comm. C.I.C. Recognoscendo, "De forma celebrationis matrimonii", in Comm., 10(1978), p. 86.

This amendment was substantially accepted, but instead of permission, consultation with the local Ordinary of the place of marriage would suffice.⁸⁹

Cardinal Satowaki expressed his desire that it be possible for the faculty envisaged in this proposed canon to be delegated, and asked whether the Episcopal Conference could pronounce on the matter. Since this faculty was ordinary, he was told, it could be delegated according to the norms of Canon 134 of the 1980 Draft.⁹⁰

Sections 1 and 2 of Canon 1081 of the 1980 Draft were subsequently merged and the whole canon was transposed to the section on mixed marriages as Canon 1127 in the draft presented to the Pope on March 25, 1982 for his official approval.⁹¹

89. Pont. Comm. C.I.C. *Recognoscendo, Relatio*, p. 264: "[...] servandae obstant, Ordinario loci domicilii vel quasi-domicilii partis catholicae ius est ab eadem in singulis casibus dispensandi, praevia licentia Ordinarii loci in quo matrimonium celebratur obtenta vel saltem praesumpta et salva ad validitatem aliqua publica forma celebrationis [...] etc."

"R. Admitti potest, attamen non requiratur "licentia" Ordinarii loci in quo matrimonium celebratur, sed tantum imponatur consultatio. Dicatur ergo: "[...] Ordinario loci partis catholicae ius est ab eadem in singulis casibus dispensandi, consulto tamen Ordinario loci in quo matrimonium celebratur, et salva ad validitatem aliqua publica forma celebrationis [...]."

90. *Ibid.*: "Videtur esse nimis exigere ut dispensatio a forma canonica concedatur "in singulis casibus", praesertim in regionibus ubi talia matrimonia sunt inevitabilia et valde numerosa. Valde exoptatur ut potestas Ordinarii loci sit delegabilis. Conferentia Episcoporum potestne statuere et declarare quod haec dispensatio delegabilis est?"

"R. Utpote ordinaria, potestas est delegabilis [cfr. can. 134]."

91. Codex iuris canonici: schema novissimum iuxta placita patrum Commissionis emendatum atque summo Pontifici praesentatum, 1982, p. 200.

On January 25, 1983, Pope John Paul II promulgated the revised Code of Canon Law.⁹² In this revised Code, we find that Canon 1127 is identical to the proposed canon bearing the same number in the 1982 Draft.

It is of interest and importance to note that in the provisions of Canon 1127, par. 1, the canonical form of marriage is retained for validity. However, if the non-Catholic partner belongs to an oriental church, then the canonical form is for liceity only.

Canon 1127, par. 2, confers on the local Ordinary of the Catholic spouse the right to dispense from the canonical form, after he has consulted with the Ordinary of the place where the marriage is to be celebrated. This dispensation is to be given only in cases where serious difficulties stand in the way of the observance of the canonical form. It is for the Episcopal Conference to issue norms regulating the granting of such a dispensation in an orderly manner.

Canon 1127, par. 3, encompasses a twofold prohibition. The first part forbids a second religious celebration of the same marriage either to express or renew matrimonial consent. It repeats, in essence, the provisions of Canon 1063, par. 1 (C.I.C. 1917), but without mention of the quality of the non-Catholic minister or of a proxy. The second part introduces a significant change in mixed marriage legislation. It carries a prohibition against a religious celebration of marriage in which a Catholic minister and a non-Catholic minister perform together, each following his own rite and asking for and receiving the consent of the spouses. The origin of this prohibition can

92. A.A.S., 75(1983), Pars II, p. xiv.

be traced to Matrimonii sacramentum⁹³ and Matrimonia mixta.⁹⁴

The prescription against a dual religious marriage celebration is not of recent origin. It goes back to the ruling of the Holy Office laid down in 1865,⁹⁵ which was codified in 1917. This prescription is based on the concern of the Church to safeguard its members from a weakening or loss of their faith.

The addition of the second prohibition in this canon forestalls a move on the part of those who would want to take liberties in the name of ecumenism in the post-Vatican II era.

This being the case, our problem still remains unsolved. But a solution has to be found. Perhaps a study of the nature of this law embodying the prescription would help in finding a solution that is within the parameters of ecclesiastical law without offending against the divine law.

D. THE NATURE OF THE LEGISLATION

In the preceding section we reviewed the content of Canon 1127, par. 3 (C.I.C. 1983). The time has now arrived for us to investigate the nature of this canon which carries an express prohibition. If, on examination, it is found that this law is merely disciplinary and not constitutive, it could be the object of a dispensation.

93. S. C. pro Doct. Fidei, Instruction, Matrimonii sacramentum, March 18, 1966, in A.A.S., 58(1966), p. 238.

94. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 262.

95. F. X. Wernz, op. cit., p. 448.

According to St. Thomas Aquinas, law is "an ordinance of reason for common good, made and promulgated by him who has care of the community."⁹⁶ The approaches towards the common good can be varied. Some laws have to allow for amendments or adaptation according to circumstances of time, place and persons. Some, on the other hand, do not allow for accommodation, without militating against the very essence of the law. The former could be categorized as "disciplinary", while the latter might fall under the heading of "constitutive".

This distinction is in evidence in the 1983 Code: Canon 86, which does not have a corresponding canon in the 1917 Code, speaks of constitutive law. The immediate source of this norm can be traced to the Apostolic Letter of Paul VI, De episcoporum muneribus, June 15, 1966. Norm IV states:

[...] the faculty to dispense is exercised only as to laws which command or forbid, not as to constitutive laws.⁹⁷

Canon 86 (C.I.C. 1983) first made its appearance in the 1977 Draft of the Canons of Book I (General Norms)⁹⁸ and was repeated in the 1980 Draft of the Code of Canon Law.⁹⁹

96. St. Thomas Aquinas, Summa Theologica, Ia-IIae, v. 90, art. 4: "[...] quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata."

97. Paul VI, Apostolic Letter, De episcoporum muneribus, June 15, 1966, in A.A.S., 58(1966), p. 469: "[...] Facultas autem dispensandi exercetur circa leges praecipientes vel prohibentes, non autem circa leges constitutivas."

98. Schema canonum libri primi de normis generalibus, 1977, p. 29.

99. Schema codicis iuris canonici Patribus commissionis reservatum, 1980, p. 17.

The norm of the Apostolic Letter mentioned above, suggests that there are disciplinary laws as distinguished from constitutive ones. Among the disciplinary ones we could mention from the 1983 Code:

- (a) preceptive laws, which create an obligation to do something, e.g. Canon 1108, the canonical form for marriage;
- (b) prohibitive laws, which create an obligation to omit an action, e.g., Canon 286, clerics may not engage in business or trade;
- (c) permissive laws, which allow an action; e.g. Canon 1106, marriage through an interpreter;
- (d) certain invalidating laws, which render an action null and void, e.g. Canon 1086, the diriment impediment of disparity of worship;
- (e) some incapacitating laws, which make a person legally incapable to do something, e.g. Canon 1087, the diriment impediment of Holy Orders;
- (f) procedural laws, which regulate the judicial procedure in ecclesiastical tribunals, e.g. Canon 1405, the Pope is the sole judge in certain cases;
- (g) penal laws, which prescribe penalties for various delicts, e.g. Canon 1398, the automatic excommunication for those who procure an abortion.

Notwithstanding the fact that the term "constitutive law" did not appear in the 1917 Code, the principle of constitutive legislation and the incapacity to dispense from it was generally accepted.

It is axiomatic in canon law not to hazard a definition: definitio est periculosa. However, some authors have treated specifically of the topic of constitutive laws. Buijs refers to Vermeersch-Creusen's definition of constitutive law:

Constitutive laws are laws which immediately constitute rights, be they public or private, protect public order and only mediately and indirectly impose an obligation: thus, laws which regulate the constitution of society or hierarchy, constitute elements of juridical status, carry penalties, deprive acts of juridical effect and persons of capacity.¹⁰⁰

This definition is wide in range. It would, therefore, engulf some of the laws mentioned as disciplinary, namely: invalidating, incapacitating, permissive and penal laws.

On the other hand, Michiels' definition of constitutive law is much narrower:

[...] ecclesiastical law which is called constitutive is that law which positively determines the intrinsic form, or the essential elements of an act itself, which from canon law derives both its beginning and state, thus constituting it in its being or determinate nature.¹⁰¹

Some obvious examples of constitutive law are:

- (a) Canon 266: incardination of clerics;
- (b) Canon 369: notion of diocese;
- (c) Canon 654: religious profession;
- (d) Canon 1057: notion of matrimonial consent.

100. L. Buijs. "De potestate episcoporum dispensandi", in Periodica, 56(1967), pp. 101-102: "Leges, quae immediate iura, sive publica sive privata, constituunt, ordinem publicum muniunt, mediate tantum et indirecte obligationem imponunt; sic leges, quae constitutionem societatis seu hierarchiae ordinant, elementa status iuridici constituunt poenas ferunt, actus effectu iuridico vel personas capacitate privant."

101. G. Michiels, Normae generales iuris canonici; commentarius libri I codicis iuris canonici, Vol. I, p. 341: "Lex ecclesiastica sic dicta iuris constitutiva, quae scilicet positive determinat formam intrinsecam, seu elementa essentialia ipsum actum, qui ex iure canonico initium et totum statum capit, in suo esse seu determinata natura constituentia."

According to Michiels' more restrictive definition, invalidating and incapacitating laws would not come under the species of law called "constitutive". Buijs is inclined to agree: he maintains that the term has to be understood in a restricted sense which is in keeping with De episcoporum muneribus. Further, he argues that it would be redundant to have the twenty papal reservations, which involve most invalidating and incapacitating laws, listed under norm IX of De episcoporum muneribus, because if such laws could be considered constitutive laws, dispensations from them would be reserved by virtue of norm IV of the same Apostolic Letter.¹⁰²

One test, then, to distinguish between a disciplinary and a constitutive law would be to investigate the possibility of dispensation. We could use Canon 1108 as a test case. This canon is a preceptive one, because it prescribes the canonical form for marriage. Without the observance of this canonical form or without a dispensation from the prescription of this canon, a marriage would not exist. But the canon provides for a possible dispensation and, when this is sought and obtained, a marriage can exist. Thus, Canon 1108 can readily be categorized as a disciplinary law.

Now let us consider constitutive laws. A constitutive law could be of divine origin, e.g. Canon 900, par. 1 which declares that only a validly ordained priest can confect the Holy Eucharist. Constitutive laws could also be of ecclesiastical origin, e.g. Canon 102 regarding domicile. It would appear that the supreme legislator could dispense from any constitutive law that he has enacted or approved, i.e. a constitutive law of ecclesiastical origin. But this would more correctly be termed a derogation or perhaps even

102. L. Buijs, loc. cit., p. 102.

an abrogation of the law in question; because, in order to relax an ecclesiastical constitutive law, the supreme legislator would have to do away with those essential elements which constitute either the juridical institute or the juridical act. This does not happen when a disciplinary law is dispensed from. Such a dispensation merely suspends the operation of the particular law in a given case for a special reason. The law stands, in spite of the dispensation. Hence, we have the general principle that constitutive laws are not subject to a dispensation in the normal course of events.

A clear example of a constitutive law would be the law on incardination. Canon 111, par. 2 (C.I.C. 1917) stated that incardination into a diocese took place by the reception of the first tonsure. On August 15, 1972, Paul VI issued his Apostolic Letter, Ministeria quaedam, abolishing the first tonsure.¹⁰³ In effect, the law of the 1917 Code was superseded. There was no question of a dispensation. The law regulating the moment of incardination was revised. Likewise, Canon 266, par. 1 contains a norm according to which a person becomes a cleric and is incardinated into a diocese. This canon is a new law, not the result of a dispensation from a former one. Thus, it demonstrates certain aspects of the essence of constitutive law.

