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The Canonical Form of Marriage in Latin Law and in Oriental Law: A Comparative Study
With References to the Application of Catholic-Byzantine Law to Selected Pastoral Concerns
In Eastern Europe.

A DISSERTATION

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By

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The Canonical Form of Marriage in Latin Law and in Oriental Law: A Comparative Study
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In Eastern Europe.

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Book IV of the 1983 *Code of Canon Law*, title VII, chapter V and the *Code of Canons of the Eastern Churches*, title XVI, chapter VII, article VI govern the canonical form of marriage. In many ways the provisions of the two codes are similar; in some instances, however, they differ. Both the similarities and the differences have pastoral consequences, especially in cases of mixed marriages or in territories where a hierarchical organization of various Oriental Catholic churches *sui iuris* does not exist. The purpose of this dissertation is to examine the canonical form of marriage by comparing the Latin and Oriental canonical legislations and analyzing the pastoral consequences that arise when laws concerning canonical form of marriage are applied in specific areas, especially in light of recent political and social changes in Eastern Europe.

This comparative study of the canonical form of the marriage in the Latin and in the Catholic Oriental law, especially within the Byzantine rite, begins with an historical overview of the issue in both the Latin and the Byzantine traditions focused on specific documents and circumstances that had a significant impact on the evolution of canonical form. Subsequently, it considers the treatment of the canonical form of marriage in the 1917 *Codex Iuris Canonici* and post-codal legislation concerning the oriental churches, especially

the motu proprio *Crebrae allatae*. Afterward this dissertation surveys the evolution of the issue in the conciliar and post-conciliar legislative documents. The same comparative method is applied in analyzing the present law as expressed in the 1983 *Code of Canon Law* and the 1990 *Code of Canons of the Eastern Churches*. Finally, this dissertation analyzes selected pastoral issues peculiar to Eastern Europe after the fall of the communist governments. This last section investigates canonically a few concrete problem situations related to the canonical form of marriage and proposes a tentative solution for each one.

This study reveals how important is for those involved in pastoral work to be acquainted with both Latin and Oriental matrimonial legislation within the context of interecclesial relationships and within the prospect of today's increasing global mobility.

This dissertation by Benone Farcas fulfills the dissertation requirement for the doctoral degree in canon law approved by John Beal, J.C.D., as Director, and by Ronny Jenkins, M.A., S.T.L., J.C.D., and Robert Kaslyn, S.J., J.C.D. as Readers.

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Robert Kaslyn, S.J., J.C.D., Reader

This work is dedicated first of all
to my father, Gheorghe Farcas,
who entered eternal life on July 14, 2001,
and my mother, Maria Farcas,
who has prayed me through all my years of education.
They first taught me to respect the laws of God and of the Church.

TABLE OF CONTENTS

Acknowledgements	x
------------------------	---

GENERAL INTRODUCTION	1
----------------------------	---

CHAPTER ONE

THE CANONICAL FORM OF MARRIAGE IN RITE OF LATIN LAW AND THE RITE OF MARRIAGE IN EASTERN LAW

Introduction	8
A. The Canonical Form of Marriage in Latin Law	10
1. Clandestine Marriages	10
2. The Council of Trent	14
a. The conciliar debates at Bologna	14
b. The debates at Trent	18
c. The Decree <i>Tametsi</i>	25
d. Shortcomings of the Decree <i>Tametsi</i>	29
3. The Post-Tridentine Legislation	36
a. The historical, religious and social circumstances	36
b. The <i>Benedictine Declaration</i>	39
c. Pertinent provisions issued after the <i>Benedictine Declaration</i>	43
d. The Decree <i>Ne temere</i>	45
Conclusion	47
B. The Rite of Marriage in Eastern Law	49
Introduction	49
1. The Development of Liturgical Celebration of Marriage	

in the Byzantine tradition	51
2. The Development of Liturgical Rite of Marriage in other Oriental Traditions	54
3. Matrimonial Legislation in the Eastern Roman Empire	58
a. Civil matrimonial legislation	60
b. Theological and canonical approach to the matrimonial rite	65
4. The Development of the Oriental Rite of Marriage in Selected Countries of Eastern Europe	67
a. The matrimonial rite in the Russian Orthodox Church in 17 th and 18 th centuries.....	68
b. The Matrimonial rite in Moldavia and Walachia	75
c. The marriage legislation of the Romanian Oriental Catholic Church in Transylvania	78
Conclusion	86

CHAPTER TWO

THE CANONICAL FORM OF MARRIAGE IN THE 1917 CODEX IURIS CANONICI, IN MOTU PROPRIO *CREBRAE ALLATAE*, AND IN CONCILIAR AND POST- CONCILIAR DOCUMENTS

Introduction.....	88
A. The Canonical Form of Marriage in 1917 Codex Iuris Canonici and in Motu Proprio <i>Crebrae Allatae</i>	90
I. The form of marriage	91
1. The pastor	94
a. In Latin law	94
b. In Oriental law	96
2. The local Ordinary	97
3. The local Hierarch	98

4. Witnesses	100
5. Sacred rite	103
6. Delegation vs. faculty	105
II. Assistance at marriage	106
1. Time of assistance	106
2. Place of assistance	110
3. Ritual affiliation	112
4. Manner of assistance	114
5. Assistance at marriages of Catholic faithful of different rites	115
6. Delegation to assist at a marriage	122
7. Requirements for licit assistance at marriage	131
III. The extraordinary form of marriage	139
IV. Persons subject to the canonical form of marriage	146
V. The liturgical rite of marriage	150
VI. The recording of marriage	155
Conclusion	158
B. The Canonical Form of Marriage in Conciliar and Post-conciliar documents	159
Introduction	159
I. Canonical form at the Second Vatican Council	160
1. Canonical form in the decree on Eastern Catholic Churches	160
2. Canonical form during the discussion on mixed marriages	166
II. Canonical form of marriage in post-conciliar legislation	170
1. Instruction <i>Matrimonii Sacramentum</i>	170
2. The decree <i>Crescens matrimoniorum</i>	172
3. The 1967 Synod of Bishops	174
4. Motu proprio <i>Matrimonia Mixta</i>	178
5. Subsequent interpretations and legislation	180

Conclusion	182
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CHAPTER THREE

THE CANONICAL FORM OF MARRIAGE IN THE 1983 CODE OF CANON LAW AND IN CODE OF CANONS OF THE EASTERN CHURCHES

Introduction	185
I. The elements of Canonical Form	189
1. The qualified witness and the sacred minister	190
a. The local ordinary	191
b. The local hierarch	192
c. The pastor	193
d. The deacon	195
2. The common witnesses	196
3. The manner of assistance	198
4. The sacred rite	199
II. Requirements for a valid celebration of marriage	205
1. Authorization by office	206
a. Time of competence	206
b. Territorial limits	208
c. Limits established by ritual affiliation of spouses	209
2. Authorization by persons	212
3. Privilege of the patriarch	214
4. Delegation to assist at marriage	216
a. Delegation of priests	216
b. Delegation of deacons	219
c. Delegation of lay persons	222
III. Requirements for a licit celebration of marriage	228

1. Responsibility of the delegator	228
2. Responsibilities of all authorized witnesses	229
3. The canonical place of celebration	230
IV. The extraordinary form of marriage	234
V. Faculty to bless marriage of non-Catholic Oriental faithful	239
VI. Persons subject to canonical form of marriage	241
VII. Canonical form of mixed marriages	246
VIII. Dispensation from canonical form	250
IX. The liturgical place of celebration	255
X. The liturgical rite of celebration	259
XI. Prohibition of double ceremonies	263
XII. The recording of marriages	265
Conclusion	271

CHAPTER FOUR

SELECTED PASTORAL ISSUES PECULIAR TO EASTERN EUROPE AFTER THE FALL OF THE COMMUNIST GOVERNMENTS

Introduction	273
I. The requirements of the canonical form to be observed in the celebration of marriage by the Catholic faithful of Oriental rite who live in territories where a hierarchy of their own rite was not established	275
1. The statement of the subject	275
2. The ritual affiliation of Eastern Christians who enter into full communion with the Catholic Church	279
3. Practical guidelines	285
Conclusion	287
II. The canonical condition of civil marriages	288

1. The canonical status of civil marriages contracted by Oriental non-Catholics	288
2. The canonical condition of civil marriages contracted in the former Soviet Union	294
a. Civil marriage of two non-baptized persons who subsequently received baptism in the Orthodox Church	297
b. Civil marriage of two non-baptized persons one of whom subsequently receives the baptism in the Orthodox Church	297
3. Practical guidelines	298
Conclusion	300
 GENERAL CONCLUSION	 302
 List of Abbreviations	 311
 Bibliography	 313

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GENERAL INTRODUCTION

On October 25, 1990, Pope John Paul II presented to the General Congregation of the Synod of Bishops the *Code of Canons of the Eastern Churches*.¹ On that occasion the Supreme Pontiff pointed out that the new Eastern Code, along with the *Code of Canon Law*² and the apostolic constitution on the Roman Curia, *Pastor bonus*³ were constitutive parts of the unique *Corpus Iuris Canonici* of the Catholic Church. In view of this fact the Pope urged that “a proper comparative study be promoted in the Schools of Canon Law.”⁴ On the same circumstance, Pope John II added that there is a need to support initiatives intended to promote a greater knowledge of the elements which constitute the ritual patrimony of the

¹ *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1990). English translation from *Code of Canons of the Eastern Churches, Latin-English Edition* (Washington, DC: CLSA, 1992). Hereafter cited as *CCEO*. All subsequent English translations of canons from this code will be taken from this source unless otherwise indicated.

² *Codex Iuris Canonici auctoritate Ioannis Paulii PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983). English translation from *Code of Canon Law, Latin-English Edition: New English Translation* (Washington, DC: CLSA, 1998). Hereafter cited as 1983 *CIC*. All subsequent English translations of canons from this code will be taken from this source unless otherwise indicated.

³ John Paul II, apostolic constitution *Pastor bonus*, June 28, 1988: *AAS* 89 (1988) 841-922.

⁴ John Paul II, Discourse on the occasion of presentation of the Code of Canons of the Eastern Churches, October 25, 1990: *AAS* 83 (1991) 490. Nr. 8: “Hoc « Corpore » perpenso, via oritur adhortatio ut in Facultatibus Iuris Canonici idoneum ovehatur studium comparativum amborum Codicum.”

Catholic Church.⁵ In fact, the Pope confirmed the provision made already by the Second Vatican Council:

Those persons, however, who by reason of their office or apostolic ministry, have frequent contact with the Eastern Churches or their faithful are to be carefully instructed in the knowledge and practice of the rites, law, teaching, history and nature of Eastern Christians, in keeping with the importance of the office they hold.⁶

For Christians of both Oriental and Latin rite living in Eastern European countries this mutual knowledge of their proper traditions and laws acquires a significant importance. Historical and political events which took place in Eastern Europe during the last century influenced greatly the social and religious life of people living in those regions. The communist governments, installed first in the Soviet Union and later on in several other Eastern European countries, produced significant changes in the religious life of these countries which are traditionally Christian. Beside the continuous religious persecution, the communist regimes imposed, at times in an extremely aggressive manner, a massive transmigration of population, especially in the territories of the Soviet Union. Consequently, a large number of people ended in foreign territories, far away from their homeland, with little or no religious assistance at all. The fall of communism in the late eighties and the collapse of the Soviet Union in the early nineties, brought about a new situation and new

⁵ Ibid.

⁶ Vatican II, *Orientalium Ecclesiarum* 6, November 21, 1964: AAS 57 (1965) 78: “Illi vero qui ratione sive muneris, sive apostolici ministerii frequens cum Orientalibus Ecclesiis aut cum earum fidelibus habeant commercium, in cognitione et cultu rituum, disciplinae, doctrinae, historiae atque indolis Orientalium accurate, pro gravitate officii quod gerunt, instituantur.” English translation in *Decrees of Ecumenical Councils*, ed. Norman P. Tanner (London: Sheed & Ward and Washington, DC: Georgetown University Press, 1990) 2 : 902.

challenges for the Church in that part of the world. First of all, the Church, freed from restrictions imposed by totalitarian regimes for almost half a century, enjoyed the liberty to organize its activity without any significant limitation on the part of the newly installed democratic governments. On the other hand, the fall of communism opened the borders between the countries formerly situated behind the Iron Curtain and Western Europe which resulted in a massive process of emigration of people from Eastern Europe toward Western European countries. As a consequence, there is presently a constant and vast process of cultural and religious interchange between local people and various groups of immigrants.

These events created new pastoral and juridical problems with regard to Christian education and formation, the religious life of the Christian family, interritual and mixed marriages, etc. Accordingly, there is an urgent need to consider the canonical and pastoral consequences of the ever increasing presence of the Oriental Catholic faithful who live in Latin dioceses without the pastoral assistance of their proper pastors. Therefore, Latin pastors who are entrusted with the pastoral care of Oriental faithful are called to improve their knowledge of the theological, liturgical, spiritual, and canonical patrimony of the Oriental Churches in order to better understand and minister to people who belong to various Eastern Churches *sui iuris*. In carrying out the process of deepening their understanding of the values of the Eastern tradition, Latin pastors may improve the quality of their ministry to Oriental Christians entrusted to their pastoral care. Moreover, communities of Latin rite faithful are enriched by the proper patrimony of Oriental Christians who settled there.

Thus, the preservation of this patrimony should be supported and encouraged not only by Eastern pastors, but also by Latin pastors of the territory of

immigration, so that the colorful richness of the Church of Christ might be expressed in an admirable manner.⁷

Therefore, given the multi-ritual character of the Church and in the context of today's human mobility it seems most probable that most of the priests and deacons involved in pastoral activity will have to deal at some point with Christian faithful who belong to a rite other than their own. For this reason, a basic knowledge of traditions and legislation of both Latin and Oriental rites would be very useful for an efficient pastoral ministry. Most of the time, it is the celebration of Christian marriage that brings together Christians of various rites and gives priests and deacons entrusted with the pastoral care of Christian faithful the opportunity to recognize the value of the multi-ritual nature of the Catholic Church. In view of the fact that the validity of the sacrament of marriage may depend on the observance of the law it is very important that those involved in pastoral ministry be knowledgeable about the matrimonial legislation of both Latin and Eastern Catholic Churches. Even though the norms are significantly the same, there are important differences between Latin and Oriental codes, differences which sometimes may have an effect on the validity of marriage. This is particularly true when considering the question of mixed marriages between Catholics and Oriental non-Catholics, interritual marriages between Latin and Eastern Catholics, or marriages between Eastern Catholics who are entrusted to the pastoral care of a Latin bishop.

⁷ Congregation for the Oriental Churches, instruction, *Il Padre incomprendibile*, 10, January 6, 1996: *Enchiridion Vaticanum* 15 (1996) 15: "Sicché la conservazione di tale patrimonio va sostenuta e incoraggiata non solo dai pastori orientali ma anche da quelli latini dei territori di immigrazione, perché mirabilmente esprime la ricchezza variopinta della Chiesa di Cristo."

One of the areas of matrimonial legislation where significant dissimilarities exist between Latin and Oriental codes is the canonical form of marriage.

The purpose of this dissertation is to examine the canonical form of marriage by comparing the Latin and Oriental canonical legislations and to analyze the pastoral consequences that arise when laws concerning canonical form of marriage are applied in areas of Eastern Europe in light of recent political and social changes which took place during the second half of the past century. For the sake of clarity it should be specified that the subject of the present study is the canonical form of marriage, not the sacramental form nor the liturgical form of marriage. The canonical form of marriage “consists in those solemnities required for the Church to recognize the union as valid marriage.”⁸

Therefore, this dissertation is a comparative study of the canonical form of marriage in the Latin and in the Oriental Catholic law. This study is structured in four chapters. The first chapter is an historical overview of the issue in both Latin and Oriental traditions focused on specific documents and circumstances that had a significant impact on the evolution of canonical form. Thus, the first section of this chapter will consider the evolution of canonical form of marriage in Latin law. After a brief consideration of the religious, historical, and social conditions that prompted the establishment of the canonical form of marriage, this section will examine the development of the issue at the various sessions of the Council of Trent, evaluate the law itself, and consider some of the most important Church’s

⁸ John Beal, “The Form of the Celebration of Marriage,” in *New Commentary on the Code of Canon Law*, ed. John Beal et al. (New York/Mahwah, NJ: Paulist Press, 2000) 1325.

documents that intended to make the implementation of the canonical form of marriage established at the Council of Trent more effective. The second section of the first chapter will analyze the development of the matrimonial rite in the Eastern liturgical and canonical tradition. It will first consider the liturgical evolution in the Byzantine tradition of the matrimonial rite, followed by a short overview of the same rite in a few other Oriental traditions. Then, this section will study the matrimonial imperial legislation and the theological and canonical approach of the same legislation in the Eastern Roman Empire. Finally, it will analyze the development of the Oriental rite of marriage in selected countries of Eastern Europe from the seventeenth into the nineteenth centuries.

The second chapter will consider the treatment of the canonical form of marriage in the 1917 *Codex Iuris Canonici*,⁹ in the motu proprio *Crebrae allatae*,¹⁰ and in conciliar and post-conciliar documents. Thus, the first section of this chapter will present a comparative analysis of the 1917 *CIC* and *Crebrae allatae*, with references to prior legislation, to the subsequent authentic interpretations made by various Congregations and Commissions of the Roman Curia, and to various amendments made to the law. The second section of this

⁹ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritatae promulgatus* (Romae: Typis Polyglottis Vaticanis, 1917). English translation from *The Pio-Benedictine Code of Canon Law*, Edward N. Peters, curator (San Francisco: Ignatius Press, 2001). Hereafter cited as *1917 CIC*. All subsequent English translations of canons from this code will be taken from this source unless otherwise indicated.

¹⁰ Pius XII, motu proprio *Crebrae Allatae*, February 22, 1949: *Acta Apostolicae Sedis* 41 (1949) 89-119. English translation from Victor Pospishil, *The Law on Marriage: Interritual Marriage Law Problems. English Translation and Differential Commentary* (Chicago: Universe Editions, 1962). Hereafter cited as *CA*. All subsequent English translations of canons from this document will be taken from this source unless otherwise indicated.

chapter section will scrutinize the approach to the canonical form of marriage of the Second Vatican Council and the post-conciliar development of the issue as expressed in the 1967 Synod of Bishops and the post-conciliar and post-synodal documents.

The third chapter will present a comparative analysis of the 1983 *CIC* and the *CCEO* concerning the canonical form of marriage, with references to the authentic interpretation issued by various dicasteries of the Roman Curia and to the changes made by the legislator. Since the legislation concerning the canonical form of marriage is substantially the same as in the previous legislation considered in the second chapter of these study, the analysis presented in this third chapter will highlight the new elements introduced in the present legislation and will also emphasize the differences that exist between the Latin and Oriental discipline.

Finally the fourth chapter will consider, from a canonical perspective, a few pastoral issues related to the canonical form of marriage, issues which are peculiar to Eastern Europe after the fall of the communist governments.

CHAPTER ONE
THE CANONICAL FORM OF MARRIAGE IN LATIN LAW AND THE RITE OF
MARRIAGE IN EASTERN LAW

Introduction

The phenomenon of migration of populations promoted or imposed by communist regimes in Eastern Europe during the past century and the increase of today's global mobility have been causing large masses of population to leave their homelands and to settle somewhere else. This fact generated a vast and continuous interchange of traditions, and of religious and cultural values that influenced to a great extent the life of these people. One of the challenges they have been facing is the living of their religious life in new, and often extremely difficult, conditions. With regard to the subject of the present study it must be said that these massive transigrations had as result a combination of Catholic faithful belonging to Oriental and Latin rites living in territories without the pastoral assistance of their proper pastors, or even with no religious assistance at all. Obviously, the most frequent difficulties the Catholic faithful living the above described situation have been experiencing, were Christian education and celebration of Sacraments. Among sacraments, the celebration of marriage has been raising several issues. What is the juridical status of Catholics belonging to an Oriental church *sui iuris* in territories without a proper hierarchy? Does a Latin ordinary or pastor have the faculty to assist at the marriage of Oriental Catholics in their own territories if there is no Catholic Oriental hierarchy? In territories where the Catholic Church has been suppressed for political reasons, numerous Catholics had been deprived of spiritual

and sacramental assistance from their pastors for decades; are their marriages celebrated before civil authorities or before non-catholic ministers valid? And the list could continue.

Any attempt to find an answer and a solution to these problems should begin by outlining the historical development of the Church's teaching on what has been and what is now considered to be the canonical form of marriage. In fact, the historical overview reveals that the contemporary legislation on the canonical form of marriage is not a arbitrary creation of ecclesiastical legislators, but is the result of the Church's attempts to find solutions to numerous problems that have been challenging the matrimonial institution in different places and cultures and at different times. These problems never ceased to appear. Once a difficulty has found a solution, another problem had appeared. Thus, the canonical form of marriage has been in continuous process of evolution. Moreover, it may be stated that many of the contemporary problems which confront the Church when putting into practice the provisions of Latin and Oriental ecclesiastical law on form, have their beginning in the early history of the discipline. Hence, the necessity of this historical chapter which will not examine exhaustively the development of the marriage form and sacred rite, but rather will scrutinize the main stages of their evolution.

Thus, this first chapter has two sections. The first section will analyze the establishment of the canonical form of marriage at the Council of Trent. First, it will briefly scrutinize the religious, historical, and social reasons that prompted an answer from the Church. Secondly, it will examine the development of the issue at the various sessions of the Council of Trent and evaluate the law itself. Finally, this section will consider some of the

most important Church's documents that intended to make the implementation of the canonical form of marriage established at the Council of Trent more efficient. The second section is concerned with the provisions the Eastern law require for the celebration of marriage. After a general presentation of the rite of marriage developed in Eastern Churches, in which the blessing given by the bishop or the priest is the *sine qua non* condition for the efficacy of the sacrament, this section will analyze a series of legislative provisions issued in Eastern Europe on this issue.

A. The Canonical Form of Marriage in Latin Law

1. Clandestine Marriages

The Council of Trent was the official response of the Catholic Church to the Protestant reformers. The objective of the Council was twofold: first, to re-affirm the truth of the Catholic Church's dogmas contested by Protestants by elucidating them beyond any debate and, second, to realize the reform of ecclesiastical discipline, which the fifteen-century's councils had failed to do.¹

With regard to the sacrament of marriage the Fathers of the Council faced several issues. Some of these were errors raised by the Reformers as for instance: their rejection of the sacramentality of matrimony, their recognition of dissolution of the matrimony because of adultery, and their reversal of the traditional precedence of virginity over matrimony.²

¹ Adhémar Esmein, *Le Mariage en Droit Canonique* (Paris: Librairie du Recueil Sirey, 1935) 2 : 157.

² Paolo Sarpi, *Istoria del Concilio Tridentino* (Firenze: Sansoni, 1966) 2 : 841-842.

Another important issue, albeit one more disciplinary than doctrinal, was that of clandestine marriages. The answer to this problem would lead eventually to the introduction within the canonical discipline of the Church of the canonical form of marriage. Clandestine marriages had been a painful problem for the church for a long time prior to the Protestant Reformation. Faithful to the Roman principle *consensus facit nuptias*, the Church granted an absolute preeminence in the formation of marriage to the irrevocable personal will expressed by the two contracting parties. The consent was the essential element,³ the only one necessary and sufficient to constitute the matrimonial covenant.⁴

Consequently, not only did the Church accept the several forms of celebration of marriage used by various cultures, but she also considered validly married spouses who exchanged their consent secretly, without any public celebration at all. As a result, the so-

³ Paolo Moneta, "Il Matrimonio," in *Il Diritto nel Mistero della Chiesa*, 3rd ed. (Rome: Lateran University Press, 1992) 284.

⁴ One of the Sovereign Pontiffs, Pope Nicholas I, enunciated this principle in a letter addressed to the Bulgars in 866. (Nicholas I, "Ad consultas vestras," 13 November 866: "Cap. 3. Sufficiat secundum leges solus eorum consensus, de quorum coniunctionibus agitur; qui consensus si solus in nuptiis forte defuerit, cetera omnia, etiam, cum ipso coitu celebrata, frustantur." *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum*, Eds. Heinrich Denzinger and Adolf Schönmetzer (Friburg and Rome: Herder, Barcinone, Brigoviae, 1976) 643.) Three centuries later, in a letter addressed to the archbishop Humbert of Arles, Pope Innocent III affirmed, "only the consent of those concerning whose marriage we are speaking is sufficient for marriages." (Innocent III, "Cum apud sedem", 15 July 1198: "Sufficiat ad matrimonium solus consensus illorum, de quorum quarumque coniunctionibus agitur." Denzinger, *Enchiridion*, 766). This principle was also reaffirmed at the Council of Florence: "The efficient cause of matrimony is regularly mutual consent expressed in words about the present." (Council of Florence, "Bulla unionis Armenorum" session 8, 22 November 1439: "Causa efficiens matrimonii regulariter est mutuus consensus per verba de presenti expressus." Tanner, 1 : 550).

called *matrimonii clandestini*, unions contracted without any solemnity, based only on the exchange of the consent between the spouses, on their mutual and personal determination to consider themselves husband and wife, became very common. This insistence on the sufficiency of consent had negative consequences for the life of both the Church and of society. The phenomenon of clandestine marriages seriously undermined the stability of marriage and family relationships and rendered ambiguous and uncertain the boundaries between marriage and concubinage. As a result, this situation led to complex controversies concerning the matrimonial status of persons and resulted in injustices and betrayals of legitimate expectations of the parties who considered themselves to be validly married but were unable to prove their married status.⁵ This situation led to outrage on the part of parents who, according to the custom of the time, had planned the marriages of their children for the political, social and economic reasons rather than for the mutual sentiments of the future spouses.

Therefore, in order to limit this phenomenon, various Pontiffs and particular councils condemned and prohibited clandestine marriages. In 1215 the Fourth Council of Lateran denounced secret marriages and issued rules and prohibitions to deter them:

Following in the footsteps of our predecessors, we altogether forbid clandestine marriages and we forbid any priest to presume to be present at such marriage. Extending the special custom of certain regions to other regions generally, we decree that when marriages are to be contracted they shall be publicly announced in the churches by priests If any persons presume to enter into clandestine marriages . . . the offspring of the union shall be deemed illegitimate Moreover, the parish priest who refuses to

⁵ Moneta, "Il Matrimonio," 284.

forbid such unions, or even any member of the regular clergy who dares to attend them, shall be suspended for three years and shall be punished more severely if the nature of the fault requires it.⁶

Subsequently, various local and provincial councils established penalties for those involved in the celebration of clandestine marriages, both the parties and priest-assistants.⁷ Such prohibitions, however, had little or no effect since the marital contract was still considered to be valid. Consequently, the desire for change was broadly felt in the whole Church.

Besides, the Church had to answer the criticism of the Protestant Reformers who argued that the Catholic Church endorsed clandestine marriages. When the sixteenth century religious turmoil began and the Protestant leaders challenged the dogma and authority of the Catholic Church, the question of clandestine marriage arose. The Reformers still held in common with the Catholic Church the principle that marriage is a bond generated by the reciprocal consent of the parties. However, for Martin Luther a fundamental requirement for contracting a marriage was not merely a religious ceremony between the spouses but a public event requiring the consent of parents or guardians of the parties. Consequently, he

⁶ Lateran Council IV, Constitution 51 “De poena contrahentium clandestine matrimonia,” 11-30 November 1215: “Unde praedecessorum nostrorum inhaerendo vestigiis, clandestine coniugia penitus inhibemus, prohibentes etiam ne quis sacerdos talibus interesse praesumat. Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando, statuimus ut cum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponatur [...] Siquis vero huiusmodi clandestine [...] coniugia inire praesumpserint [...] soboles de tali coniunctione suscepta prorsus illegitima censeatur [...] Sane parochialis sacerdos, qui tales coniunctiones prohibere contempserit aut quilibet etiam regularis qui eis praesumpserit interesse, per triennium ab officio suspendatur, gravius puniedus, si culpae qualitas postulaverit.” Tanner, 1 : 258.

⁷ George H. Joyce, *Christian Marriage: An Historical and Doctrinal Study* (London: Sheed and Ward, 1948) 108-112.

considered a clandestine marriage to be one entered into without parental approval, or at least without their knowledge. In his view, marriage was not a private enterprise but an issue concerning the whole community and, as a result, it ought to occur in presence of the community. For this reason, he judged clandestine marriages to be null and void. Therefore, for him the law of the Catholic Church, that recognized such marriages and even enabled them by considering them to be valid, was to be condemned.⁸

2. The Council of Trent

a. The conciliar debates at Bologna

In its first period, the Council of Trent did not expressly broach the question of marriage. However, in its seventh session on March 3, 1547, the Council issued a decree concerning the sacraments and declared that there are seven sacraments and that marriage is one of them.⁹ Soon after, on April 21, 1547, for fear of plague the Council moved to Bologna¹⁰ where for the first time the topic of reformation of the discipline governing the sacrament of marriage was discussed.¹¹ These debates did not result in any final definitions

⁸ Martin Luther, "Lectures on Genesis, chapter 24," in *Luther's Works*, Jaroslav Pelikan ed. (Saint Louis: Concordia Publishing House, 1962) 4 : 288-289. See also vol. 45 : 390 and 392.

⁹ Council of Trent, "Decretum primum [De sacramentis]," session 7, 3 March 1547: "Si quis dixerit, sacramenta novae legis non fuisse omnia a Iesu Christo domino nostro instituta, aut esse plura vel pauciora, quam septem, videlicet baptismum, confirmationem, eucharistiam, poenitentiam, extremam unctionem, ordinem et matrimonium, aut etiam aliquod horum septem non esse vere e proprie sacramentum: a. s." Tanner, 2 : 684.

¹⁰ Charles-Josef Hefele, *Histoire des Conciles d'après les Documents Originaux* (Paris: Librairie Letouzey et Ané, 1938) 10 : 237.

or decisions. However, they were important because the conciliar fathers suggested for the first time the introduction of certain type of canonical form as a remedy for clandestine marriages. On September 9, 1547 a canon concerning clandestine marriages was submitted to general congregation:

If anyone says that secret marriages entered by free consent of the parties are not true and valid marriages and that the parents have the power to validate or invalidate them: let him be anathema. However, the Holy Church prohibited such matrimones for good and reasonable causes.¹²

This canon, along with other canons regarding matrimonial matters were examined by conciliar fathers in general congregations that took place from September 10 to 24, 1547. The canon did not satisfy the general assembly because it did not offer an effective solution to the problem of secret marriages. During these debates, the first to suggest a radical resolution was Dionysus of Zanettini, bishop of Chironissa, who proposed that: “This article must decide and prohibit clandestine matrimones entirely and that they are not valid unless they are contracted before some witnesses or before the church.”¹³ Luigi Lippomani, coadjutor bishop of Verona supported this suggestion and took it a step further by proposing

¹¹ Giuseppe Di Mattia, “Il decreto *Tametsi* nasce a Bologna. Saggio per ricostruzione sistematica del dibattito nella fase bolognese,” *Apollinaris* 57 (1984) 627-718.

¹² *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio: Edidit Societas Goerresiana Promovendis inter Germanos Catholicos Litterarum Studiis*, (Friburgi Brisgoviae: Herder, 1972) 6/1 : 446: ”Si quis dixerit clandestina matrimonia, quae libero contrahentium consensu fiunt, non esse vera et rata matrimonia[...] proinde esse in potestate parentum ea rata vel irrita facere, a.s.; < tametsi sancta ecclesia matrimonia huiusmodi bonis ac rationabilis causis inhibenda censuerit>.”