In applying the same analysis to Canon 1127, par. 3, the following points emerge:

- (1) There is no reference to the intrinsic form of the marriage celebration -- the canon refers solely to the extrinsic form; nor is there any recognition of validity of the marriage without the observance of the external form.

103. Paul VI, Apostolic Letter, Ministeria quaedam, August 15, 1972, in A.A.S., 64(1972); p. 531.

- (2) The canon does not outline the elements necessary for the establishment of a juridical institute or the placing of a juridical act.
- (3) The canon contains a specific prohibition directed against a second celebration of the same marriage before a non-Catholic minister.
- (4) Canon 1127, par. 3 also forbids the presence of a non-Catholic minister along with a Catholic priest at a wedding, each asking for and receiving marital consent according to his own rite.
- (5) The contravention of either of these norms would in no way invalidate the marriage which was celebrated canonically before the second celebration.
- (6) In the event a dispensation from the binding force of this law is granted, the law itself would still stand. Only in that special case covered by the dispensation would it be rendered inactive.
- (7) A dispensation from an impediment to allow a couple to enter into a mixed marriage is possible, if all the conditions prescribed by law are fulfilled.

This being the case, we are strongly inclined to favour the view shared by Buijs and Michiels on constitutive laws, and hold that Canon 1127, par. 3 is clearly an ecclesiastical disciplinary law. In other words, it is subject to the dispensing power of the diocesan bishop.

SUMMARY

We began this chapter by reviewing the cases where the Holy See permitted a dual religious celebration of the same marriage. It only goes to show that the law prohibiting a dual religious marriage celebration is not inflexible.

Thereafter we saw some significant changes in mixed marriage legislation that were the result of post-conciliar thinking. These changes were in the

area of ecclesiastical discipline. There was no tampering with the divine law obligations of the Catholic.

But while the Church liberalized her laws governing the celebration of mixed marriage, it retained the prescription against a dual religious marriage celebration. This is because there could be a danger to the faith of the Catholic in such a situation.

Yet, as we have demonstrated, this prohibitive law is of ecclesiastical origin and disciplinary in nature, thus yielding to a dispensation.

If we could establish that this dispensation is within the competence of the diocesan bishop, without the need of recourse to a higher authority, then there is a possibility of resolving the problem in individual cases.

CHAPTER IV
THE AUTHORITY OF THE EPISCOPAL CONFERENCE
AND THE DIOCESAN BISHOP OVER THE
CELEBRATION OF MARRIAGE ACCORDING TO
THE 1983 CODE

So far, in our study we have considered not only the marriage situation in India, but also the Church's legislation regarding the celebration of mixed marriage. There remains for us to see whether the law itself contains mechanisms that would enable either the Episcopal Conference or the diocesan bishop to adapt the general law through a decree, or to dispense on occasion from the prescription of the norms.

This is the purpose of the present chapter which shall comprise two sections. In the first section, we shall look into the possibility of having the Episcopal Conference legislate, or dispense from certain laws. In the second section, the legislative and dispensing power of the diocesan bishop will be examined. We shall confine ourselves to the celebration of marriage.

A. THE EPISCOPAL CONFERENCE

As early as the mid-nineteenth century, the bishops of various countries met at fixed intervals to discuss, on an informal basis, the pastoral governing of their local churches.¹ Conferences of this type were held in

1. B. A. Prince, Episcopal Conferences and the Canadian Catholic Conference, pp. 1-2.

Germany as early as 1848, and in Italy from 1849.² In Italy, an Instruction issued by the Congregation of Bishops and Regulars on August 24, 1889, divided the country into regions for the purpose of such meetings and included guidelines for their proceedings.³ Letters were sent by Leo XIII encouraging the bishops of Austria⁴ and Brazil⁵ to meet regularly for advice on better ways of promoting the faith. Similar letters were sent to America by Benedict XV⁶ and to Portugal by Pius XI.⁷ The Catholic Bishops' Conference of India has been operating since 1941 though its statutes were only officially approved at the First Plenary Council of India in 1950.⁸

Such Episcopal Conferences, though encouraged by the Popes and the Roman Congregations, had no canonical status, no legislative power. However, they did have a wider range than the one eventually determined by Canon 292 (C.I.C. 1917) which provided for bishops' meetings to be held every five years in each ecclesiastical province to deliberate on expedient measures and prepare them for proposal to the next provincial council.

2. Ibid., pp. 8-9.

3. Sacra Congregazione de' Vescovi e Regolari, "Circolare ai Vescovi d'Italia, per le annue conferenze episcopali di ciascuna regione," in I.M.E., 6(1889-1891), Par.1, pp. 173-175; S.C.C., Lettera circolare, February 15, 1919, in A.A.S., 11(1919), pp. 175-177.

4. Leo XIII, Letter, In ipso supremi Pontificatus, March 3, 1891, in A.S.S., 23(1890-1891), pp. 518-522.

5. ID., Letter, Litteras a vobis, in A.S.S., 27(1894-1895), pp. 3-7.

6. Benedict XV, Letter, Dilecti filii Nostri, April 10, 1919, in A.A.S., 11(1919), pp. 171-174.

7. Pius XI, Letter, Dilecte filii Noster, March 31, 1922, in A.A.S., 14(1922), p. 376; ID., Letter, Dilecte filii Noster, May 14, 1923, in A.A.S., 15(1923), pp. 339-340.

8. J. Dupuis, "Whither the CBCI", in Vidyajyoti, 47(1983), p. 418.

Canonical status was accorded to Episcopal Conferences by the conciliar decree on the pastoral office of bishops in the Church, Christus Dominus, October 28, 1965. Paragraph 38 (1) has this to say on the matter:

An episcopal conference is a form of assembly in which the bishops of a certain country or region exercise their pastoral office jointly in order to enhance the Church's beneficial influence, on all men, especially by devising forms of the apostolate and apostolic methods suitably adapted to the circumstances of the times.⁹

The 1983 Code has an entire chapter, consisting of thirteen canons, on Episcopal Conferences. Canon 447 describes an Episcopal Conference:

The conference of bishops, a permanent institution, is a grouping of bishops of a given nation or territory whereby, according to the norm of law, they jointly exercise certain pastoral functions on behalf of the Christian faithful of their territory with the view of promoting that greater good which the Church offers humankind, especially through forms and programmes of the apostolate which are fittingly adapted to the circumstances of the time and place.¹⁰

In this description of the Episcopal Conference, there are some significant elements:

- (1) the Episcopal Conference is established to provide varied and fruitful assistance in our times. This echoes the teaching of Lumen gentium, the

9. Vatican II Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), no. 38 (1), p. 693: "Est Episcoporum Conferentia veluti coetus in quo sacrorum Antistites cuiusdam nationis vel territorii munus suum pastorale coniunctim exercent ad maius bonum, quod hominibus praebet Ecclesia, provehendum, praesertim per apostolatus formas et rationes occurrentibus aetatis adiunctis apte compositas."

10. A.A.S., 75(1983), Pars II, p. 82: "Episcoporum conferentia, institutum quidem permanens, est coetus Episcoporum alicuius nationis vel certi territorii, munera quaedam pastoralia coniunctim pro christifidelibus eius territorii exercentium, ad maius bonum provehendum quod hominibus praebet Ecclesia, praesertim per apostolatus formas et rationes temporis et loci adiunctis apte accommodatas, ad normam iuris."

dogmatic constitution on the Church;¹¹

- (2) the Episcopal Conference is in the service of all people, making available to them the greater good the Church has to offer.

One aspect of the Episcopal Conference that should be examined more particularly is its legislative and dispensing power with respect to the celebration of marriage.

1. Legislative Power

The Episcopal Conference is not a legislative body. Rather, it would seem to be administrative and executive in its existence and function. However, the Conference may issue general decrees which are equivalent to laws, provided certain restrictions are observed.

The Conference can issue such decrees whenever the universal law of the Church permits it, or when it has received a mandate to do so from the Apostolic See. Such a mandate can come at the initiative of the Apostolic See itself or it can be requested by the Conference. At least two-thirds of the bishops who have a deliberative vote in the Conference must vote for it before such a decree can have binding force. Similar to the procedure for a particular council, the decree must be reviewed by the Apostolic See before it may be promulgated and take effect.

11. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 23, p. 29: "[...] Coetus Episcopales hodie multiplicem atque fecundam opem conferre possunt, ut collegialis affectus ad concretam applicationem perducatur."

It is also possible for the members of an Episcopal Conference to take joint action which would have binding force if all the bishops unanimously adopted a particular action. This in effect would mean that each bishop would be making local law in his own diocese but it would be a common law for all dioceses since each would have adopted it. Under such circumstances it is not necessary to have the approval of the Apostolic See or even its review of what the bishops have done.¹²

In the 1983 Code, there are eight canons that regulate the legislative power of the Episcopal Conference with respect to marriage. Some of these refer to the preliminaries and formalities that usually precede the celebration, e.g.:

- (1) the Conference may determine a particular law regarding the promise of marriage or the canonical engagement;¹³

12. Canon 455:

1. "Episcoporum conferentia decreta generalia ferre tantummodo potest in causis, in quibus ius universale id praescripserit aut peculiare Apostolicae Sedis mandatum sive motu proprio sive ad petitionem ipsius conferentiae id statuerit.

2. Decreta de quibus in #1, ut valide ferantur in plenario conventu, per duas saltem ex tribus partibus suffragiorum Praesulum, qui voto deliberativo fruente ad conferentiam pertinent, proferri debent, atque vim obligandi non obtinent, nisi ab Apostolica Sede recognita, legitime promulgata fuerint.

3. Modus promulgationis et tempus a quo decreta vim suam exserunt, ab ipsa Episcoporum conferentia determinantur.

4. In casibus in quibus nec ius universale nec peculiare Apostolicae Sedis mandatum potestatem, de qua in #1, Episcoporum conferentiae concessit, singuli Episcopi dioecesani competentia integra manet, nec conferentia eiusve praeses nomine omnium Episcoporum agere valet, nisi omnes et singuli Episcopi consensum dederint."

13. Canon 1062, par. 1: "Matrimonii promissio sive unilateralis sive bilateralis, quam sponsalia vocant, regitur iure particulari, quo ab Episcoporum conferentia, habita ratione consuetudinum et legum civilium, si quae sint, statutum fuit."

- (2) it shall determine the content of the pre-nuptial enquiry and the norms for the publication of banns;¹⁴
- (3) the Conference may establish a higher age for the licit celebration of marriage than that stipulated in canon law;¹⁵
- (4) it can draw up a suitable rite for the area.¹⁶

As for the formalities to be observed after the celebration of marriage, besides the diocesan bishop, the Episcopal Conference can also prescribe the manner of registration.¹⁷

According to the norms of Canon 1112, par. 1, the diocesan bishop can delegate suitable lay persons to assist at marriage, provided that the Conference is in favour and the Holy See approves.¹⁸ It is seen that the role of the Episcopal Conference in this matter is subordinated to the decision of

14. Canon 1067: "Episcoporum conferentia statuatur normas de examine sponsorum, necnon de publicationibus matrimonialibus aliisque opportunis mediis ad investigationes peragendas, quae ante matrimonium necessariae sunt, quibus diligenter observatis, parochus procedere possit ad matrimonium assistendum."

15. Canon 1083, par. 2: "Integrum est Episcoporum conferentiae aetatem superiorem ad licitam matrimonii celebrationem statuere."

16. Canon 1120: "Episcoporum conferentia exarare potest ritum proprium matrimonii, a Sancta Sede recognoscendum, congruentem locorum et populorum usibus ad spiritum christianum aptatis, firma tamen lege ut assistens matrimonio praesens requirat manifestationem consensus contrahentium eamque recipiat."

17. Canon 1121, par. 1: "Celebrato matrimonio, parochus loci celebrationis vel qui eius vices gerit, etsi neuter eidem astiterit, quam primum adnotet in matrimoniorum registis nomina coniugum, assistentis ac testium, locum et diem celebrationis matrimonii, iuxta modum ab Episcoporum conferentia aut ab Episcopo diocesano praescriptum."

18. Canon 1112, par. 1: "Ubi desunt sacerdotes et diaconi, potest Episcopus diocesanus, praevio voto favorabili Episcoporum conferentiae et obtenta licentia Sanctae Sedis, delegare laicos, qui matrimoniis assistant."

the Holy See. However, if the Conference is not in favour, the diocesan bishop cannot delegate a lay person to witness a marriage.

There are but two canons in the 1983 Code that spell out the legislative power of the Episcopal Conference in matters of mixed marriages.

Canon 1126 empowers the Episcopal Conference, within its own territorial competence, to determine the way in which the declarations and promises of the Catholic spouse in a mixed marriage, a prerequisite to permission/dispensation, shall be made; that is, whether they will be made orally, or in writing, or before witnesses. Also, the Conference can determine what proof of such promises should be had in the external forum, and how they are to be brought to the knowledge of the non-Catholic partner.¹⁹

By virtue of Canon 1127, par. 2, the Episcopal Conference shall establish norms for the granting of dispensation from canonical form, in order that it may be granted in a uniform way throughout the territory of the Conference. These norms would prescribe, in lieu of the canonical form, some public form of celebration, which is required for validity.²⁰

19. Canon 1126: "Episcoporum conferentiae est tum modum statuere, quo hae declarationes et promissiones, quae semper requiruntur, faciendae sint, tum rationem definire, qua de ipsis et in foro externo constet et pars non catholica certior reddatur."

20. Canon 1127, par. 2: "Si graves difficultates formae canonicae servandae obstant, Ordinario loci partis catholicae ius est ab eadem in singulis casibus dispensandi, consulto tamen Ordinario loci in quo matrimonium celebratur, et salva ad validitatem aliqua publica forma celebrationis; Episcoporum conferentiae est normas statuere, quibus praedicta dispensatio concordati ratione concedatur."

The two canons described above, Cónons 1126 and 1127, par. 2, can be traced back to norms 7 and 9 of Matrimonia mixta.²¹ Following the directives of this document, Episcopal Conferences of various nations drew up their own norms for their respective territories.²²

The 1983 Code does not provide for a general decree of the Conference regarding a dual religious marriage ceremony. Consequently, if a special decree were to be issued, particular authorization of the Holy See would be required before such a decree would be approved by the Episcopal Conference according to the norms of Canon 455.

It can be seen that the Episcopal Conference as such enjoys rather limited power over the celebration of marriage. It cannot enact legislation in this regard, except in conformity with the norms of Canon 455. However, given the unique religious pluralism in India, it would be opportune for the Catholic Bishops' Conference of India to petition the Holy See for a special law for its territory.

21. P. Felici and H. D'Souza, in Comm., 12(1980), p. 452; Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 261.

22. For instance: Canadian Catholic Conference, "Mixed Marriages: Particular Norms for Canada", June 5-6, 1970 [Provisional Norms], in C.L.D., pp. 718-725; ID., "Mixed Marriage Legislation for Canada", September 20-24, 1971, in J. A. Plourde, Manuscript Letters or Communiqués, Archdiocese of Ottawa, 1971, pp. 302-309; etc. Catholic Bishops' Conference of India, 1970, "Mixed Marriages: Particular Norms for India", in C.L.D., 7, pp. 725-726; South Africa Catholic Bishops' Conference, "Mixed Marriages: Particular Norms for South Africa", September 1-4, 1970, in C.L.D., 7, pp. 727-729; Irish Episcopal Conference, "Mixed Marriages: Particular Norms for Ireland", October 1970, in C.L.D., 7, pp. 729-730; National Conference of Catholic Bishops, "Mixed Marriages: Particular Norms for U.S.A.", November 16, 1970, in C.L.D., 7, pp. 730-740.

2. Dispensing Power

No dispensing power has been envisaged for the Episcopal Conference in the 1983 Code. Although the Conference does exercise certain pastoral functions, it does not have the direct care of souls. Hence it is not as such vested with power to dispense.

B. THE DIOCESAN BISHOP

Before elaborating on the legislative and dispensing powers of the diocesan bishop, it will be helpful to recall briefly what Chapter III of Lumen gentium states about the diocesan bishop.²³

1. The Office of the Diocesan Bishop

In paragraph 18 we read:

This sacred synod, following in the steps of the First Vatican Council, teaches and declares with it that Jesus Christ, the eternal pastor, set up the holy Church by entrusting the apostles with their mission as He himself had been sent by the Father (cfr. Jn. 20-21). He willed that their successors, namely the bishops, should be the shepherds in his Church until the end of the world.²⁴

The conciliar decree on the pastoral office of bishops in the Church, Christus Dominus, October 28, 1965, also refers to bishops "as successors of the Apostles".²⁵

23. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), nos. 18-27, pp. 21-33.

24. Ibid., no. 18, p. 22: "Haec Sacrosancta Synodus, Concilii Vaticani primi vestigia premens, cum eo docet et declarat Iesum Christum Pastorem aeternum sanctam aedificasse Ecclesiam, missis Apostolis sicut Ipse missus erat a Patre (cfr. Jn. 20-21); quorum successores, videlicet Episcopos, in Ecclesia sua usque ad consummationem saeculi pastores esse voluit."

25. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), no. 8 (a), p. 676, "Episcopis, ut Apostolorum successoribus [...]"

Utilizing these conciliar teachings, the Code Commission formulated a draft definition of bishops, also including a description of their office. This appeared as Canon 36, par. 1 in the 1971 draft of the Lex Ecclesiae Fundamentalis:

Bishops, who are the successors of the Apostles by divine institution, through the Holy Spirit, who is given to them, are constituted in the Church in order that they may be teachers of doctrine, priests of sacred worship and ministers of governance.²⁶

This text was then amended, at the instance of some bishops, by including the word pastores (pastors), thus emphasizing this aspect of the bishop's office. This amended canon, numbered 37, par. 1, read in the following fashion: [...] are constituted pastors in the Church [...]²⁷

In its session of November 20-23, 1972, the Commission reviewed the amended canon and decided to introduce it in the draft of the Code itself. It now became Canon 225, par. 1. Exactly the same wording was retained in the 1980 Draft (Canon 342, par. 1), repeated in the 1982 Draft as Canon 375, par. 1²⁸ and promulgated as Canon 375, par. 1 in the 1983 Code.²⁹

26. Schema Legis Ecclesiae Fundamentalis: textus emendatus cum relatione de ipso schemate deque emendationibus receptis, 1971, p. 25: "Episcopi, qui ex divina institutione in Apostolorum locorum succedunt, per Spiritum Sanctum qui datus est eis, in Ecclesia constituuntur ut sint doctrinae magistri, sacri cultus sacerdotes et gubernationis ministri."

27. Ibid., p. 25: "[...] in Ecclesia constituuntur pastores [...]"

28. Schema codicis iuris canonici, 1980, p. 82; Codex iuris canonici: schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum, p. 68.

29. Canon 375, par. 1: "Episcopi, qui ex divina institutione in Apostolorum locum succedunt per Spiritum Sanctum qui datus est eis, in Ecclesia Pastores constituuntur, ut sint et ipsi doctrinae magistri, sacri cultus sacerdotes et gubernationis ministri."

As indicated before, this canon has its taproot in the teaching of Lumen gentium³⁰ which makes mention of a sacra potestas with which the holders of office are invested.³¹ This same dogmatic constitution teaches that the sacra potestas of bishops comes into existence through the bestowal of the fullness of the sacrament of holy orders by means of episcopal ordination.³²

The authority which comes with this sacra potestas is given to bishops as an authority of service; they are appointed not to lord it over their faithful, but to serve them in a truly Christian way, so that all, servants and served, may move forward together on the road to salvation and to God.³³

Vatican II makes mention simply of the one sacra potestas,³⁴ and upholds the view that the three munera of teaching, ruling and sanctifying are all rooted in the one sacrament which confers the authority.³⁵

30. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 18, p. 22; no. 20, p. 24.

31. Ibid., no. 18, p. 21: "[...] Ministri enim, qui sacra potestate pollent [...]"

32. Ibid., no. 21, p. 25: "[...] Docet autem Sancta Synodus episcopali consecratione plenitudinem conferri sacramenti Ordinis [...]"

33. Ibid., no. 18, p. 21: "Ministri enim, qui sacra potestate pollent, fratribus suis inserviunt, ut omnes qui de Populo Dei sunt, ideoque vera dignitate christiana gaudent, ad eundem finem libere et ordinatim conspirantes, ad salutem perveniant."

34. Ibid., no. 18, p. 21.

35. Ibid., no. 21, p. 25: "Episcopalis autem consecratio, cum munere sanctificandi, munera quoque confert docendi et regendi [...]"

Episcopal ordination, as we have already seen, confers the sacrament of orders in its fullness. It brings into existence the sacra potestas for every bishop.³⁶ However, this sacra potestas needs juridical determination.³⁷ In actual practice, this can consist of the granting of a particular office or in the assignment of subjects and is given according to fixed norms approved by the Church's supreme authority.³⁸

It follows that such an ecclesiastical mandate, with its consequent munera demands regulation by the highest authority.³⁹ Therefore, hierarchical communion with the head and other members of the college of bishops is also required to obtain this ecclesiastical mandate, which is technically called missio canonica.⁴⁰

36. Ibid., no. 21, p. 25.

37. R. R. Ryan, "The Dispensing Authority of the Residential Bishop of the Latin Rite regarding the General Laws of the Church", in The Jurist, 35(1975), p. 177.

38. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, Nota explicativa praevia, in A.A.S., 57(1965), p. 73: "[...] Quae determinatio potestatis consistere potest in concessione particularis officii vel in assignatione subditorum, et datur iuxta normas a suprema auctoritate adprobatus. [...]"; cfr. also, R. R. Ryan, loc. cit., pp. 177-178.

39. Ibid., "[...] Huiusmodi ulterior norma ex natura rei requiritur, quia agitur de muneribus quae a pluribus subiectis, hierarchice ex voluntate Christi cooperantibus, exerceri debent"; cfr. also R. R. Ryan, loc. cit., p. 178.

40. Ibid., "Aliquis fit membrum Collegii vi consecrationis episcopalis et communionem hierarchia cum Collegii Capite atque membris"; cfr. also, R. R. Ryan, loc. cit., p. 178.

Should the Pope object to or refuse apostolic communion, then a bishop cannot be admitted to office.⁴¹

Thus, the missio canonica puts into specific practice the three munera already obtained radically in episcopal ordination. It is also the outward sign that a bishop is in hierarchical communion with the Roman Pontiff and the other members of the college of bishops. Finally, the supreme authority of the Church can establish a missio canonica in such a way that, if a bishop were to act beyond his ecclesiastical mandate, he would act invalidly.⁴²

It must be remarked in passing that the expression missio canonica has disappeared in the 1983 Code. The same idea is conveyed in the term "mandate".

Can. 376 distinguishes between diocesan bishops and titular bishops. A diocesan bishop is one to whom the pastoral care of a diocese has been entrusted.⁴³ In the 1917 Code, the diocesan bishop was referred to as the residential bishop.⁴⁴

41. Ibid., no. 24, p. 29: "Episcoporum autem missio canonica fieri potest per legitimas consuetudines, a suprema et universali potestate Ecclesiae non revocatas, vel per leges ab eadem auctoritate latas aut agnitas, vel directe per ipsum Successorem Petri; quo renuente seu communionem Apostolicam denegante, Episcopi in officium assumi nequeunt."

42. R. R. Ryan; loc. cit., pp. 179-180.

43. Canon 376: "Episcopi vocantur diocesani, quibus scilicet alicuius diocesis cura commissa est; ceteri titulares appellantur."