¹³ *Ibid.*, 6/1 : 421: “Iste tamen articulus debet decidi et prohiberi clandestina in totum, et quod non sint valida nisi facta coram aliquibus testibus vel ecclesia.”

that “matrimony is to be contracted ... before the church namely, in the presence of the pastor and at least four witnesses.”¹⁴ In other words, these conciliar fathers were proposing to impose a certain form of the celebration of marriage as a condition for its validity.

At this point one could wonder why the conciliar Fathers were so concerned with finding a way to regulate secret marriages instead of declaring them invalid and thereby avoiding all the disorders and troubles arising from such marriages. The answer is quite simple. The conciliar Fathers knew they lacked the power to take such a decision. The Church had maintained consistently that the mutual consent was, by divine law, the efficient cause of matrimony and constitutive of the sacrament. Thus, they believed the matter and form of all sacraments had been established by Christ and they had no power to change it.¹⁵

However, in the course of the conciliar debates, a juridical mechanism was found that was able to justify such an intervention. The solution came from Peter of Flanders, bishop of Aquí, who proposed to incapacitate the persons intending to marry clandestinely and, as a result, to render their secret marriages invalid.¹⁶ The principle of *inhabilitatio personarum* was clearly explained by Paul Laymann who used the analogy of the laws issued by secular governments that invalidated contracts of minors by rendering these persons incapable and the contracts null when they lacked certain solemnities. Analogously, the Church, in virtue of

¹⁴ Ibid., 6/2 : 132: “Ut matrimonium in facie ecclesiae, hoc est presente parrocho et quattuor testibus ad minus ... contraheretur.”

¹⁵ Joyce, *Christian Marriage*, 116.

¹⁶ *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 6/1 : 473: “Cuperet inhabilitari personas, ne matrimonia huiusmodi clandestine valerent.”

the fact that matrimony is a sacrament and therefore within its jurisdiction, could render incapable of contracting marriage those who attempted to contract it secretly, that is, not observing the prescribed solemnity. Therefore, while admitting that the Church cannot *per se* change the matter and the form of the sacrament as instituted by its Divine Founder, this approach would also hold that it can do so *per accidens*, namely, by invalidating the marriage when entered secretly.¹⁷

The principle of *inhabilitatio personarum*, enunciated for the first time at Bologna, would eventually find its way into the Council's final decree concerning the reform of marriage. Although no final decisions were made at Bologna, the conciliar debates that took place there stimulated discussions of the sacrament of matrimony and indicated the path which would lead to the matrimonial legislation enacted during the final period of the Council.

¹⁷ Paul Laymann, *Theologia moralis: in quinque libros distributa* (Moguntiae [Mainz]: sumpt. viduae Joh. Martini Schönwetteri, 1723) 360: "Cum quaevis Respublica ob justam et publicam causam certum personarum genus, v.g. pupillos, prodigos ad contrahendum inhabiles reddere et contractus aliquos, vel ultima voluntates certa solemnitates destitutas ipso jure infirmare possit; sequitur quod etiam Respublica Ecclesiastica, quae matrimonii contractum propter anexam rationem sacramenti suae jurisdictioni, reservavit, propter publicam animarum utilitatem potuerit eos, qui clam et sine praescripta solemnitatem matrimonium contrahere attentant, ad ita contrahendum inhabiles reddere: sive quod eodem recidit, ejusmodi clandestinum matrimonium prorsus infirmari . . . Per se, ac directe Ecclesia mutaret rationem, et institutionem sacramenti, si efficere posset, ut materia, v.g. quae ante legitima erat, postea fine sui mutatione illegitima, et insufficiens esset, quod Ecclesia efficere nequit. Indirecte autem, et per accidens mutat vel potius impedit sacramentum, si immutet, vel destruat ipsam materiam, in qua sacramentum fundatur. Quemadmodum, si quis vinum physice corrumpat, v.g. multam aquam vel acetum infundendo, ut jam non sit materia sacrae Eucharistiae; ita etiam Ecclesia mutavit, et infirmavit contractum naturalem matrimonii clandestine, et consequenter rationem sacramenti abstulit; quippe quod ex Christi institutione in legitima viri, ac feminae conjunctione, seu contractu fundatur."

b. The debates at Trent

Thirteen years later, at the beginning of 1563 the questions concerning marriage and the reform of this sacrament again became the focus of the conciliar debates.¹⁸ At that time, the fathers of the Council were fully aware that the most urgent problem related to marriage to be dealt with was to establish a theologically grounded and canonically effective rule to prevent the valid celebration of clandestine marriages. Unfortunately, there was little agreement among the conciliar Fathers on how this goal should be achieved. Consequently, several drafts were submitted for their approval but all were subsequently rejected.¹⁹

The first draft was proposed on July 20, 1563 and contained three provisions concerning clandestine marriages. First, there was a canon (number three on the conciliar draft) that declared *vera ac rata matrimonia* the marriages which had been contracted in secret only by the consent of the parties. This canon added that parents did not have the authority to confirm or to repeal the matrimonial contracts concluded by their children in this manner.²⁰ This canon concerned the marriages contracted in the past. Its goal was to condemn the Protestant positions according to which such clandestine marriages should have

¹⁸ Sarpi, *Istoria*, 2 : 843-844; *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 380.

¹⁹ Esmein, *Le Mariage*, 2 : 163-167, 177-193.

²⁰ *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 640: “Si quis dixerit, clandestina matrimonia, quae libero contrahentium consensus fiunt, non esse vera ac rata matrimonia, ac proinde esse in potestate parentum, ea rata vel irrita facere: anathema sit.”

been declared null.²¹ Then, the first conciliar draft contained a decree in two parts. The first part acknowledged the ineffectiveness of the previous penalties issued by the Church with regard to clandestine marriage. Consequently, the decree declared null all marriages that in the future would be clandestinely contracted without the presence of three witnesses.²² The second part of the decree declared null the marriages contracted without the parental consent by sons before their eighteenth year of age and by daughters before their sixteenth year of age.²³

These proposals seemed to be satisfactory since they responded to the general expectations of people and conciliar fathers, the majority of whom were in favor of this draft.²⁴ However, these proposals raised a significant opposition among some of the conciliar fathers as can be seen from the results of the vote: one hundred and thirty six approved the draft, fifty-seven opposed it, and ten abstained.²⁵ Those opposing this draft, especially the draft decree, raised various objections. Some of the fathers, while fully aware

²¹ Esmein, *Le Mariage*, 2 : 177.

²² *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 640: “Statuit et decernit ea matrimonia, quae in posterum clam non adhibitis tribus testibus contrahentur, irrita fore ac nulla prout praesenti decreto irritat et annulat.”

²³ *Ibid.*, 9 : 640: “Insuper eadem sancta synodus ea quoque matrimonia, quae filii familias ante decimum octavum, filiae vero ante decimum sextum suae aetatis annum completum sine parentum consensus de caetero contraxerint, praesenti decreto irritat et annulat.”

²⁴ *Ibid.*, 9 : 787: “Dixitque expediens esse matrimonia clandestine irritari, cum nationibus placeat et majori parti Patrum.”

²⁵ Sarpi, *Istoria*, 2 : 952.

of the severe inconveniences caused by clandestine marriages, were against the introduction of any new law since, in their minds, canon law had to make marriage easily available to everybody as a remedy against incontinence.²⁶ This argument, though on the traditional canonical path, had just a few supporters.²⁷ Another group proposed to suppress clandestine marriages without invalidating them by imposing more rigorous penalties for the offenders and by binding them to declare their marriage before an ecclesiastical judge within a certain period of time.²⁸ The most powerful objection was a theological one: clandestine marriages fulfilled all the essential requirements of the sacramental sign and for centuries they had been considered valid. Moreover, canon three of the proposed draft, echoing a previous proposal made in Bologna on September 9, 1547, had recognized the above principle as a dogma.²⁹ Therefore, according to this faction, the Church had no power to declare clandestine

²⁶ *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 669: “Item dixit ex irritatione huiusmodi non obviam ire inconvenientibus quae oriuntur ex clandestinis; nam ex hoc juvenes immiscebunt se omnibus impudiciis, scientes non posse alligari matrimonio, quare non videtur facienda aliqua novitas.”

²⁷ Esmein, *Le Mariage*, 2 : 180.

²⁸ *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 656: “Matrimonia etiam clandestina sunt medicinae ad multa mala; neque ex irritatione talium matrimoniorum tolluntur inconvenientia; igitur non sunt tollenda, nec irritanda; sed apponantur poenae, statuaturque ut clandestine contrahentes infra mensem compareant coram ecclesiastico iudice, quod tales priventur haereditatem.”

²⁹ *Ibid.*, 9 : 640: “Si quis dixerit clandestina matrimonia, quae libero contrahentium consensu fiunt, non esse vera et rata matrimonia ... proinde esse in potestate parentum ea rata vel irrita facere, anathema sit.”

marriages invalid.³⁰ Besides, since the Protestants strongly affirmed the nullity of such marriages,³¹ by declaring clandestine marriages invalid the Council would have seemed to acknowledge that the heretics were right.³²

In order to overcome this objection, various groups proposed different solutions. For some of the conciliar fathers the most effective manner to overcome these objections would have been to admit that the sacrament of marriage consisted of the blessing given by the priest and not of the consents of the parties.³³ Thus, all the marriages that were not celebrated before the Church were to be declared invalid.³⁴ However, this solution could not prevail against the ancient and constant tradition of the Western Church that considered the sacerdotal blessing to be only a sacramental.³⁵

³⁰ Ibid., 9 : 698: “Dixit circumferri quaedam scripta incerto auctore quibus conantur asserere quod Ecclesia non possit irritare clandestina matrimonia.” See also 9 : 675 and 713.

³¹ Sarpi, *Istoria*, 2 : 841.

³² Ibid., 9 : 696: “Praeterea hoc faciendo non anathematizamus haereticos, quid id dixerunt, sed videmur eos sequi ... Lutherus dicit matrimonia clandestine aut invitis parentibus non esse vera. Idem dicit Buccerus et Calvinus. Ne igitur videamur sequi haereticos, non debent hujusmodi clandestina irritari.” Ibid., 9 : 741: “Nec convenit ut concilium conformet se haereticis [...] praesertim quia haeretici dicunt quod lex canonica diabolica est circa matrimonia clandestina.”

³³ Ibid., 9 : 656: “Ratio sacramenti matrimonii consistit in benedictione sacerdotali cum oblatione sacrificii; ponatur ergo lex quod non fiant matrimonia ante benedictionem sacerdotalem.”

³⁴ Ibid., 9 : 664, 659, 666.

³⁵ Thomas Aquinas, *Summa theologiae; cura et studio Petri Caramello, cum textu ex recensione Leoniana* (Torino: Marietti, 1952-1956) suplem. tertiae partis, q. 42, art.1: “Verba

Some other fathers attempted to overcome the objections by distinguishing between contract and sacrament. In their theory, the contract existed in every marriage prior to the sacrament for which it served as a foundation. On the one hand, the sacrament did not exist unless there was a valid contract. On the other hand, the ecclesiastical legislator could alter the contract by amending it with new conditions. Thus, by invalidating the clandestine marriages in the future only the contract would be changed without touching the sacrament of marriage.³⁶ While embraced by many of the council fathers, this theory was also strongly contested. Its opponents argued that the ancient and constant doctrine of the canonists affirmed that in a Christian marriage it is impossible to separate contract from the sacrament and that the contract itself has been elevated to the dignity of the sacrament and has been so absorbed by the sacrament that the one cannot be conceived without the other.³⁷ Others defended the proposed draft by comparing it with Church's right to establish new

quibus consensus exprimitur matrimonialis sunt forma huius sacramenti, non autem benedictio sacerdotis, quae est quoddam sacramentale.”

³⁶ *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 401: “Ecclesia tamen, etiam quod clandestina matrimonia sint sacramenta, irritare potest, id est modum contrahendi et contractum matrimonii; nam, irritato contractu, irritatur matrimonium, quod non est sacramentum si contractus matrimonii non subsistit. Nam Christus nihil aliud fecit in matrimonio, nisi quod sacramentum illud fecit, contractum autem ejus non immutavit. Igitur ubi non est contractus, non est sacramentum. Si igitur Ecclesia irritat contractum, irritat sacramentum. Potest itaque Ecclesia irritare etiam clandestina matrimonia, quatenus sacramenta sunt.” See also 9 : 404, 408, 650, 651.

³⁷ *Ibid.*, 9 : 725: “Nec potest intelligere contractum matrimonialem sine sacramento.” *Ibid.*, 9 : 670: “Quod ratio contractus et matrimonii sunt ita conjuncta sicut calor et ignis.” See also 9 : 661, 662, 669. See also Esmein, *Le Mariage*, 2 : 183.

impediments, while still others affirmed the power of the Church to modify even the matter and form of the sacrament of marriage.³⁸

Finally, some proposed another approach whose roots might be traced back to the earlier conciliar debates at Bologna. The patriarch of Aquilea proposed to invalidate future clandestine marriages by declaring the faithful, i.e. the person, incapable of entering marriage without a certain public manifestation established by the law. This solution would preserve the validity of clandestine marriages contracted in the past but simultaneously would allow those contracted in the future to be declared invalid.³⁹ The adversaries of any reform of marriage law contested this proposition too.⁴⁰ It is important to note that during the debates concerning the first draft, the Cardinal of Lorraine, echoing the conciliar discussions that took place at Bologna thirteen years earlier, asked that the priest be included among the three witnesses. He argued that if the Protestants insisted that their ministers bless the marriage, how much more appropriate it was that the Catholic priest, who is the true *sacerdos* should do so.⁴¹ However, the Cardinal of Lorraine's proposal was turned down at this time.

³⁸ Ibid., 9 : 704: “Declarando et statuendo quae sit propria materia et forma huius sacramenti.” See also 9 : 706, 725.

³⁹ Ibid., 9 : 643: “Ut forma decreti potius sit contra personas quam contra matrimonia jam facta, ut personae fiant inhabiles.” Ibid., 9 : 677: “Fiat irritatio matrimonii clandestini, sed irritatio sit circa personas non autem circa sacramentum.”

⁴⁰ Ibid., 9 : 687: “Ecclesia nullatenus potest irritare clandestine nec quoad consensum, nec quoad personas.” See also 9 : 679.

⁴¹ Ibid., 9 : 642-643: “Remedium promptum est unus ex tribus testibus sit sacerdos. Si enim haeretici maxime volunt ut sui impii ministri benedicant nuptias, a fortiori hoc debet fieri in Ecclesia catholica, in qua sunt veri ministri ac sacerdotes.”

After much debate, a second draft was presented on August 7, 1563. In this second draft the canon affirming the validity of clandestine marriages no longer appeared as a distinct provision but was included within the preamble of the decree.⁴² With regard to clandestine marriages, this second project adopted the theory of *inhabilitatio personarum*. As a result, the draft proposed the invalidation of future marriages and even of future betrothals, which would be contracted without the presence of at least three witnesses.⁴³

On September 5, 1563, a third draft containing two projects was presented. One of the projects required for the validity of marriage or betrothal the presence of three witnesses.⁴⁴ The other project envisaged marriages, not betrothals, and declared that in order to be valid the marriage had to be contracted in the presence of the proper pastor or another priest delegated by the pastor himself or by the ordinary, and two or three additional witnesses.⁴⁵ This idea of making the priest one of the witnesses had arisen initially, as

⁴² Ibid., 9 : 683: “Tametsi sacrosanta Dei ecclesia clandestina matrimonia, libero contrahentium consensu facta, vera ac rata esse non dubitat”

⁴³ Ibid., 9 : 683: “[Sancta Synodus] statuit ac decernit illas omnes personas, quae in posterum clam sine trium saltem testium praesentia matrimonium sive sponsalia contrahere attentaverint, ad matrimonium sive sponsalia contrahenda inhabiles fore, ac propterea omnia ab eis acta pro matrimonio sive sponsalibus contrahenda irrita fore ac nulla, prout praesenti decreto irritat et annullat.”

⁴⁴ Ibid., 9 : 763: “Et insuper addendo decernit, eos omnes, qui in posterum sine testium saltem trium presentia matrimonia vel sponsalia contrahere attentaverint ad sic contrahendum inhabiles fore, et contractus huiusmodi ob eis fieri attentatos irritos esse et nullos, ut eos praesenti decreto irritos facit et annullat.”

⁴⁵ Ibid., 9 : 762: “Qui aliter quam presente parrocho, vel alio sacerdote de ipsius parrochi vel ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentaverint; eos

mentioned above, during the debate concerning the first draft of the decree and presented a twofold advantage. First, without legitimizing the opinion of those who considered the sacerdotal benediction as essential to the sacrament of marriage, it gave them satisfaction because the priest was not only to assist at the marriage but also to give the nuptial blessing.⁴⁶ Second, at a practical level, the priest certainly made the best official witness. Since, he was supposed to know ecclesiastical laws, he would presumably be able to ascertain the freedom of the parties to marry. Besides, he was more suitable than a notary to record the marriage properly.⁴⁷

This last project was proposed again on October 13, 1563 as the fourth draft. Although some conciliar fathers opposed it until the very end,⁴⁸ this fourth and last draft was approved on November 11, 1563 and received pontifical approval on January 26, 1564.⁴⁹

sancta synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit.”

⁴⁶ Esmein, *Le Mariage*, 2 : 190-191.

⁴⁷ John J. Carberry, *The Juridical Form of Marriage*, Canon Law Studies 84 (Washington, DC: CUA Press, 1934) 22-23.

⁴⁸ Out of 199 conciliar fathers 136 of them approved the decree; 55 were against it. Four of them, namely the papal legates, Cardinals Morone, Simonetta and Hosius and the Patriarch of Venice remitted their decision to the judgment of the Supreme Pontiff; four other fathers eventually sided with the majority. See *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 971-977.

⁴⁹ *Ibid.*, 9 : 977, 1152-1155.

c. The Decree *Tametsi*

The reformed legislation on matrimony eventually took the form of a doctrinal preamble, followed by twelve doctrinal canons and twelve disciplinary canons on the reform of marriage. The first chapter of these last canons contained the law governing clandestine marriages and has become known to the posterity by its first word, *Tametsi*. From the very beginning this chapter reflects the tensions that accompanied the debates among the conciliar fathers over this issue.

First, the decree affirmed, in opposition to the Protestant reformers, that clandestine marriages contracted by the freely expressed consent of the parties were valid as long as the Church had not declared them null. It was also erroneous to sustain that the parents had the power to decide whether the marriages of their children still at home were valid or not.

There is no doubt that secret marriages, entered by free consent of the parties, are true and valid marriages as long as the church has not made them null. Hence those are worthy of condemnation, and the holy council condemns them under anathema, who deny that they are true and valid, and falsely assert that marriages contracted by children still at home without the consent of their parents are null, and that the parents can make them either valid or invalid. Nevertheless, the holy church of God has always detested and prohibited such marriages for the best of reasons.⁵⁰

⁵⁰ Council of Trent, “*Canones super reformatione circa matrimonium*,” session 24, 11 November 1563: “*Tametsi dubitandum non est, clandestina matrimonia, libero contrahentium consensus facta, rata et vera esse matrimonia, quamdiu ecclesia ea irrita non fecit, et proinde iure damnandi sint illi, ut eos sancta synodus anathemate damnat, qui ea vera ac rata esse negant quique falso affirmant, matrimonia, a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse: nihilominus sancta Dei ecclesia ex iustissimis causis illa semper detestata est atque prohibuit.*” Tanner, 2 : 755.

Later, the Council gave the reasons why a law requiring a juridical form for the validity of marriage was necessary. The text of the decree complained that, because of “human disobedience,” earlier prohibitions against clandestine marriages had been ineffective and they continued to generate “grave sins” and “a state of damnation” especially for those “who have deserted a first wife married in secrecy and have publicly contracted marriage with another woman and live with her in a permanent state of adultery.” As a result, “the church, in that it does not judge about what is not public, is unable to treat this evil unless it uses a more effective remedy.”⁵¹ Then, the Council laid down detailed provisions concerning the marriage bans, the public announcement of those intending to marry, and a liturgical form for the celebration of the marriage.⁵² The core of the decree, however, was the provision that established the elements of the canonical form of marriage:

The holy synod now renders incapable of marriage any who may attempt to contract marriage otherwise than in the presence of the parish priest or another priest, with the permission of the parish priest or the ordinary, and two or three witnesses; and it decrees that such contracts are null and invalid, and renders them so by this decree.⁵³

⁵¹ Ibid: “Verum cum sancta synodus animadvertat, prohibitiones illas propter hominum inobedientiam iam non prodesse, et gravia peccata perpendat, quae ex eiusdem clandestinis coniugiis ortum habent, praesertim vero eorum, qui in statu damnationis permanent, dum, priore uxore, cum qua clam contraxerant, relicta, cum alia palam contrahunt et cum ea in perpetuo adulterio vivunt; cui malo cum ab ecclesia, quae de occultis non iudicat, succurri non possit, nici efficacius aliquod remedium adhibeatur.”

⁵² Ibid., 2 : 755-756.

⁵³ Ibid., 2 : 756: “Qui aliter, quam presente parochi vel alio sacerdote, de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt: eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et huiusmodi contractus irritos et nullos esse decernit, prout eos praesenti decreto irritos facit et annullat.”

After these provisions, the decree established the sanctions to be incurred by those transgressing the above-mentioned rules, laid down the rules regarding the blessing of the marriage, and made provisions for the reception of the sacraments of penance and Eucharist by the spouses. Provisions were also made for the recording of the marriage. The decree ended with a clause that established the time-frame in which it was to become effective: “This council further determines that this decree shall begin to take effect in each parish after thirty days, to be counted from the first day of promulgation in that parish.”⁵⁴

In conclusion, it seems that by choosing to disqualify the persons who attempted clandestine marriages, the council transformed clandestinity, or the lack of canonical form, into a diriment impediment for marriage. The decree also declared invalid contracts concluded in this manner. Thus, the intention of the council was to disqualify directly the persons and, thereby, to nullify indirectly matrimonial contracts. By requiring certain public formalities, under the penalty of the nullity, the council replaced the simple, consensual matrimonial contract, admitted in the Church until then, with the necessity of a solemn matrimonial contract. This solemnization did not change the matrimonial contract in itself. The only efficient cause of the matrimonial contract remained the free exchange of the consent of the spouses; without it the contract did not generate its effects. The canonical form, i.e., the requirement of the presence of the priest and witnesses was only a *sine qua non*

⁵⁴ Ibid., 2 : 757: “Decernit insuper, ut huiusmodi decretum in unaquaque parochial suum robur post triginta dies habere incipiat, a die primae publicationis in eadem parochia factae numerandos.”

condition for the validity of the contract and did not constitute the exterior sign of the sacrament.

d. Shortcomings of the Decree *Tametsi*

Although the council succeeded in finding a strategy able to eliminate the phenomenon of clandestine marriages, the decree *Tametsi* had a number of shortcomings that diminished its effectiveness. Some of these were caused by differing interpretations given to its various terms. For instance, the decree established that marriage was to be contracted *presente parochi*.⁵⁵ There was no determination whatsoever of which “pastor” was referred to in the decree, whether it was to be the proper pastor of the contracting parties or another pastor. Although canonists held different opinions over the centuries, the common view was that the Council certainly meant the proper pastor of the contracting parties.⁵⁶ The main argument for this position was drawn from the context of the decree. Before the invalidating clause, the decree ruled that an announcement of those intending to marry was to be made publicly during mass by “the parish priest of the contracting parties.”⁵⁷ Similarly, after the invalidating clause the decree provided that the nuptial blessing “must be given by the couple’s own parish priest.”⁵⁸ Consequently, even if the council did omit the word “proper”

⁵⁵ *Ibid.*, 2 : 756.

⁵⁶ Esmein, *Le Mariage*, 2 : 202.

⁵⁷ Council of Trent, “*Canones super reformatione circa matrimonium*,” session 24, 11 November 1563: “*A proprio contrahentium parochi*.” Tanner, 2 : 756.

⁵⁸ *Ibid.*: “*Benedictionem a proprio parochi fieri*.”

in the invalidating clause, the word is nonetheless inevitably implied, and it is, as a matter of fact, inserted both before and after the invalidating clause, where the same idea is expressed.⁵⁹

On the other hand, a strictly literal interpretation would seem to justify a second opinion, i.e., that a valid marriage might be contracted before any pastor within his jurisdiction.⁶⁰ There are reasons to believe that the council purposely omitted the word “proper” from the invalidating cause. It is clear that neither the publication of the banns nor the nuptial blessing has anything to do with the validity of the sacrament of marriage. Hence, when the council employed the term “proper pastor” it must have intended to establish the requirements for the liceity of the marriage whereas the council treated of what was necessary for the validity, it used the word “pastor” only.⁶¹ However, following the council of Trent the canonical jurisprudence adopted the first opinion and interpreted the word “pastor” as the “proper pastor.” This opinion eventually prevailed and was confirmed by several declarations of the Holy See.⁶²

⁵⁹ Charles D. Cronin, *The New Matrimonial Legislation* (New York, Cincinnati and Chicago: Benziger Bros, 1908) 101-102.

⁶⁰ August Marie Félix Boudinhon, *Le mariage et les fiançailles: nouvelle législation canonique: commentaire du decret "Ne temere" (2 août 1907)* (Paris: P. Lethielleux, 1907) 23.

⁶¹ Cronin 101-150, where the author presents an exhaustive analysis of the true mind of the Council of Trent with regard to this issue.

⁶² Urban VIII, Constitution *Exponi*, August 14, 1627, in *Bullarum, diplomatum et privilegiorum Sanctorum Romanorum Pontificum Taurinensis editio: locupletior facta collectione novissima plurium brevium, epistolarum, decretorum actorumque S. Sedis a S.*

The issue was further complicated by the fact that the pastor's competency in assisting marriages was personal i.e., the pastor's jurisdiction depended on the domicile of the contracting parties.⁶³ Besides, since the assistance required from the pastor was merely passive, it was possible to celebrate a marriage "by surprise." When two young people accompanied by two witnesses made their appearance before the pastor unannounced and expressed their consent in his presence, the pastor became a witness against his will. Nevertheless, the canonical provisions had been fulfilled and the marriage was valid although illicit.⁶⁴

Nonetheless, the provision which did the most to deprive the decree of its desired effect was the method prescribed for its promulgation.

So that such salutary percepts may not escape anyone's notice, the council orders all local bishops to see that this decree is promulgated to their people as soon as they can, and is explained in all the parish churches of their dioceses; this should be done as soon as possible in the first year, and then again as often as they think expedient. The council further determines that this decree shall begin to take effect in each parish after thirty days, to be counted from the first day of promulgation in that parish.⁶⁵

Leone Magno usque ad praesens. Cura et studio collegii adlecti Romae virorum s. theologiae et ss. canonum peritorum; quam Pius Papa IX apostolica benedictione erexit; auspicante Cardinali Francisco Gaude (Augustae Taurinorum: A. Vecco et sociis editoribus, 1868) 13 : 591-592. Benedict XIV, Constitution *Paucis ab hinc*, March 19, 1758, in *Codicis iuris canonici fontes*, Petri Card. Gasparri ed. (Rome: Typis Polyglottis Vaticanis, 1923) 2 : 571-576, n. 447.

⁶³ Luigi Chiappetta, *Prontuario di diritto canonico e concordatario* (Rome: Dehoniane, 1994) 574-575.

⁶⁴ An endeavor of this kind was illustrated by Alessandro Manzoni in his novel *I promessi sposi*, chapters 5 and 8. See Alessandro Manzoni, *I promessi sposi (The Betrothed)*, (New York: P. F. Collier, 1909).

This rather unusual method of promulgation chosen by the council was prompted by the Europe's political situation in the sixteenth century. As a consequence of the Reformation the religion professed by the people of a territory depended on the kind of government they had or the religion of their sovereign. The principle *cuius regio illius et religio* was operational at that time. During the council's debates, it was pointed out that heretics would refuse to publish and accept the decree although its provisions would have bound them. As a result, their marriages would have to be regarded as invalid and consequently their children would be considered illegitimate. Consequently, innumerable lawsuits concerning inheritance and succession would ensue.⁶⁶ Aware of these dangers, the Fathers of the Council chose this unusual method of promulgation because it presented a way of exempting heretics from the decree's provisions without including any exemption in the decree itself. Therefore, assuming that the heretics would refuse to accept the decree in their territorial entities, the canonical form provided by *Tametsi* would not bind for marriages contracted

⁶⁵ Council of Trent, "Canones super reformatione circa matrimonium," session 24, 11 November 1563: "Ne vero haec tam salubria praecepta quemquam lateant, ordinaries omnibus praecipit, ut, cum primum potuerit, current hoc decretum populo publicari ac explicari in singulis suarum dioecesum parochialibus ecclesiis, idque in primo anno quam saepissime fiat, deinde vero quoties expedire viderint. Decernit insuper, ut huiusmodi decretum in unaquaque parochial suum robur post triginta dies habere incipiat, a die prima publicationis in eadem parochia factae numerandos." Tanner, 2 : 756-757.

⁶⁶ *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatum nova collectio*, 9 : 739-741.

there and consequently those marriages even if contracted clandestinely would be still valid.⁶⁷

For a variety of reasons, however, the decree was not promulgated in many parishes, dioceses and even nations and consequently, the valuable effects intended by the council were not achieved. As a result, instead of having a general system regarding the valid celebration of marriage, an inconsistency and a multiplicity of methods was in use for centuries to come.⁶⁸ Further confusion was produced by certain technicalities required for valid publication. The Council provided that the decree was to be published in each parish with the authorization of the bishop.⁶⁹ When the pastor published the decree in his parish but failed to obtain the bishop's prior consent, his act would be invalid and the decree's provisions would not bind the people within that parish.⁷⁰ The council further established that the decree was to be published in every parish of every diocese.⁷¹ Accordingly, the promulgation of the decree only in the cathedral church for the whole diocese or even at a

⁶⁷ Carberry, *The Juridical Form*, 25-26. Benedictus XIV, *Paucis ab hinc*, *Fontes*, 2 : 571-576, n. 447.

⁶⁸ Carberry, *The Juridical Form*, 24-25.

⁶⁹ Council of Trent, "Canones super reformatione circa matrimonium," session 24, 11 November 1563 in Tanner, 2 : 756-757. Pietro Gasparri, *Tractatus Canonice de Matrimonio*, 3rd ed. (Paris: Beauchesne, 1904) 2 : 115-116, n. 1048.

⁷⁰ Gasparri, *De Matrimonio*, 2 : 115-116, n.1048.

⁷¹ Council of Trent, "Canones super reformatione circa matrimonium," session 24, 11 November 1563 : "A proprio contrahentium parochi." Tanner, 2 : 756-757.

diocesan synod or local council was considered insufficient.⁷² Although the decree itself empowered the bishop to publish it in his diocese, post-conciliar legislation required him to obtain Holy See's permission prior to the publication.⁷³ As a result, the map of the regions where the canonical form of marriage was required for the validity of marriage in the Catholic Church had the following configuration: there were areas where the decree was certainly published validly, others where the decree was certainly published but its promulgation was doubtfully valid, other areas where it was impossible to establish whether or not the decree was ever published, and finally areas where the decree was certainly not published.⁷⁴

Finally, there were also some ambiguities concerning the subjects of the decree *Tametsi*. As it was shown above, some uncertainties arose from the matter of publication of the decree. Catholics had to determine first whether or not the decree had been validly published in their parish. Those living within the limits of a parish where the decree was published were to abide by the decree's provisions. Moreover, since the decree was both

⁷² Benedict XIV, "De Synodo Dioeclesana," in *Benedicti XIV Pont. Opt. Max., olim Prosperi Cardinalis de Lambertinis, opera omnia. Ed. novissima ad postremam Remondinianam omnino exacta, t. 11* (Prati: Typographia Aldina, 1839-1847) lib. 12, c. 5, n. 7, 456. Sacred Congregation of the Council, Instruction, *Russiae (Archiep. Chioven.)* of December 2, 1628, *Fontes*, 5 : 254, n. 2500.

⁷³ Gaspari, *De Matrimonio*, 2 : 115-116, n. 1048.

⁷⁴ Donald Raymond Espen, *The Canonical Form of Marriage: Reevaluation*, Canon Law Studies 462 (Washington, DC: Catholic University of America, 1968) 24.

territorial and personal,⁷⁵ it followed a person who had the domicile in such a place wherever he or she went and consequently he or she was bound by it even in a parish where the decree had not been published.⁷⁶

The issue was even more complicated for non-Catholics. The Council, by choosing this particular method of promulgation, did not intend to bind non-Catholics to the provisions of the decree. This intention of the Council was realized in the case of non-Catholics living in places where *Tametsi* had not been published. How about non-Catholics living in territories where the decree had been published? Were they bound by its provisions? There was no express exemption in the text of the decree for non-Catholics. A century later a reply of the Sacred Congregation of the Council apparently solved this doubt:

Those heretics living in a place where the decree was published are bound by the [canonical] form and consequently those marriages contracted without the form of the Council before a heretic minister or a local magistrate are null and void.⁷⁷

In conclusion, the decree *Tametsi* was the answer of the Council of Trent to a very specific phenomenon: clandestine marriages. These marriages seriously undermined the

⁷⁵ Carberry, *The Juridical Form*, 30.

⁷⁶ Gasparri, *De Matrimonio*, 2 : 127, n. 1066.

⁷⁷ Sacred Congregation of the Council, Instruction (*ad ep. Tricarien.*) of January 18, 1663: “Haereticos quoque, ubi decretum . . . est publicatum, teneri talem formam observare, ac propterea ipsorum etiam matrimonia absque forma Concilii, quamvis coram ministro haeretico vel magistratu loci contracta, nulla atque irrita esse.” Congregation for the Propagation of the Faith, *Collectanea Constitutionum, Decretorum, Indultorum ac Instructionum Sanctae Sedis ad Usus Operariorum Apostolicorum Societatis Missionum ad Exteros; Selecta et Ordine Digesta Cura Moderatorum Seminarii Parisiensis ejusdem Societatis, ann. 1622-1906* (Rome: Typographia Poliglota, 1907) 1 : 51, n. 149.

stability of marriage and family relationships and required the church's authority to find an effective way to eradicate them. The solution submitted by Council's fathers and approved by the supreme legislator was to impose, for the first time in the history of the Latin Church, a unique canonical form for the celebration of the sacrament of marriage. The celebration of marriage was to take place in the presence of the pastor or other priest authorized by the pastor or by the ordinary and before two or three other witnesses. Nonetheless, several shortcomings partially deprived the decree of its much-desired effect and consequently generated confusion in some parts of the world. Subsequently, these deficiencies were gradually removed and through several church documents the canonical discipline of the form of marriage was improved. One of these documents was the Benedictine Declaration published by Benedict XIV on November 4, 1741.

3. The Post-Tridentine Legislation

a. The historical, religious, and social circumstances

Following the Reformation and the Council of Trent, Europe experienced a long period of political and religious convulsion. Territories and even entire nations changed their leaders and beliefs, sometimes by their own will, sometimes by the will of political leaders. Needless to say, this situation made it difficult, at times even impossible, to put the decrees of the Council of Trent into application. Such a situation arose in Belgium and Holland that were, at the time of the promulgation of the Tridentine decree *Tametsi*, under the domination of Philip II of Spain. Although Margaret of Parma, the regent and governor of Belgium, supported by the Belgian bishops, requested that the publication of the decree *Tametsi* be

delayed, Philip II ordered the publication of the decree, which took place on July 11, 1565. However, the political confusion together with the not infrequent resistance of the clergy, delayed the enforcement of the decree *Tametsi*. As a consequence of dissension and revolt against Spanish domination,⁷⁸ Belgium joined the mostly Protestant Northern provinces which, allied in the Union of Utrecht in 1579 under the command of William of Nassau, prince of Orange,⁷⁹ proclaimed their independence, and started a war against Spain which lasted until the truce of 1609. Although as early as 1566 the Catholic Church had been proscribed and Catholics treated with cruelty,⁸⁰ on December 20, 1581 William of Orange published an ordinance, which was rigorously enforced, forbidding Catholic worship.⁸¹

As a result of this violent and sudden change of the religious outlook entire Catholic communities ceased to exist and were replaced by Protestant communities and societies. The question then arose whether the marriages of Protestants, either among themselves or with Catholics, were valid in these territories if the canonical form was not observed. For almost

⁷⁸ It was not an inclination to heresy and revolt that put arms into the hand of the people of Holland and Belgium; it was rather the heavy taxes imposed by the King of Spain and the harsh treatment administered to them by the Spanish army under the command of Duke of Alva.

⁷⁹ William of Orange, surnamed "The Silent", was successively Lutheran, Catholic, and eventually Calvinist. Clever and unscrupulous, at bottom William of Orange was religiously indifferent and he used various religions in order to reach his political objectives.

⁸⁰ For instance, in 1572 nineteen priests and monks were executed at Gorkum out of hatred for the Catholic faith. Pius IX canonized them on June 29, 1867.

⁸¹ Fernand Mourret, *A History of the Catholic Church* (St. Louis, MO and London, W.C: B. Herder Book Co., 1930) 5 : 501-507.

two centuries theologians and canonists expressed different opinions on this issue. Some asserted that all marriages contracted in the above-mentioned countries, including Protestant marriages, without observing the canonical form provided by the decree *Tametsi*, were invalid. Consequently, those who converted to the Catholic Church were free to separate and contract new marriages, but, if the parties wished to continue their common life, they had to celebrate a new marriage according to the canonical form. However, some scholars maintained the contrary opinion that, since the decree *Tametsi* had never intended to impose the canonical form on Protestants, they were able to enter valid marriages without complying with the provisions of the Tridentine decree.⁸²

On 1671, the Apostolic Vicar of Holland enquired of the Holy Office whether marriages contracted by Protestants without observing the terms of the decree *Tametsi* were valid or not. The Holy Office answered that a definitive decision is not desirable at that moment and that the Apostolic Vicar should proceed as he considered most convenient for the good of the souls entrusted to his care.⁸³ While the Holy Office was unwilling to reach an unequivocal decision, the Roman tribunals, when cases of such marriages were brought before them, adhered to the stricter opinion that the marriages in question were invalid.⁸⁴ It seems that this opinion was shared also by the Sacred Congregation of the Council since in a

⁸² Joyce, *Christian Marriage*, 134.

⁸³ *Ibid.*, 134-135.

⁸⁴ Benedict XIV, *De Synodo Dioecesana*, lib. 6, c. 6, n. 4, 161.

reply of 1663 it indicated that non-Catholics were bound by the decree *Tametsi* if they lived in territories where it had been promulgated.⁸⁵

b. *The Benedictine Declaration*

Before his election to the Supreme Pontificate, Benedict XIV took part in the controversies concerning the validity of marriages contracted among Protestants and held that they were valid.⁸⁶ After his elevation to the papacy, Benedict XIV was determined to settle the question. After discussion in the Sacred Congregation of the Council, on November 4, 1741, he published the declaration *DECLARATIO, Cum Instructione, super Dubiis respicientibus MATRIMONIA in Hollandia, et Belgio contracta, et contrahenda*,⁸⁷ known to posterity as *Declaratio Benedictina*.

In the prologue of this declaration, Benedict XIV specifically adverted to the diversity of opinions expressed over the centuries by theologians and canonists as well as to the widespread doubts and anxieties which burdened bishops, priests, and missionaries, concerning the validity of non-Catholic and mixed marriages.⁸⁸ His reference to these doubts

⁸⁵ See note 77.

⁸⁶ Benedict XIV, *De Synodo Dioecessana*, lib. 6, c. 6, n. 4, 161.

⁸⁷ *Benedicti XIV Pont. Opt. Max., olim Prosperi Cardinalis de Lambertinis, opera omnia. Ed. novissima ad postremam Remondinianam omnino exacta. t. 15 Bullarium*, (Prati: Typographia Aldina 1839-1847) 111-113, translated in *The Sources of the Catholic Dogma* (Fitzwilliam, NH: Loreto Publications, 2004) 354-356.

⁸⁸ Benedict XIV, "Declaratio," 4 november 174, *Bullarium*, 111: "Matrimonia quae in locis Foederatorum Ordinum dominio in Belgio subjectis iniri solent, sive inter Haereticos ex utraque parte, sive inter Haereticorum ex una parte Virum, et Catholicam Foeminam ex alia, aut viceversa, non servata forma a Sacro Tridentino Concilio praescripta, utrum valida

and anxieties seemed to imply that Benedict XIV thought the opinion which held that heretics were exempt from the canonical form was not entirely devoid of foundation.⁸⁹ The most important reason presented in support of the validity of these marriages seems to have been that the parochial communities in which the decree *Tametsi* had been promulgated, were substantially and entirely different from those which existed after Protestant rule had been established in these territories. The Catholic parishes had been terminated and Protestant parishes had replaced them. For this reason, the promulgation of the decree *Tametsi*, which had made the law of clandestinity binding upon the Catholic parishes then in existence, could not be valid for Protestant communities which did not exist at the time the promulgation was ordered. Consequently, the marriages contracted among Protestants in these territories after the termination of the Catholic parishes had been valid.⁹⁰ Therefore, Benedict XIV settled the problem declaring that heretics were exempt from the canonical form of marriage when they married other heretics.

In regard to marriages celebrated between heretics in places subject to the authority of the Federated Orders, which did not observe the form prescribed by Trent ... in order to furnish advice to all the faithful residing in those places and to avert more grave disorders ... [His Holiness] declared and

habenda sint, nec ne, diu multumque disceptatum est, animis hominum, ac sententiis in diversa distractis: Id quod satis uberem anxietatis, ac periculorum sementem per multos annos subministravit, quum praesertim Episcopi, Parochi, atque illarum Regionum Missionarii, nihil certi hac super re haberent, nihil vero inconsulta Sancta Sede auderent statuere, ac declarare.”

⁸⁹ Josiah G. Chatham, “Evolution of the Juridical Form of Marriage in the Latin Rite,” *The Jurist* 16 (1956) 302.

⁹⁰ Gasparri, *De Matrimonio*, 2 : 205-207, nn. 1185-1187.

decreed that marriages which have been contracted up to now, and which will be contracted hereafter in the said provinces of Belgium between heretics, even if the form prescribed by Trent shall not have been observed in their celebration, provided no other canonical impediment interferes, are to be considered valid.⁹¹

Moreover, in so far as validity was concerned, heretics were also exempt from canonical form when they married Catholics, although these marriages were considered illicit.

Now as regards those marriages which likewise in the same federated provinces of Belgium are contracted by Catholics with heretics without the form established by Trent, whether a Catholic man takes an heretical woman in marriage, or a Catholic woman marries an heretical man; ... if by chance some marriage of this sort without observing the Tridentine form, has already been contracted, or may be contracted in the future (which God forbid!), His Holiness declares that such a marriage, provided that no other canonical impediment exists, must be considered valid.⁹²

This last provision was an application of the principle of the communication of exemption according to which the non-Catholic party, who was not bound to observe the provision of the decree *Tametsi*, communicated his or her privilege to the Catholic party.

⁹¹ Benedict XIV, "Declaratio," 4 november 1741, *Bullarium*, 112: "Quod attinet ad Matrimonia ab Haereticis inter se in locis Foederatorum Ordinum dominio subjectis celebrata non servata forma per Tridentinum praescripta, ... et alioquin oportere omnino ad consulendum universes Fidelibus in iis locis degentibus, et plura avertenda gravissima incomoda ... [Sanctitas Sua] declaravit, statuitque, Matrimonia in dictis Foederatis Belgii Provinciis inter Haereticos usque modo contracta, quaeque imposterum contrahentur, etiamsi forma a Tridentino praescripta non fuerit in iis celebrandis servata, dummodo aliud non obstiterit canonicum impedimentum, pro validis habenda esse."

⁹² *Ibid.*: "Quod vero spectat ad ea Conjugia, quae pariter in iisdem Foederatis Belgii Provinciis, absque forma Tridentino statuta contrahuntur a Catholicis cum Haereticis, sive Catholicus Vir Haereticam Foeminam in Matrimonium ducat, sive Catholica foemina Haeretico Viro nubat, ... si forte aliquod hujus generis Matrimonium, Tridentini forma non servata, ibidem contractum jam sit, aut imposterum (quod Deus avertat) contrahi contigat; declarat Sanctitas Sua, Matrimonium hujusmodi, alio non concurrente canonico impedimento, validum habendum esse."

Thus, in this particular circumstance, the Protestant party, being considered exempt from the law of canonical form of marriage, communicated the exemption to the Catholic party and consequently, the marriage was considered to be valid.⁹³ This principle, accepted by the civil law at the time, was debated by canonists since it was not based on the general principles of law and was not universally applied. In fact, this principle was not applied to other impediments, as for instance, *disparitas cultus*, age, etc. It was admitted only in regard to the canonical form of marriage as a concession on the part of the legislator in this particular situation.⁹⁴

To summarize, the *Benedictine Declaration* settled the dispute whether or not marriages contracted without observing the canonical form in territories inhabited mostly by Protestants or ruled by Protestant authorities, where the decree *Tametsi* has been previously promulgated were valid. The Benedictine Declaration provided that: first, when a baptized non-Catholic married a baptized non-Catholic, they were not required to observe the form. Second, when a Catholic married a baptized non-Catholic, the canonical form did not bind them. These two exceptions to the Tridentine decree were valid for both past and future marriages contracted in the territories specified in the Benedictine Declaration.

⁹³ Benedict XIV, *De Synodo Dioecesana*, lib. VI, c. 6, n. 12, 164: “Quoniam cum conjugum alter, tum ratione loci in quo habitat, tum ratione societatis in qua vivit, exemptio qua ipse fruitur, alteri parti comunicata remanet, propter individuitatem contractus, vi cujus exemptio quae uni ex partibus competit, ad alteram, secundum etiam civiles leges, extenditur, eidemque comunicatur.”

⁹⁴ Gasparri, *De Matrimonio*, 2 : 190, n. 1167.

c. Pertinent provisions issued after the *Benedictine Declaration*

A reply sent by the Holy Office on April 6, 1859 to the bishop of Haarlem in Holland introduced a broader understanding of the term *haeretici* employed by Benedict XIV in his declaration by including among heretics not only those born and raised as Protestants but certain groups of persons who, although baptized in the Catholic Church, became Protestants later in life. Under the terms of this reply, the term *haeretici* included the following categories: baptized Catholics who had been raised and educated in heresy from a time prior to the age seven years; baptized Catholics who were brought up by heretics and participated several times in their worship although they had not been educated in any distinctive heretical doctrine; baptized Catholics who had fallen under the influence of heretics in childhood and joined a heretical sect; apostates from the Catholic Church to an heretical sect; those who, born of heretics and baptized by them, had grown up without any particular religion and without any formal profession of heresy.⁹⁵ All persons comprised in these categories were designated “heretics” and consequently considered to be exempt from the canonical form of marriage. The reason for this benevolent interpretation was to prevent those who were bound by the law but disobeyed it in good faith because of their invincible

⁹⁵ Sacred Congregation of the Holy Office, letter (*ad Ep. Harlemeden.*) of 6 April 1859, in *Fontes*, 4 : 224, n. 950.: “1° Illi qui catholice baptizati, a pueritia nondum septennali, in haeresi educantur ac haeresim profitentur; 2° Qui non tam in haeresi, quam ab haereticis educantur, nulla scilicet vel vix ulla haereticae doctrinae instructione accepta et cultu non frequentato, licet aliquoties participato; 3° Qui adhuc pueri in manus haereticorum incidentes, haereticae sectae adjunguntur; 4° Apostatae ab Ecclesia catholica ad haeticam sectam transeuntes; 5° Qui nati et baptizati ab haereticis adolaverunt, quin ullam solemnem haereseos professionem emisierint ac veluti nullius religionis.”

ignorance from being penalized by having their marriages rendered invalid.⁹⁶ However, on March 31, 1911 the Holy Office modified the practical operation of this law and decreed that those who fell into the categories of persons indicated by the 1859 reply should have recourse to the Holy See in each individual case in which their marriages were questioned on the basis of defect of form.⁹⁷

Besides the Benedictine Declaration, the Holy See issued several other decrees granting an authentic dispensation from the canonical form of marriage in the matter of clandestine mixed marriages for countries and territories where the Tridentine law was undoubtedly in effect and binding upon non-Catholics as well as Catholics. The Holy See granted dispensations or declared valid those marriages contracted by non-Catholics among themselves or with Catholics even though they were entered without observing canonical form. Within a span of more than a century such decrees were issued for Ireland, Hungary and Transylvania, Russia, Poland, parts of the then German Empire, and Malta.⁹⁸ These decrees were not extensions of the *Benedictine Declaration* which referred principally to the marriage of heretics and only secondarily and as a consequence of the application of the

⁹⁶ Joseph Creusen, "Annotations at motu proprio *Decretum Ne temere*," *Periodica* 37 (1948) 336.

⁹⁷ Sacred Congregation of the Holy Office, decree of March 31, 1911: *De Matrimoniis eorum qui a Genitoribus A catholicis vel Infidelibus Nati, sed in Ecclesia Catholica Baptizati, ab Infantili Aetate in Haeresi vel Infidelitate aut sine ulla Religione Adoleverunt*, in AAS 3 (1911) 163-164.

⁹⁸ For an extensive list of the territories for which such dispensations were granted, see Gasparri, *De Matrimonio*, 2 : 209, n. 1190.

principle of communication of exemption, to mixed marriages. These decrees were actual dispensations given directly and exclusively for the territories in question and for the situations expressly requested by the local bishops namely, for clandestine mixed marriages.⁹⁹ Finally, on January 18, 1906, Pius X published the decree *Provida sapientique*,¹⁰⁰ by which he extended the decree *Tametsi* to the entire German Empire, but, at the same time, declared both the marriages of heretics and mixed marriages exempt from this form of marriage. On February 1, 1908, the same provisions were extended to Hungary.¹⁰¹

d. The Decree *Ne temere*

The canonical discipline concerning the form of marriage as described so far could be considered neither acceptable nor practical. Because of the aforementioned weaknesses of the Tridentine law, many people were subject to “perplexities and disadvantages,”¹⁰² and “not a few marriages have been exposed to the danger of nullity: many too, owing either to ignorance or fraud, have been found to be illegitimate and void.”¹⁰³ In this state of affairs, a large number of bishops petitioned to the Holy See and urged that a remedy be found for

⁹⁹ Gasparri, *De Matrimonio*, 2 : 209, n. 1190.

¹⁰⁰ Pius X, Decree *Provida sapientique*, January 18, 1906: ASS 39 (1906) 81-84.

¹⁰¹ Sacred Congregation of the Council, decree *Romana et aliarum*, February 1, 1908: ASS 41 (1908) 80-81.

¹⁰² Sacred Congregation of the Council, decree *Ne temere*, August 2, 1907: ASS 40 (1907) 526: “Haesitationibus atque incommodis.” English translation in Cronin, *The New Marriage Legislation*. All subsequent English translations of this document will be taken from this source unless otherwise indicated.

¹⁰³ Ibid: “Haud pauca matrimonia fuerunt obiecta periculo ne nulla essent: Multa quoque, sive inscitia hominum sive fraude, illegitima prorsus atque irrita deprehensa sunt.”

these difficulties.¹⁰⁴ Consequently, the Sacred Congregation of the Council prepared a decree which was presented to Pope Pius X, received his approval on August 2, 1907, and became effective on Easter Sunday, April 19, 1908. The decree, which was to be known by its incipit *Ne temere*, reflected the effort made by the Holy See to remedy the deficiencies of the Tridentine decree *Tametsi* and to eliminate the confusions generated by its application over the centuries. The provisions of this decree were incorporated to a large extent in canons 1094-1099 of the 1917 *Code of Canon Law*. The decree significantly altered the canonical discipline of the juridical form of marriage.

First of all, the decree *Ne temere* clearly identified the subjects of the law. According to the provisions of the new decree, all Catholics of the entire world were bound to the juridical form of marriage¹⁰⁵ when they married Catholics.¹⁰⁶ Catholics were also bound to the juridical form of marriage when they married non-Catholics.¹⁰⁷ Thus, the principle of communication of exemption, endorsed by the Benedictine Declaration, was no longer in

¹⁰⁴ *Ibid.*, 527.

¹⁰⁵ Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 527-528: “III. Ea tantum matrimonia valida sunt, quae contrahuntur coram parrocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus.”

¹⁰⁶ *Ibid.*, 530: “XI §1. Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant.”

¹⁰⁷ *Ibid.*, 530: “XI §2. Vigent quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus, sponsalia vel matrimonium contrahunt.”

force.¹⁰⁸ Non-Catholics, whether baptized or not, were not bound to observe the canonical form of marriage when they married among themselves.¹⁰⁹

Second, territoriality became the foundation for valid assistance at marriages. Local Ordinaries or pastors could validly assist at all marriages within the territorial limits of their jurisdictions, whether the parties were subject to them or not.¹¹⁰ Finally, the decree provided that the lawful assistant had to ask for and receive the consent of contracting parties.¹¹¹ These provisions removed the major shortcomings of the Tridentine law: the law concerning the canonical form of marriage was now universal no matter whether it was promulgated in a certain parish or diocese or not, the jurisdiction of the assistant was territorial, and his assistance had to be active.

Conclusion

This first section of the chapter reviewed the birth of canonical form and the subsequent attempts to improve it and to make it more effective and convenient. The Church

¹⁰⁸ The only exception to this rule was provided by the Constitution *Provida* which had been given to Germany by Pope Pius X and was later extended to Hungary by *Romana et alliarum* by the Sacred Congregation of the Council.

¹⁰⁹ Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 530: “XI §3. A catholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi ligantur ad catholicam sponsalium vel matrimonii formam servandam.”

¹¹⁰ Ibid., 528: “IV. Parochus et loci Ordinarius valide matrimonio adsistunt, [...] §2. intra limites dumtaxat sui territorii: in quo matrimonies nedum suorum subditorum, sed etiam non subditorum valide adsistunt.”

¹¹¹ Ibid., 528: “IV. Parochus et loci Ordinarius valide matrimonio adsistunt, [...] §3. dummodo invitati ac rogati, et neque vi neque metu gravi constricti requirant excipientque contrahentium consensum.”

remained faithful to the belief that the consent freely expressed by the two contracting parties was the essential element, the only one necessary and sufficient to constitute the matrimonial covenant. In order to underline the sanctity of this sacrament and to overcome the unwanted and at time damaging practice of clandestine marriages, the Church added a public solemnity to the expression of the consent, namely the canonical form of marriage. The law was not perfect and because of its shortcomings it did not entirely achieve its desired effects. Several pieces of legislation subsequently improved the initial provisions of decree *Tametsi*. At the beginning of the twentieth century, the original significance of the canonical form, namely the prevention of clandestine marriages, apparently was no longer present. The civil authorities, almost everywhere in Europe, took over the function once the canonical form of marriage had fulfilled. However, the other incontestable values attached to canonical form proved to be enormously helpful in order to preserve and promote the values of the matrimonial sacrament during the totalitarian regimes that emerged during the twentieth century, especially the communist regime in Eastern Europe. New situations raised new challenges which the Church was called to deal with. The 1917 *CIC*, the motu proprio *Crebrae Allatae*, several authentic interpretations of Roman dicasteries, conciliar and post-conciliar documents, will address these problems, contributing at the same time to the evolution of the canonical form of marriage. These documents will constitute, in fact, the subject of the second chapter of the present study.

Finally, it can be said that this solemnization enriched the austerity typical of the Latin rite bringing it closer to the complexity and richness of the Eastern rites of the sacrament of marriage, which will now be analyzed in the following section.

B. The Rite of Marriage in Eastern Law

Introduction

Oriental Christian rites comprise various worship structures, institutions, disciplines, and customs which have developed in specific geographical, historical and social conditions, different from their Western counterparts. Eastern Catholic rites are part of the tradition of the Universal Church and are essential sources and means for the Christian life for a large number of Christian faithful. In the modern times an increasing number of the Oriental Catholics have been leaving their traditional territories where their faith and religious traditions were nurtured and cherished and establishing themselves in areas where the majority of Christians belong to the Latin rite or to the Orthodox Church. On one hand, this phenomenon has been a source of mutual spiritual and cultural enrichment. On the other hand, this event brought about several new difficulties, some of which were mentioned at beginning of this chapter. It is worth mentioning here that Catholics migrants of Eastern rites do not always enjoy the religious assistance of their pastors and Hierarchs, but are subject to Latin pastors and Ordinaries. These facts affect especially the celebration of sacraments and particularly the celebration of marriage. In order to find an adequate solution to the problems mentioned earlier, an historical overview of the development of the rite of marriage in East is very helpful. To keep in line with the aim of this study, the present section will be concerned

mainly with the Byzantine rite, but will mention occasionally influences and practices of other Eastern rites. The reason for this is that the overwhelmingly majority of Oriental Christians belong to the Byzantine rite. For centuries Constantinople was the center of an empire which claimed the title of universal. Its historic position and responsibility made the Byzantine rite the heir of the liturgical traditions of the older churches of Jerusalem and Antioch, of Asia Minor and Greece whose territories were conquered by Muslims. Christian missionaries of Byzantine rite handed on this tradition, translating it into their languages, to most of the Slavic nations of the Eastern Europe and to the furthestmost parts of Russian Asia.¹¹²

In the Orient, the theology and liturgy of the sacrament of matrimony drew intensely upon the Pauline idea of the communion of Christ with his Church, in correlation with Ephesians 5, 22-32. Commenting upon Genesis 2,24, Paul asserted that “This [matrimony] is a great mystery: but I speak concerning Christ and the Church”.¹¹³ In this Old Testament text, Paul uncovers an image of the unity between Christ and the Church, a mystery which has been hidden for centuries but unveiled now as the mystery of salvation for all peoples. This Pauline doctrine is the principal source of the Oriental Churches’ theology and liturgy relative to the sacrament of matrimony. The rites and symbols of matrimony in various Oriental Churches are better understood if considered within the mystical and pneumatological perspective that characterizes the Oriental theology of the sacraments. This

¹¹² Irénée-Henri Dalmais, *Eastern Liturgies* (New York: Hawthorn Books, 1960) 10.

¹¹³ Eph. 5,22-23.

is particularly true for the celebration of matrimony in the Byzantine tradition, with which this study is concerned, which is deeply imbued with a biblical character and emphasizes the cooperation of the human person in God's creative work.¹¹⁴ Consequently, the development of theology and liturgical rites in various Oriental churches influenced and shaped to a great extent the evolution of the canonical discipline of the matrimonial sacrament.

1. Development of Liturgical Celebration of Marriage in the Byzantine Tradition

The religious rite of the matrimonial celebration held a fundamental importance in the Christian Orient as early as the third century.¹¹⁵ Wedding rites of the Eastern churches have been characterized by complexity and richness, somewhat in contrast with the austerity typical of the Western rites.¹¹⁶ The Western view of marriage, with its typically legal character, played little if any part in the East, where the accent was placed on the mystical significance of marriage and its spirituality.¹¹⁷ This theological understanding of matrimony led, starting at the end of the fourth century until the end of the eighth century, to the

¹¹⁴ Dimitrios Salachas, "Il *Ritus sacer* nella forma canonica di celebrazione del sacramento del matrimonio secondo la tradizione delle Chiese Orientali," *Euntes Docete* 47 (1994) 16-17.

¹¹⁵ Joseph Prader, *Il Matrimonio in Occidente e Oriente* (Rome: Pontificium Institutum Orientalium Studiorum, 1992) 195.

¹¹⁶ Dalmais, *Eastern Liturgies*, 116.

¹¹⁷ Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery* (New York: Sheed & Ward, 1965) 344.

development of a liturgical ceremony structured in two moments in which the priest¹¹⁸ played the central part.¹¹⁹

The first moment was the ceremony of betrothal. Betrothal was considered to possess already the mystery of the Church as the bride of Christ. Since the provision of the Synod of Trullo, the Church had considered marriage to a third party after a separation from the betrothed to be adultery.¹²⁰ Moreover, various civil laws enacted by Roman emperors established punishments for those entering a marriage with a third party after a breach with the betrothed.¹²¹ Eventually, the promise of the betrothed became part of a liturgical rite and was accompanied by the exchange of rings, the kiss, the joining of hands by the priest, and the common cup.¹²²

¹¹⁸ Schillebeeckx considers that the importance of the role assumed by the priest in celebration of the sacrament of marriage goes back to the role held by the priest in the pagan marriage ritual. See Schillebeeckx: *Marriage: Human Reality and Saving Mystery*, 355.

¹¹⁹ Schillebeeckx: *Marriage: Human Reality and Saving Mystery*, 348.

¹²⁰ Council of Trullo, can. 98: *Sacrorum conciliorum nova et amplissima collection*, I.D. Mansi ed. (Paris: Hubert Welter, 1910) 11 : 986: “Qui alteri desponsam mulierem eo adhuc vivo, cui desponsa est, in nuptiarum duci societatem, adulterii crimini subjiciatur.”

¹²¹ Jean Dauvillier, Charles De Clercq, *Le Mariage en Droit Canonique Oriental* (Paris: Recueil Sirey: 1936) 34.

¹²² Paul Evdokimov, *The Sacrament of Love: The Nuptial Mystery in the Light of the Orthodox Tradition* (Crestwood, New York: St. Vladimir’s Seminary Press: 2001) 128. The “common cup” is a significant element of the matrimonial rite in the Byzantine liturgy. The priest offers spouses and testimonies a cup of wine, as a sign of the new union concluded between them. After they drank from the cup, the priest threw it down and broke it as a symbol of the indissolubility and faithfulness of the spouses. For a more extensive analysis of this custom see Dimitrios Salachas, *Il Sacramento del Matrimonio nel Nuovo Diritto Canonico delle Chiese Orientali* (Bologna: Edizioni Dehoniane, 1994) 188-189.

The second moment in the celebration, the marriage itself, was the blessing of the bride and bridegroom. Originally, this blessing had a private character, but, as early as the fourth century, the blessing was given by the bishop or the priest.¹²³ Subsequently, a liturgical rite consisting in hymns and prayers was developed.¹²⁴ Among the nuptial rites, the crowning of the bride and bridegroom was of essential significance from a very early date. This rite, of non-Christian origin, was at first repugnant to Christian sentiment because of its association with pagans beliefs and practices.¹²⁵ A key turning point came when John Chrysostom gave the rite of crowning a Christian theological basis:

The crown that is put on the heads of bride and groom is a token of their victory: in that they have not succumbed to the lure of pleasure, they come undefeated to the heaven of marriage.¹²⁶

In his interpretation John Chrysostom points particularly to the Christian triumph over sinful desires by referring to Paul's image of the crowned competitors.¹²⁷ Reserving to the clergy

¹²³ Council of Neocesarea, can. 7: "Presbyter in nuptiis eius qui duas uxores ducit, seu digamus efficitur, ne convivetur. Cum enim requirat poenitentiam digamus, qui erit presbyter; qui eo quod sit convivio acceptus, nuptiis assentiatur?" Mansi, 2: 541.

¹²⁴ John Chrysostom, "Homilies on Genesis," Homily 48, n. 6, *Patrologiae Cursus Completus: Series Graeca*, J. P. Migne ed. (Paris: J. P. Migne, 1862) 54 : 443. Prader, *Il matrimonio in Oriente e Occidente*, 196.

¹²⁵ Dauvillier, De Clerq, *Le Mariage en Droit Canonique Oriental*, 40. Dalmais, *Eastern Liturgies*, 118.