44. Pont. Comm. C.A.C. Recognoscendo, "De episcopis in genere", in Comm., 5 (1973), p. 217: "Episcopi distinguuntur diocesani - in iure Codicis I.C. dicuntur residentiales, nunc autem dicendi sunt diocesani (cfr. Decr. Christus Dominus, Cap. II, n. 1) - et titulares scilicet quibus diocesis non est concedita [...]"

Article 27 of Lumen gentium delineates the position of the diocesan bishop with respect to his munus of governing. A bishop, having already received the divinely established sacra potestas through episcopal ordination and his particular missio canonica, governs a particular church which has been entrusted to his care as the vicar and legate of Christ by his counsel, exhortation and example, but over and above that by his episcopal authority and sacred power.⁴⁵ As mentioned before, in view of its inherent nature, the sacra potestas can be exercised only in hierarchical communion with the head and the other members of the episcopal college.⁴⁶ Thus, the exercise of the sacra potestas by diocesan bishops necessarily demands the elements of both episcopal ordination and hierarchical communion. Hierarchical communion in this case is manifested in the bestowal of the missio canonica of being the head of a diocese.⁴⁷

The sacra potestas of diocesan bishops is personally exercised in the name of Jesus Christ,⁴⁸ according to divine institution, with each bishop possessing personal responsibility for his diocese. Using traditional terms, Vatican II affirms that this potestas is ordinary, immediate and proper to the

45. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 27, p. 32: "Episcopi Ecclesias particulares sibi commissas ut vicarii et legati Christi regunt, consiliis, suasionibus, exemplis, verum etiam auctoritate et sacra potestate [...]"

46. Ibid., no. 21, p. 25: "Episcopalis autem consecratio, cum munere sanctificandi, munera quoque confert docendi et regendi, quae tamen natura sua non nisi in hierarchica communione cum Collegii Capite et membris exerceri possunt."

47. R. R. Ryan, loc. cit., pp. 180-181.

48. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 27, p. 32: "Haec potestas qua, nomine Christi personaliter funguntur [...]"

diocesan bishop.⁴⁹ With regard to his own subjects, the diocesan bishop, by virtue of this sacra potestas, has the sacred right and the duty before the Lord to enact laws, to pass judgements on them and to regulate all matters pertaining to the order of worship and of the apostolate.⁵⁰ The pastoral charge, that is, the permanent and daily care of the people is entrusted to him.⁵¹

The diocesan bishop is not to be regarded as a vicar of the Roman Pontiff. In spite of being subordinate to the Pope, he is not a lower official of the Pope. He possesses a sacra potestas in his own right having received it together with the munera in episcopal ordination. He is called in the truest sense of the term the prelate of the people whom he governs.⁵² Consequently, this sacra potestas of the bishop in his diocese, far from being weakened by the supreme and universal authority, rather is defended, upheld and strengthened by it, since the Holy Spirit preserves unflinchingly that form of government which was set up by Christ the Lord in His Church.⁵³

49. Ibid., "Haec potestas [...] est propria, ordinaria et immediata [...]"

50. Ibid., no. 27, pp. 32-33: "[...] Vi huius potestatis Episcopi sacrum ius est et coram Domino officium habent in suos subditos leges ferendi, iudicium faciendi, atque omnia, quae ad cultus apostolatusque ordinem pertinent, moderandi."

51. Ibid., no. 27, p. 33: "Ipsis munus pastorale seu habitualis et cotidiana cura ovium suarum plene committitur [...]"

52. Ibid., no. 27, p. 33: "[...] neque vicarii Romanorum Pontificum putandi sunt, quia potestatem gerunt sibi propriam verissimeque populorum quos regunt Antistites dicuntur."

53. Ibid., no. 27, p. 33: "Eorum itaque potestas a suprema et universali potestate non eliditur sed e contra asseritur, roboratur et vindicatur, Spiritu Sancto constitutam a Christo Domino in sua Ecclesia regiminis formam indefectibiliter servante."

While the diocesan bishop enjoys this sacra potestas personally and as a legate of Christ, its exercise is ultimately controlled by the supreme authority of the Church and can be confined within certain limits, should the usefulness of the Church and the faithful require that.⁵⁴ Canon 381, par. 1 is the juridical expression of this teaching of Vatican II enucleated in Lumen gentium. Though he receives radically the sacra potestas and the munera in episcopal ordination and can exercise his power due to being in hierarchical communion, the diocesan bishop is appointed to his own concrete office as head of a particular church or a diocese through the missio canonica or mandate given by the competent ecclesiastical authority. This same authority can withdraw the concrete office from the diocesan bishop according to law.⁵⁵

With this theological portrait of the diocesan bishop completed, the stage is set for us to investigate his legislative and dispensing authority over the celebration of marriage.

2. Legislative Power of the Diocesan Bishop

Canon 391, par. 1 endows the diocesan bishop with legislative, executive and judicial power.⁵⁶ By this triple power, the bishop implements his function of governing his people.

54. Ibid., no. 27, p. 32: "Haec potestas qua nomine Christi personaliter funguntur, est propria, ordinaria et immediata, licet a Suprema Ecclesiae auctoritate exercitium eiusdem ultimatum regatur et certis limitibus, intuitu utilitatis Ecclesiae vel fidelium, circumscribi possit."

55. K. Mürsdorf, "Decree on the Bishops' Pastoral office in the Church", in Commentary on the Documents of Vatican II, Vol. II, pp. 207-208; cfr. also R. R. Ryan, loc. cit., p. 182.

56. Can. 391, par. 1: "Episcopi dioecesani est Ecclesiam particularem sibi commissam cum potestate legislativa, executiva et iudiciali regere, ad normam iuris."

The diocesan bishop exercises his executive power either personally or through his deputies, be they vicars general or episcopal vicars, in keeping with the law. Likewise, he exercises his judicial power either personally or through his judicial vicar or judges, in conformity with the law. But he is the only law-maker in his diocese.⁵⁷ It stands to reason that there cannot be more than one who lays down the law in the diocese or, for that matter, in any institution. When there is more than one law-maker, conflict and chaos are possible.

We now ask ourselves how much of this legislative power can a diocesan bishop exercise over the celebration of marriage. It appears that there is little or nothing that the diocesan bishop can legislate about the actual celebration of marriage. The supreme authority has already laid down the law in this respect. Thus, the diocesan bishop has to follow the laws regulating the celebration of marriage as promulgated in the 1983 Code.

3. Dispensing Power

(a) Conciliar Teaching

In the Dogmatic Constitution on the Church, Lumen gentium, Vatican II has described diocesan bishops as:

57. Can. 391, par. 1: "Potestatem legislativam exercet ipse Episcopus; potestatem executivam exercet sive per se sive per Vicarios generales aut episcopales ad normam iuris; potestatem iudicalem sive per se sive per Vicarium iudicalem et iudices ad normam iuris."

vicars and legates of Christ who govern the particular churches assigned to them [...] by the authority and sacred power which indeed they exercise exclusively for spiritual development [...]. This power, which they exercise personally in the name of Christ, is proper, ordinary and immediate, although its exercise is ultimately controlled by the supreme authority of the Church and can be confined within certain limits should the usefulness to the Church and the faithful require that. [...]58

In the conciliar decree on the pastoral office of bishops in the Church, Christus Dominus, the principles proposed in the dogmatic constitution on the Church are dealt with from a more practical angle. The power of the diocesan bishops and the limitations which may be imposed on its exercise are reaffirmed in this decree. This teaching has been formulated in Article 8 (a):

Bishops, as the successors of the apostles, enjoy as of right in the dioceses assigned to them all ordinary special and immediate power which is necessary for the exercise of their pastoral office, but always without prejudice to the power which the Roman Pontiff possesses; by virtue of his office, of reserving certain matters to himself or to some other authority.⁵⁹

The words per se ("as of right") indicate that the power of the diocesan bishops does not derive from the power of the Pope, but is a power of divine right with an existence of its own apart from the papacy.⁶⁰

58. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 27, p. 32: "Episcopi Ecclesias particulares sibi commissas ut vicarii et legati Christi regunt [...] auctoritate et sacra potestate, qua quidem non nisi ad gregem suum in veritate et sanctitate aedificandum utuntur [...]. Haec potestas qua, nomine Christi personaliter funguntur, est propria, ordinaria et immediata, licet a suprema Ecclesiae auctoritate exercitium eiudem ultimatum regatur et certis limitibus, intuitu utilitatis Ecclesiae vel fidelium, circumscribi possit."

59. A.A.S., 58(1966), no. 8 (a), p. 676: "Episcopis, ut Apostolorum successoribus, in diocesibus ipsis commissis per se omnis competit potestas ordinaria, propria ac immediata, quae ad exercitium eorum muneris pastoralis requiritur, firma semper in omnibus potestate quam, vi muneris sui, Romanus Pontifex habet sibi vel alii Auctoritate causas reservandi."

60. K. Mürsdorf, op. cit., p. 207; cfr. also R. R. Ryan, loc. cit., p. 183.

The power of the diocesan bishop, which he possesses per se, never in any instance infringes upon the Pontiff's power to reserve cases to himself or to some authority by virtue of his particular munus⁶¹ of being the Vicar of Christ and Pastor of the entire Church.⁶²

However, the Roman Pontiff cannot destroy the sacra potestas which the diocesan bishop possesses by virtue of his episcopal ordination. In the same way, the Roman Pontiff cannot restrict the exercise of the diocesan bishop's sacra potestas to such an extent as to render it ineffective, for that would be tantamount to destroying the sacra potestas. The diocesan bishop then would not possess de facto the potestas needed for carrying out his own pastoral office.⁶³

With this conciliar teaching on the juridical status of the diocesan bishop in mind, we must now enquire whether he could exercise his sacra potestas to resolve the problem of "the double religious marriage ceremony which gives the bishops in India cause for great pastoral concern."⁶⁴

61. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), no. 8 (a), p. 676: "[...] firma semper in omnibus potestate quam, vi muneris sui Romanus Pontifex habet sibi vel alii Auctoritati causas reservandi"; cfr. also R. R. Ryan, loc. cit., p. 183.

62. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 22, p. 26: "[...] Romanus enim Pontifex habet in Ecclesiam, vi muneris sui, Vicarii scilicet Christi et totius Ecclesiae Pastoris, plenam, supremam et universalem potestatem, quam semper libere exercere valet."

63. R. R. Ryan, loc. cit., p. 184.

64. C.B.C.I., Communication to the Synod of Bishops 1980 on its theme "The Role of the Christian Family in the Modern World", p. 16.

While Article 8 (a) deals with the power of the diocesan bishop and the limitations on the exercise of this power, Article 8 (b) of Christus Dominus defines the dispensing authority of the diocesan bishop vis-à-vis the general laws of the Church:

Individual diocesan bishops have the power to dispense those faithful over whom they normally exercise authority, from the general law of the Church in particular cases. It must, however, be to their spiritual benefit and may not cover a matter which has been specially reserved by the supreme authority of the Church.⁶⁵

Left unresolved, however, is the question of the origin of the diocesan bishop's faculty to dispense from the general laws of the Church in particular cases. One may ask: is Vatican II conferring the faculty on the diocesan bishop or is it acknowledging the fact that he is already in possession of the faculty by virtue of his office?

It seems that Vatican II in Article 8 (b) of Christus Dominus is admitting the fact that the diocesan bishop is already vested with the authority to grant dispensations from the general law of the Church.⁶⁶

Article 8 (b) of Christus Dominus envelopes four elements which are worthwhile examining:

- (1) the particular case;
- (2) the faithful;

65. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), no. 8 (b), p. 676: "Singulis Episcopis dioecesanis facultas fit a lege generali Ecclesiae in casu particulari dispensandi fideles in quos ad normam iuris exercent auctoritatem, quoties id ad eorum bonum spirituale conferre iudicent, nisi a Suprema Ecclesiae Auctoritate specialis reservatio facta fuerit."

66. R. R. Ryan, loc. cit., p. 187.

- (3) their spiritual welfare;
- (4) the role of the ~~supreme~~ authority of the Church.