¹²⁶ John Chrysostom, "In epist. I ad Timoth. Cap. II, Homil. IX," *PG*, 62 : 546: "Ideo coronae capitibus imponuntur, symbolum victoriae, quod antea invicti, sic ac thalamum accedant, quia non superati sunt a libidine."

the crowning of the spouses symbolized that it was Christ himself who crowned them through sacred ministers.¹²⁸ According to Ritzer, the custom of the crowning, which has been in use among the Christians from Armenia as early as the fourth century, was promoted by John Chrysostom, and by the end of the sixth century has spread to most of the Christians communities in the Greek speaking world.¹²⁹ Subsequently, under John Chrysostom's influence,¹³⁰ the Church accepted, incorporated, and developed the rite of crowning into a liturgical ceremony which not only became part of the celebration of the sacrament, but also gave the name to the entire liturgical solemnization of marriage: "The Service of Crowning".¹³¹

2. The Development of Liturgical Rite of Marriage in Other Oriental Traditions

The importance of the liturgical celebration of the sacrament of marriage, especially the matrimonial blessing given by the bishop or the priest, was strengthened by several provincial Councils of various Oriental churches. The Armenian Church was the first to

¹²⁷ Korbinian Ritzer, *Formen, Riten und Religiöses Brauchtum der Eheschliessung in den Christlichen Kirchen des Ersten Jahrtausends* (Münster, Westfalen: Aschendorffsche Verlagsbuchandlung, 1962) 77-78.

¹²⁸ John Chrysostom, "In epist. I ad Timoth. Cap. II, Homil. IX," PG 62 : 546.

¹²⁹ Ritzer: *Formen, Riten*, 77-79.

¹³⁰ This is the opinion expressed by some authors as: Dauvillier, De Clerq: *Le mariage en droit canonique oriental*, 40; Ritzer, *Formen, Riten*, 78; Schillebeeckx: *Marriage: Human Reality and Saving Mystery*, 347.

¹³¹ John Meyendorff: *Marriage: An Orthodox Perspective*, 3rd revised edition, (Crestwood, New York: St. Vladimir's Seminary Press, 2000) 33.

establish the rite of blessing as an essential act of the matrimonial celebration. The Council of Ashirismat, presided over by the Patriarch Nerses I the Great in 365, received *Collectio Canonum Apostolorum* which in canon 33 asserts: “The man is united in matrimony through the right hand of the priest and his blessing.”¹³² A century later, canon 7 of the Council of Shahapivan (444 A.D.) established that the religious rite of the celebration of the marriage was a condition for the legitimacy of matrimony.¹³³ Subsequently, canons 15 and 16 of the Council of Dvin (717-719 A.D.) required that the priest’s blessing was to be given for the first as well for the second marriage.¹³⁴ This rule, observed by both the Orthodox and Catholic Armenian Church,¹³⁵ was confirmed by the Acts of the Council of the Armenians

¹³² *Collectio Canonum Apostolorum, c. 33*, in *Codificazione Canonica Orientale, Fonti*, (Città del Vaticano: Tipografia Poliglotta Vaticana, 1931) ser. II, 21 : 27: “Per dexteram sacerdotis manum eiusque benedictione homo in matrimonium coniungeretur.”

¹³³ Basilius Talatinian, *De contractu matrimoniali iuxta Armenos : disquisitio historico- iuridica* (Hierosolymis: Typis PP. Franciscanorum, 1947) 90-91. The author offers an extensive analysis of the nuptial blessing as related to the efficiency of the matrimony, to the mutual consent, and to the matrimonial intercourse as well as a complete study of the matrimonial form by the Armenians, both civil and ecclesiastical. See pp. 87-102 and 113-120.

¹³⁴ Council of Dvin, *Canon 15*, year 719, in *Fonti CCO*, ser. I, 7 : 440-441, n. 516: “Coronandos debet sacerdos ad ecclesiam perducere; et super eos perficiat ritum et canonem iuxta Christianorum legem, et ibidem in sanctitatis loco eos coronet;” Talatinian, *De contractu matrimoniali iuxta Armenos*, 91: “In canonibus ... iubet, ut matrimonia sive virginum, sive viduorum peragantur cum deductione nupturientium in ecclesia a presbytero perficienda et cum coronatione eorumdem inter divina officialia et cum praesentia fidelium et s. comunione (c. 15-16).”

¹³⁵ However, there was an exception to this rule. An instruction issued by the Congregation for the Propagation of the Faith at October 1, 1785, addressed to the Apostolic Vicar of Constantinople provides that the marriages contracted before the Turkish judges are to be considered valid if there are not any other impediments and there are doubts concerning the

held in Rome in 1911: “In our [Church] ... in order for marriages to be valid they must be contracted before a priest, not necessarily the pastor. Matrimony entered into without the presence of a priest is null and void.”¹³⁶ According to the provisions of this Council, approved by the Supreme Pontiff,¹³⁷ Catholic Armenians were bound to observe this Oriental form even when they lived in territories that were under the jurisdiction of the Latin Church.¹³⁸

In the Coptic Church, the rite of the matrimonial blessing also constitutes a condition for the validity of the marriage in virtue of an immemorial custom.¹³⁹ Moreover, the thirteenth century *Nomocanon* of Ibn-Al-‘Assal established as essential elements for the matrimonial celebration both the priest’s blessing and the Eucharistic communion of the spouses.

veracity of the consent. Instruction, Sacred Congregation for the Propagation of the Faith, in *Collectanea*, 1 : 365-366, n. 580.

¹³⁶ *Acta et decreta Concilii Nationalis Armenorum Romae habiti ad Sancti Nicolai Tolentinalis anno Domini MDCCCXI* (Rome : Typis Polyglottis Vaticanis, 1913) 285, n. 575: “Apud nos ... ut valida habeantur matrimonia que coram sacerdote, non necessario parrocho, contrahuntur; quare coniugium sine praesentia sacerdotis initum nullum est et irritum.”

¹³⁷ Joseph Prader, *La Legislazione Matrimoniale Latina e Orientale* (Rome: Edizione Dehoniane, 1993) 34.

¹³⁸ The Holy Office issued an answer that a civil marriage contracted in USA in 1942 between a Catholic Armenian man and a non Catholic woman was null for the lack of the sacred rite. Sacred Congregation of the Holy Office, answer of July 14, 1950: *Leges Ecclesiae post Codicem iuris canonici editae*, ed. Xaverius Ochoa (Rome: EDIURCLA, 1996-1987) 2 : col. 2139.

¹³⁹ Prader, *La Legislazione Matrimoniale Latina e Orientale*, 34.

The marital bond does not take place if not accomplished by the intervention of the priest and the prayer (that he pronounces) upon the contracting parties and if the priest does not give them the Holy Eucharist at the moment of the Crowning through which the two unite themselves and both become one body, as Our Lord said ... And without these, the prayer and the Communion, their union is not considered as marriage because it is the prayer that entrusts the woman to the man and the man to the woman.¹⁴⁰

While in the Coptic Church the Communion is no longer an essential element of the matrimonial rite,¹⁴¹ the Ethiopian Church observes even today the provisions of this *Nomocanon* according to which both the priest's blessing and the Eucharistic Communion are essential elements of the matrimonial rite.¹⁴²

In the Chaldean Church the first known reference of the priest's blessing as mandatory requirement for the validity of the marriage was made by the theologian Narsai in the fifth century: "The woman is not married to the man without the blessing of the priest."¹⁴³

The same provision was restated by a Council held at 676 which stated that, the marriage is

¹⁴⁰ *Nomocanon*, XXIV, V, 1 and 2 in Dauvillier, De Clerq, *Le Mariage en Droit Canonique Oriental*, 70: "Le lien du mariage n'a lieu et ne s'accomplit qu'avec l'intervention du prêtre et la prière (qu'il prononce) sur les contractants, et le prêtre leur administre la Sainte-Eucharistie au moment de couronnement, pendant laquelle ils s'unissent tous deux, et deviennent tous deux une seule chair, comme l'a dit Notre-Seigneur Et sans ceci, sans la prière et la communion, on ne considère pas leur union comme un mariage, puisque c'est la prière qui adjuge la femme à l'homme et l'homme à la femme."

¹⁴¹ Prader, *Il matrimonio in Oriente e Occidente*, 197.

¹⁴² Paulos Tzadua, "The Ancient Law of the Kings – The Fetha Nagast - in the Actual Practice of the Established Ethiopian Orthodox Church," *Kanon; Jahrbuch der Gesellschaft für das Recht der Östkirchen* (Wien: Verlag Herder, 1973) 1 : 138.

¹⁴³ Alphonse Raes, *Le Mariage: Sa Célébration et sa Spiritualité dans les Églises d'Orient* (Paris: Editions de Chevetigné, 1958) 155-156.

accomplished if celebrated by a priest in the presence of a cross.¹⁴⁴ The *Ordo Iudiciorum Ecclesiasticorum* (thirteenth century), in force until the present time in the Chaldean Church, states: “The legal marriage is the mutual consent of man and woman through the testimony and the prayer of the priest.”¹⁴⁵ The Chaldean Catholic Church follows the same rule. The Rabban Harmidz Council (1853) established that the marriage must be celebrated with the priestly blessing according to the ancient rule.¹⁴⁶

Finally, in the Syrian Church the matrimonial blessing is required for the validity of the marriage since the eighth century¹⁴⁷ and Bar Hebreus describes in detail the matrimonial rite as early as the end of thirtieth century.¹⁴⁸

3. Matrimonial legislation in the Eastern Roman Empire

After the Eastern Roman Empire became Christian and after the coming into existence of liturgical rites of marriage, the Byzantine Church developed a proper matrimonial law which would distinguish it from the Western matrimonial law. The Byzantine Church admitted as the sources of its law the ecumenical councils among which

¹⁴⁴ Ibid.

¹⁴⁵ *Ordo Iudiciorum Ecclesiasticorum, Tractatus Tertius, Caput Primum: De quidditate coniugii legitimi et de utilitate ex eo <manante>*, in *Fonti CCO*, ser. II, 15 : 170, n. 140. “Coniugium legitimum est unanimes consensus viri ac mulieris testimonio ac oratione sacerdotali.”

¹⁴⁶ Acacius Coussa, *Epitome Praelectionum de Iure Ecclesiastico Orientali: De Matrimonio* (Rome: Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1950) 3 : 235, n 197.

¹⁴⁷ Prader, *La Legislazione Matrimoniale*, 37.

¹⁴⁸ Bar-Hebreus, *Nomocanon*, VIII, 2, in *Fonti CCO*, ser. II, 27 : 263-264, n. 285.

the Council of Chalcedon provided three canons concerning marriage.¹⁴⁹ An important contribution to the Oriental marital law came from the Council of Trullo convoked by Emperor Justinian II in 691. Nine out of 102 disciplinary decrees promulgated at this council regarded matrimonial legislation.¹⁵⁰ Decrees of local councils as well as patristic texts were added as part of Byzantine matrimonial law. Later, the matrimonial law would also include the decrees of the Patriarchs of Constantinople.¹⁵¹

However, the legislation of the Byzantine Church received an important contribution from the civil legislation issued by the Emperors of Eastern Roman Empire. After centuries of democracy in which the principle of separation between state and church have become so common, the above statement might sound strange to a contemporary reader. Nevertheless, for the ancients this division did not obtain. In ancient Rome, political and religious powers were conjoined. When the Empire became Christian this situation was supposedly changed, but the centuries-old system had marked deeply the Greek-speaking society of the time and most Emperors continued to act as masters in both political and religious areas.¹⁵² Evidently, the Emperors' reasons for issuing ecclesiastical matrimonial laws were not of a religious nature. Their aim was to regulate various aspects of civil effects of marriage such as the legitimacy of children, the right to inheritance, etc.

¹⁴⁹ Council of Chalcedon, cann. 14-16, in Tanner, 1 : 93-94.

¹⁵⁰ Council of Trullo, cann. 3,6,26, 53, 54, 87, 92, 93, and 98, in Mansi, 11 : 941-986.

¹⁵¹ Dauvilier, De Clerq, *Le Mariage en Droit Canonique Oriental*, 2-4.

¹⁵² Joyce, *Christian Marriage*, 362-366.

a. Civil matrimonial legislation

Concerning the form of marriage, one of the first imperial laws was the one issued in 537 by Justinian who ordered that high ranking individuals express their consent before the Church as an evidence of their marriage. This provision was to be observed only if the spouse wanted to exclude the prenuptial contracts required by civil laws.¹⁵³ However, between the eighth and eleventh centuries, the imperial legislation gave a special attention to the matrimonial law. The Emperor Leo III (717-741) provided explicitly two forms of marriage contract. One was the usual legal form of marriage contract i.e., betrothal with written confirmation of the arrangements concerning *arrha*.¹⁵⁴ If, because of poverty, the parties could not observe the usual form, the marriage could be contracted simply by the expression of mutual consent either during the religious ceremony or before two witnesses.¹⁵⁵ The legal consequence was that the religiously celebrated marriage became valid before civil authorities.¹⁵⁶

Worthy of a special consideration is the matrimonial legislation enforced by the Emperor Leo VI the Wise (the Philosopher) (886-912). The first piece of legislation

¹⁵³ Novella 74, c. 4, *Corpus Iuris Civilis, Editio Stereotypa Quinta* (Berolini: Weidmannos, 1928) 3: 354-356.

¹⁵⁴ *A manual of later Roman law, the Ecloga ad Procheiron mutata founded upon the Ecloga of Leo III and Constantine V of Isauria, and on the Procheiros nomos of Basil I, of Macedonia, including the Rhodian maritime law edited in 1166 A.D., rendered into English by Edwin Hanson Freshfield*, (Cambridge: University Press, 1927) 78.

¹⁵⁵ *Ibid.*, 81.

¹⁵⁶ Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 351.

regarded the betrothal. As mentioned above, following the provision of the Council of Trullo, the Church considered the breaking of a betrothal and marriage with a third party as adultery.¹⁵⁷ For civil authority, however, this provision brought about several difficulties generated because of the betrothals contracted between children who had not reach the legal age required for getting married. Through the *Novella* 74, Leo VI legislated that every solemnization celebrated by the priest, including the blessing on the betrothal, was considered a legally valid marriage, but, through the same *Novella*, the Emperor forbade the betrothal or marriage blessings of children who had not attained the legal age of marriage, i.e. fifteen years for the boys and thirteen years for girls.¹⁵⁸ Consequently, the Church's rite of betrothal was considered in the eyes of civil law a valid contract of marriage and as such, indissoluble.¹⁵⁹

Another important legislation concerning marriage was issued by the same Emperor through the *Novella* 89, which declared that the priest's blessing granted during the celebration of the matrimonial rite was to be observed as the unique form necessary for the civil validity of the marriage. Accordingly, marriages contracted between free citizens

¹⁵⁷ See above p. 52, note 120.

¹⁵⁸ *Novella 74, Imperatoris Leonis Augusti Novellae Constitutiones in Historia Juris Romano-Justinianei Chronologica* (Lipsiae: Litteris Christophori Bartelli, 1740) 678: "Sancimus, ne prius benedictiones celebrentur, quam legitimum matrimonii advenerint tempus quod in maribus decimum quantum, in feminis decimum tertium exspectat annum. Sic enim et benedictio tempestive fiet et desponsatis a se invicem divertentibus, quod perfectum matrimonium dirimant, a civili lege iudicium quod Ecclesiae placitis non adversetur, obveniet."

¹⁵⁹ Schilebeeckx, *Marriage: Human Reality and Saving Mystery*, 352

without the religious matrimonial rite were considered to be null in civil legislation. By the end of the eleventh century, the emperor Alexis I Comnenos extended to slaves the obligation to observe the form of marriage provided by Leo VI for free citizens. Through various rescripts addressed to different hierarchs, Alexis I made mandatory the blessings of marriages for slaves, who were to be declared free in the case their master was opposed to the blessing of their marriages.¹⁶⁰

The new law issued by Leo VI is worthy of special consideration since it has been differently interpreted by scholars. In his *Novella*, the Emperor first expressed regrets that previously adoption and marriage were considered to be simply civil matters. He then declared that henceforth both adoption and marriage were to be confirmed by a religious ceremony: sacred invocations in the case of adoption and blessing in the case of marriage. Otherwise, cohabitation will be considered an illegitimate concubinage with no legal effects.

Therefore, we decree that adoption should take place with holy invocation. Furthermore, we order that marriages be confirmed by a sacred blessing, and if the couple will neglect that procedure, their cohabitation will not be considered at any time as marriage, and will not produce the legal effects of marriage.¹⁶¹

¹⁶⁰ *Constitutiones Imperatoriae Alexii Comneni, c. 9: De testibus et benedictione matrimonii servorum*, in *Historia Juris Romano-Justiniani Chronologica*, 694-695.

¹⁶¹ Novella 89, *Imperatoris Leonis Augusti Novellae Constitutiones*, in *Historia Juris Romano-Justiniani Chronologica*, 680: “Itaque queadmodum adhibitis sacris deprecationibus adoptionem perfici praecipimus, sic sane etiam facere benedictionem testimonio matrimonia confirmari iubemus, adeo ut, si qui citra hanc matrimonium ineant, id ne initio quidem ita dici, neque illos in vitae illa consuetudine matrimonii iure potiri velimus.”

In issuing this law, the Emperor used the word *confirmari*, which admits of the interpretation that the blessing is a necessary confirmation of a juridical act already in existence by the exchange of the consent. However, among scholars the prevailing opinion is that the Church's blessing was to be considered as a constitutive and indispensable act for the matrimony's validity. Among others, this opinion is upheld by Herman,¹⁶² Navarette,¹⁶³ and Prader.¹⁶⁴ A contrary opinion is upheld by Zhishman¹⁶⁵ and Ritzer who consider the blessing as a necessary legal form.¹⁶⁶ In fact, the question arising from this difference of opinions is how a law issued by a civil authority could establish a condition affecting the validity of matrimony.¹⁶⁷ Although the imperial legislators issued matrimonial laws to establish the

¹⁶² Aemilius Herman, "De benedictione nuptiali quid statuerit ius byzantinum sive ecclesiasticum sive civili," *Orientalia Christiana Periodica* 4 (1938) 212: "Extra dubium manet quoque quod sine benedictione matrimonium deinceps prorsus nullus sit et benedictio non solum ad probandum matrimonium, sed ad constituendum matrimonium requiratur."

¹⁶³ Urbano Navarette, "De ministro sacramenti matrimonii in Ecclesia latina et in Ecclesiis orientalibus. Tentamen Explicationibus concordantis," *Periodica* 84 (1995) 719: "Novellam 89 praescribit benedictionem nuptialem uti unicam formam celebrandi matrimonii. Benedictio nuptialis imponitur ad validitatem, et non ad probandum matrimonium celebratum, sed uti elementum constitutivum ipsius matrimonii."

¹⁶⁴ Joseph Prader, *La Legislazione Matrimoniale*, 37: "Dal testo della Novella 89 appare che la benedizione sacerdotale non e soltanto un elemento di prova, ma anche costitutivo del matrimonio."

¹⁶⁵ Joseph Ritter von Zhishman, *Das Eherecht der Orientalischen Kirche* (Wien: Wilhelm Braumüller, 1864) 158-159.

¹⁶⁶ Ritzer, *Formen, Riten*, 105.

¹⁶⁷ Congregation for the Propagation of the Faith, instruction, June 20, 1858, in *Collectanea*, 1 : 621, n. 1154: "Huiusmodi Leonis imperatoris sanctio, utpote a civili potestate lata, nec ecclesiasticas leges mutarem neque dirimens impedimentum matrimonii inducere potuit."

juridical order and to control the juridical status of persons, these laws also had important consequences within the field of ecclesiastical legislation. From the twelfth century onward, among the Eastern theologians there took shape the concept according to which the sacrament of marriage was celebrated by the sacred minister through the matrimonial blessing. Thus, over the centuries the liturgical rite of marriage acquired juridical force.

The promulgation of these imperial laws that empowered the Church to grant legal status to matrimony prompted some authors to assert that what had been realized in the West only in the sixteenth century after the institution of the canonical form at the Council of Trent, was already been in force in the East as early as the eighth century.¹⁶⁸ However, there are several differences between West and East. First of all, in the East the law had been issued by the civil authority while in West the canonical form of marriage had been established by an Ecumenical Council and approved by the authority of the Holy See. Second, in the West the law was universal while in the East the law applied only to the citizens of the Eastern Roman Empire, as long as it lasted. Moreover, in certain Eastern European territories, the two forms of marriage, those contracted by consent and those celebrated with a ritual blessing, coexisted until the nineteenth century when the majority of

¹⁶⁸ Vasile Gavrilă, *Cununia, Viața întru Împărăție* (București: Fundația Tradiția Românească, 2004) (Matrimony, Life for the Kingdom, Bucharest: Foundation Romanian Tradition) 117. Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 353.

Eastern theologians and canonists agreed to consider the religious rite of matrimony as the constitutive act of marriage.¹⁶⁹

b. Theological and canonical approach to the matrimonial rite

The civil legislation of the Roman Emperors, accepted by the Oriental Churches, did not remain unaddressed by the Eastern theologians. Thus, Nicephorus, Patriarch of Constantinople (806-815) asserts that “a union without the blessing of the priest is fornication whether the person be a free man or a slave; and as fornicators they may not be permitted to offer gifts nor may they be admitted into the house of God.”¹⁷⁰ However, the same Patriarch ordered that in the case a widower wished to marry a widow, he should prepare a formal meal and in front of ten men of the family declare that he would take the woman as his wife, but he should not enjoy the matrimonial prayers.¹⁷¹

Theodore Balsamon, (+1195) one of the first Oriental canonists to address this issue, distinguished precisely between the ancient doctrine that had considered consent as the fundamental element of the constitution of the marriage and the prevalent doctrine of his time

¹⁶⁹ Martin Jugie, “L’essence e le ministre du sacrament de mariage d’après les théologiens Greco-Russes,” *Revue Thomiste* 33 (1928) 316-317.

¹⁷⁰ Nicephorus, *Constitutiones*, can. 199, *Iuris ecclesiastici Graecorum historia et monumenta iussu Pii ix. Pont. Max.*, I.B. Pitra ed. (Rome: Typis Collegii Urbani, 1864-1868) 2 : 346.: “Coniunctio sine sacerdotali benedictione este fornication, sive servus, sive liber sit; et sicut minime ad oblatione donorum, ita neque etiam in Dei domum fornicari recipiuntur.”

¹⁷¹ *Ibid.*, can. 149, 2 : 341.

which considered the blessing mandatory for the validity of marriage.¹⁷² However, in Balsamon's opinion, when two slaves married only by consent, having the approval of their master, the Church should not impose any penalty. Thus, indirectly, he considered slaves' marriages contracted by consent and without the nuptial blessing to be valid.¹⁷³

At the end of thirteenth century, the monk Job, called the Jasite, asserted that the minister of the marriage, as in all other sacraments, is the priest or the bishop. Job affirmed that the sacrament of marriage is constituted by the blessing of the priest and by the other ceremonies of betrothal and crowning incorporated in the Byzantine ritual. However, he does not specify which one of these rites is absolutely essential for the celebration of the marriage.¹⁷⁴

On the other hand, at the beginning of the fifteenth century, Simon the Archbishop of Thessalonica disagreed with Job the Jasite and affirmed that the rite of crowning does not belong to the essence of the marital sacrament: "Blessing the marriage is a function of the bishop; yet a simple priest may accomplish it because it is but a simple rite with no relation

¹⁷² Balsamon, *Schol. In Ep. S. Basil.*, can. 38, *PG* 138 : 706: "Haec autem ... locum habebant, quando solo consensu consistebat matrimonium. Hodie vero [matrimonium] fit cum sacra benedictione." See also Joyce, 197.

¹⁷³ *Ibid.*, can 40, *PG* 138 : 714: "Ancilla quae praeter domini sui sententiam se viro dedit, ut fornicatrix poenas luet. Si cum autem postea cum domini voluntate ei conjugatur, legitime nupsit."

¹⁷⁴ Martin Jugie, *Theologia Dogmatica Christianorum Orientalium ab Ecclesia Catholica Dissidentium*, (Paris: Letouzey et Ané , 1930) 3 : 452. Jugie, "L'Éssence et le ministre," 313.

to communication of the grace.”¹⁷⁵ Consequently, it might be concluded that for Simon the essence of the sacrament consisted in the matrimonial contract itself.¹⁷⁶ Nevertheless, it is important to note that Simon was not particularly concerned to establish the form of the sacrament of marriage, but rather focused his attention principally on the richness and vividness of the liturgical rites in order to emphasize the majesty of the mystery celebrated. This conception has been upheld by most of the Eastern theologians up to the beginning of the nineteenth century.¹⁷⁷

4. The Development of the Oriental Rite of Marriage in Selected Countries of Eastern Europe

After the fall of the Eastern Roman Empire to the Turkish rule, most of the Eastern Orthodox Churches from the Balkans to the Near East remained within the borders of the Islamic world. The Russian Orthodox Church and the Orthodox Churches from the principalities of Moldova and Walachia (territories that are part of today’s Romania) remained outside of the control of the Ottoman Empire and enjoyed always the favor of their rulers. Obviously, these Churches kept always in touch with the Patriarch of Constantinople

¹⁷⁵ Simon of Thesalonica, “De onesto et legitimo coniugio,” *PG* 155 : 509: “Benedicere nuptiis ad pontificem pertinent; hoc tamen et presbyteris conceditur, quia haec benedictio est ritus nudus, ad gratiae communicationem non pertinens.” The above is the translation given by Jugie in *Theologia Dogmatica*, 3 : 448. Migne gives another translation, slightly different but without significant changes: “Coniugum benediction proprium episcopi est opus. Attamen hoc pariter facere sacerdotibus conceditur, quoniam tantummodo est mysterium, et non agitur de communicandae gratiae.” *PG* 155 : 510.

¹⁷⁶ Jugie, “L’Éssence et le Ministre,” 313.

¹⁷⁷ *Ibid.*, 313-314.

and other Orthodox Churches from the Balkans. Moreover, the Orthodox Churches of Moldova and Wallachia remained until the end of nineteenth century under the jurisdiction of the Patriarchal See of Constantinople. Consequently, the sacramental and liturgical practice of Orthodox Churches in Eastern Europe remained over the centuries mostly the same, except for the language.

a. The matrimonial rite in the Russian Orthodox Church in 17th and 18th centuries

Concerning marriage, there was a particular development in the Russian Orthodox Church generated by Petru Movila, Metropolitan of Kiev, in the first half of the seventeenth century. Petru Movila has been born in Moldavia as the son of Simeon, head of a princely family. Political turmoil forced his family to seek refuge in Poland, where they had numerous and influential ties with the nobility. Petru was educated in Lvov and then continued his studies in Western Europe, probably Paris and Amsterdam. He then served as an officer in the Polish army and fought in at least two battles against the Turkish army. At the age of 30 decided to become a monk at the famous Pecherskaia Lavra Monastery, whose archimandrite he became on 1627. Eventually he was made Metropolitan of Kiev in 1633, a position he held until his death. As archimandrite and later as Metropolitan, Movila transformed the hitherto irrelevant monastic school of Pecherskaia Lavra into the Kievan Academy, which soon reached a standard of excellence unmatched elsewhere in the Orthodox world of the time and which continued to play an influential role throughout the seventeenth century. The

Academy was organized on Western models and the teaching was given predominantly in Latin, not in Greek or Slavonic.¹⁷⁸

Seeking to provide a concise and clear catechism of Orthodoxy, Petru Movila composed a *Confession of Orthodox Faith* that followed the structure of Tridentine Catechism, but that contained Orthodox doctrine.¹⁷⁹ Movila's *Confession* was aimed principally to combat the Calvinistic influence that had even contaminated the *Confession of Faith* composed by the Patriarch Kyril Lukaris. Movila's *Confession*, drawn up as a catechism with questions and answers, was first approved by the Synod of Kiev in 1640 and then corrected and purged by a Synod of the Greek and Russian clergy 1643 at Iasi (then the capital city of Moldova, today's Romania), where it received its final shape from Meletius Syrigos, who not only translated it from Latin into Greek, but who corrected and emended many of its teachings.¹⁸⁰ Thus, the version approved at Iasi was the Greek text amended by

¹⁷⁸ Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române* (București: Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, 1994), (*The History of the Romanian Orthodox Church*, Bucharest: Publishing House of the Biblical and Missionary Institut of Romanian Orthodox Church) 2 : 32-48.

¹⁷⁹ For an extensive analysis of Petru Movila's *Confession of the Orthodox Faith* see Ronald Popivchak, *Peter Mohila, Metropolitan of Kiev (1633-47): Translation and Evaluation of his "Orthodox Confession of Faith"*, *Studies in Sacred Theology*, n. 259 (Washington DC: Catholic University of America, 1975).

¹⁸⁰ Since the *Confession of Faith* was based on Latin catechisms by Peter Canisius and others, Movila's latinizing approach is evident. For instance, when considered the Sacrament of Eucharist, Moghila not only employed the term transubstantiation but he taught explicitly that the moment of consecration in the Eucharist occurs at the words of institution, not at the epiclesis of the Holy Spirit. Besides, when discussing the state of the departed he virtually adopted the Latin doctrine of purgatory. In fact, these issues were corrected by Meletius Syrigos. However, the extent of Moghila's Latinisms should not be exaggerated, for on

Syrigos. It was this version that was sent to four other Eastern Patriarchs who also approved it. The Synod of Jerusalem gave it a new sanction in 1672 and thus adopted it as the Orthodox Standard Catechism.¹⁸¹ In this way Movila's *Confession* became for a certain period of time the Confession of the Greek and Russian Church,¹⁸² and it has been the basis of several later Catechisms prepared by Russian theologians. However, Movila was displeased by these changes made by Syrigos and did not print this emended version of his *Confession* even though he had all the necessary means to do so.¹⁸³ Instead he printed a *Short Catechism* in 1645 and a *Trebnik* (Sacramentary) in 1646, both in the Slavonic language, in which he preserved most of the original teachings of the *Confession*.¹⁸⁴

The *Confession of Faith* is divided, after a short introduction, into three parts arranged according to the three theological virtues of faith, hope and charity. Marriage is treated in the last section of the first part under question 115, which considers the essence of

questions such as the *filioque* and the papal claims, he adheres to the traditional Orthodox viewpoint, although he expresses this viewpoint in a moderate form.

¹⁸¹ George A. Maloney, S.J., *A History of Orthodox Theology since 1453* (Belmont Massachusetts: Nordland Publishing Company, 1976) 36.

¹⁸² Petru Pruteanu, *Viața și Activitatea Mitropolitului Petru Movilă al Kievului (1596-1646)*, (*Life and Activity of Petru Movila, Metropolitan of Kiev*) 2-3 in http://teologie.net/biblioteca/altele/petru_movila.pdf.

¹⁸³ Movila not only had a printing press at the Pecherskaia Lavra in Kiev but he provided other three of them to various monasteries in Moldova and Walachia.

¹⁸⁴ Maloney, *A History of Orthodox Theology*, 36-37.

the matrimonial sacrament, and question 116, which addresses the fruits of the sacrament of marriage. Concerning the form of marriage, Movila states the following in question 115:

Q. 115. What is the sixth mystery?

A. - Matrimony, which is brought about through the reciprocal consent of both man and woman, without any impediment; their consent cannot be received as true matrimony until they state the promise in turn in the presence of the priest and they offer each other their hands as an evidence that they will watch over each other in faith, honor, and matrimonial love until the end of life, not abandoning each other in any danger. And afterwards their promise is confirmed and blessed by the priest. And so is brought about that “marriage honorable in all, and the bed undefiled.”¹⁸⁵ (Heb 13,4) .

At a first reading it appears clearly that Movila adopts the Western view of marriage according to which the essence of marriage is the mutual consent of the spouses. Moreover, he went even further and made the validity of matrimony depend upon the exchange of consent in front of a priest. The only difference between Movila’s requirements and the rules laid down for the canonical form at the Council of Trent is that Movila did not mention anything about additional witnesses. Immediately after the consent had been exchanged, the priest was to confirm and bless it as an endorsement of a juridical act brought into existence by the exchange of the consent. One cannot but notice the use of the same word, *confirmari*,

¹⁸⁵ Petru Movila, *Orthodoxa Confessio Fidei Catholica et Apostolica Ecclesiae Orientalis* in Antoine Malvy and Marcel Viller, “La Confession Orthodoxe de Pierre Moghila Métropolitte de Kiev, 1633–1646,” *Orientalia Christiana*, 10 (1927) (Pont. Institutum Orientalium Studiorum, Rome and Gabriel Beauchesne, Paris, 1927) 68: “Q. 115. – Quodnam sit sextum mysterium? R. – Matrimonium, quod fit primo per mutuuum consensum tam viri quam mulieris absque ullo impedimento, qui eorum consensus non potest pro vero matrimonio accipi antequam illi coram sacerdote vicissim promissionem testentur manusque porrigant quod unus alteri servaturus sit fidem, honorem, amorem matrimoniale, usque ad extremum vitae exitum, omnibus in periculis unum alterum non deserendo. Et post haec ista eorum promissio a sacerdote confirmanda et benedicenda. Efficiturque illud *honorabile connubium in omnibus, et thorus immaculatus.*”

both in the law issued by the Emperor Leo VI and in the definition given by Movila when they consider the priest's blessing, although neither Movila nor his commentators made any reference to the Emperor's legislation.

It should be noted as well that apparently the text on this question was not significantly altered by Meletius Syrigos. Since he was more concerned to address issues of a dogmatic character, Meletius Syrigos probably left the definition of marriage untouched. In support of this opinion is also the fact that in his *Short Catechism*, Movila did not change the description of marriage as he did with other issues which had been emended by Meletius Syrigos.¹⁸⁶ Moreover, Movila gave an almost identical definition in his *Trebnik* printed in Slavonic language in 1646. In this Sacramentary, or Office-Book, Movila wrote of marriage:

The matter of this mystery is the husband and wife who, without any impediment, want to join with honor in the communion of marriage. The form, i.e. the image or the completion, are the words of spouses that express their internal consent before the priest.¹⁸⁷

Thus, it seems wrong to claim, as Popivchak does, that: “Movila upholds the universal teaching of the Orthodox Church on the axiomatic necessity of the blessing of the

¹⁸⁶ Antoine Malvy and Marcel Viller, “La Confession Orthodoxe de Pierre Moghila Métropolitain de Kiev, 1633–1646,” *Orientalia Christiana* 10 (1927) CXXXVI.

¹⁸⁷ *Требник Митрополита Петра Могилы, Киев 1646* (Киев: Информационно-Издательский Центр Украинской Православной Церкви, 1996), (*The Sacramentary of the Metropolitan Peter Movila, Kiev 1646*, Kiev: Center for Information and Publishing of Ukrainian Orthodox Church) 1 : 380: “Вещь сей тайны есть муж и жена в приобщении брака но кроме всякого препятія правильного совокупитися изволяющих. Форма сия есть образ или совершеннее её суть словеса совокупляющихся изволение их внутреннее пред иереем извещающая.”

priest for a true marriage.”¹⁸⁸ As his own writings evidence, Movila did consider the nuptial blessing as a part of the matrimonial celebration, but clearly affirmed that the spouses are the matter of the sacrament and the form consists in the consent expressed by the spouses.

The authority of Movila’s teaching on the marriage extended over the official collection of the Russian Orthodox Church, *Kormčaja Kniga*, which was in use until 1721.¹⁸⁹ Regarding the matrimonial sacrament, chapter 50 of *Kormčaja Kniga* assumed Movila’s definition almost word for word:

The matter of this mystery is the husband and wife who, without any impediment, *sincerely* want to join with honor in the communion of marriage. The form, i.e. the image or the completion, are the words of spouses that express their internal consent before the priest.¹⁹⁰

As can be easily noticed, only one more word appears in this text than in Movila’s definition in his *Trebnik*. It is also important to point out that in 1796, a Synod of the Russian Orthodox Church authorized the celebration of matrimony through proxy, a fact that confirms once again the influence and the authority of Movila’s teaching on matrimony within the Orthodox Church.¹⁹¹ The Russian canonist Anton Pavlov in his book *The Fiftieth*

¹⁸⁸ Ronald Popivchak, *Peter Mohila, Metropolitan of Kiev*, 463. The same opinion is expressed by Paul Evdochimov in *The Sacrament of Love*, 129.

¹⁸⁹ Ivan Žužek, *Kormčaja Kniga: Studies on the Chief Code of Russian Canon Law* (Rome: Pont. Institutum Orientalium Studiorum, 1964).

¹⁹⁰ *Kormčaja Kniga*: “Вещь сея тайны, есть муж и жена, в приобщении брака *честно* кроме всякаго препятія правильного совокупитися изволяющими. Форма, сие есть образ, или совершение, суть словеса совокупающихся, изволение их внутреннее, пред иереом извещающая.” In <http://www.korajglubze.boom.ru/kormczaja.htm>, p. 1156.

¹⁹¹ Ivan Žužek, *Kormčaja Kniga*, 263.

Chapter of “Kormčaja Kniga” as a Historical and Practical Source of the Russian Matrimonial Law published at the end of nineteenth century proposed the following definition of marriage as presented in *Kormčaja Kniga*:

Marriage is a sacrament established by Christ the Lord, in which man and woman (the matter), as a result of expressing before the priest and the church their reciprocal consent to become spouses (the form), enter into a indissoluble covenant of love and friendship, in order to help each other, to avoid the sin of fornication, and to generate and educate children to the glory of God (the essence and goal of marriage).¹⁹²

In reality, Pavlov was repeating the description of marriage given by Movila in his *Confession of Faith*.

In fact, most of the Russian theologians¹⁹³ from the eighteenth and the first half of the nineteenth century were faithful to this doctrine on marriage. It was not until the second half of the nineteenth century that matrimonial doctrine underwent a significant change that led

¹⁹² Anton Pavlov, *50-я глава Кормчей книги, как исторический и практический источник русского брачного права*, (Москва: Университетская типография, 1887), (*The 50th Chapter of “Kormčaja Kniga:” Historical and Practical Source of the Russian Matrimonial Law*, Moscow: The University’s Printing House) 42: “Брак-это установленное Христом Богом таинство, к котором мужчина и женщина(материя), в следствие выраженного ими перед священником и церковью взаимного согласия быть супругами(форма), вступают в нерасторжимый союз любви и дружбы, для взаимной помощи, для избежания греха любодеяния и для рождения и воспитания детей к славе Божьей (содержание и цель брака).”

¹⁹³ There were, however, theologians that affirmed the contrary. For instance, Platon Levkhine, Metropolitan of Moscow in eighteenth century, considered that the priest is the celebrant of the marriage and the blessing was essential to its celebration.

the priestly nuptial benediction to be considered the most important element of the sacrament of marriage.¹⁹⁴

b. The matrimonial rite in Moldavia and Walachia

Although Petru Movila had an enormous influence on the life of the Orthodox Church in Moldavia and Walachia, his view on the essence of marriage did not make a way into the sacramental theology of the Orthodox Church in these countries. Here the belief that the priest's blessing was the essential element of marriage continued to prevail. Those few collections of law printed at that time pointed out that the authentic marriage is the one celebrated with the prescribed prayers and with the blessing of the priest. These laws gave little if any significance to the expression of the consent of spouses. Among these collections the most important and the largest is by far *Pravila cea Mare* (The Great Law).

Pravila, a tome of eight hundred pages, was printed in 1652 in Targoviste,¹⁹⁵ the capital city of what was then Walachia and is today's Romania, at the printing press that had been provided, most probably, by Petru Movila.¹⁹⁶ This collection, translated from Greek, had two parts and an appendix. The first part was also called *Indreptarea Legii* (The Rule of Law) and was divided into 417 chapters. Of these 314 were taken from Manuel Malaxos'

¹⁹⁴ Martin Jugie, "Mariage dans l'Église Greco-Russe," *Dictionnaire de Théologie Catholique*, 9/2 : 2321-2322.

¹⁹⁵ Ioan N. Floca, *Drept Canonic Ortodox, Legislație și Administrație Bisericească*, (București: Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, 1990), (*Orthodox Canon Law, Ecclesiastical Legislation and Administration*, Bucharest: Publishing House of the Biblical and Missionary Institut of Romanian Orthodox Church) 1 : 139.

¹⁹⁶ See note 183.

Nomocanon, while the others were a copy of another code of law printed in 1646 in Iasi by the prince Vasile Lupu, a friend and supporter of Petru Movila. The second part included a canonical collection of Alexios Aristem (sec. XII) and several canons of various Fathers of the Church. The appendix consisted of questions and answers written by Anastasius of Sinai in the sixth century.¹⁹⁷ Thus *Pravila* was a codification of Romanian legislation, a combination of both ecclesiastical and civil law.

Pravila's importance in Romanian civil legislation ceased by the middle of nineteenth century, when, among other reforms, the promulgation of a new and modern Civil Code occurred. In the Romanian Orthodox Church, in contrast, *Pravila* has never been abrogated.¹⁹⁸ Since its publication and promulgation in 1652,¹⁹⁹ *Pravila* has played a significant role not only in Moldavia and Walachia but also in the third Romanian region, Transylvania, which was at the time under the rule of the Austro-Hungarian Empire. This situation is explained by the fact that the Orthodox Church in Transylvania was at the time of the *Pravila's* promulgation under the ecclesiastical jurisdiction of the Metropolitan See of Walachia.²⁰⁰ This fact is of great importance since it was here in 1700 that the union of a large part of the Orthodox Church in Transylvania, headed by Metropolitan Athanasius, with

¹⁹⁷ Ioannes Dan, *Pravila Magna eiusque Auctoritas in Ecclesia Romena "Indreptarea Legii" a. 1652* (Rome: Pontificium Atheneum Urbanianum de "Propaganda Fide," 1944) 42-44.

¹⁹⁸ Ioan Floca, *Drept Canonic Ortodox*, 140.

¹⁹⁹ Ioannes Dan, *Pravila Magna*, 149.

²⁰⁰ *Ibid.*, 149-150.

the Catholic Church took place. In the decree declaring the union, the Holy See implicitly approved also the *Pravila Mare* as a code of laws for the newly established Romanian Church United with Rome.²⁰¹ After the act of union and until the first Provincial Council, the Bishops of the Greek-Catholic Church used regularly *Pravila*'s provisions in their decision making process.²⁰² Only in 1878 did a document of the Congregation *De Propaganda Fide* decree: "The code of laws called *Pravila*, because of its schismatic origin and the many errors that it contains, is to be removed from ecclesiastical usage."²⁰³

Various issues concerning marriage are addressed all through *Pravila*. The issue concerning the form of the marriage is treated in the first part of the collection in Chapter 204:

When the marriage is done only with a precarious contract, without prayers and without blessing, and afterwards one of them would repent, then by all means they would separate and the man would take another woman and the woman would take another man. On the contrary, if the prayers and blessing have been done, even though they would not consummate [the marriage], the marriage of that man and that woman has been done according to the law and their common life is indissoluble and nobody could separate them. This has been constituted according to the law of eternally remembered Emperor Leo the Wise and of thrice blessed Emperor Alexis Comnenos.²⁰⁴

²⁰¹ Ibid., 164-165.

²⁰² Ibid., 165-174.

²⁰³ Sacred Congregation for the Propagation of the Faith, Response at dubium, July 29, 1978, in Mansi, 42 : 459-460: "Codicem legum *Pravila* dictum, propter schismaticam originem et multos errores quos continent, esse removendum ab usu ecclesiastico."

²⁰⁴ *Îndreptarea Legii* (Oradea: Editura Pelerinul Român, 2002) (*The Rule of Law*, Oradea: Publishing House Romanian Pilgrim) 302.

This provision does not establish directly how the marriage is to be celebrated but it does determine when a marriage is done according to the law and when it is unlawful. First, the provision points out that a marriage accomplished without the priest's blessing but only through mutual contract is not legally binding. Thus, it can be dissolved even by the will of only one of the spouses. On the other hand, a marriage celebrated with the priest's blessing is legitimate and cannot be dissolved by anybody. Even if the marriage has not been consummated, once the priest's blessing has been received, the matrimony is considered to be legal and, as such, indissoluble.²⁰⁵ Finally, this provision based its authority on the laws promulgated by Emperors Leo VI and Alexis Comnenos.²⁰⁶ In addition, some other provisions of the *Pravila* mentioned indirectly the necessity of the blessing for lawful marriage. Chapter 207, for instance, determines that only the children born into a marriage that has been blessed according to the law are legitimate, otherwise they are to be considered illegitimate.²⁰⁷ Therefore, unlike the Russian Orthodox Church, the Orthodox Church in Moldavia, Walachia, and Transylvania constantly considered the sacrament of the matrimony to be constituted by the blessing of the priest.

- c. The marriage legislation of the Romanian Oriental Catholic Church in Transylvania.

²⁰⁵ Ioannes Dan, *Pravila Magna*, 101.

²⁰⁶ See above pp. 60-64.

²⁰⁷ *Îndreptarea Legii*, 305.

Following the conquest of Transylvania in 1687 by the Austrian army of the Emperor Leopold I of Habsburg, a movement to restore the Catholic faith was launched in this territory that for a long time had been under Protestant influence. Within a politically and religiously complex situation, a great part of the Orthodox Church in Transylvania, headed by their Metropolitan Atanasie Anghel, entered into full communion with Rome by the Act of Union of 1698 which was formalized by a synod of bishops on September 4, 1700. By the Union, the newly created Greek-Catholic Church could retain its Greek Byzantine liturgical rite but accepted the four doctrinal points established by the Council of Florence:²⁰⁸ the papal primacy of the Bishop of Rome, the existence of Purgatory, the *Filioque* clause of the Nicene Creed, and the use of unleavened bread at the Eucharistic celebration.²⁰⁹

Nothing was mentioned in the act of Union concerning marriage, but the Metropolitan Atansie Anghel stated at 1700 that their rite was not to be disturbed by anybody and that they would keep their ceremonies and feasts as they were.²¹⁰ Since no document of the Holy See has been issued ordering the retraction of this statement, it has been considered that the Holy See implicitly approved the use of *Pravila*, inasmuch as it did not contradict the

²⁰⁸ Council of Basel-Ferrara-Florence-Rome, “Definition of the holy ecumenical synod of Florence,” session 6, 6 July 1439. Tanner, 1 : 523-528.

²⁰⁹ Under the same conditions took place the Union of Ruthenians with Rome, a century earlier.

²¹⁰ Ioannes Dan, *Pravila*, 164: “Ut nos et successores nostros, in nostrae Ecclesiae orientalis ritu nemo perturbet, sed omnes ceremoniae, festa et jejunia ut hucusque errant ita et in futurum maneant.”

Catholic doctrine.²¹¹ In fact, the provisions of *Pravila* were used up to the First Provincial Council in 1872 with the Holy See's tolerance.²¹² Thus, the celebration of marriage continued to take place as provided by the Greek Byzantine tradition and the priest's blessing was considered essential for the celebration of the sacrament. In fact, in the century following the Union there was very little matrimonial legislation deriving either from local councils or from the Holy See. Most of the provisions regarded the prohibition of divorce, a practice which was accepted by the Orthodox Church and whose conditions were provided by *Pravila* in chapters 179-184.²¹³

A first provision concerning the canonical form of marriage was issued in a synod of the Eparchy of Fagaras held in 1754 where Bishop Petru Paul Aron declared that a marriage would be null if not contracted before the proper pastor of either spouse and in presence of two or three witnesses.²¹⁴ Bishop Aron's declaration clearly reiterated in fact the provision of the decree *Tametsi*. The bishop ordered this synodal decree to be promulgated, but did not instruct that it be promulgated precisely as the Tridentine form had been.²¹⁵ However, this

²¹¹ Ibid., 164-165.

²¹² Ibid., 165-172.

²¹³ *Indreptarea Legii*, 261-270.

²¹⁴ Joannes Deliman, *De impedimentibus Matrimonium Dirimentibus apud Romanos quum Dissidentes tum Catholicos, a Saeculo XVII ad nostra usque Tempora* (Rome: Pontificium Institutum Orientalium Studiorum, 1941) 27. See also Cristian Barta, "Samuil Micu: De la Divorț la Indisolubilitatea Matrimoniului," *Cultura Creștină*, Anul V, n. 1-2, 2002, 85.

²¹⁵ Ibid., 29-30.

rule lasted only for eleven years until the death of Bishop Aron. His successor, Bishop Athanasius Rednic, at a synod held in 1766, abrogated this decree considering it as a synodal decree and not as the promulgation of the Decree of the Council of Trent.²¹⁶ In a letter to the Sacred Congregation for the Propagation of the Faith in 1766, Bishop Rednic defended his decision by saying that the promulgation of Bishop Aron's decree caused many of the Romanians to marry before an Orthodox priest.²¹⁷ There were no other significant provisions concerning the form of marriage from 1766 until the second part of the nineteenth century. Nevertheless, the close contact with the Latin rite and the fact that most of Romanian Oriental hierarchs were educated at the Western universities, especially at the Roman Universities, made the Tridentine form seem the best remedy to some of the problems the Oriental Catholic Church in Transylvania faced at the time. Though never formally promulgated, the Tridentine form was tacitly promoted and, by the middle of the nineteenth century, was largely in use in the whole Greek Catholic Church in Transylvania.²¹⁸ In fact,

²¹⁶ Ibid., 30-31.

²¹⁷ Athanasius Rednic, Letter to the Sacred Congregation for the Propagation of the Faith, August 8, 1766, in *Fonti CCO*, ser. I, 8 : 548. "Accedit, quod qui ex nostris a publicatione illius synodalis constitutionis varie in fide tentati a s. unione defecerunt (deficit autem maxima pars) iam per parochos non unitos tamquam suos ordinarie copulentur."

²¹⁸ Vasile Chirvaiu, *Drept Bisericesc Comparat pe Baza Codului Nou Latin și a Conciliilor Provinciale Romane. Volumul III: Dreptul Matrimonial* (Oradea: Chiriașii Tipografiei Românești, 1933), (*Eclesiastical Comparativ Law of the New Latin Code of Canon Law and of Councils of the Romanian Province, Volum III: Matrimonial Law*, Oradea: Tenants of Romanian Printing House) 306.

the first Provincial Council held in 1872, tried to impose the Tridentine form without explicitly mentioning it by name.²¹⁹

In 1853, Pope Pius IX established the first Catholic Oriental Archdiocese, giving the Oriental Catholic Romanians their own Ecclesiastical Province.²²⁰ The increasing necessity for a united legislation produced two provincial councils one held in 1872 and the other in 1882, and their decisions included several matrimonial provisions.²²¹ Prior to these two councils, the Sacred Congregation for the Propagation of the Faith addressed to the Greek Catholic Romanian bishops an instruction providing several essential features to be considered in their debate regarding the form of marriage.²²² Among the points made by the Congregation were the following:

- Only the Supreme authority of an Ecumenical Council or the Supreme Pontiff could establish a new form to be observed when entering a marriage and predetermine the nullity of marriages contracted without observing the established canonical form.²²³

²¹⁹ Mansi, 42 : 814.

²²⁰ Pius IX, Bulla, *Ecclesiam Christi*, November 26, 1853, in Mansi, 42 : 620-626.

²²¹ The stipulations regarding marriage are recorded in Mansi, 42 : 554-558 and 584-585 for the First Provincial Council and in Mansi 45 : 723-734 for the Second Provincial Council.

²²² Sacred Congregation for the Propagation of the Faith, instruction, 1858, in *Collectanea*, 1: 618-626, n. 1154.

²²³ *Ibid.*

- In order to be binding, the Tridentine form had to be promulgated as such and it was not enough to have a similar form promulgated by a bishop, a council, or a civil authority.²²⁴
- It could not be maintained that the Decree *Tametsi* has been promulgated in Transylvanian parishes. Consequently, mixed marriages contracted before an Orthodox priest were to be considered valid.²²⁵
- Marriages were not to be instantly declared null because they were celebrated without the nuptial blessing of a priest.²²⁶
- There was no document of the Oriental Church that clearly and explicitly required the blessing of the priest as a condition for the validity of the marriage.²²⁷

The attempt of the First Provincial Council held in 1872 to impose the Tridentine form, though not specifying explicitly this form by name, was sanctioned by the Sacred Congregation for the Doctrine of the Faith, which suspended judgment on this decree and asked the Archbishop of Alba Iulia and Fagaras, Ioan Vancea, to inform the Congregation about the proof of the promulgation of the Tridentine decree in Romanian parishes.²²⁸ On

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Sacred Congregation for the Faith, *Lettera della Sacra Congregazione Diretta a Monsignor Giovanni Vancea Arcivescovo Rumeno di Fogoras e Alba-Giulia*, July 30, 1878, in Mansi, 42 : 820-821.

1878, Archbishop Vancea answered that no document had been found proving that the decree of the Council of Trent had been published in his province's parishes.²²⁹ However, Archbishop Vancea specified:

It is indisputably clear that here clandestine marriages are considered illicit But then after 1855, when there was published the instruction regarding matrimonial causes for Ecclesiastical Judges of the Austrian Empire, all the matrimonial tribunals in this Province considered clandestinity to be a diriment impediment.²³⁰

In its reply in 1881, the Sacred Congregation for the Propagation of the Faith did not pronounce a definite decision on the validity of marriages contracted without the required form, but instead asked the bishops to elaborate a uniform discipline.²³¹

In view of this request, in 1882 the second Provincial Council declared that:

In order to contract marriage licitly, spouses must marry in the church before the proper pastor, or before another priest delegated by the pastor himself or by the ordinary, in the presence of two or three witnesses; thus it is not permitted for any priest to marry somebody without having the explicit faculty from the pastor himself or from the ordinary.²³²

²²⁹ *Risposta di Monsignor Giovanni Vancea, Arcivescovo di Fogoras, alla Antecedente Lettera della Sacra Congregazione*, September 7, 1878, in Mansi, 42 : 821-824.

²³⁰ *Ibid.*: “Hoc tamen non obstante, matrimonia clandestina hic locorum pro illicitis habebantur Ab anno vero 1855 dum “instructio pro iudiciis ecclesiasticis imperii Austriaci quoad causas matrimoniales” concinata ... omnia fora matrimonialia huius quoque provinciae ecclesiasticae impedimentum clandestinitatis qua dirimens matrimonium reputabant.” Mansi 42 : 822-823.

²³¹ Sacred Congregation for the Propagation of the Faith, Letter, April 30, 1881, in *Fonti CCO*, ser. I, 10 : 202-203, n. 271.

²³² *Decretele Conciliului Prim și al Doilea ale Provinciei Bisericești Greco-Catolice de Alba-Iulia și Făgăraș* (Blaj: Tipografia Seminarului Catolic, 1927). (*Decrees of the First and Second Councils of the Ecclesiastical Province of the Greek-Catholic Church of Alba Iulia and Făgăraș*. Blaj: Printig House of the Catholic Seminary, 1927) 102-108: “Cap. III, § 23.

Accordingly, the form of marriage provided by the Council of Trent was eventually introduced in the Greek Catholic Church from Transylvania for liceity only.

It must be noted, however, that these attempts to adopt the Tridentine form of marriage were not meant to replace the priest's nuptial blessing as a mandatory element of matrimonial celebration. In fact, in 1908, the Metropolitan of Alba Iulia and Fagaras, in a letter sent to the Sacred Congregation for the Propagation of the Faith declared: "In this province it is not heard of for matrimony to be contracted without the priest's blessing and before witnesses."²³³ Accordingly, the Romanian diocesan tribunals, apparently with the tacit consent of the Holy See, continued to declare null and void all marriages contracted without the intervention of a priest.²³⁴

To summarize, in the territories of Moldavia, Walachia, and Transylvania, the Orthodox Church maintained over the centuries the position that the essential element of marriage is the nuptial blessing granted by the priest. The same continued to be true in the Romanian Oriental Catholic Church in Transylvania, although there were several attempts on

Pentru a putea încheia căsătoria în mod licit, mirii trebuie să se cunune în fața bisericii de parohul propriu, ori de un alt preot autorizat de însuși parohul ori de ordinariat, în prezența a doi sau trei martori; pentru aceasta nu este iertat altui preot a cununa pe cineva fără facultate expresă de la însuși parohul, ori de la ordinariat." See also Mansi, 45 : 730.

²³³ Metropolitan Victor Mihaly de Apșa, Letter, October 27, 1908, in *Fonti CCO*, ser. I, 8 : 534: "In provincia hacce ... matrimonium absque sacerdotali benediction et coram testibus contrahere inauditum."

²³⁴ *Ibid.*, 535: "Hanc propter rationem, tribunalia nostra matrimonialia conviventes sine sacerdotali benedictione ut concubinaris considerant, eorumque convivial non pro validis habent matrimoniis."

the part of the hierarchy to impose the Tridentine form within this Ecclesiastical Province. The canonical form that required the marriage to be celebrated before the proper pastor, and in the presence of two or three witnesses, was eventually introduced by the Second Provincial Council of the Romanian Oriental Catholic Church for liceity only.

Conclusion

The second section of this first chapter analyzed the development of the matrimonial rite in the Eastern liturgical and canonical tradition. It first considered the liturgical evolution in the Byzantine tradition of the matrimonial rite with its two parts: the betrothal and the marriage itself, focusing on its culminating moment, the Service of Crowning. Then followed a short overview of the rite of marriage in a few other Eastern traditions including Armenian, Coptic, Chaldean, and Syrian churches. Subsequently, there followed a discussion of the matrimonial legislation in the Eastern Roman Empire, studying both imperial legislation and the theological and canonical approach as well. Finally, this chapter examined the development of the Oriental rite of marriage in selected countries of Eastern Europe from the seventeenth into the nineteenth centuries. First, it scrutinized the conception of marriage of Metropolitan Petru Movila and its consequences on the Russian Orthodox Church matrimonial legislation. Then it investigated the understanding of the marriage in Moldavia and Wallachia as presented in the collection of laws *Pravila Mare*. Lastly, it considered the marriage legislation of the Romanian Oriental Catholic Church in Transylvania, especially the relevant provisions of the two Provincial councils of the second half of the nineteenth century. To summarize, it can be concluded that up to the eighteenth

century there coexisted in the Eastern Byzantine Tradition two doctrines concerning marriage: one that considered consent as the fundamental element of the constitution of marriage and the other one which considered the blessing mandatory for the validity of marriage. It was not until the second half of the nineteenth century that the matrimonial doctrine underwent a significant change and the priestly nuptial benediction was considered to be the most important element of the sacrament of marriage.²³⁵

As it has already been shown, various churches within the same rite had different disciplines, norms, legal customs, and laws that accumulated over the centuries concerning marriage. Some of these laws were in need of adjustment to the demands of modern time. In the Catholic Church the need of a certain uniformity of matrimonial norms for the various rites became more imperative after the promulgation of the Latin *Code of Canon Law* in 1917. The promulgation of the motu proprio *Crebrae Allatae*, brought not only the much desired uniformity and clarity but also incorporated many new insights which had been gained since the emergence of the 1917 *CIC*. A comparative examination of the two sets of matrimonial norms concerning canonical form of marriage comprised in 1917 *CIC* and in the motu proprio *Crebrae Allatae*, will be the concern of the second chapter of this study.

²³⁵ For a pertinent and extended analysis of the reasons the doctrine that considered the nuptial blessing mandatory for the validity of marriage gained precedence on the Eastern tradition, see Jugie, "Mariage dans l'Église Greco-Russe," *Dictionnaire de Théologie Catholique*, 9/2 : 2323.

CHAPTER TWO

THE CANONICAL FORM OF MARRIAGE IN THE 1917 *CODEX IURIS CANONICI*, IN THE MOTU PROPRIO *CREBRAE ALLATAE*, AND IN CONCILIAR AND POST-CONCILIAR DOCUMENTS

Introduction

The previous chapter considered the historical development of both the canonical form of marriage in the Latin Church and the provisions in the Eastern law governing the celebration of marriage. It showed that the laws governing this particular aspect of the marital sacrament were a continuation of traditional principles and values, joined with new norms which were meant to fulfill the needs that emerged at various stages of the Church's history. Over the years, religious and social changes compelled the Church to clarify the meaning of certain legal terms, to emend or even to amend laws in order to address new situations, and to enforce the existent legislation in order to obtain the initial desired effects. A major achievement was the codification of the canon law of the Latin Church in 1917. The 1917 *CIC* became the worldwide law of the Latin Church; all previous legislation which was opposed to the new laws were abrogated, unless the law itself allowed particular norms to remain. The section of the 1917 *CIC* concerning marriage was not entirely new. Besides the basic provisions of the Decree *Tametsi*, the 1917 *CIC* incorporated other pieces of legislation issued over the years, especially the 1907 decree *Ne Temere*. The successful codification of the Latin law persuaded Pope Pius XI to address the long-required revision and unification of the Eastern law by deciding to begin the preparation of an Oriental Code of Canon Law. The

task of assembling the whole code proved to be a difficult undertaking and was not concluded by the time of the Second Vatican Council. However, because of the pressing needs of many Oriental Rite Churches, several parts of the Eastern law were promulgated in four distinct *motu proprios* in the period between 1949 and 1957. The first to be published - and perhaps the most important of the legislative acts - was the *motu proprio Crebrae allatae*, which contained the matrimonial law of the Eastern Church. It was promulgated on February 22, 1949 and went into effect on May 2, 1949.

With respect to the subject of this study, the analysis of these two sets of binding legislation, as well as the analysis of the subsequent ecclesiastical legislative acts and authentic interpretations issued by various dicasteries of the Roman Curia, is important for two main reasons. First, they marked a significant progress in the evolution of the canonical form of marriage. They gave for the first time a universally and uniformly codified legislation of the canonical form of marriage with due respect for both Latin and Oriental traditions. The canonical form of marriage, as established in the 1917 *CIC* and *Crebrae allatae*, was the result of centuries of legislation and jurisprudence and at the same time is the backbone for the current legislation contained in the 1983 *CIC* and *CCEO*.

Second, the provisions concerning the canonical form, as instituted by the 1917 *CIC* and *Crebrae allatae* and amended by conciliar and post-conciliar legislation, were in force until the promulgation of the 1983 *CIC* and *CCEO*. Consequently, all marriages contracted up to those dates fell under the provisions of the 1917 *CIC*, *Crebrae allatae*, and conciliar and post-conciliar legislation. Therefore, a thorough knowledge of this legislation could be very helpful in finding the best solution for many marriage cases presented before diocesan

chanceries and ecclesiastical tribunals. This is particularly true for dioceses and eparchies in Eastern Europe where the political and social circumstances made the religious celebration of marriage difficult and at times impossible. Thus, the analysis of the legislation in force up to the promulgation of the 1983 *CIC* and the 1990 *CCEO* may offer clear answers to a variety of questions facing ecclesiastical tribunals and chanceries in Eastern European countries. Here are just a few of them. To what extent may marriages celebrated before a civil authority in the former Soviet Union be considered valid? Given the exceptional religious situation in Eastern Europe during the Soviet era, were the inter-ritual and mixed marriages valid when celebrated before a priest who was not properly delegated, or before a non-Catholic minister? The analysis presented in this chapter will be used in the fourth chapter of this study in order to offer a tentative answer to this type of question.