(1) the particular case

The expression in casu particulari is the usual term employed when describing a dispensation.⁶⁷ This is a change from the phrases, in casu speciali⁶⁸ and in casu quidem peculiari⁶⁹ found in the 1917 Code. The "particular case" is one in which a dispensation is granted to a particular person for a just cause.⁷⁰

(2) the faithful

The concept of the faithful has undergone a significant change in the drafts that preceded the decree Christus Dominus. In the original 1964 draft, the "faithful" were referred to, but only in relation to the cause for which the faculty to dispense could be used by the diocesan bishop, that is, as often as he judges it helpful for their spiritual good.⁷¹ The emended 1964 draft clarified the concept of the "faithful" who could be dispensed: those

67. U. C. Beste, Introductio in codicem, p. 129: "Dispensatio est actus, quo in lege suo vigore firma manente, eius obligatio in casu particulari tantum aufertur vel suspenditur."

68. Can. 80 (C.I.C. 1917): "Dispensatio, seu legis in casu speciali relaxatio [...]"

69. Can. 81 (C.I.C. 1917): "A generalibus Ecclesiae legibus Ordinarii infra Romanum Pontificem dispensare nequeunt, ne in casu quidem peculiari [...]"

70. J. Brys, "De potestate episcoporum dispensandi in legibus ecclesiae generalibus", in C.B., 29(1929), p. 144.

71. Sacrosantum Oecumenicum Concilium Vaticanum Secundum, Schema decreti de pastorali episcoporum munere in Ecclesia: Textus emendatus et relationes, p. 17; "[...] quoties id ad bonum spirituale fidelium conferre iudicent [...]"; cfr. also R. R. Ryan, loc. cit., p. 188.

over whom the diocesan bishop has authority according to the norm of the law.⁷²

The final text of the draft of the decree Christus Dominus was distributed to the Council Fathers during the 129th general congregation on September 16, 1965.⁷³ This text made a further modification. The word habent (have) was replaced by the word exercent (exercise), so that the text would read: the faithful over whom they normally exercise authority.⁷⁴

It was this emended text that went into the decree Christus Dominus. Thus, by virtue of Article 8 (b) of this decree, the faculty of dispensing from a general law of the Church in a particular case can be used by the diocesan bishop for the faithful over whom he exercises authority according to the norm of law.⁷⁵

The change from habent to exercent fitted well into the context of the teaching of Article 8 (a) of Christus Dominus. In that article, it is acknowledged that all the ordinary, immediate and proper potestas belongs per se to the diocesan bishop.⁷⁶ It is by virtue of that divinely constituted

72. Ibid., "[...] fideles in quos ad normam iuris habent auctoritatem [...]"

73. Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, Vol. 4-4-2, p. 508.

74. Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, Vol. 4-4-2, p. 514; "[...] fideles in quos ad normam iuris exercent auctoritatem [...]"

75. Vatican II, Decree, Christus Dominus, in A.A.S., 58(1966), no. 8 (b), p. 676.

76. Ibid., no. 8 (a).

potestas required for the exercise of his office, that the diocesan bishop exercises the faculty to dispense from a general law of the Church.⁷⁷ Hence, it follows that in Article 8 (b) of Christus Dominus, the word exercent, is used to highlight the fact that the diocesan bishop already possesses the said authority. It is a question of exercise of authority rather than the possession of the said authority.⁷⁸

(3) the spiritual welfare

While the diocesan bishop enjoys the power to dispense from a general law of the Church, he needs a weighty motive, a just and reasonable cause to exercise this authority validly.⁷⁹ This is because a general law is enacted by the supreme authority of the Church, that is, by the Roman Pontiff alone or acting together with the other members of the college of bishops. This supreme authority is one which is superior to that of the diocesan bishop as an individual member of the college of bishops.⁸⁰

Vatican II, through Christus Dominus, provides a just and reasonable cause: as often as and when a bishop judges that a dispensation contributes to the spiritual benefit of the faithful.⁸¹ The spiritual welfare of the

77. Acta Synodalia Sacrosanctum Concilii Oecumenici Vaticani II, Vol. 4-4-2, p. 514.

78. R. R. Ryan, loc. cit., p. 189.

79. Can. 90, par. 1: "A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione adiunctorum casus et gravitatis legis a qua dispensatur; alias dispensatio illicita est et, nisi ab ipso legislatore eiusve superiore data sit, etiam invalida."

80. R. R. Ryan, loc. cit., p. 190.

81. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), no. 8 (b), p. 676.

Christian determines the scope of the dispensing authority.⁸²

(4) the role of the supreme authority of the Church

In terms of Article 8 (b) of Christus Dominus, the diocesan bishop has the faculty of granting a dispensation from the general law of the Church in a particular case, if he judges it will be of spiritual benefit to the faithful. But this same article also places a restriction on the exercise of that faculty: unless a special reservation has been made by the supreme authority of the Church.⁸³ Hence, the diocesan bishop can exercise his dispensing power only over those cases not reserved to the supreme authority of the Church.

The original text of the 1964 draft has this wording: "provided it is a question of a matter over which the Apostolic See is wont to dispense, and a special reservation has not been made by the Apostolic See either to itself or to another authority."⁸⁴ No modification was made in the emended text distributed to the Council Fathers on September 16, 1965. But the final text did see a significant change. While the original text referred to the special reservation made by the Apostolic See, the final text refers to a "special reservation made by the supreme authority of the Church.

82. K. Mörsdorf, "The Relationship of Bishops to the Universal Church", in Commentary on the Documents of Vatican II, Vol. II, p. 210.

83. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), no. 8 (b), p. 676.

84. Sacrosanctum Oecumenicum Concilium Vaticanum Secundum, op. cit., p. 17: "[...] dummodo agatur de re in qua Sedes Apostolica dispensare solet, nec specialis reservatio a Sede Apostolica sibi vel alii Auctoritati facta fuerit."

validly dispense in non-reserved cases.⁸⁸

Hence, it would seem that the dispensing power of bishops does not extend to all matters, according to the Conciliar Commission, but only to those for which a special reservation has not been made by the supreme authority of the Church.⁸⁹ It also seems that a dispensation from such specially reserved cases given by a bishop would be invalid, precisely because of the special reservation to and by the supreme authority. The Conciliar Commission in its Relatio notes that only the supreme authority, be it the Roman Pontiff or an ecumenical council, per se validly establishes such reservations in favour of another authority, whenever dispensations in general or universal laws are concerned.⁹⁰

Ryan holds that a diocesan bishop can dispense validly, albeit unlawfully, in cases where a special reservation is made by the supreme authority of the Church, provided a proportionately grave and just cause is present.⁹¹ How he would reconcile his view with the ruling of the

88. Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II, Vol. 4-4-2, pp. 518-519: "Suppressa sunt verba 'dummodo agatur de re in qua sedes Apostolica dispensare solet'; haec enim verba, quae nimis indeterminatam relinquunt materiam inutilia sunt, quia cum ipsi Episcopi dispensare valeant in materiis non reservatis, revera non dabitur iurisprudencia, qua constare poterit in quibusnam materiis Sedes Apostolica dispensare solet."

89. Ibid., p. 519: "Potestas autem Episcoporum non ad omnes materias sese extendit sed solummodo ad eas, de quibus non fuerit facta reservatio specialis a Suprema Ecclesiae Auctoritate. Haec itaque formula introducta est in textu 'nisi a Suprema Ecclesiae Auctoritate specialis reservatio facta fuerit' [...]"

90. Ibid., "Re quidem vera, una ex parte, cum agatur de dispensationibus in legibus generalibus seu universalibus, sola Suprema Auctoritas, scilicet sive Romanus Pontifex sive Concilium Oecumenicum, per se valet tales reservationes in favorem alicuius auctoritatis statuere."

91. R. R. Ryan, loc. cit., p. 194.

Congregation for the Doctrine of the Faith, or, for that matter, how he would circumvent Canon 291 is difficult to understand and beyond the scope of this study.⁹²

(b) Implementing Conciliar Teaching

On June 15, 1966, Paul VI promulgated an Apostolic Letter, De episcoporum muneribus, interpreting Article 8 (b) of Christus Dominus and, at the same time, containing rules for the application of conciliar legislation vis-à-vis the dispensing power of the diocesan bishop in the Latin Church.⁹³ Paul VI took it upon himself to issue this Apostolic Letter because he believed it was his duty to perfect the norms of the decree, Christus Dominus, where they needed to be more fully stated, and to explain them if they needed interpretation, so that the results that are expected from them may be fully attained.⁹⁴

At the outset, Paul VI reiterates the conciliar teaching on the authority and functions of the diocesan bishop as spelled out in Lumen gentium. In other words, he recalls the fact that particular churches are governed with

92. Congregation for the Doctrine of the Faith, Declaration, Die XIII Ianuarii 1971, in A.A.S., 64(1972), n. III, p. 642: "Ad propositum dubium an Ordinarii applicare possint can. 81 CIC etiam cum de dispensatione a sacro coelibatu agitur, 'Negative' respondendum est. Haec enim dispensatio unice et personaliter Summo Pontifici reservatur (cfr. De episcoporum muneribus, n. IX, 1). Proinde matrimonium forte celebratum quin concessa fuerit ab ipsa Sede Apostolica dispensatio quavis validitate caret."

93. Paul VI, Apostolic Letter, De episcoporum muneribus, June 15, 1966, in A.A.S., 58(1966), pp. 467-472; a corresponding document, Episcopalis potestatis, was promulgated by Paul VI for the Eastern Churches on May 2, 1967, cfr. A.A.S., 59(1967), pp. 385-390.

94. Ibid., p. 468: "[...] singulari studio considerantes cum nuper exhibitam doctrinam, tum potissimum Episcoporum munia et iura, nostrum esse censemus normas in Decreto Christus Dominus editas, sive perficere, ubi complemento indigeant, sive enucleare, ubi interpretationem desiderent; ut fructus, qui inde expectantur, plane percipiantur."

authority and sacred power by the bishops to whom they are entrusted as representatives of Christ; and that the pastoral office, that is, the constant daily care of the flock is fully given to them with a power that is ordinary and immediate, by virtue of which they have the sacred right and the duty before the Lord to make laws for their subjects, to pass judgment on them, and to moderate everything pertaining to the ordering of worship and the apostolate.⁹⁵ Paul VI stresses that this sacra potestas is actuated when a canonical or juridical determination is received by authority of the hierarchy according to norms approved by the supreme authority of the Church.⁹⁶ He observes that these principles concerning the diocesan bishop are enunciated in Christus Dominus.⁹⁷

At the same time, Pope Paul invites attention to his immediate power over the particular churches - a power which is peculiar as an innate right in the successor of Peter - to reserve to himself certain cases which concern the well-being of the entire flock of Christ.⁹⁸ This is in tune with Article 8 (a) of Christus Dominus, according to which a diocesan bishop, as successor of the

95. Ibid., p. 467: "De episcoporum muneribus doctrina, quam Nobis feliciter contigit in Concilio Oecumenico Vaticano II sollemni ritu promulgare, perspicue tradit, Ecclesias particulares ab Episcopis, quibus tamquam Christi legatis concreditae sunt, auctoritate et sacra potestate regi; iisdemque pastorale officium - hoc est constantem et cotidianam ovium curationem - plene committi cum potestate propria, ordinaria et immediata, propter quam sacrum ius et coram Domino officium habent in suos subditos leges ferendi, iudicium faciendi, atque omnia quae ad cultum apostolatusque ordinem pertinent, moderandi."

96. R. R. Ryan, loc. cit., pp. 195-196.

97. Ibid., p. 196.

98. Paul VI, Apostolic Letter, De episcoporum muneribus, June 15, 1966, in A.A.S., 58(1966), p. 467: "[...] simul Nostram iterum profitetur in singulas Ecclesias immediatam potestatem ad bonum totius Dominici gregis reservandi causas, iure nativo Petri successoris propriam."