A. The Canonical Form of Marriage in 1917 *Codex Iuris Canonici* and in the Motu Proprio *Crebrae Allatae*

The first section of this chapter will present a comparative analysis of the 1917 *CIC* and *Crebrae allatae*, with references to prior legislation, to the subsequent authentic interpretations made by various Congregations and Commissions of the Roman Curia, and to various amendments made to the law. The 1917 *CIC* treated the canonical form of marriage in the third book - *On Things*, the first part – *On Sacraments*, the seventh title – *On marriage*, the sixth chapter – *On the form of the celebration of marriage*, canons 1094 to 1103. Principally, the motu proprio *Crebrae allatae* follows the 1917 *CIC* at least substantively if not always literally. However, there are some differences concerning the particular

characteristics of the Oriental tradition. Other dissimilarities emerged because of the incorporation within the Oriental law of the authentic interpretations by various dicasteries of the Roman Curia after the promulgation of the 1917 *CIC*. Finally, there were several additions meant to explain the meaning of corresponding terms in the Latin Code, clarifying in this way disputed interpretations and disagreements which sprang up among commentators. The topic of the canonical form of marriage was considered in the sixth chapter of the motu proprio *Crebrae allatae*, canons 85 to 92.

For analytic purpose, the texts of canons of the two codes are placed side-by-side on the page with the text of canons of the 1917 *CIC* on the left side and the text of canons of *Crebrae allatae* on the right. Whenever necessary, texts of canons of other motu proprios promulgated as part of the Oriental Code legislation are also placed on the right side of the page. Those canons or paragraphs which are without parallel in the other code are simply printed in the proper column. For the sake of clarity, whenever paragraphs of a certain canon are analyzed separately, the number of the respective canon will also be indicated.

I. The form of marriage

Canon 1094. Only those marriages are valid that are contracted in the presence of the pastor, or the local Ordinary, or a priest delegated by either, and two witnesses, according to the rules expressed in the canons that follow, with due regard for the exceptions mentioned in Canons 1098 and 1099.¹

Canon 85 § 1. Only those marriages are valid which are contracted with a sacred rite, either before the pastor or the local Hierarch or a priest who received from either of them the faculty to assist the marriage, and before at least two witnesses; in conformity, however, with the prescriptions of the following canons, and

¹ 1917 *CIC*, c. 1094: “Ea tantum matrimonia valida sunt quae contrahuntur coram parrocho, vel loci Ordinario, vel sacerdote ab alterutro delegato et duobus saltem testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in can. 1098,1099.”

save for the exceptions mentioned in cc. 89, 90.

§ 2: As the effect mentioned in § 1, the rite is to be considered sacred because of the intervention itself of the assisting and blessing priest.²

In these terms was enunciated the general law of both Latin and Oriental Church regarding the canonical form required for the validity of marriage. It is evident from the essence of these canons that the main components of the canonical form of marriage were taken verbatim from the decree *Ne temere*.³ It is important to point out that the nucleus of this law did not differ from the nucleus of the legislation of the Council of Trent on this matter.⁴ The canons above laid down the same conditions and terms provided in the decree *Tametsi*: in order to be valid, a marriage had to be contracted before a priest or ordinary and two witnesses. Obviously, there were several important adjustments and variations intended to unify and simplify the legislation, but the substance of the law remained unchanged. The main difference consisted in the manner of promulgation. The decree *Tametsi* was ordered by the Council of Trent to be published in each parish, and should have become mandatory

² CA, c. 85 § 1: AAS 41 (1949) 107: "Ea tantum matrimonia valida sunt quae contrahuntur rito sacro, coram parochio, vel loci Hierarcha, vel sacerdote cui ab alterutro facta sit facultas matrimonio assistendi et duobus saltem testibus, secundum tamen praescripta canonum qui sequuntur, et salvis exceptionibus de quibus in can. 89, 90. § 2: Sacer censetur ritus, ad efectum de quo in § 1, ipso interventu sacerdotis adsistentis et benedicens."

³ Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 527-528: "III. Ea tantum matrimonia valida sunt, quae contrahuntur coram parochio vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus.

⁴ Cronin, *The New Matrimonial Legislation*, 42.

thirty days after publication; this manner of promulgation deprived the decree of its effects by the omission of its publication in many parishes.⁵ In contrast, the canons governing the form of marriage for both Latin and Oriental Churches were part of the 1917 *CIC* and the motu proprio *Crebrae allatae* respectively, promulgated for the universal Church, the former by Pope Benedict XIV and the latter by Pope Pius XII. Consequently, all Catholics of the entire world were bound to the juridical form of marriage.

Both canons established as the main actors in the matrimonial form the pastor and the local Ordinary or Hierarch. It is important to examine the meaning of these terms and ascertain those who were designated under these names, since every one of them was empowered to assist at marriage or to celebrate it. The pastor and the local Ordinary or Hierarch received power to act as “qualified witnesses”⁶ or to celebrate the marriage by the law itself. Consequently, an Ordinary or a Hierarch, within the limits of their jurisdiction, did not need the pastor’s permission to assist or to celebrate a marriage. According to the same principle, an Ordinary or a Hierarch could not forbid a pastor to assist or to celebrate a marriage. The Ordinary or the Hierarch could prohibit a particular marriage,⁷ but if the pastor went against the prohibition and assisted or celebrated the marriage within the limits of his jurisdiction, the marriage would be valid though illicit.⁸

⁵ See above pp. 31-34 of chapter one.

⁶ Benedict XIV, *De synodo*, lib. 13, c. 23, n. 6. p. 651: “Testis auctorizabilis.”

⁷ 1917 *CIC*, c. 1039 § 1; *CA*, c. 29 § 1: AAS 41 (1949) 95.

⁸ Petrus Gasparri, *Tractatus Canonicus de Matrimonio*, 4th edition (Vatican City: Typis Polyglottis Vaticanis, 1932) 109-110, nn. 942-944.

1. The pastor

a. In Latin law

Generally, the title pastor included all those designated by canon 451. First, the pastor in the strict sense of the term, understood as “a priest or a moral person upon whom a parish is conferred in title along with the care of souls to be exercised under the authority of the local Ordinary.”⁹ The 1917 Code made it clear that in order to become a pastor one “must be constituted in the sacred presbyteral order.”¹⁰ Previously, a cleric could have been appointed pastor and accordingly could assist a marriage.¹¹ In the case of a moral person, the authority to assist marriages was entrusted exclusively to the concrete vicar who “actually conducts the care of the souls”¹² and “who has all the rights and obligation of pastors.”¹³

Second, under the title pastor were included quasi-pastors and parochial vicars who “enjoy the complete power over a parish.”¹⁴ In the second category the following were

⁹ 1917 *CIC*, c. 451 § 1: “Parochus est sacerdos vel persona moralis cui paroecia collata est in titulum cum cura animarum sub Ordinarii loci auctoritate exercenda.”

¹⁰ *Ibid.*, c. 453 § 1: “Debet esse in sacro presbyteratus ordine constitutus.”

¹¹ Gasparri, *De matrimonio*, 2 : 133, n. 1094.

¹² 1917 *CIC*, c. 471 § 1: “Qui actualem curam gerat animarum.”

¹³ *Ibid.*, c. 471 § 4: “Ad vicarium exclusive pertinet tota animarum cura cum omnibus parochorum iuribus et obligationibus.”

¹⁴ *Ibid.*, c. 451 § 2, 1° and 2°: “Parochis aequiparantur cum omnibus iuribus et obligationibus paroecialibus et parochorum nomine in iure veniunt: 1° Quasi-parochi, qui quasi-paroecias regunt, de quibus in can. 216, §3; 2° Vicarii paroeciales, si plena potestate paroeciali sint praediti.”

included: the administrator of a vacant parish called vicar econome (before the administrator is appointed, the senior vicar),¹⁵ the vicar assistant,¹⁶ and the vicar substitute.¹⁷

The present canon did not list the vicar cooperator among those who were authorized by law to assist marriages. The question whether the vicar cooperator had the power to assist marriages in virtue of his office was in some way disputed. There were commentators who considered that the vicar cooperator had this authority¹⁸ and supported their opinion with the provision of canon 476 § 6, which stipulated: “Unless otherwise expressly provided, he [vicar cooperator] must by reason of office supply the place of the pastor and help him in the ministry of the whole parish, except for the application of the Mass for the people.”¹⁹ The doubt was, however, eliminated by an authentic interpretation by the Pontifical Commission of the Code which ruled that the vicar cooperator does not have ordinary power to assist marriages in virtue of his office.²⁰

¹⁵ Ibid., c. 472, 1° and 2; c. 473 § 1.

¹⁶ Ibid., c. 475 §§ 1 and 2.

¹⁷ Ibid., cc. 474, 465 §§ 4 and 5, 1923 § 3. For an extensive analysis of the complex figure of the vicar substitute see Felix Cappello, *Tractatus Canonico-Moralis de Sacramentis* (Turin-Rome: Marietti, 1950) 5 : 629-632, n. 650.

¹⁸ Louis Nau, *Manual on the Marriage Laws of the Code of Canon Law* (New York – Cincinnati: Frederick Pustet Co., Inc., 1934) 144.

¹⁹ 1917 CIC, c. 476 § 6: “Nisi aliud expresse caveatur, ipse debet ratione officii parochi vicem supplere eumque adiuvere in universo paroeciali ministerio, excepta applicatione Missae pro populo.”

²⁰ The Pontifical Commission for the Authentic Interpretation of the Code, response, January 31, 1942: AAS 34 (1942) 50.

b. In Oriental law

For the Oriental Churches the provisions concerning the pastor and those equivalent to him were laid down in the motu proprio *Cleri Sanctitati*²¹ and were mostly the same as the Latin provisions, with very small differences. First, the pastor in the strict sense of the term “is a priest to whom a parish has been conferred *in titulum*, to attend to the care of souls under the authority of the bishop.”²² The difference consisted in the replacement of the Latin “local ordinary” with the Oriental “bishop” since, wherever a parish existed, there was a bishop or another local Hierarch, i.e. an exarch.²³ The sections of an exarchate were quasi-parishes and their rectors were quasi-pastors.²⁴ Since according to Oriental Law a moral person could not be pastor,²⁵ “when the parish is united with a religious house or with another legal person, a pastor must be appointed for the care of the souls.”²⁶ Thus, the one with the care of the souls was called pastor and not “actual vicar” as it was in 1917 *CIC*.

²¹ Pius XII, motu proprio *Cleri Sanctitati*, June 11, 1957: AAS 49 (1957) 433-603. English translation from Victor Pospishil, *The Law on Persons: English Translation and Differential Commentary* (Ford City, PA.: St. Mary’s Ukrainian Catholic Church, 1960). Hereafter cited as *CS*. All subsequent English translations of canons from this document will be taken from this source unless otherwise indicated.

²² *CS*, c. 489 § 1: AAS 49 (1957) 579: “Parochus est presbyter cui paroecia collata est in titulum cum cura animarum sub Episcopi auctoritate exercenda.”

²³ Pospishil, *The Law on Persons*, 211.

²⁴ *CS*, c. 160 § 3: AAS 49 (1957) 437.

²⁵ Pospishil, *The Law on Persons*, 211.

²⁶ *CS*, c. 489 § 2: AAS 49 (1957) 579: “Etiam si paroecia unita fuerit domui religiosae vel alii personae morali, parochus debet constitui ad curam animarum exercendam.”

Second, and similarly to the 1917 *CIC*, under the title pastor were designated quasi-pastors and the parochial vicars “endowed with full parochial power.”²⁷ In the second group were included: the administrator of a vacant parish,²⁸ the vicar adjutor,²⁹ and the vicar substitute.³⁰

2. The local Ordinary

The Tridentine decree *Tametsi* did not explicitly mention the Ordinary among those qualified to assist at marriages as representatives of the Church. However, the Council in no way intended to exclude the Ordinary from assisting at marriages, since in the same sentence the decree *Tametsi* empowered both the pastor and the Ordinary to delegate another priest to assist at marriages.³¹ Thus, according to the rule of Canon Law that “nobody can transfer to another more rights than he himself possesses,” the Ordinary possessed in himself the power to assist at marriages.³²

²⁷ *Ibid.*, c. 489 § 3, 1° and 2°: AAS 49 (1957) 579: “Parochis aequiparatur cum omnibus iuribus et obligationibus paroecialibus et parochorum nomine in iure veniunt: 1° Quasi-parochi 2° Vicarii paroeciales, si plena potestate paroeciali sint praediti.”

²⁸ *Ibid.*, c. 513, 1° and 2°; c. 514 § 1: AAS 49 (1957) 588.

²⁹ *Ibid.*, c. 516 §§ 1 and 2: AAS 49 (1957) 589.

³⁰ *Ibid.*, cc. 515, 506 §§ 4 and 5: AAS 49 (1957) 589.

³¹ Council of Trent, “*Canones super reformatione circa matrimonium*,” session 24, November 11, 1563: “Qui aliter, quam presente parochio vel alio sacerdote, de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt.” Tanner, 2 : 756.

³² Gasparri, *De matrimonio*, 2 : 153-154, n. 1115: “Nemo potest plus iuris transferre in alium, quam sibi competere dignoscatur.”

The present canon modified the Tridentine wording and expressly indicated the local Ordinary was empowered by the law to assist marriages in his jurisdiction. The 1917 *CIC* also clearly identified all those who came under the meaning of local Ordinary and consequently had the authority to assist marriages, namely: the Roman Pontiff, residential Bishops, Abbots, Prelates *nullius*, vicars general of the previous three, Apostolic Administrators, Vicars Apostolic, and Prefects Apostolic, as well as those who, by law or by approved constitutions, temporarily replaced the above-mentioned during a vacancy.³³

Prior to the promulgation of 1917 *CIC* there had been a debate whether Cardinals in their titular churches, and Apostolic Legates and Nuncios in the countries and provinces to which they are accredited, could act as Ordinaries and accordingly could have the right to assist marriages. The 1917 *CIC* clarified the dispute. The above mentioned figures were not classified as Ordinaries and consequently they did not have the power to assist marriages in virtue of their titles.³⁴

3. The local Hierarchy

The figure of the local Hierarchy in Oriental law was very similar to that of the local Ordinary in Latin law. The differences consisted mostly in the nomenclature of Oriental tradition. Those who were to be understood as local Hierarchs and accordingly had the right

³³ 1917 *CIC*, c. 198 § 1.

³⁴ Cappello, *De Sacramentis*, 5: 633-634, n. 652; Francisco Xavier Wernz, Petrus Vidal, *Jus Canonicum* (Rome: Gregorian University, 1925) 5 : 627, note 27; Gasparri, *De Matrimonio*, 2 : 156-158, nn. 1121-1122.

to celebrate marriages were identified in the motu proprio *Postquam Apostolicis Litteris*.³⁵ Accordingly, the following were local Hierarchs: a residential Bishop, an exarch, an apostolic administrator permanently appointed, a syncellus,³⁶ an apostolic administrator temporarily appointed, and those who, by law or by approved constitutions, temporarily replaced the above-mentioned during a vacancy.³⁷ Moreover, patriarchs enjoyed in the entire patriarchate the privilege to “assist at or bless the betrothal and the celebration of marriage.”³⁸ Since assisting was a personal privilege granted to him because of his exalted dignity, the patriarch could not delegate the power of assistance at marriage outside the patriarchal eparchy.³⁹ Major Archbishops did not enjoy the same privilege.

³⁵ Pius XII, motu proprio *Postquam Apostolicis Litteris*, February 25, 1952: AAS 44 (1952) 65-152. Hereafter cited as *PAL*.

³⁶ The office of syncellus was established by *PAL* in canon 432 and represented the Oriental counterpart of the Latin office of the vicar general. In the East, when monks were appointed bishops, they continued their monastic life by taking with them a companion who stayed in the same living quarters called a cell. This attendant and secretary was called *synkellos*, viz., one who lives in the same cell. Being the confidant of the bishop, this companion began to occupy an important position in the eparchy. When among the Oriental Catholics, under the influence of the Latin Church, was introduced the institution of the general vicar as the *alter ego* of the bishop, the syncellus was vested with this new office.

³⁷ *PAL*, c. 306 § 2, 1° and 2°: AAS 44 (1952) 145.

³⁸ *CS*, c. 284: AAS 49 (1957) 520: “Canon 284. Patriarcha in universo patriarchatu, ... potest: ... 2° Matrimonii sive promissioni sive celebrationi assistere seu benedicere.”

³⁹ Victor Pospishil, *The Law on Persons: English Translation and Differential Commentary* (Ford City, PA: St. Mary’s Ukrainian Catholic Church, 1960) 143.

4. Witnesses

Marriage had to be celebrated in the presence of two other witnesses as well as the Ordinary or the pastor. Both 1917 *CIC* and *Crebrae allatae* repeated the provisions established by the decrees *Tametsi* and *Ne temere*, without requiring any particular qualities in these witnesses, often referred to as “common witnesses” in order to differentiate them from the priest or Ordinary/Hierarch who was a qualified witness.⁴⁰ Regarding the number, they had to be at least two.⁴¹ Consequently, matrimony was invalid if celebrated in the presence of the priest or Ordinary and of only one common witness.⁴²

Neither 1917 *CIC* nor *Crebrae allatae* required special qualities or qualifications in the two common witnesses beyond natural attributes which made them capable of testifying to the fact of marriage, namely the use of reason and of the senses.⁴³ In fact, since the purpose of the common witnesses was to testify that marriage was celebrated according to the norms of the law, witnesses at marriage should have met the criteria established in the procedural law for witnesses at trial. In view of that, canon 1756 of the 1917 *CIC* determined that all persons could be witnesses, unless they were explicitly rejected by the

⁴⁰ Ludovicus Bender, *Forma Iuridica Celebrationis Matrimonii: Comentarius in Canones 1094-1099* (Rome: Desclee & Cⁱ-Editori Pontifici, 1960) 45.

⁴¹ English version of canon 1094 of the 1917 *CIC* edited by Peters omits the adverb *saltem* from the translation.

⁴² Benedictus XIV, *De Synodo Dioecessana*, lib. 12, cap. 5, n. 5, p. 455; Gasparri, *De matrimonio*, 2 : 179, n. 1155; Cappello, *De Sacramentis*, 5 : 636, n. 654.

⁴³ A person who is both blind and deaf cannot be a valid witness to marriage. See Gasparri, *De matrimonio*, 2 : 183, n. 1161.

law.⁴⁴ Further on, canon 1757 of the 1917 *CIC* listed several categories of persons rejected by the law to act as witnesses at trials because they were unsuitable, suspected, or incapable. Accordingly, the following categories of persons were considered to be unable to act as witnesses at marriage: children who did not have yet the use of reason, persons who were mentally disabled,⁴⁵ those who were excommunicated, perjurers, those who had been classified as infamous by a condemnatory or declaratory sentence, persons who were not considered trustworthy because of their degraded character, and the public and hostile enemies of the parties.⁴⁶ Likewise, by analogy with the provision of canon 1757 §3, 1°, parents and guardians of the parties, i. e., of the spouses, were considered incapable of acting as witnesses at marriage.⁴⁷ Consequently, with the exception of the categories listed above everybody else could be witnesses at marriage. Thus, men, women, children who had the use of reason, clerics, nuns, nonbelievers, heretics, etc., all could validly act as common witnesses to marriage.⁴⁸ If local legislation provided a certain selection of common

⁴⁴ 1917 *CIC*, c. 1756: “Omnes possunt esse testes, nisi expresse a iure repellantur vel in totum vel ex parte.”

⁴⁵ 1917 *CIC*, c. 1757 § 1: “Ut non idonei repelluntur a testimonio ferendo impuberes et mente debiles.”

⁴⁶ 1917 *CIC*, c. 1757 § 2: “Ut suspecti: 1° Excommunicati, periuri, infames, post sententiam declaratoriam vel condemnatoriam; 2° Qui ita abiectis sunt moribus ut fide digni non habeantur; 3° Publici gravesque partis inimici.”

⁴⁷ 1917 *CIC*, c. 1757 § 3: “Ut incapaces: 1° Qui partes sunt in causa, aut partium vice funguntur, veluti tutor in causa pupilli.”

⁴⁸ Gasparri, *De matrimonio*, 2 : 178-179, n. 1155.

witnesses, these laws would affect only the liceity of marriage.⁴⁹ A response of the Holy Office declared that heretics “are not to be assumed [as witnesses]; they might be permitted by the Ordinary for a grave reason, but without the danger of scandal.”⁵⁰ Neither Latin nor Oriental law stipulated how the common witnesses were to be chosen nor the manner in which they were to witness the marriage. Even if they were forced to witness the marriage, the witnesses acted validly.⁵¹

With respect to the method of assistance, the witnesses had to be present at marriage both physically and intellectually. In other words, they had to be present in a human manner so as to understand that there was a marriage taking place between two persons and that the contracting parties were exchanging mutual consent. This knowledge was absolutely necessary, so that later they could testify with conviction that a specific marriage took place.⁵² Therefore, insane persons, persons intoxicated to such a degree that they were not aware of what was happening, persons who were asleep, unconscious, or, for some reason, did not enjoy the use of their senses, could not act as valid common witnesses to marriage.⁵³

⁴⁹ Ibid.

⁵⁰ Sacred Congregation of the Holy Office, response, August 19, 1891, in *Collectanea*, 2 : 264, n. 1765: “Non esse adhibendos; posse tamen ab Ordinario tolerari ex gravi causa, dummodo non adsit scandalum.”

⁵¹ Ludovico Wouters, *De Forma Promissionis et Celebrationis Matrimonii*, (Bussum, Netherland: Paul Brand, Editor Pontificius, 1919) 15; Capello, *De Sacramentis*, 5 : 634-635, n. 653.

⁵² Gasparri, *De matrimonio*, 2 : 182, n. 1161.

⁵³ Cronin, *The New Matrimonial Legislation*, 82-83.

In addition, the assistance provided by all witnesses had to be simultaneous, i.e. all of them had to be present at the time of the exchange of the consent of spouses.⁵⁴

5. Sacred rite

Evidently, the most important difference between the two canons in discussion is the sacred rite. While the 1917 *CIC* determined as essential elements of the canonical form the presence of the sacred minister and two witnesses at the moment when parties exchanged their consent, *Crebrae allatae* in canon 85 § 1 included another mandatory element for Oriental Catholics, namely the blessing upon the spouses given by the celebrating priest. This stipulation constituted a confirmation of the principle that had become generally accepted by this point in time by most of the Oriental Churches, namely the principle which considered the priestly nuptial benediction to be the most important element of the sacrament of marriage. This provision also established a long-wanted canonical uniformity among Catholic Oriental churches and realized a certain consistency with the Oriental liturgical tradition in which there was no place for a marriage rite without the priestly blessing. In the second paragraph, the law became more precise and specified that in order to fulfill the requirement laid down in the first paragraph, a rite was considered to be sacred through the intervention of a priest who assisted and blessed the marriage. In other words, the priest had to be present and act as a sacred minister, carrying out a sacred action and not just acting as a simple qualified witness.⁵⁵

⁵⁴ Wouters, *De Forma*, 16; Cappello, *De Sacramentis*, 5 : 636, n. 655.

⁵⁵ Francisque Galtier, *Le mariage: discipline orientale et discipline occidentale, la réforme du 2 mai 1949* (Beyrouth: Université St. Joseph, Faculté de théologie, 1950) 236-237.

Since various liturgical rites were in use in various Oriental churches, the doubt was raised whether a particular blessing was necessary for the validity of marriage. An interpretation issued by the Pontifical Commission for the Redaction of the Code of Oriental Canon Law solved the doubt by deciding that any blessing would be sufficient to meet the requirements of canon 85 § 2 of *Crebrae allatae*.⁵⁶ As to the form of the blessing, the opinions of canonical commentators were very different. Galtier considered that the provision of canon 85 § 2 of *Crebrae allatae* did not determine a specific act on the part of the priest but referred to the general attitude the priest assumed while he celebrated the sacrament of marriage.⁵⁷ Coussa believed that the sign of the cross should fulfill the requisite of the law.⁵⁸ Pospishil did not agree with these opinions and asserted that a prayer containing a blessing suitable to marriage would fulfill the law.⁵⁹ Herman also disagreed with Galtier⁶⁰ and went further, specifying that the fact that the law did not prescribe a particular form of blessing did not mean that any kind of blessing could be used. For instance, Saint Blase's blessing or blessings prescribed for the celebration of other sacraments would be inadequate,

⁵⁶ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, May 3, 1953: AAS 45 (1953) 313: "D. - Utrum per verbum can. 85 § 2 <<benedicentis>> intelligatur simplex benedictio an requiratur certus ritus liturgicus. R. Affirmative ad primam partem, negative ad secundam."

⁵⁷ Galtier, *Le mariage*, 237.

⁵⁸ Coussa, *Epitome*, 3 : 195, n. 167.

⁵⁹ Pospishil, *The Law on Marriage*, 136-137.

⁶⁰ Aemilius Herman, *De Disciplina Sacramenti Matrimonii pro Ecclesia Orientali (Iuxta Motu Proprio "Crebrae allatae sunt")* (Rome: Pontificum Institutum Orientalium Studiorum, 1958) 173.

because they were not related to marriage. The wording of the blessing had to be appropriate to marriage.⁶¹

Another issue that the necessity of the liturgical blessing established by *Crebrae allatae* for Oriental Catholics brought forth was that of the case in which a Catholic priest was required to assist at marriages of faithful belonging to a rite other than his. Which rite was he supposed to follow, the spouses' rite or his own? The difficulty arose especially when a Catholic priest of Latin rite was to assist at a marriage of an Oriental rite Catholic with a non-Catholic party. Canon 1102 of 1917 *CIC* provided a special formulary for mixed marriages which contained only the inquiry of the consent and excluded any sacred rite.⁶² In this case, would the marriage assisted by the Catholic priest of the Latin rite be valid? The Pontifical Commission for the Redaction of the Code of Oriental Canon Law issued an interpretation which established that a Catholic priest, when he assists at a mixed marriage, follows his own rite with no concern for the parties' rites.⁶³

6. Delegation vs. faculty

Another difference, which was rather a clarification, was the use in canon 85 of *Crebrae allatae* of the term "the priest who received ... the faculty"⁶⁴ instead of "priest

⁶¹ Aemilius Herman, "Adnotationes ad Motu Proprio *Crebrae allatae sunt*," *Periodica* 38 (1949) 110-111.

⁶² See 1917 *CIC*, c. 1102 §§ 1 and 2.

⁶³ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, January 8, 1953: *AAS* 45 (1953) 104.

⁶⁴ *CA*, c. 85 § 1: *AAS* 41 (1949) 107: "Sacerdote cui ... facta sit facultas."

delegated”⁶⁵ as mentioned in canon 1094 of 1917 *CIC*. A doubt arose from the use in the 1917 *CIC* of two different phrases in order to describe the same concept. Thus, the phrase “priest delegated”⁶⁶ used in canon 1094 reappeared as “permission granted to assist ... to a priest”⁶⁷ in canon 1096. This ambiguity prompted the Pontifical Commission for the Authentic Interpretation of the Code to provide a series of responses on this issue.⁶⁸ The consistent use of the word “faculty” in *Crebrae allatae*’s counterpart-canons 85 § 1 and 87 § 1 eliminates the ambiguity of the terminology used in 1917 *CIC*.⁶⁹

II. Assistance at marriage

1. Time of assistance

Canon 1095 § 1. A pastor and local Ordinary validly assist at marriage:

1.º From the very day they have taken canonical possession of a benefice according to the norm of Canons 334, § 3, [or] 1444, § 1, or have entered into office, unless by sentence they have been excommunicated, interdicted, or suspended from office, or so declared.⁷⁰

Canon 86 § 1. The pastor and the local Hierarch assist validly at marriage:

1.º Only from the day on which they lawfully entered upon administration of their benefice, or from their entrance into office, provided they have not been excommunicated or interdicted or suspended from office, or been so declared by sentence.⁷¹

⁶⁵ 1917 *CIC*, c. 1094: “Sacerdote ... delegato.”

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, c. 1096 § 1: “Licentia assistendi concessa ... sacerdoti.”

⁶⁸ Four responses issued by Pontifical Commission for the Authentic Interpretation of the Code are translated and published in *CLD* 1 : 540-541.

⁶⁹ John Donald Conway, “A Comparative Glance at the Latin and the Oriental Marriage Discipline,” *The Jurist* 9 (1949) 321-323.

⁷⁰ 1917 *CIC*, c. 1095 §1: “Parochus et loci Ordinarius valide matrimonio assistant:

After laying down the general principles of the canonical form of marriage, the law continued by determining the requirements the pastor and the Ordinary had to fulfill in order to act validly. The first provision established time limits in which the pastor and Ordinary or Hierarch could exercise their power to assist at and/or celebrate marriages. In the Latin law, the authority of the pastor and Ordinary began on the day⁷² he took canonical possession as provided for in canon 334 § 3 for residential Bishops and in canon 1444 § 1 for pastors. While the method of taking possession for a Bishop was described in detail,⁷³ the method of taking possession for pastors was to be determined by particular law or legitimate custom.⁷⁴ For those entitled to assist at marriages but without possessing any benefice, the law established the time they began to enjoy the authority to assist validly at marriage as the

1.º A die tantummodo adeptae canonicae possessionis beneficii ad normam can. 334, §3, 1444, §1, vel initi officii, nisi per sententiam fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati.”

⁷¹ CA, c. 86 § 1: AAS 41 (1949) 107: “Parochus et loci Hierarcha valide matrimonium assistunt: 1.º a die tantummodo initae legitime administrationis beneficii, vel initi officii, nisi per sententiam fuerint excommunicati vel interdicti vel suspense ab officio aut tales declarati.”

⁷² Gasparri mentions that the competence of a pastor and Ordinary begins from the very moment they take possession of the benefice. A marriage assisted just an hour before this moment is considered to be invalid. See Gasparri, *De Matrimonio*, 4th ed., 123, n. 969. Bender, moreover, states that the expression “from the day” means in fact “from the moment” and refers to canon 461 of 1917 *CIC* which provides: “curam animarum parochus obtinet a momento captae possessionis.” Consequently, concludes Bender, a pastor who takes possession in the afternoon cannot assist at a marriage in the morning of the same day. See Bender, *Forma Iuridica*, 58.

⁷³ 1917 *CIC*, c. 334 § 3.

⁷⁴ *Ibid.*, c. 1444 § 1.

moment they entered their office, which was generally established in the document of appointment.⁷⁵

The situation is somewhat different in the Oriental law. Since the Oriental tradition did not have in its authentic structure the institute of benefice, it therefore lacked also the concept of taking possession of the benefice.⁷⁶ However, concerning pastors, *Cleri Sanctitati* introduced a similar provision: “From the moment of the canonical appointment, the pastor assumes the care of the souls, which he is not permitted to exercise before he has, according to the rules of particular law, taken possession of the government of the parish.”⁷⁷ The provision of this canon substituted for the Oriental law the concept of taking possession and left to particular law to establish rules according to which the pastor was supposed to accomplish in order to assume the administration of his office. Therefore, an Oriental rite pastor could validly celebrate the sacrament of marriage from the moment of his appointment, although not licitly.⁷⁸ In order to act both validly and licitly the pastor had to take possession of the government of the parish according to the rules provided by the particular law.

⁷⁵ Cappello, *De sacramentis*, 5 : 647, n. 661.

⁷⁶ Pospishil, *Law on Persons*, 219.

⁷⁷ CS, c. 502: AAS 49 (1957) 582-583: “Curam animarum parochus obtinet a provisione canonica, quam tamen ei exercere non licet nisi inita, ad normam iuris particularis, paroeciae administratione.”

⁷⁸ Pospishil, *Law on Persons*, 219.