Apostles, enjoys all the power he needs to govern his diocese, but always without prejudice to the power which the Roman Pontiff possesses, by virtue of his office, of reserving certain matters to himself or to some other authority.⁹⁹

For the sake of uniformity, both of law and its application in the entire Latin Church, Paul VI determined which of the general ecclesiastical laws were reserved to the Roman Pontiff.¹⁰⁰ They are laws whose dispensation the Apostolic See has never given or has given very rarely, because of their importance in human society.¹⁰¹

The Pope, as the authentic interpreter, gives Article 8 (b) of Christus Dominus its juridical significance. This he does in De episcoporum muneribus by giving an explanatory authentic interpretation of Article 8 (b). Unlike a declarative authentic interpretation, which is retroactive, the explanatory authentic interpretation, since it can restrict or extend a law, or settle a doubt of law, is not retroactive.¹⁰²

99. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), p. 676.

100. Paul VI, Apostolic Letter, De episcoporum muneribus, June 15, 1966, in A.A.S., 58(1966), p. 468.

101. Ibid.

102. Can. 16, par. 2 (C.I.C. 1983): "si verba legis in se certa declaret tantum, valet retrorsum; si legem coarctet vel extendat aut dubiam explicet, non retrotrahitur."

In offering this explanatory authentic interpretation, Paul VI not only clarifies certain points, such as the term fideles,¹⁰³ but also restricts and likewise extends certain other points. Through his own interpretation, Paul VI restricts the term lex generalis (general law) to those laws which prescribe or prohibit. The laws regarding processes are also not to be the object of the faculty treated of in Article 8 (b) of Christus Dominus; for these procedural laws have been enacted to protect rights, and a dispensation from them does not directly look to the spiritual good of the faithful.¹⁰⁴ He extends the expression episcopi diocesani (diocesan bishops) to include not only the diocesan bishops, but also those equated to them in law, namely vicars apostolic, prefects apostolic, permanently constituted apostolic administrators, prelates nullius and abbots nullius.¹⁰⁵ Finally, he completes the implementation of Article 8 (b) of Christus Dominus by providing the list of those cases which are reserved to himself.¹⁰⁶

C. THE DEVELOPMENT OF CANON 87 (CIC 1983)

In a study session during which dispensations figured on the agenda, the Code Commission recalled the time when no distinction was made between the three functions of the power of governing, namely the distinction into

103. Paul VI, Apostolic Letter, De episcoporum muneribus, June 15, 1966, in A.A.S., 58(1966), p. 469: "Fideles, in quos ad normam iuris auctoritas dispensandi exercetur, sunt ii omnes qui ratione domicilii vel alius tituli Episcopo subiciuntur."

104. Ibid., p. 469: "[...] Facultas autem dispensandi exercetur circa leges praecipientes vel prohibentes, non autem circa leges constitutivas. [...] Leges ad processus spectantes, cum ad iurium defensionem sint constitutae, et dispensatio ab iis bonum spirituale fidelium directe non respiciat, non sunt obiectum facultatis, de qua agitur in Decreto Christus Dominus, n. 8 (b)."

105. Ibid., pp. 468-469.

106. Ibid., pp. 470-472.

legislative, executive and judicial power.¹⁰⁷ At that time, to dispense meant to exercise legislative power and a dispensation was not infrequently defined as an act of jurisdictional power connected with legislative authority or an incomplete exercise of legislative power.¹⁰⁸

Guided by the principles for the revision of the Code of Canon Law, the Code Commission deemed it opportune to split ecclesiastical power of governance into three distinct functions, namely, legislative, administrative and judicial, each of these to be exercised by separate bodies.¹⁰⁹

A dispensation has been defined as a relaxation of an ecclesiastical law in a special case. It is a particular act. In post-conciliar canonical language, it is called an administrative act. Once it is admitted that a dispensation is a particular act of an administrative nature,¹¹⁰ it follows that the granting of a dispensation can no longer be the exclusive prerogative of the legislator or his superior, but would come within the competence of one enjoying executive power. Thus some decentralization is envisaged.

107. Pont. Comm. C.I.C. *Recognoscendo*, in *Comm.*, 3(1971), pp. 89-90: "Sane, saeculis anteactis cum in scientia canonica cognita vel saltem recepta non fuerit distinctio inter tres functiones potestatis regiminis, scilicet distinctio in potestatem legislativam, potestatem executivam (ad actus indolis administrativae ponendos) et potestatem iudiciale[m] [...]"

108. *Ibid.*: "[...] dispensatio intelligatur ut actus potestatis legislativae et haud raro definiebatur actus potestatis iurisdictionis cum potestate legislativa connexus aut exercitium non plenum potestatis legislativae."

109. Pont. Comm. C.I.C. *Recognoscendo*, in *Comm.*, 1(1969), p. 83: "Admisso hoc principio, potestatis ecclesiasticae clare distinguantur diversae functiones, videlicet legislativa, administrativa et iudicialis, atque apte definiatur a quibusnam organis singulae functiones exercentur."

110. *ID.*, in *Comm.*, 3(1971), p. 89: "[...] actus scilicet qui hodie dicitur actus administrativus." *Ibid.*, p. 90: "Dispensatio vero cum sit actus particularis indolis administrativae [...]"

In drawing up the draft canons "On Diocesan Bishops", the Code Commission took into account the legislation set forth in Article 8 (b) of Christus Dominus.¹¹¹ In line with the relevant norm of De episcoporum muneribus, it excluded constitutive laws from the dispensing power of diocesan bishops.¹¹² Finally, the Commission, aware of the fact that the 1917 Code did not determine who could be dispensed, decided to fill in the gap.¹¹³

In a subsequent study session, it took a definite stand in the matter.

Regarding the possibility of the dispensing power of diocesan bishops from the universal laws of the Church, a proposal of a new norm is made determining those over whom the dispensing power is exercised. By force of this norm, the one who has the power to dispense can exercise the same, even when outside of his territory, over his subjects, although they be away from their territory, and, unless expressly stated to the contrary, over travellers also actually residing in the territory.¹¹⁴

111. Ibid.: "Ad potestatem dispensandi Episcoporum diocesanorum quod attinet, affirmatur etiam eorundem potestas dispensandi a legibus Ecclesiae universalibus necnon a legibus a suprema Ecclesiae auctoritate pro eorum territorio latis [...]"

112. Ibid., p. 91: "Certum autem est non ab omnibus legibus dispensari posse. Dispensatio enim ne quidem intelligitur a legibus, quae elementa definiunt quibus instituta quaedam aut actus iuridici essentialiter constituuntur [...]"

113. Ibid.: "Tandem, norma etiam proponitur determinans personas in quas potestas dispensandi exerceri valet. Talis norma in Codice I.C. deficit."

114. ID., in Comm., 6(1974), p. 54: "Riguardo alla possibilità che i vescovi diocesani possano dispensare dalle leggi universali della Chiesa viene proposta tra l'altro una nuova norma che determina quali sono le persone sulle quali può essere esercitata la potestà di dispensare. In forza di tale norma colui che ha la facoltà di dispensare può esercitarla ... etiam extra territorium existens, in subditos, licet e territorio absentes, atque, nisi contrarium expresse statuatur, in peregrinos quoque in territorio actu degentes."

In yet another study session, the Code Commission adverted to a limitation on the dispensing power of the diocesan bishops.

Also to be noted is the fundamental rule enunciated regarding dispensations, by virtue of which laws, to the extent that they define that which essentially constitutes juridical institutes or acts, are not subject to dispensation.¹¹⁵

This principle, borrowed from De episcoporum muneribus, was included in the 1977 Draft as Can. 86, a new canon.

Laws are not subject to dispensation in so far as they define those things which are essentially constitutive of institutes or juridical acts.¹¹⁶

As for the actual dispensing power of the diocesan bishop, the proposed legislation had been framed in the light of conciliar and post-conciliar teaching, but was spread over two books of the 1977 Draft: Book I (General

115. ID., in Comm., 9(1977), p. 233: "Notetur etiam de dispensationibus enuntiari regulam fundamentalem, vi cuius scilicet dispensationi obnoxia non sunt leges quatenus definiunt ea quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva."

116. Schēma canonum libri primi de normis generalibus, p. 29. "Dispensationi obnoxiae non sunt leges quatenus definiunt ea quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva."

Norms), Can. 87;¹¹⁷ Book II (The People of God), Can. 246.¹¹⁸

These two proposed canons taken together embodied the new conciliar and post-conciliar teaching on the dispensing power of the diocesan bishop, in particular, the "spirituale bonum" (the spiritual good) of the faithful as the motive for the granting of a dispensation. The only practical inconvenience is that the legislation was formulated piecemeal.

The 1980 Draft repeats the restriction of De episcoporum muneribus placed on the dispensing power of the diocesan bishop in the case of constitutive law. This is done in Canon 86. This canon was not even discussed by the Code Commission in its 1981 Relatio. It appeared unaltered in the 1982 Draft which was presented to the Pope and emerged as definitive canon law in the 1983 Code. Constitutive laws are removed from the dispensing power of the diocesan

117. Ibid., p. 30:

Can. 87 #1. "Episcopus dioecesanus in legibus, tam universalibus quam particularibus a suprema Ecclesiae auctoritate pro suo territorio latis, dispensare valet ad normam can. (De populo Dei, can. 246).

#2. "Si difficilis sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, Ordinarius quicumque in casu particulari dispensare valet in legibus Ecclesiae universalibus et in particularibus a suprema auctoritate pro suo territorio latis, de quibus in can. (De populo Dei, can. 246), etiam si dispensatio reservatur Sanctae Sedi, dummodo tamen agatur de dispensatione quam ipsas in iisdem adiunctis concedit; firmo praescripto, vi cuius dispensatio a lege coelibatus uni Apostolicae Sedi reservatur."

118. Schema canonum libri secundi de populo dei, p. 105:

Can. 246 #1. "Episcopus dioecesanus in disciplinariis legibus tam universalibus quam particularibus a suprema Ecclesiae auctoritate pro suo territorio latis, quae bonum spirituale fidelium directe intendunt, tum praeceptivis et prohibitivis, tum irritantibus et inhabilitantibus, dispensare valet, in casibus particularibus, fideles in quos ad normam can. ("De normis generalibus", can.) 91) auctoritatem exercet, quoties id ad eorundem bonum spirituale conferre iudicet, firmis praescriptis canonum ("De normis generalibus", can. 87, #1 et 90) et salvo praescripto #2.

#2. "Dispensare nequit in hisce legibus in quibus iuris praescripto vel decreto particulari dispensatio Apostolicae Sedi aliive auctoritati specialiter reservatur."

bishop. Likewise, laws concerning procedure and penal laws were not envisaged in the dispensing power of the diocesan bishop, according to the provision of De episcoporum muneribus.¹¹⁹

Proposed Canon 87 of the 1980 Draft spoke of the dispensing power of the diocesan bishop and, in cases where recourse to the Holy See was difficult, of the dispensing power of the Ordinary. This proposed canon takes in conciliar and post-conciliar legislation which is divided into two sections. It reads as follows:

Can. 87

#1. Whenever he judges that it contributes to their spiritual welfare, the diocesan bishop can dispense the faithful from disciplinary laws, both universal laws and those particular laws made by the supreme ecclesiastical authority for his territory or his subjects. He cannot dispense from procedural laws or from penal laws, nor from those whose dispensation is specially reserved to the Apostolic See or to some other authority.

#2. If recourse to the Holy See is difficult, and at the same time there is danger of grave harm in delay, any Ordinary can dispense from these laws, even if the dispensation is reserved to the Holy See, provided the dispensation is one which the Holy See customarily grants in the same circumstances, and without prejudice to the prescription by force of which dispensation from the laws of celibacy is reserved to the Apostolic See alone.¹²⁰

119. Paul VI, Apostolic Letter, De episcoporum muneribus, in A.A.S., 58(1966), n. IV, p. 469: "Leges ad processus spectantes, cum ad iurium defensionem sint constitutae, et dispensatio ab iis bonum spirituale fidelium directe non respiciat, non sunt obiectum facultatis, de qua agitur in Decreto Christus Dominus, n. 8 (b)."