Concerning the Hierarchy, it should be mentioned that according to the Oriental tradition it was episcopal consecration that made a priest a bishop and not the granting of episcopal jurisdiction.⁷⁹ *Cleri Sanctitati* provided: “Having received episcopal consecration, the bishop: 1° Obtains episcopal jurisdiction.”⁸⁰ Thus, episcopal jurisdiction could be exercised only after the priest had received episcopal consecration.⁸¹ Accordingly, Oriental rite bishops acquired the power to celebrate marriages “by canonical provision, provided they possessed the Episcopal consecration.”⁸²

Finally, both laws established the end of the time limit when the pastor and Ordinary or Hierarchy could exercise their power to assist at and/or celebrate marriages. The authority to witness or celebrate marriages was enjoyed by pastor and Ordinary or Hierarchy as long as they held the benefice or were in office. First, the authority to witness or celebrate marriage ceased when the office was lost by resignation, privation, removal, transfer, or expiration of a predetermined term according to the rules laid down in canons 183-195 of 1917 *CIC* and in canons 125-137 of *Cleri Sanctitati*. In addition, the law provided three other instances in which the authority to witness or celebrate the marriage was not extinguished, but its exercise was invalid.⁸³ Thus, the power was lost by those who had been excommunicated, interdicted,

⁷⁹ Coussa, *Epitome*, 1 : 303-304, n. 304.

⁸⁰ *CS*, c. 396 § 2, 1°: AAS 49 (1957) 550: “Recepta episcopali ordinatione, Episcopus: 1° Episcopalem iurisdictionem ... obtinet.”

⁸¹ Pospishil, *Law on Persons*, 177.

⁸² Pospishil, *Law on Marriage*, 139.

⁸³ Bender, *Forma Iuridica*, 59.

or suspended from office by a definitive sentence when the penalty was incurred *ferendae sententiae* or by a declaratory sentence when the penalty was incurred *latae sententiae*.⁸⁴ The principle according to which penal laws were subject to strict interpretation⁸⁵ and the use of the disjunctive wording of canons led to the consideration that only these penalties deprived the pastor and the Ordinary or Hierarch of the power to assist at or celebrate marriages.⁸⁶ Thus, this power was not removed by other penalties, such as suspension from jurisdiction, from orders, from divine things,⁸⁷ or from a benefice.⁸⁸

2. Place of assistance

<p>Canon 1095 § 1, 2.° Within the limits of their territory only; they validly assist at the marriages not only for their subjects but also non-subjects.⁸⁹</p>	<p>Canon 86 § 1, 2.° Only within the limits of their territory, whether the contracting parties are subjects or not, provided they belong to his rite.⁹⁰</p>
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The first condition for the valid assistance of the pastor and the local Ordinary or Hierarch was concerned with the limits of their authority. The second provision regarded the

⁸⁴ Nau, *Marriage Laws*, 147.

⁸⁵ 1917 *CIC*, c. 9.

⁸⁶ Wouters, *De Forma*, 18.

⁸⁷ 1917 *CIC*, c. 2279 §2, 1°, 2° and 3°.

⁸⁸ *Ibid.*, c. 2280 §1. Carberry, *The Juridical Form*, 67.

⁸⁹ 1917 *CIC*, c. 1095 § 1: “2° Intra fines dumtaxat sui territorii; in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide assistunt;”

⁹⁰ *CA*, c. 86 § 1: AAS 41 (1949) 107: “2° Intra fines dumtaxat sui territorii sive contrahentes sunt subditi, sive non subditi, modo sint sui ritus.”

territorial limits of their authority. The previous legislation of the Latin Church established by decree *Tametsi* and supplemented by subsequent decisions, provided that the authority to witness marriages belonged to the proper pastor who could assist at the marriage of his subjects everywhere. This fact led to major difficulties which were analyzed in the previous chapter of this study.⁹¹ The decree *Ne temere* adopted the principle of territoriality and established as fundamental for valid assistance for marriage the boundaries of the parish or diocese.⁹² The 1917 *CIC* renewed this principle and incorporated it in the provision cited above. Moreover, the pastor and the local Ordinary had the authority to assist validly at the marriages not only of their subjects but also of non-subjects as well. Consequently, within the boundaries of his parish, the pastor could validly witness all marriages whether the spouses were his parishioners or not. Similarly, the local Ordinary, within the limits of his diocese could validly assist at all marriages whether the spouses were his subjects or not. The same regulation was applicable for all those who had a general mandate according to the rules provided by in canon 1094. The principle of territoriality extended over the religious exempt community as well. In other words, the church of a religious exempt community was to be considered part of the territory of the parish or diocese where it was located and,

⁹¹ See chapter I, pages 29-31.

⁹² Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 528: “IV. Parochus et loci Ordinarius valide matrimonio adsistunt, [...] §2. intra limites dumtaxat sui territorii: in quo matrimoniae nedum suorum subditorum, sed etiam non subditorum valide adsistunt.”

consequently, the pastor in his parish and the local Ordinary in his diocese could assist validly at marriages in churches and oratories of those communities.⁹³

3. Ritual affiliation

As to the Oriental law, *Crebrae allatae* repeated almost verbatim the provision of the 1917 *CIC*, but added a very important clause, namely: “provided they belong to his rite.”⁹⁴ Accordingly, a pastor or a local Hierarch acted validly only if at least one party was of his rite.⁹⁵ This stipulation was of great importance, because it determined the interpretation of the Latin law as well. Prior to the promulgation of the decree *Crebrae allatae*, it was commonly believed that the Latin pastor could assist validly in his territory at marriages of all Catholic faithful, no matter what rite they belonged to.⁹⁶ The basis of this common opinion was given by the provision of the canon at hand which stated that a pastor could validly assist at marriages only in his territory, but in this territory he could assist at marriages of non-subjects also. Accordingly, the pastor could assist validly at a marriage of people of another rite.⁹⁷ *Crebrae allatae* brought more clarity to this issue. From the clause

⁹³ Sacred Congregation for Sacraments, *Romana et aliarum. Dubiorum circa decretum de sponsalibus et matrimonio*, March 13, 1910: AAS 2 (1910) 194-195.

⁹⁴ *CA*, c. 86 § 1, 2°: AAS 41 (1949) 107: “modo sint sui ritus.”

⁹⁵ Pospishil, *The Law on Marriage*, 140.

⁹⁶ *Ibid.*, 142.

⁹⁷ A clear expression of this common view is given by Stephanus Sipos in an article written in 1939 where he argues that an Oriental pastor can validly assist at a marriage contracted between two Latins and vice versa. See Sipos, “Positne Latini coram parochio orientali matrimonium celebrare?” *Jus Pontificium* 19 (1939) 97-99.

“provided they belong to his rite,” it followed that when an Oriental pastor assisted without a specific delegation at a marriage of two Catholics of the Latin rite, he acted invalidly. An advanced conclusion to be drawn from this stipulation is that a Latin pastor who assisted at a marriage between two Catholics of Oriental rite without specific delegation given by the proper Hierarchy of the Oriental rite spouse, also acted invalidly.⁹⁸ However, it seemed that the provision of canon 86 § 1, 2° was not enough to clarify the matter, and the Pontifical Commission for the Redaction of the Code of Oriental Canon Law issued an authentic interpretation which specifically determined that a Latin rite pastor cannot validly assist at a marriage of two Oriental rite Catholics, and an Oriental rite pastor cannot validly assist at a marriage of two Latin rite Catholics.⁹⁹

Another issue that prompted an authentic interpretation was the use of “places of exclusive jurisdiction” of another rite for the celebration of marriages. These places were considered to be “churches, the residence of the bishop, rectories, hospitals, diocesan schools in the strict sense (i.e. erected by the authority of the bishop mainly for the faithful of his rite).”¹⁰⁰ The Pontifical Commission for the Redaction of the Code of Oriental Canon Law established that the pastor or the local Hierarchy, when he assisted at marriages of faithful of his rite within the limits of his territory, but in places which were exclusively of another rite,

⁹⁸ Jan Rezac, “De nova legislatione matrimoniali,” *Orientalia Christiana Periodica* 20 (1954) 371-405.

⁹⁹ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, May 3, 1953: *AAS* 45 (1953) 313.

¹⁰⁰ Coussa, *Epitome*, 3 : 197, n. 168.

in order to act licitly and validly, he had to have the express consent either of the Ordinary, or the pastor, or the rector of the place.¹⁰¹

4. Manner of assistance

<p>Canon 1095 § 1, 3.º Provided they are not constrained by force or grave fear [when] they ask for and receive the consent of the contractants.¹⁰²</p>	<p>Canon 86 § 1, 3.º Provided they are not coerced by force or grave fear to ask for and receive the consent of the contracting parties.¹⁰³</p>
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Concerning the manner of assistance of marriage, the provisions of both laws were identical. Thus, the law's requirement was twofold. First, the official witness had to assist or celebrate unconstrained by force or grave fear, and second, he had to ask for and receive the consent from the parties. It should be noted that, previously, the decree *Ne temere* had required also that the priest be "invited and requested."¹⁰⁴ The 1917 *CIC* removed this clause which was considered useless.¹⁰⁵ The assistance of the pastor and the local Ordinary or Hierarch was not valid if he was constrained by force or grave fear. In order to prevent the validity of the marriage, the fear had to be inflicted with the purpose of extorting assistance

¹⁰¹ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, July 8, 1952: AAS 44 (1952) 552.

¹⁰² 1917 *CIC*, c. 1095 § 1, 3º: "Dummodo neque vi neque metu gravi constricti requirant excipientque contrahentium consensum."

¹⁰³ *CA*, c. 86 § 1, 3º: AAS 41 (1949) 107: "Dummodo neque vi neque metu gravi constricti requirant excipientque contrahentium consensum."

¹⁰⁴ Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 528: "IV. Parochus et loci Ordinarius valide matrimonio adsistent, [...] §3. dummodo invitati ac rogati"

¹⁰⁵ Cappello, *De Sacramentis*, 5 : 652, n. 668.

at marriage.¹⁰⁶ Neither law specified, as it did in the case of the marital impediment of force and fear,¹⁰⁷ whether the fear was inflicted by a just or unjust cause.¹⁰⁸ The law simply said that the qualified assistant had to be free of force or grave fear. Thus, the authorized witness had to assist unconstrained by a force or a fear which was so severe to the extent that it influenced the priest until the marriage was celebrated and cause him to assist at that marriage.

Moreover, the authorized witness had to interrogate the contracting parties and receive their mutual consent. This provision was an obvious improvement on the Tridentine law, which required, for the validity of marriage, only the passive presence of the priest. The new law demanded from the pastor an active assistance at marriage and invalidated any surprise marriages which were possible under the provision of decree *Tametsi*.¹⁰⁹ The priest could ask the question not only by words but also by signs or in writing, when special circumstances were present. Likewise, the contracting parties could answer by means of signs or in writing when there was a case of necessity.¹¹⁰

5. Assistance at marriages of Catholic faithful of different rites

Canon 86 § 2. At a marriage of faithful who belong to different rites that local

¹⁰⁶ Wouters, *De Forma*, 19.

¹⁰⁷ 1917 *CIC*, c. 1087 § 1; *CA*, c. 78§ 1.

¹⁰⁸ Bender, *Forma Iuridica*, 71-72.

¹⁰⁹ *Ibid.*, 65-70.

¹¹⁰ Wouters, *De Forma*, 20; Cappello, *De Sacramentis*, 5 : 5653-654, n. 669.

Hierarch and that pastor can validly assist who according to § 3, 2^o-4,^o is their own Hierarch or pastor.¹¹¹

The general norm already established that the pastor and the local Hierarch could validly assist only at marriages of faithful who belonged to his own rite.¹¹² *Crebrae allatae* provided exceptions to this rule in canon 86 §§ 2 and 3. When the small number of faithful of a certain rite in a territory did not justify the erection of an eparchy, exarchy, or even a parish, or when a certain political situation obstructed the establishment of such structures, it became indispensable to subject the faithful of one rite to pastors or Hierarchs of a different rite which already existed in that place. Thus, these two paragraphs established the norms to be followed in order to determine the pastor and the Hierarch who could validly assist at a marriage of these faithful and were to be applied whenever both parties belonged to a rite different from that of their proper pastor or Hierarch, even if the rite of one party was different from the rite of the other party.¹¹³

Before considering these rules, it should be mentioned that they should normally have been part of the section of general norms, because they established principles valid not only for the celebration of marriage but for other sacraments as well. They were placed in this section because the difficult task of assembling the whole Oriental code could not be

¹¹¹ CA, c. 86 § 2: AAS 41 (1949) 107: “Matrimonio fidelium diversi ritus valide assistit Hierarcha loci et parochus qui ad normam § 3, nn. 2-4 est eorum proprius Hierarcha vel parochus.”

¹¹² Ibid., c. 86 § 1, 2^o: AAS 41 (1949) 107.

¹¹³ Herman, “Adnotationes ad Motu Proprio *Crebrae allatae sunt*,” 113.

accomplished at one time and parts of it were promulgated at different times in the form of *motu proprios*. The first of these *motu proprios*, and perhaps the most important, was *Crebrae allatae*, which contained the matrimonial law of the Oriental Church, promulgated on February 22, 1949. Only eight years later the *motu proprio Cleri Sanctitati* was promulgated, which contained general norms in canons 16-37. In fact, all norms included in canon 86 § 3 of *Crebrae allatae* were also contained in canon 22 of *Cleri Sanctitati*. It is also important to note that some of these norms were similar or even identical to the norms provided by 1917 *CIC*, while others did not have a counterpart in the Latin law because of the peculiar circumstances proper to the Oriental churches.

<p>Canon 94 § 1. Through one's domicile or quasi-domicile, one's pastor and Ordinary are determined.¹¹⁴</p>	<p>Canon 86 § 3, 1.º Unless decreed otherwise, everyone acquires by domicile as well as by quasi-domicile the pastor and Hierarch of his own rite.¹¹⁵</p>
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Both laws provided that the proper pastor and Ordinary or Hierarch was determined by the place where one had the domicile or quasi-domicile. Additionally, the Oriental law established that the proper pastor and Hierarch be the same rite as their subject. The same norm would be later confirmed by *Cleri Sanctitati*.¹¹⁶

¹¹⁴ 1917 *CIC*, c. 94 § 1: "Sive per domicilium sive per quasidomicilium suum quisque parochum et Ordinarium sortitur."

¹¹⁵ *CA*, c. 86 § 3, 1.º: AAS 41 (1949) 107: "Nisi aliud statuatur, sive per domicilium sive per quasi-domicilium suum quisquis parochum et Hierarcham proprii ritus sortitur."

¹¹⁶ *CS*, c. 22 § 1: AAS 49 (1957) 441.

Canon 86 § 3, 2.º When the faithful of a certain rite do not have a pastor, their Hierarch shall assign the pastor of another rite, who is to assume their care after the same Hierarch has obtained the consent of the Hierarch of the pastor so assigned.¹¹⁷

This norm did not have an equivalent in Latin law and envisioned the situation in which a group of Oriental faithful had a Hierarch of their rite but not a pastor of the same rite.¹¹⁸ In this situation the norm stipulated that the Hierarch should designate a pastor of another rite, who would take care of their pastoral needs as their proper pastor. In order to designate a pastor of another rite for faithful who belonged to his own rite, the Hierarch should have obtained the consent of the Ordinary or the Hierarch of the designated pastor. However, Coussa considered that the consent was required only for the liceity of such an appointment.¹¹⁹ Moreover, Herman held that a specific pastor need not even be designated. In other words, in a territory where the vast majority of the faithful were Latin rite, the Hierarch did not have to write to all the pastors requesting them to commit themselves to the pastoral care of the faithful of his own rite. It would have been enough if a convention were made with the Latin Ordinary in which it would be stipulated that the Latin pastors, within

¹¹⁷ CA, c. 86 § 3, 2º: AAS 41 (1949) 107: “Deficiente parrocho pro fidelibus alicuius ritus, horum Hierarcha designet alius ritus parrochum, qui eorundem curam suscipiat, postquam idem Hierarcha habuerit consensum Hierarchae parrochi designandi.”

¹¹⁸ This norm is reiterated as such in *Cleri Sanctitati*, canon 22 § 2: AAS 49 (1957) 442.

¹¹⁹ Coussa, *Epitome*, 5 : 198, n. 168.

their territory, would have the pastoral care of the faithful who belong to that specific Oriental rite.¹²⁰ Thus, a pastor assigned in the manner provided by the above norm could validly assist at marriages of faithful who belonged to the rite of the Hierarch that designated him.

Canon 86 § 3, 3° Outside of the territory of one's rite, in case there is no Hierarch of that rite, the local Hierarch is to be considered as the proper one. If there are several, he shall be considered the proper Hierarch who has been assigned by the Apostolic See, or after having its consent, by the patriarch, if according to particular law the care of faithful of his rite outside the patriarchate has been entrusted to him.¹²¹

This norm, which had no counterpart in Latin law, foresaw the situation in which the faithful lived outside of the territory of their own rite and did not have a local Hierarch of the same rite.¹²² This provision stipulated that the Hierarch or the Ordinary of the place where those faithful resided was to be their own proper Hierarch. In case there were more Hierarchs in a certain territory, the Holy See would decide which one was the proper Hierarch of these persons. The patriarch might assign a Hierarch of another rite to be the

¹²⁰ Herman, "Adnotationes ad Motu Proprio *Crebrae allatae sunt*," 113.

¹²¹ CA, c. 86 § 3, 3°: AAS 41 (1949) 107-108: "Extra territorium proprii ritus, deficiente huius ritus Hierarcha, habendus est tamquam proprius, Hierarcha loci. Quodsi plures sint, ille habendus est tamquam proprius, quem designaverit Sedes Apostolica vel, obtento eiusdem consensus, Patriarcha, si iure particulari cura fidelium sui ritus extra patriarchatus commorantium ei commissa est."

¹²² CS, c. 22 § 3: AAS 49 (1957) 442.

proper Hierarch of the faithful of his rite only if the particular law had entrusted to him the care of the faithful outside the boundaries of his patriarchate, and only after he had obtained the consent of the Holy See. Concerning the situation in Eastern Europe, this norm meant that in most instances Oriental rite Catholics were subjected to the Latin rite Ordinaries. This norm was not an assertion of the preeminence of the Latin rite over Oriental rites. On the contrary, it expressed the concern of the Church, which wanted to assure that even a small number of faithful were entrusted to a bishop who would make certain they were not deprived of the proper pastoral care. However, the subjection of the faithful of the Oriental rite to the local Latin rite Ordinaries was limited, since they had to respect and preserve the distinctiveness of the Oriental rite particularities, with any interference being excluded. Since Catholics were bound by the laws of their rite everywhere, Oriental Catholics who were under the care of a Latin Ordinary were held by the disciplinary laws of the Latin rite only inasmuch as these laws did not cause any detriment to their respective rite.¹²³

More to the point, this norm made clear that Oriental rite Catholics living outside their territory and without a Hierarch of their own were to consider as the proper Hierarch the Hierarch or the Ordinary of the place where they lived, but not the pastor of that place. Concerning marriage, this norm sustained the provision of canon 86 § 1, 2° of *Crebrae allatae* and the subsequent authentic interpretation according to which a pastor could validly assist at marriages of his subjects only when they belonged to his rite. Accordingly, without

¹²³ Pospishil, *Law on Marriage*, 154.

proper delegation, a Latin rite pastor could not validly assist at a marriage of two Oriental rite Catholics who lived in the limits of his parish and who did not have a pastor of their own rite.

Canon 94 § 2. The proper pastor or Ordinary of a transient is the pastor or Ordinary of the place in which the transient is actually present.¹²⁴

Canon 86 § 3, 4.º The proper pastor or Hierarch of a vagus is the pastor or Hierarch of his own rite having jurisdiction in the place where the vagus is actually staying; in case there is no pastor or Hierarch of his own rite, the rules contained in 2º and 3º, shall be observed.¹²⁵

Both norms stipulated that transients became subjects to the pastor and Ordinary or Hierarch of the place where they were actually residing. The Oriental norm also required that the proper pastor and Hierarch be of the same rite as the transient. When such a pastor or Hierarch was not available, the rules set down in 2º and 3º of the same paragraph were to be followed. Canon 1032 of the 1917 *CIC*, and canon 22 of *Crebrae allatae* provided that, except for the case of necessity, the pastor should not assist at the marriage of transients without first submitting the matter to the local Ordinary or Hierarch, or the priest delegated by him, and obtaining his permission.¹²⁶

Canon 94 § 3. As for those who have nothing more than a diocesan domicile or quasi-domicile, the proper pastor is the Canon 86 § 3, 5º: The proper pastor also of those who have only eparchial domicile or quasi-domicile is the pastor of the place

¹²⁴ 1917 *CIC*, c. 94 § 2: “Proprius vagi parochus vel Ordinarius est parochus vel Ordinarius loci in quo vagus actu commoratur.”

¹²⁵ *CA*, c. 86 § 3, 4º: *AAS* 41 (1949) 108: “Proprius vagi parochus vel Hierarcha est sui ritus parochus vel Hierarcha loci ubi vagus actu commoratur; deficiente parochus vel Hierarcha sui ritus, servantur normae in nn. 2, 3 statutae.”

¹²⁶ See 1917 *CIC*, c. 1032 and *CA*, c. 22: *ASS* 41 (1949) 94.

pastor of the place in which they are where they are actually staying.¹²⁸
actually present.¹²⁷

This norm envisioned the case in which a person or a group might have a domicile or quasi-domicile within the limits of a diocese or eparchy but they did not acquire a parochial domicile or quasi-domicile there.¹²⁹ In this case, as in the previous norm concerning transients, the proper pastor was the one of the place where they actually resided. The notion of eparchial domicile or quasi-domicile was not known to the Oriental law, but because it proved to be useful it has been included in the motu proprio *Crebrae allatae* as well as in *Cleri Sanctitati*.¹³⁰

6. Delegation to assist at a marriage

<p>Canon 1095 § 2. A pastor and a local Ordinary who can validly assist at marriage can grant permission to other priests so that within the limits of their territory they validly assist at marriage.¹³¹</p> <p>Canon 1096 § 1. Permission granted to assist at a marriage according to the norm</p>	<p>Canon 87 § 1, 1°. The pastor and the local Hierarch who can validly assist at marriage can also grant the faculty to another priest to assist within the limits of their territory at a determined marriage, provided they do it expressly and the priest has been determined. They can also grant to the</p>
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¹²⁷ 1917 *CIC*, c. 94 § 3: “Illorum quoque qui non habent nisi dioecesanum domicilium vel quasi-domicilium parochus proprius est parochus loci in quo actu commorantur.”

¹²⁸ *CA*, c. 86 § 3, 5°:AAS 41 (1949) 108: “Illorum quoque qui non habent nisi eparchiale domicilium vel quasi-domicilium, parochus proprius est parochus loci in quo actu commorantur.”

¹²⁹ *CS*, c. 22 § 5: AAS 49 (1957) 442.

¹³⁰ Coussa, *Epitome*, 3 : 199, n. 168.

¹³¹ 1917 *CIC*, c. 1095 § 2: “Parochus et loci Ordinarius qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti licentiam dare ut intra fines sui territorii matrimonio valide assistat.”

of Canon 1095, § 2, must be given expressly to a specific priest for a specific marriage, to the exclusion of any sort of general delegation, unless it concerns a vicar cooperator for the parish to which he is attached; otherwise is invalid.¹³²

same priest the power to subdelegate another specified priest to assist at that marriage.

2°. The vicar cooperator can also obtain the general faculty to assist at marriages from the pastor or from the local Hierarchy; once it had been obtained, he enjoys the faculty to subdelegate as in 1°.

3°. A faculty granted against the prescription of 1° and 2°, is void.¹³³

Up until this point the canons established the persons who had the power to assist at marriages in virtue of their offices and the time, territory, and manner in which they could exercise this power. Now the law laid down the rules which were to be observed in the process of transmitting this power to another person. At first reading, there seemed to be a difference or even a divergence between the Latin and Oriental norms for valid assistance at marriages by a delegated individual. However, the difference was only apparent, because in essence the norms were the same. There were three reasons for the apparent dissimilarity. First, the norms were organized differently. The Latin law set down the general rule of delegation for marriage in canon 1095 § 2 and then established the conditions in canon 1096

¹³² Ibid., c. 1096 § 1: “Licentia assistendi matrimonio concessa ad normam can. 1095, §2, dari expresse debet sacerdoti determinato ad matrimonium determinatum, exclusis quibuslibet delegationibus generalibus, nisi agatur de vicariis cooperantibus pro paroecia cui addicti sunt; secus irrita est.”

¹³³ CA, c. 87 § 1: AAS 41 (1949) 108: “1° Parochus et loci Hierarcha, qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti facultatem dare ut intra fines sui territorii determinato matrimonio assistat, dummodo id expresse faciant, et sacerdos sit determinatus; possunt quoque eidem sacerdoti concedere facultatem subdelegandi alium determinatum sacerdotem, qui illi matrimonio assistat; 2° Vicario cooperatori concedi potest a parochi vel a loci Hierarcha etiam facultas generalis assistendi matrimoniis; qua obtenta, ipse facultate subdelegandi gaudet, ut in n.1; 3° Facultas concessa contra prescriptum nn. 1, 2 irrita est.”

§§ 1 and 2. The Oriental law on the other hand, included all the provisions concerning delegation at marriages in only one canon, namely canon 87. Secondly, *Crebrae allatae* included in its provisions several authentic interpretations issued by the Code Commission prior to its promulgation. Third, *Crebrae allatae* consistently used the word “faculty” to describe the power which the pastor and the local Ordinary or Hierarch had to assist at marriages. In this manner, the equivocal use of the term “permission” used by the Latin law was avoided, and the norm was much clearer.¹³⁴

Therefore, in order to delegate validly the faculty of assistance at marriages, the pastor and the local Ordinary or Hierarch had to meet two conditions. First, they had to be entitled to assist at a marriage themselves. In other words, they must already had taken possession of benefice or had entered into office, provided they had not been excommunicated, interdicted, or suspended by a sentence or declared as such.¹³⁵ Secondly, the marriage or marriages for which the faculty was delegated had to take place within the limits of their jurisdiction.¹³⁶

Both laws set down strict rules to be observed in the process of delegating the faculty to assist at a marriage, rules which affected the validity of the delegation, and consequently the validity of the marriage: “otherwise it is invalid.”¹³⁷ First of all, both laws provided that

¹³⁴ The better use of Latin terms in this matter has been considered in the present chapter at pages 105-106.

¹³⁵ Cappello, *De sacramentis*, 5 : 657-658, n. 673. Wouters, *De Forma*, 21.

¹³⁶ *Ibid.*

¹³⁷ 1917 *CIC*, c. 1096 § 1: “secus irrita est.”

the delegation had to be expressly granted. In this manner, all tacit¹³⁸ and presumed permissions were excluded. The delegation could have been given expressly in writing, orally, or by action.¹³⁹

The next requirement in granting the faculty to assist at marriage was that it had to be given to a specific priest. The priest might have been designated by name or by office, or in a way which assured the identity of the priest who received the delegation.¹⁴⁰ The Pontifical Commission for the Authentic Interpretation of the Code made it clear in a declaration that an indirect designation of a priest was not sufficient for the validity of a delegation.¹⁴¹ Another decision of the same Commission declared that the pastor or the local Ordinary who delegated a determined priest to witness a specified marriage might also give him permission to subdelegate another specified priest to assist at the same marriage.¹⁴² In fact, this provision was incorporated in canon 87 § 1 of *Crebrae allatae*. Neither Latin nor Oriental

¹³⁸ Under the provisions of decree *Ne temere* the delegation granted in a tacit manner was considered valid. See Bender, *Forma iuridica*, 81.

¹³⁹ Cappello, *De sacramentis*, 5 : 659, n. 674. Wouters, *De Forma*, 24.

¹⁴⁰ *Ibid.*

¹⁴¹ The Pontifical Commission for the Authentic Interpretation of the Code, declaration, May 20, 1923: AAS 16 (1924) 115.

¹⁴² *Ibid.*, response, December 28, 1927: AAS 20 (1928) 61-62.

law prohibited delegation of several specified priests for the same marriage.¹⁴³ In this case, the first who acted, excluded the others.¹⁴⁴

A further condition in giving permission to assist at marriage was that the permission had to be given for a specific marriage. The law did not specify exactly how the marriage was to be determined, but commentators considered a marriage as specific when it was indicated by the name of the parties, by reference to the time and place of celebration, or by reference to qualities or positions of the parties which distinguish them from others.¹⁴⁵ Nonetheless, the law did not exclude that the permission be given to a priest for several specified matrimonyes. The intention of the legislators was to exclude the delegation to assist at undetermined marriages.¹⁴⁶

The only general delegation allowed was the one given by the pastor and local Ordinary or Hierarch to vicar cooperators for the parish to which they were assigned. It should be noted that, in expressing this norm, the Oriental law used a clearer wording. First, it removed the clause “to the exclusion of any sort of general delegation”¹⁴⁷ and expressed this stipulation in other words. Second, it also eliminated the ambiguity present in the

¹⁴³ Cappello, *De Sacramentis*, 5 : 660, n. 674.

¹⁴⁴ 1917 *CIC*, c. 205 § 2.

¹⁴⁵ Cappello, *De Sacramentis*, 5 : 660, n. 673.

¹⁴⁶ *Ibid.*; Bender, *Forma Iuridica*, 109-110.

¹⁴⁷ 1917 *CIC*, c. 1096 § 1: “exclusis quibuslibet delegationibus generalibus.”

expression “unless it concerns vicars cooperators.”¹⁴⁸ The doubt was whether general delegation was intended only for marriages or for priests as well. In other words, was the general delegation to be given to a vicar cooperator for all marriages or to all vicars cooperators of a parish for all marriages?¹⁴⁹ *Crebrae allatae*, in canon 87 § 1, 2°, removed this doubt and makes it clear that the general delegation was to be granted by the pastor or the local Hierarch to a determined vicar cooperator for all marriages: “The vicar cooperator can also obtain the general faculty to assist at marriages from the pastor or the local Hierarch.”¹⁵⁰

Crebrae allatae cleared up yet another doubt. It was mentioned above that a reply of the Pontifical Commission for the Authentic Interpretation of the Code stated that the pastor or the local Ordinary who delegated a determined priest to witness a specified marriage could also give him permission to subdelegate another specified priest to assist at the same marriage.¹⁵¹ Could the vicar cooperator to whom the general delegation was granted, in subdelegating a specified priest for a determined marriage, grant to him the faculty to subdelegate another priest to assist at the same marriage? Some commentators argued that,

¹⁴⁸ Ibid.: “nisi agatur de vicariis cooperatoribus.” English version of canon 1096 § 1 of the 1917 *CIC* edited by Peters erroneously translated “vicariis cooperatoribus” by the singular number, viz. “a vicar cooperator” while it should be translated by plural, namely “vicars cooperators.”

¹⁴⁹ Bender, *Forma Iuridica*, 76-77.

¹⁵⁰ *CA*, c. 87 § 1, 2°: *AAS* 41 (1949) 108: “Vicario cooperatori concedi potest a parrocho vel a loci Hierarcha etiam facultas generalis assistendi matrimoniis.”

¹⁵¹ See *supra* at note 140.

according to canon 199 § 5 of the 1917 *CIC*, the right to grant the permission belonged only to those who possess the power of assisting at marriage in virtue of their office. This apparently excluded vicars cooperator who had to receive this power from a higher authority. Some other commentators disagreed with this argument.¹⁵² *Crebrae allatae*, in canon 87 § 1, 2°, removed this doubt by giving the vicar cooperator the right to grant the subdelegated priest the faculty to chose another priest to substitute for him at the same determined marriage: “once it had been obtained, he enjoys the faculty to subdelegate as in 1°.”¹⁵³

Finally, both the 1917 *CIC*, in canon 1096 § 1, and *Crebrae allatae*, in canon 87 § 1, 3°, stipulated that in granting the faculty to assist at marriage, the above-established rules were to be observed, otherwise the faculty was invalid, and consequently the marriage assisted without the observance of these rules was null.