120. Schema codicis iuris canonici, 1980, p. 17:

1. "Episcopus dioecesanus fideles, quoties id ad eorundem spirituale bonum conferre iudicet, dispensare valet in legibus disciplinaribus tam universalibus quam particularibus pro suo territorio vel suis subditis a suprema Ecclesiae auctoritate latis, non tamen in legibus processualibus aut poenalibus nec in iis quarum dispensatio Apostolicae Sedi aliive auctoritati specialiter reservatur.

2. "Si difficilis sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, Ordinarius quicumque dispensare valet in iisdem legibus, etiam si dispensatio reservatur Sanctae Sedi, dummodo tamen agatur de dispensatione quam ipsa in iisdem adiunctis concedere solet; firmo praescripto, vi cuius dispensatio a lege coelibatus uni Apostolicae Sedi reservatur."

In its Relatio of 1981, the Code Commission had some interesting observations from its members on proposed Canon 87. Archbishop Bernardin extolled the "spirituale bonum" (the spiritual good) of the faithful as the motive for the granting of a dispensation.¹²¹ Cardinal Konig wanted the expression "Episcopus diocesanus" (diocesan bishop) replaced by the term "Ordinarius loci" (local Ordinary). This proposition was found to be inexpedient, for Article 8 (b) of Christus Dominus gave very wide power only to diocesan bishops.¹²² Thus, this proposed canon was assumed without any further changes in the 1982 Draft and was numbered 87.¹²³

When the 1983 Code was promulgated on January 25, 1983¹²⁴ this proposed Canon 87 was formed in the same legal terminology in Chapter V of Book I as

121. Pont. Comm. C.I.C. Recognoscendo, in Relatio, p. 28: "Laudatur #1, praesertim quod 'spirituale bonum' tanquam motivum dispensationis assumatur (Exc. Bernardin)."

122. Ibid.: "Locutio 'Episcopus diocesanus' non servetur et dicatur hic (uti etiam in can. 88) 'Ordinarius loci' (Card. Konig). R. Non expedit. Agitur de amplissima potestate, et in Decreto Christus Dominus, n. 8 haec potestas datur 'Episcopis diocesanis' tantum."

123. Codex iuris canonici: schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum, 1982, p. 12:

1. "Episcopus diocesanus fideles, quoties id ad eorundem spirituale bonum conferre iudicet, dispensare valet in legibus disciplinariis tam universalibus quam particularibus pro suo territorio vel suis subditis a suprema Ecclesiae auctoritate latis, non tamen in legibus processualibus aut poenalibus, nec in iis quarum dispensatio Apostolicae Sedi aliive auctoritati specialiter reservatur.

2. "Si difficilis sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, Ordinarius quicumque dispensare valet in iisdem legibus, etiam si dispensatio reservatur Sanctae Sedi, dummodo agatur de dispensatione quam ipsa in iisdem adiunctis concedere solet, firmo praescripto can. 295."

124. John Paul II, Apostolic Constitution, Sacrae disciplinae leges, January 25, 1983, in A.A.S., 75(1983), Pars II, p. xiv.

Canon 87, consisting of two sections, as in the previous drafts.¹²⁵ This canon, reflecting the conciliar and post-conciliar teaching on the episcopate, enunciates the principle that the diocesan bishop has the right to dispense from all universal and particular disciplinary laws, unless such a dispensation is explicitly reserved to the Apostolic See. This canon is significant since it acknowledges that this dispensing power is not delegated but is part of the pastoral office of the diocesan bishop.

D. THE SIGNIFICANT CHANGES IN THE LAW

Canon 87, par. 1 (C.I.C. 1983), pastoral in its wording, replaces Canon 81 (C.I.C. 1917) which read:

Ordinaries subordinate to the Roman Pontiff cannot dispense from the general laws of the Church, even in a particular case, unless this power has been granted to them explicitly or implicitly, or recourse to the Holy See is difficult while there is danger of grave harm in delay. Furthermore, the dispensation requested must be one which the Apostolic See usually grants.¹²⁶

A comparative study immediately brings to the fore three substantial changes:

- a) Canon 87, par. 1 speaks of the diocesan bishop instead of Ordinaries subordinate to the Roman Pontiff;
- b) it mentions disciplinary laws, both universal laws and those particular laws made by the supreme ecclesiastical authority for his territory or his subjects instead of just general laws;

125. A.A.S., 75(1983), Pars II, p. 12.

126. Canon 81 (C.I.C. 1917): "A generalibus Ecclesiae legibus Ordinarii infra Romanum Pontificem dispensare nequeunt, ne in casu quidem peculiari, nisi haec potestas eisdem fuerit explicita vel implicite concessa, aut nisi difficilis sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, et de dispensatione agatur quae a Sede Apostolica concedi solet."

- c) it adds further specification to the dispensing power of the diocesan bishop by stating that he cannot dispense from procedural laws or penal law and from those dispensations which are specially reserved to the Apostolic See or to some other authority.

For all practical purposes, Canon 87, par. 1 (C.I.C. 1983) is a substantial restatement of Article 8 (b) of Christus Dominus, adding further precision to the subject matter of this Article 8 (b).¹²⁷

The dispensing power conceded in Canon 87, par. 1 (C.I.C. 1983) refers only to the diocesan bishop¹²⁸ and, therefore, it must be understood here that the said power does not, by law itself, pertain to the Ordinary.

In view of Canon 87, par. 1, it is only the diocesan bishop who has, by law, the power to dispense from disciplinary laws, both universal laws and those particular laws made by the supreme ecclesiastical authority for his territory or his subjects. Therefore, not all Ordinaries, nor all Local Ordinaries (Canon 134, par. 1, n. 2) have that power by law. However, by virtue of Canon 134, par. 3, that power could be delegated to them.

Moreover, the dispensing power conceded to the diocesan bishop in Canon 87, par. 1, should be exercised only when he judges that a dispensation from the said disciplinary laws contributed to the spiritual welfare of the

127. Vatican II, Decree, Christus Dominus, October 28, 1965, in A.A.S., 58(1966), p. 676.

128. In law, the term 'diocesan bishop' includes: bishops to whom the care of a diocese has been entrusted, (Canon 376); vicar apostolic, prefect apostolic (Canon 371, par. 1); diocesan administrator (Canon 427, par. 1); apostolic administrator (Canon 371, par. 2); territorial abbots, prelates (Canon 370); personal prelates (Canon 372, par. 2).

faithful. The power of dispensing mentioned in Canon 87, par. 1, concerns disciplinary laws of the Church, such as Canons 1108-1118, on the form of marriage.

In the 1983 Code, in accordance with principle 4 of the fundamental principles guiding the revision of the Code,¹²⁹ several cases are clearly and specifically reserved to the Apostolic See, e.g. irregularities and impediments to sacred ordination, Canon 1047; matrimonial impediments, Canon 1078, par. 2; etc.

Canon 81 (C.I.C. 1917) made no mention of those in whose favour an Ordinary below the Roman Pontiff could dispense from the general laws of the Church in circumstances stated therein. But Canon 87, par. 1 (C.I.C. 1983) makes it clear: the diocesan bishop can dispense the faithful from disciplinary laws.

Since, in the case of dispensations, there is question of the exercise of executive power, it should be exercised in accordance with the prescription of Canon 136. This canon states that persons may exercise executive power over their subjects, even when either they themselves or their subjects are outside the territory, e.g. clerics incardinated in the diocese as per Canons 265 and 266, par. 1 and who remain subject to their bishops, even though they may have acquired domicile or quasi-domicile elsewhere. The following also come under this law:

- residents, Canons 100 and 102, par. 2;
- strangers, visitors, Canons 100 and 102, par. 2;

129. Pont. Comm. C.I.C. *Recognoscendo*, in *Comm.*, 1(1969), p. 80.

- travellers, Canon 100;)
- vagrants, Canon 107, par. 2.

This dispensing power is given effect in Canons 1078, par. 1 and 1127, par. 2 as far as the celebration of marriage is concerned. Canon 1078, par. 1 empowers the local ordinary to dispense from all impediments of ecclesiastical law.

The local Ordinary can dispense his own subjects wherever they are staying as well as all persons actually present in his own territory from all the impediments of ecclesiastical law with the exception of those impediments whose dispensation is reserved to the Apostolic See.¹³⁰

Canon 1127, par. 2 legislates a possible dispensation from canonical form.

If serious difficulties pose an obstacle to the observance of the canonical form, the local Ordinary of the Catholic party has the right to dispense from the form in individual cases, but after consulting the ordinary of the place where the marriage is to be celebrated and with due regard, for validity, for some public form of celebration; the conference of bishops is to issue norms by which such a dispensation may be granted in an orderly manner.¹³¹

The concession, by law, of the power to dispense in the cases envisaged by these two canons enfleshes the conciliar and post-conciliar teaching on the dispensing power of the diocesan bishop.

130. Canon 1078, par. 1 (C.I.C. 1983): "Ordinarius loci proprios subditos ubique commorantes et omnes in proprio territorio actu degentes ab omnibus impedimentis iuris ecclesiastici dispensare potest, exceptis iis, quorum dispensatio Sedi Apostolicae reservatur."

131. Canon 1127, par. 2 (C.I.C. 1983): "Si graves difficultates formae canonicae servandae obstant, Ordinario loci partis catholicae ius est ab eadem in singulis casibus dispensandi, consulto tamen Ordinario loci in quo matrimonium celebratur, et salva ad validitatem aliqua publica forma celebrationis; Episcoporum conferentiae est normas statuere, quibus praedicta dispensatio concordati ratione concedatur."

In the 1917 Code, a dispensation from canonical form by a diocesan bishop was not mentioned. However, one case of a dispensation from canonical form in favour of two Catholics by the Holy See has come to our knowledge.¹³²

This decentralization of authority notwithstanding, our problem of the dual religious marriage celebration still faces us. Canon 1127, par. 3 contains a prohibition against such an event. We have to find a way to apply the law correctly.

In the preceding chapter we have seen that Canon 1127, par. 3 is merely an ecclesiastical disciplinary law. We have also studied the revitalized position of the diocesan bishop, the vicar of Christ in the particular church. As head of the particular church, he is empowered to dispense from disciplinary laws that are not reserved to the Apostolic See or to some other authority when he judges his action will spiritually benefit those who request the dispensation. This is provided for.

Since Canon 1127, par. 3 is a merely ecclesiastical disciplinary law and since its dispensation is not reserved to the Apostolic See, it can be the object of a dispensation by the diocesan bishop, in accordance with the norms of Canon 87, par. 1.

SUMMARY

In the main, this chapter hinges itself on two canonical teachings: the juridical status of the diocesan bishop in his diocese in the light of conciliar doctrine; and the nature of ecclesiastical law.

132. Congregation for the Sacraments, Rescript, June 6, 1973, in C.L.D., Vol. 8, pp. 818-820.

Vatican II has established that the diocesan bishop is the vicar of Christ in his own diocese and not the representative of the Pope. The diocesan bishop has the habitual and daily care of the faithful entrusted to him. As such, he should be equipped with all the authority he needs to promote the spiritual good of the faithful under his pastoral care.

Article 8 (b) of the decree, Christus Dominus, has made more precise the dispensing power of the diocesan bishop, in the light of conciliar teaching. The Apostolic Letter, De episcoporum muneribus, further spells out in detail the power of the diocesan bishop in dispensing and also clarifies which laws are excepted from dispensation by him.

Once we admit these premises and that the law prohibiting a dual religious marriage celebration is only a disciplinary law enacted by the Church, we have to acknowledge that it is possible for the diocesan bishop to exercise his dispensing power when, in his judgment, it contributes to the spiritual welfare of those in whose favour he grants the dispensation.

CONCLUSION

As we approached the end of our study, it became evident that the prescription against the dual religious marriage celebration did not present any insurmountable canonical obstacle.

The law forbidding another religious celebration of the same marriage to express or renew matrimonial consent is merely an ecclesiastical disciplinary law. As such, it is subject to a dispensation in particular cases.

The diocesan bishop who governs his diocese as vicar and legate of Christ, has been vested with proper, ordinary and immediate power which he exercises personally in the name of Christ for the spiritual development of the faithful entrusted to his pastoral care.

The 1983 legislation confers on him the right to dispense from all merely ecclesiastical disciplinary laws when, in his judgment, such a dispensation promotes the spiritual good of the person dispensed. However, some ecclesiastical disciplinary laws have been withdrawn from his dispensing power. The law prohibiting a dual religious celebration of the same marriage is not one that is reserved to the Apostolic See. Nor is it a procedural law or a penal one which also are exempt from the dispensing power of the diocesan bishop. Hence, the diocesan bishop can set aside the application of this prohibitive law in a particular case according to the norms of Canon 87, par. 1.

The problem of the double religious marriage ceremony in India is closely allied with the growing phenomenon of mixed marriages. In fact, it is a mixed marriage celebration with an additional canonical and pastoral dimension.

Not too long ago it was rather difficult to obtain authorization from Church authorities to contract a mixed marriage. In our day, the Church still discourages the contracting of mixed marriage, but is taking a broader look at the issue.

In the pre-Code days as well as in the 1917 Code legislation, the Church maintained consistently that it was of divine law, in a mixed marriage, that all dangers to the faith of the Catholic spouse be eliminated, and that the children's baptism and upbringing in the Catholic Faith be assured. It was this same preoccupation of the Church - an overriding concern - that was at the root of the prescription against a dual religious celebration of the same marriage.

The Church law avoided explaining fully the divine law basis of the requirements for lawfully contracting a mixed marriage, or against a second religious celebration of marriage. This was left to Theology. We quote Orsy in the matter.

In the past, there was a certainty about the existence of a divine law, but there was not much theological investigation, if any, into the meaning of the term "divine law". The expression was consistently used without a critical assessment of its theological significance.¹

1. L. M. Orsy, "Mixed Marriages", in America, 117(1967), p. 243.

However, the Church's appeal in the past to the divine law seems to have been derived chiefly from the following ecclesiological presuppositions:

- 1) the Church was convinced that its role in the world was to be the only sacrament of salvation;
- 2) it believed that it alone possessed the fullness of the true faith without which no one could be saved;
- 3) it considered those who did not profess the Catholic Faith to be in error, and felt duty-bound to lead them into the true faith and to salvation.

In view of these presuppositions, objective truth was given priority over personal rights and conscientiously held beliefs; consequently, both parents, regardless of their religious affiliation, were considered bound by divine law to have all their children baptized and raised in the Catholic Faith.

Vatican II opened up new vistas by enunciating various other principles which seem to have prompted a new understanding of the divine law obligations:

- 1) the one Church founded by Christ subsists in the Catholic Church with its fullness of grace and means of salvation; but other ecclesial communities also possess salvific means;²

2. Vatican II, Dogmatic Constitution, Lumen gentium, November 21, 1964, in A.A.S., 57(1965), no. 8, p. 12: "[...] Haec Ecclesia, in hoc mundo ut societas constituta et ordinata, subsistit in Ecclesia catholica, a successore Petri et Episcopis in eius communione gubernata, licet extra eius compaginem elementa plura sanctificationis et veritatis inveniantur, quae ut dona Ecclesiae Christi propria, ad unitatem catholicam impellunt"; ID., Decree, Unitatis redintegratio, November 21, 1964, in A.A.S., 57(1965), nos. 3 and 4, pp. 92-96.

- 2) every person has a right to hold firmly to what he or she believes to be true and good.³ Hence, in a mixed marriage, the spouses should respect each other's religious convictions and the responsibilities they entail. This could also imply that any request from the non-Catholic or non-Christian spouse for a second wedding celebration would not necessarily be unreasonable;
- 3) both parents are equally responsible for the religious upbringing of their children. They have the God-given right and duty to fulfill this obligation without undue pressure or interference;⁴
- 4) the obligation regarding the religious upbringing of the children cannot be considered in isolation, but should be placed within the context of the over-all good of the marriage, an intimate and total communion of life and love, of which children are the supreme gift.⁵

The perception of the divine law obligation as reflected in conciliar teaching seems to point also to other aspects related to our study. The Catholic Church perceives itself as central to the plan of salvation established by Christ.⁶ Conscious of its role and mission in the world, it feels duty-bound to aid its members in fulfilling their obligations before God

3. ID., Declaration, Dignitatis humanae, December 7, 1965, in A.A.S., 58(1966), nos. 2-4, pp. 930-933.

4. Ibid., p. 933: "Cuique familiae, utpote quae est societas proprio ac primordiali iure gaudens, competit ius ad libere ordinandam religiosam vitam suam domesticam sub moderatione parentum. His autem competit ius ad determinandam rationem institutionis religiosae suis liberis tradendae, iuxta suam propriam religiosam persuasionem."

5. ID., Pastoral Constitution, Gaudium et spes, December 7, 1965, in A.A.S., 58(1966), nos. 48-50, pp. 1067-1072.

6. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 259: "[...] quae lege divina, ipso videlicet ordine salutis per Christum instituto, [...]"

to live their faith and to share it with their children. Again, conscious of its role and mission, the Church claims responsibility for interpreting the nature and extent of the divine law in concrete situations. However, this law is promulgated in each individual through conscience: "it is through his conscience that man sees and recognizes the demands of the divine law."⁷

In view of this, the obligations of the Catholic spouse in a mixed marriage, as well as the declaration and sincere promise, can be better described as a personal duty and responsibility in conscience; they can now be referred to as a spiritual mission imposed by a personal faith-commitment, and deriving from the very fact of being a Catholic.⁸

Thus it was that the legislation of Matrimonia mixta, which was intended for the entire Latin Church, and which is the basis of the revised mixed marriage legislation of the 1983 Code, struck a healthy balance. It arranged that on the one hand the divine law obligations were to be scrupulously observed, and on the other that the inviolable right of the human person to contract marriage with another human person and found a family was sincerely respected.⁹

7. Vatican II, Declaration, Dignitatis humanae, December 7, 1965, in A.A.S., 58(1966), no. 3, p. 932: "Dictamina vero legis divinae homo percipit et agnoscit mediante conscientia sua; [...]"

8. Paul VI, Apostolic Letter, Matrimonia mixta, March 31, 1970, in A.A.S., 62(1970), p. 259: "Ideo fideles commoneantur officium esse penes catholicum coniugem propriae fidei conservandae, [...]"

9. Ibid., p. 258: "[...] Quoniam vero ius est homini a natura datum, inire matrimonium prolemque procreare, Ecclesia suis legibus, quae sollicitudinem eius pastoralemente ostendunt, ita res curat disponendas, ut hinc iuris divini praescripta religiose serventur, illinc autem praedictum ius matrimonii contrahendi in tuto collocetur."

But these principles did not originate with Matrimonia mixta. They were already incorporated, much earlier, in the indults introducing some significant changes in mixed marriage legislation to accommodate situations arising in mission lands, particularly in China,¹⁰ Lesser Sunda (Indonesia)¹¹ and Japan.¹² In addition to the predispositions based on the axiom "extra Ecclesiam nulla salus" (no salvation outside the Church) and discussed earlier, a new principle was invoked, namely, the natural right of every man to marry and raise a family. In view of the factors calling for a change in the legislation, the divine law obligations also received a new interpretation and a further specification. The fulfillment of these obligations now rested solely on the Catholic spouse, who, at the same time, could not be held responsible for the fulfillment of all the obligations in the same manner.

Indeed, when circumstances prevented him from having the children baptized and raised in the Catholic Faith, the divine law could not oblige to do the impossible. Thus, the Church arrived at the conclusion that the divine law obligations allowed for different degrees: the obligation to safeguard one's own faith is absolute, but the duty to share that faith with one's children is relative and conditional.¹³ The Church also concluded that the divine law did not require a guarantee that all the children of a mixed

10. S.C.S. Off., Reply, April 5, 1918, in C.P.R., 19(1938), pp. 103-104.

11. Sylloge praecipuorum documentorum recentium Summorum Pontificum et S. Congregationis de Propaganda Fide necnon aliarum SS. Congregationum Romanorum ad usum missionariorum, Notae explicativae, pp. 565-566.

12. Ibid., pp. 561-562.

13. A. Abate, Il matrimonio nell'attuale legislazione canonica, pp. 98-99.

marriage would be baptized and raised in the Catholic Faith, but only a sincere promise from the Catholic partner that (s)he would do the best to achieve that goal.

These changes in mixed marriage legislation are significant indeed. In mission lands, they helped to accommodate particular matrimonial situations and thereby promote missionary endeavour. In the law presently in force for the universal Church, they reflect conciliar thinking.

Mixed marriages are a factor of Church life. In India, which is a mosaic of religions, they can be expected to spiral, given the changing conditions in urban living. In the rural areas, it would be quite difficult, if not almost impossible in some instances to find Catholic partners for the new Catholics.

A mixed marriage, with a double wedding ceremony (or, for that matter, even without one), could be an occasion for the perversion of the faith of the Catholic. But in preserving the faith, it may also be an opportunity for promoting religious understanding and passing on the faith to the non-Catholic spouse and to the family. It is not that the Catholic is no longer obliged to share the faith with the non-Catholic spouse. On the contrary, the obligation is there, but it is to be discharged by the witness of one's own faith and not by any deliberate attempt at proselytizing which might possibly create suspicion and estrangement. "The unbelieving husband is made one with the saints through his wife, and the unbelieving wife is made one with the saints through her husband."¹⁴

14. I Cor. 7, 14.

If the law now empowers the local Ordinary to permit mixed marriages when all the pre-requisite conditions are fulfilled, it follows that the diocesan bishop should also be able to lift the prohibition against a dual celebration, which is a mixed marriage twice celebrated.

The law should liberate, not be an obstacle. If the possibility of a dispensation to contract the actual mixed marriage is provided for in the law, a dispensation from the binding force of the canon forbidding a dual religious marriage celebration should all the more so be available.

Since the celebration of Hindu marriage is a religious rite but does not involve an explicit exchange of matrimonial consent, it would seem that it is not forbidden by Canon 1127, par. 3. The Buddhist marriage is only a civil rite and hence should pose no canonical problem. The Muslim wedding ceremony has intense religious overtones and marital consent is explicitly exchanged. Thus it comes within the purview of Canon 1127, par. 3.

By virtue of Canon 87, par. 1, the diocesan bishop now possesses the authority to set aside for particular cases the application of the provisions of Canon 1127, par. 3. He has to keep in mind the spiritual good of the faithful. He is the sole judge in the matter.

It seems a dispensation granted by the diocesan bishop "would remove the hurt to the conscience of the Catholic party."¹⁵ This is not just giving in because of pressure. It is a response to some heartfelt aspirations of

15. Catholic Bishops' Conference of India Special Committee, Double Religious Marriage Ceremony, a Study and a Note, p. 2.

individuals who have a right to be heard and understood in the context of the recent conciliar teaching. These individuals rightfully expect from the Church the means to grow and advance in their spiritual lives. Positive law should not stand in the way. It must offer a solution, within the parameters of the Church's doctrine.

There is also another pastoral aspect to the canonical problem we investigated. To isolate the pastoral aspect is to distort the true picture of mixed marriage. The 1983 Code provides for it:¹⁶ the Episcopal Conference, either on the national basis or on the regional basis, will be rendering invaluable help and service if they draw up and implement norms, guidelines and programmes geared to assist couples in reaching the highest ideals of Christian family life, where marital love is also seen as a means of spreading the Good News of salvation which Christ has offered.

16. Canons 1063-1072; 1128.

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