Canon 1096 § 2. The pastor or local Ordinary shall not grant this permission unless all of the things that prove the free status in law [of the parties] are completed.¹⁵⁴

Canon 87 § 2. The faculty mentioned in § 1, 1°, shall not be granted until all the requirements established by law in regard to the proving of the free status have been satisfied.¹⁵⁵

¹⁵² Pospishil, *The Law on Marriage*, 161-162.

¹⁵³ *CA*, c. 87 § 1, 2°: *AAS* 41 (1949) 108: “Qua obtenta, ipse facultate subdelegandi gaudet, ut in 1°.”

¹⁵⁴ 1917 *CIC*, c. 1096 § 2: “Parochus vel loci Ordinarius licentiam ne concedat, nisi expletis omnibus quae ius constituit pro libertate status comprobanda.”

¹⁵⁵ *CA*, c. 87 § 2: *AAS* 41 (1949) 108: “Facultas de qua in § 1, n. 1, ne concedatur, nisi expletis omnibus quae ius constituit pro libertate status comprobanda.”

The pastor and local Ordinary or Hierarch were instructed by the law to complete the prenuptial investigation regarding the freedom of the parties. This investigation was required for the licit concession of the faculty, and the obligation to complete it was placed on the one who granted the faculty. The reason for this rule was that the pastor and the local Ordinary or Hierarch were presumed to be in a better position to know the contracting parties and to carry out the investigation than a delegated priest. Under the decree *Ne temere*, it was the duty of the delegated priest to perform the prenuptial investigation and assure the freedom of the parties to marry.¹⁵⁶ In performing this investigation, the pastor and the local Ordinary or Hierarch should have followed the norms set down in canons 1019 and 1020 of 1917 *CIC* and canons 9 and 10 of *Crebrae allatae*. This investigation was to be done prior to the concession of the faculty to assist at marriage.

Canon 87 § 3. Local Hierarchs who according to the law have the administration of faithful of a different rite can grant the rectors of churches of any Oriental rite, or to other priests who have the care of faithful deprived of a pastor of their own rite, the general faculty to assist at marriages of the faithful of an Oriental rite, though it is a rite different from that of the rector or priest.¹⁵⁷

¹⁵⁶ Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 528-529: “VI. Delegatus autem, ut valide et licite adsistat, servare tenetur limites mandati, et regulas pro parrocho et loci Ordinario n. IV et V superius statutas. V. Licite autem adsistunt, ° 1. Constito sibi legitime de libero statu contrahentium, servatis de iure servandis.”

¹⁵⁷ CA, c. 87 § 3: AAS 41 (1949) 108: “Locorum Hierarchae administrationem fidelium diversi ritus ad normam iuris gerentes dare possunt cuiusvis orientalis ritus rectoribus ecclesiarum vel aliis sacerdotibus, curam fidelium, parrocho proprii ritus orborum, habentibus, generalem facultatem assistendi matrimoniis fidelium ritus orientalis, etsi a ritu rectoris vel presbyteri diversi.”

The 1917 *CIC* envisioned only one instance in which a general delegation to assist at marriage could be granted: to a vicar cooperator for the parish to which he was attached.¹⁵⁸ The Oriental law introduced in canon 87 § 3 a new provision which allowed the general delegation for the benefit of the faithful of Oriental rites of the priests entrusted with the pastoral care of faithful who were deprived of a pastor of their own rite.¹⁵⁹ The right to grant general delegations for the assistance at marriages was conceded only to local Hierarchs or Ordinaries to whom has been committed the pastoral care of the faithful of another rite. Hence, these local Ordinaries or Hierarchs could not grant general delegation for the faithful of their own rite, except to vicar cooperators.¹⁶⁰

Canon 86 § 3, 3° of *Crebrae allatae* had already stipulated that “outside of the territory of one’s rite, in case there is no Hierarch of that rite, the local Hierarch is to be considered as the proper one.”¹⁶¹ Canon 87 § 3 of the same motu proprio provided these Hierarchs or Ordinaries entrusted with the care of faithful belonging to a different rite than their own, with a new canonical institution, which Pospishil calls “episcopal delegate.”¹⁶² In

¹⁵⁸ 1917 *CIC*, c. 1096 § 1.

¹⁵⁹ Rufus Putnam Roberts, *Matrimonial Legislation in Latin and Oriental Canon Law* (Westminster, Maryland: The Newman Press, 1961) 56; Coussa, *Epitome*, 3 : 200, n. 169.

¹⁶⁰ Pospishil, *The Law on Marriage*, 162.

¹⁶¹ *CA*, c. 86 § 3, 3°: AAS 41 (1949) 107: “Extra territorium proprii ritus, deficiente huius ritus Hierarcha, habendus est tamquam proprius, Hierarcha loci.”

¹⁶² Pospishil, *The Law on Marriage*, 158.

light of the particular conditions in which many Oriental rite Catholics lived in various places of the world, the Oriental law allowed Ordinaries and Hierarchs (who had under their custody Oriental Catholics of a rite different from their own) to appoint special delegates, who would possess the general faculty to assist at marriages of the faithful of Oriental rite. The law did not require that the priest so delegated belonged to an Oriental rite nor did it limit the number of these delegated priests.¹⁶³ Moreover, the appointment of these special delegates did not exclude the faculty of assistance possessed by the local territorial pastors because the power of these delegates and the power of pastors were cumulative with those of pastors.¹⁶⁴

7. Requirements for licit assistance at marriage

Canon 1097 § 1. The pastor or local Ordinary licitly assists at marriage:

1°. When the free state of those contracting is legitimately shown to them in accord with the norm of law;

2°. When there is also demonstrated the domicile or quasi-domicile or month's sojourn [in the territory] or, if it concerns wanderers, the actual presence of at least one of the contractants in the place of the marriage;

3°. When the conditions mentioned 2° being lacking, he has the permission of the pastor or Ordinary of the domicile or quasi-domicile, or month's sojourn of at least one of the contractants, unless it concerns wanderers in the act of traveling, who do not have any see of dwelling, or unless

Canon 88 § 1. The pastor, however, and the local Hierarch assist lawfully at a marriage:

1°. After the free status of the contracting parties has been legally ascertained according to the law;

2°. After moreover the domicile or quasi-domicile or a stay of one month or, in the case of a vagus, the actual sojourn of either party in the place of the marriage has been ascertained;

3°. In the case of deficiency of the conditions defined in 2°, after having obtained the permission of the pastor or the Hierarch of the domicile or quasi-domicile or of the place of the monthly sojourn of one of the spouses, unless it is the case of vagi who are actually traveling and have nowhere a place of sojourn, or there is

¹⁶³ Ibid., 158-159.

¹⁶⁴ Galtier, *Le Mariage*, 257.

grave cause intervenes that excuses from seeking permission.¹⁶⁵ grave necessity which excuses from asking the permission.¹⁶⁶

These canons were almost identical in both codes and established norms concerning the liceity of marriage. The first rule was that the pastor and the local Ordinary or Hierarch had to make certain the freedom of the parties to marry. This investigation had to be conducted according to the provisions of canons 1019 and 1020 of the 1917 *CIC* or canons 9 and 10 of the motu proprio *Crebrae allatae*.

Then the law established that in order to assist licitly at a marriage, at least one of the spouses had to be the subject of the pastor, Ordinary, or Hierarch. The canon determined how a person became a subject with reference to marriage, namely by acquiring domicile, or quasi-domicile, or by staying for one month in a parish, diocese, or eparchy. The rules according to which one acquired domicile or quasi-domicile were set down in canons 92-95

¹⁶⁵ 1917 *CIC*, c. 1097 § 1: “Parochus autem vel loci Ordinarius matrimonio licite assistunt: 1° Constito sibi legitime de libero statu contrahentium ad normam iuris; 2° Constito insuper de domicilio vel quasi-domicilio vel menstrua commoratione aut, si de vago agatur, actuali commoratione alterutrius contrahentis in loco matrimonii; 3° Habita, si conditiones deficient de quibus n. 2, licentia parochi vel Ordinarii domicilii vel quasidomicilii aut menstruae commorationis alterutrius contrahentis, nisi vel de vagis actu itinerantibus res sit, qui nullibi commorationis sedem habent, vel gravis necessitas intercedat quae a licentia petenda excuset.”

¹⁶⁶ *CA*, c. 88 § 1: *AAS* 41 (1949) 108: “Parochus autem vel loci Hierarcha matrimonio licite assistunt: 1° Postquam sibi legitime constiterit de libero statu contrahentium ad normam iuris; 2° Postquam, insuper, sibi constiterit de domicilio vel quasi-domicilio vel menstrua commoratione aut, si de vago agatur, actuali commoratione alterutrius contrahentis in loco matrimonii; 3° Habita, si condiciones deficient de quibus in n. 2, licentia parochi vel Hierarchae domicilii vel quasi-domicilii aut menstruae commorationis alterutrius contrahentis, nisi vel de vagis actu itinerantibus res sit, qui nullibi commorationis sedem habent, vel gravis necessitas intercedat quae a licentia petenda excuset.”

of the 1917 *CIC* and canons 21-23 of the motu proprio *Cleri Sanctitati*. In other words, when a person, immediately before marriage, resided for an uninterrupted month in a place, he or she became the subject of the pastor and Ordinary or Hierarch of that place.¹⁶⁷ In addition, wanderers were the subjects of the pastor of the place where they actually stayed. However, in the case of wanderers, the pastor, except in case of necessity, had to seek the permission of the local Ordinary or Hierarch before assisting at their marriage.¹⁶⁸

As a general rule it was established that the pastor and the local Ordinary or Hierarch, within the boundaries of their parish and diocese/eparchy, validly assisted at marriages of their subjects as well as non-subjects.¹⁶⁹ However, they licitly assisted at the marriages of non-subjects only after they have obtained the permission of the pastor, the Ordinary, or the Hierarch of the place where at least one of the contracting parties had a domicile or quasi-domicile or had resided continuously for a month. Unlike the delegation, which had to be granted expressly to a specified priest and for a determined marriage, the permission required by the present canon could be given in general for all marriages.¹⁷⁰ In fact, this permission was not even required in two instances. First, in the case of wanderers, because they never

¹⁶⁷ Cappello, *De Sacramentis*, 5 : 669-670, n. 685; Wouters, *De Forma*, 33-34.

¹⁶⁸ 1917 *CIC*, c. 1032; *CA*, c. 22: AAS 41 (1949) 94.

¹⁶⁹ 1917 *CIC*, c. 1095 §1, 2°; *CA*, c. 86 § 1, 2°: AAS 41 (1949) 107.

¹⁷⁰ Cappello, *De Sacramentis*, 5 : 671, n. 687.

resided long enough in a place in order to acquire a proper pastor, Ordinary, or Hierarch.¹⁷¹

Second, the permission also was not required in case of grave necessity.

Canon 88 § 2. The pastor has to have moreover, if particular law demands it, the permission of the local Hierarch to assist lawfully at a marriage.¹⁷²

This norm, without counterpart in Latin law, left intact the particular laws of some Oriental churches that might have demanded the permission of the local Hierarch for all marriages. This rule was observed by Copts,¹⁷³ Melkites,¹⁷⁴ and some Byzantine churches.¹⁷⁵ A similar stipulation was also incorporated in the Latin Church. In 1941, an instruction of the Sacred Congregation for the Sacraments asserted that it was strongly desired that the pastor obtain the permission of the Chancery (Curia Episcopalis) for all marriages. It ordered that the pastor ask this permission if the spouses belonged to different dioceses.¹⁷⁶

¹⁷¹ Ibid.

¹⁷² CA, c. 88 § 2: AAS 41 (1949) 108: “Parochus, si ita ferat ius particulare, ut matrimonio licite assistat, indigent insuper licentia Hierarchae loci.”

¹⁷³ Sacred Congregation for the Propagation of the Faith, decree, March 15, 1790, in *Collectanea*, 1 : 373, n. 601.

¹⁷⁴ Galtier, *Le mariage*, 262; Herman, “Adnotationes ad Motu Proprio *Crebrae allatae sunt*,” 117.

¹⁷⁵ Cousa, *Epitome*, 3 : 202, n. 170.

¹⁷⁶ Sacred Congregation for the Sacraments, instruction, June 29, 1941: AAS 33 (1941) 299.

Canon 1097 § 2. In any case, as a rule it is held that marriage will be celebrated in the presence of the pastor of the bride, unless just cause excuses; but marriages of Catholics of mixed rite, unless particular law determines otherwise, are celebrated in the rite of the husband and in presence of his pastor.¹⁷⁷

Canon 88 § 3. A marriage shall be celebrated before the pastor of the bridegroom unless either legal custom provides otherwise or a just reason excuses. Marriages of Catholics of mixed rite, however, are to be celebrated in the rite of the man and before his pastor, unless the man, having his domicile or quasi-domicile in an Oriental region, consents to have the marriage celebrated in the rite of the bride and before her pastor.¹⁷⁸

Both codes provided rules which regulated the precedence of the pastor in case spouses belonged to different parishes or/and to different rites. The Latin law reiterated the norm established by the decree *Ne temere* that marriage was to be celebrated as a rule before the pastor of the bride. The proper pastor of the bride was the pastor of the parish where the bride had a domicile, quasi-domicile, or where she resided for a month. Accordingly, any one of these three pastors was entitled to assist at marriage. Thus far, the law did not favor a pastor of one party more than the other. By this provision the law canonized a long-standing custom, according to which the pastor of the bride had the right to perform the ceremony.¹⁷⁹

¹⁷⁷ 1917 *CIC*, c. 1097 § 2: “In quolibet casu pro regula habeatur ut matrimonium coram sponsae parrocho celebretur, nisi iusta causa excuset; matrimonia autem catholicorum mixti ritus, nisi aliud particulari iure cautum sit, in ritu viri et coram eiusdem parrocho sunt celebranda.”

¹⁷⁸ *CA*, c. 88 § 3: AAS 41 (1949) 108-109: “Matrimonium coram sponsi parrocho celebretur, nisi vel legitima consuetudo aliud ferat vel iusta causa excuset; matrimonia autem catholicorum mixti ritus, in ritu viri et coram eiusdem parrocho celebranda, nisi vir, domicilium vel quasi-domicilium habens in regione orientali, consentiat ut matrimonium ritu sponsae et coram huius parrocho celebretur.”

¹⁷⁹ Gasparri, *De Matrimonio*, 2 : 130, n. 1074.

Consequently, the pastor of the groom could not licitly assist at a marriage unless he had obtained the consent of the pastor of the bride. A “just cause,”¹⁸⁰ not a grave reason, excused from the observance of this rule. Thus, any good reason of convenience or utility would have been sufficient to make licit the celebration of the marriage before the pastor of the groom.¹⁸¹

The Latin law provision for celebrating the marriage before the bride’s pastor had its origins in the principle of courtesy, that is, the groom should go and receive his bride at her home and not require her to seek him. The Oriental law on the other hand gave precedence to a principle very important in the East, that the bride abandoned her family in order to join completely to the family of her husband.¹⁸² Thus, *Crebrae allatae* provided that the marriage was to take place before the proper pastor of the groom. Exceptions to this rule were allowed, not only because of a just reason, as in Latin law, but also when a lawful custom provided otherwise.¹⁸³

The above considerations were valid when the spouses belonged to the same rite. In the case of an inter-ritual marriage, both codes prescribed that the celebration was to take place before the pastor of the husband and in his rite. Only one exception was allowed, namely, when the parties who lived in an Oriental region agreed to have the marriage celebrated in the rite of the bride and before her pastor. The motu proprio *Postquam*

¹⁸⁰ 1917 *CIC*, c. 1097 § 2: “Iusta causa.”

¹⁸¹ Bender, *Forma Iuridica*, 258.

¹⁸² Pospishil, *Law on Marriage*, 168.

¹⁸³ Such a lawful custom exists among Ruthenians and Ukrainians. See Pospishil, *Law on Marriage*, 166.

Apostolicis Litteris defined as an Oriental region one “where the Oriental rite was observed since antiquity, although no eparchy, province, archeparchy, or patriarchate is established.”¹⁸⁴ Thus, the general norm for an inter-ritual marriage was that it had to be celebrated in the rite of the husband and before his pastor. Opposing rules provided by particular law, expressly permitted in respect to marriages of Oriental Catholics of the same rite, were purposely excluded by the legislator in the case of marriages of Catholics of different rites. This was authenticated by an interpretation of the Pontifical Commission for the Redaction of the Code of Oriental Canon Law, which expressly declared that the clause “unless particular law determines otherwise” comprised in canon 1097 § 2 of the 1917 *CIC* was rescinded.¹⁸⁵ Thus, in order to establish which pastor was authorized to assist at an inter-ritual marriage, there were two criteria to be taken into consideration: first, the domicile, quasi-domicile, or the place of one month’s residence of the husband and second, the rite of the husband.¹⁸⁶ However, in the case of an inter-ritual marriage contracted outside of an Oriental region, when spouses desired to celebrate the marriage before the pastor of the bride and in her rite, they had to obtain a dispensation which was reserved to the Holy See since

¹⁸⁴ *PAL*, c. 303 § 1, 2°: AAS 44 (1952) 144: “Nomine regionum orientalium intelliguntur loca omnia, etsi in eparchiam, provinciam, archiepiscopatum vel patriarchatum non erecta, in quibus orientalis ritus ab antiquae aetate servatur.”

¹⁸⁵ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, May 3, 1953: AAS 45 (1953) 313.

¹⁸⁶ For an extensive analysis of this matter see Pospishil, *The Law on Marriage*, 164-172.

local ordinaries enjoyed the power of dispensing from laws enacted by the supreme authority of the Church only when this power was granted to them.¹⁸⁷

<p>Canon 1097 § 3. A pastor who assists at marriage without the permission required by law shall not make his own any stole fees and will remit same to the proper pastor of the contractants.¹⁸⁸</p>	<p>Canon 88 § 4. The pastor who assists at a marriage without the permission required by law does not make the stole fee his property and is obliged to forward it to the proper pastor of the contracting parties.¹⁸⁹</p>
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When a pastor, in the absence of a grave cause, assisted at a marriage of spouses who, according to the provisions of the law, belonged to another pastor from whom the assisting pastor had not obtained the permission required by law, this assisting pastor could not retain the stole fee and was bound to return it to the proper pastor of spouses. The stole fee established by the canons above to be remitted to the pastor of the contracting parties, regarded only what was given to the pastor for the celebration of the marriage and did not include the stipend for the matrimonial Mass or any gifts given to the pastor. Unless the local Ordinary or Hierarch imposed other penalties, this punishment was the only one provided by the law for priests who illicitly assisted at marriages.¹⁹⁰

¹⁸⁷ Coussa, *Epitome*, 3 : 204, n. 170.

¹⁸⁸ 1917 *CIC*, c. 1097 § 3: “Parochus qui sine licentia iure requisita matrimonio assistit, emolumenta stolae non facit sua, eaque proprio contrahentium parochi remittat.”

¹⁸⁹ *CA*, c. 88 § 4: AAS 41 (1949) 109: “Parochus qui sine licentia iure requisita matrimonio assistit, emolumenta stolae non facit sua, eaque proprio contrahentium parochi remittendi obligatione tenetur.”

¹⁹⁰ Cappello, *De Sacramentis*, 5 : 673, n. 689.

III. The extraordinary form of marriage¹⁹¹

Canon 1098. If the pastor or Ordinary or delegated priest who assists at marriage according to the norm of canons 1095 and 1096 cannot be had or cannot be present without grave inconvenience:

1°. In danger of death marriage is contracted validly and licitly in the presence only of witnesses; and outside of danger of death provided it is prudently foreseen that this condition will perdure for one month;

2°. In either case, if another priest can be present, he shall be called and together with the witnesses must assist at marriage, with due regard for conjugal validity solely in the presence of the witnesses.¹⁹²

Canon 89. If the pastor or Hierarch or a priest who received according to canons 86 and 87 the faculty to assist at a marriage cannot be had or be approached without great inconvenience:

1°. In danger of death, marriage contracted only in the presence of two witnesses is valid and lawful, and also apart from danger of death, if it is prudently foreseen that this state of affairs will last for a month;

2°. In either case, if there is within reach any other Catholic priest who could be present, he must be called and assist at the marriage together with the witnesses, without prejudice to the validity of the marriage in the presence of the witnesses only.¹⁹³

¹⁹¹ For an extensive historical and canonical analysis of this issue see Edward A. Fus, *The Extraordinary Form of Marriage according to Canon 1098*, CUA Canon Law Studies, n. 348 (Washington, DC: CUA Press, 1954).

¹⁹² 1917 *CIC*, c. 1098: “Si haberi vel adiri nequeat sine gravi incommodo parochus vel Ordinarius vel sacerdos delegatus qui matrimonio assistant ad normam canonum 1095, 1096: 1° In mortis periculo validum et licitum est matrimonium contractum coram solis testibus; et etiam extra mortis periculum, dummodo prudenter praevideatur eam rerum conditionem esse per mensem duraturam; 2° In utroque casu, si praesto sit alius sacerdos qui adesse possit, vocari et, una cum testibus, matrimonio assistere debet, salva coniugii validitate coram solis testibus.”

¹⁹³ *CA*, c. 89: AAS 41 (1949) 109: “Si haberi vel adiri nequeat sine gravi incommodo parochus vel Hierarcha vel sacerdos cui facultas assistendi matrimonio facta sit ad normam canonum 86, 87: 1° In mortis periculo validum et licitum est matrimonium contractum coram solis testibus; et etiam extra mortis periculum, dummodo prudenter praevideatur eum rerum statum esse per mensem duraturam; 2° In utroque casu, si praesto sit quivis alius catholicus sacerdos qui adesse possit, vocari et, una cum testibus, matrimonio assistere debet, salva coniugii validitate coram solis testibus.”

When a marriage could not, without grave inconvenience, be celebrated according to the form established by previous canons, the legislator, in order to assure the faithful the exercise of their natural right to marry, established in canon 1098 norms for the valid celebration of the matrimonial sacrament in extraordinary circumstances. Both Latin and Oriental law provided very similar rules to be followed in case a marriage should be contracted before witnesses alone, without the assistance of a qualified witness, i.e., the pastor, local Ordinary or Hierarch, or a priest delegated by either one.

The previous legislation, the decree *Ne temere*, had envisioned two types of extraordinary forms for the celebration of marriage in case the qualified witness could not be present. First, in imminent danger of death, marriage could be contracted in the presence of any priest and two witnesses.¹⁹⁴ Second, outside the danger of death, when the qualified witness could not be present and this situation was foreseen as lasting for a month, the spouses could validly and licitly marry by declaring their consent in the presence of two witnesses.¹⁹⁵ The 1917 *CIC* and *Crebrae allatae* organized all the requirements for the extraordinary form of marriage into one canon, establishing a single extraordinary form, namely the marriage celebrated before witnesses alone.¹⁹⁶

¹⁹⁴ Sacred Congregation of the Council, Decree *Ne temere*, VII: ASS 40 (1907) 529.

¹⁹⁵ *Ibid.*, VIII.

¹⁹⁶ Bender, *Forma Iuridica*, 138.

The foundation for the use of the extraordinary form was “the grave inconvenience”¹⁹⁷ of having a competent priest for the marriage. What constituted a grave inconvenience? This term cannot be defined exactly in a way that would be valid for all times and places. Gasparri remarked that what might be easy for one may be grave for another.¹⁹⁸ The same author considered that a grave inconvenience was present when in the course of reaching the qualified witness, significant moral or material harm would affect the spouse, the priest, or the common good.¹⁹⁹ Each case had to be considered individually, taking into account the circumstances of times and places, the health of those involved, the financial means of the parties, the political situation, the civil legislation, the distance to be traveled, natural disasters, etc. Because of the numerous circumstances which could intermingle to generate an inconvenience grave enough to allow the use of the extraordinary form of marriage, it was not possible to categorize all the cases of its application.

Moreover, because of this grave inconvenience, the pastor, the local Ordinary or Hierarch, or the priest delegated by either one according to canons 1095 and 1096, “cannot be had” and “cannot be approached.”²⁰⁰ The first prerequisite, “cannot be had,” concerned the priest himself in case he was obstructed for getting to the contracting parties in order to ask and receive their consent. The second prerequisite, “cannot be approached,” concerned the

¹⁹⁷ 1917 *CIC*, c. 1098 and *CA*, c. 88: *AAS* 41 (1949) 109: “Gravi incommode.”

¹⁹⁸ Gasparri. *De Matrimonio*, 4th ed., 137, n. 1006: “Incommodum enim quod mihi grave est, tibi potest esse leve.”

¹⁹⁹ *Ibid.*

²⁰⁰ 1917 *CIC*, c. 1098 and *CA*, c. 89: *AAS* 41 (1949) 109: “Si habere vel adiri nequeat.”

spouses who could not go to the priest in order to get married.²⁰¹ Both situations had to be experienced; otherwise the extraordinary form could not be used.²⁰² Therefore, for a marriage to be contracted without the presence of an authorized priest, in the presence of witnesses alone, it was necessary that a grave inconvenience impeded the priest to reach the spouses and the spouses to reach the priest.

Only the impossibility of having an authorized priest for marriage would not have been enough to allow the spouse to employ the extraordinary form. The law marked out two cases which would permit spouses to make use of the extraordinary form of marriage, namely, in danger of death and, outside danger of death, when it was foreseen that the impossibility of having an authorized priest might have lasted a month. Previously, the danger of death was acknowledged as a cause excusing from the observance of the form of marriage in the decree *Ne temere*. However, the requirements were more severe since the decree *Ne temere* demanded an imminent danger of death, the presence of a priest, albeit one not authorized to witness the marriage, and as reasons provided the relief of the consciences of the spouses and the legitimation of offspring.²⁰³ The 1917 *CIC* and *Crebrae allatae* eliminated all these clauses and required no more than that a danger of death was present. It is difficult to define exactly what constituted danger of death. Danger of death is that

²⁰¹ The Pontifical Commission for the Authentic Interpretation of the Code, response, May 3, 1945: AAS 37 (1945) 149.

²⁰² Stephanus Sipos, "Forma Celebrationis Matrimonii Extraordinaria extra Mortis Periculum," *Ius Pontificium* 20 (1940) 94.

²⁰³ Sacred Congregation of the Council, Decree *Ne temere*: ASS 40 (1907) 527-528.

condition in which it is seriously probable that a person may either live or die.²⁰⁴ The danger of death may come from internal reasons, such as severe illness, serious surgery, etc., or from external causes, such as natural disasters, epidemics, wars, etc.²⁰⁵ The law no longer required, as *Ne temere* did, any particular reason for which the parties would want to marry in a danger-of-death situation. The simple desire to contract the marriage would be enough.²⁰⁶

The second case envisioned by law in which the extraordinary form might be used was when an authorized priest could not be present at marriage, and it was prudently foreseen that this situation would last for a month. The previous legislation required the pastor's absence for a month before the extraordinary form of marriage could be used.²⁰⁷ The 1917 *CIC and Crebrae allatae* restored an older practice²⁰⁸ and merely required the foreseen absence of an authorized priest for at least one month. An authentic interpretation of the Pontifical Commission for the Authentic Interpretation of the Code specified that, for a valid celebration of marriage before the witnesses alone, it did not suffice only that the the pastor was absent, but it was also necessary that the parties had moral certitude that this situation

²⁰⁴ Felix Cappello, *Tractatus Canonico-Moralis De Censuris* (Turin, Rome: Marietti, 1925) 107, n. 114: "Periculum mortis significant illud rerum discrimen, in quo cum quis constitutus est, ipsum et superesse et occumbere posse, utrumque est vere graviterque probabile."

²⁰⁵ Cappello, *De Matrimonio*, 5 : 227, n. 231.

²⁰⁶ Wouters, *De Forma*, 37.

²⁰⁷ Sacred Congregation of the Council, Decree *Ne temere*, VIII: ASS 40 (1907) 529.

²⁰⁸ Sacred Congregation of the Holy Office, instruction *De matrimonii celebratione absque praesentia parochi*, July 1, 1863, in *Collectanea*, 1: 684, n. 1240.

would continue for a month and that the priest could not be reached by ordinary means, i.e., without a grave inconvenience. The fact of the priest's absence should be notorious or should be based on information gathered from an investigation.²⁰⁹ Subsequent authentic interpretations brought more explanations as to the matter of the priest's absence. Thus, the absence of which canon 1098 speaks was a physical absence.²¹⁰ However, even when he was physically present, he was considered to be absent if because of grave inconvenience the pastor or the Ordinary could not ask and receive the consent of the contracting parties.²¹¹ Finally, this last situation was considered to be present when the civil law forbade the celebration of religious matrimony before the civil one and the latter was denied because of insufficiency of some necessary documents.²¹² In calculating the period of a month's duration concerning the unavailability of the authorized priest, the initial day was the day when the marriage was contracted.²¹³

In order to be valid, a marriage contracted in the extraordinary form required the presence of at least two witnesses. Although the law did not specify the exact number of

²⁰⁹ The Pontifical Commission for the Authentic Interpretation of the Code, response, November 10, 1925: AAS 17 (1925) 583.

²¹⁰ The Pontifical Commission for the Authentic Interpretation of the Code, response, March 10, 1928: AAS 20 (1928) 120.

²¹¹ The Pontifical Commission for the Authentic Interpretation of the Code, response, July 25, 1931: AAS 23 (1931) 388.

²¹² Sacred Congregation for the Sacraments, response *Circa formam extraordinariam matrimonii*, April 24, 1935, *Leges Ecclesiae* 1 : col. 1270.

²¹³ Bender, *Forma Iuridica*, 152.

witnesses, the use of the plural number *coram solis testibus*²¹⁴ indicated that at least two persons had to be present and witness the marriage so contracted. As was the case with the ordinary form, the law did not establish any special qualifications for witnesses. Therefore, it was enough that the witnesses had the use of reason and assist at marriage in such a manner that later they were able to testify that the marriage took place.

Both Latin and Oriental law specified in the second part of the canon that, in the instances explained above, i.e., in danger of death and when it was foreseen that an authorized priest would be unavailable for a month, if another priest might be present, he should be called and assist at marriage. His assistance, however, was not a qualified assistance; he needed neither interrogate the spouses nor receive their consent. The law made clear that such a priest was not a qualified witness by adding that his presence was not required for validity. Nevertheless, if a priest was easily available, for the licit celebration of the marriage, he had to be called and he had to assist along with the other witnesses.²¹⁵ The presence of a priest was required by the law in order to bring about a religious environment, to remind people of the dignity and holiness of the matrimonial sacrament, to offer the nuptial blessing to the spouses, and to ensure the proper registration of the marriage.²¹⁶ *Crebrae allatae* added one more clause to this provision, namely, it demanded that only a Catholic priest was to be called and assist at marriage entered according to the extraordinary

²¹⁴ 1917 *CIC*, c. 1098, 1°. *CA*, c. 89, 1°.

²¹⁵ Bender, *Forma Iuridica*, 190-196.

²¹⁶ Cappello, *De Sacramentis*, 5 : 682, n. 696.

form along with the witnesses. This prerequisite was explained by the fact that Oriental tradition required the priest to bless the spouses and the presence of a non-Catholic priest was to be ruled-out since his presence and blessing would constitute a *communicatio in sacris* prohibited by the law.²¹⁷ Herman opined that the requirement to call only a Catholic priest to be present at a marriage contracted in extraordinary form was implicitly understood in the Latin law; *Crebrae allatae* just expressly declared it for greater clarity.²¹⁸

IV. Persons subject to the canonical form of marriage

Canon 1099 § 1. [The following] are bound to observe the above-stated form:

1°. All those baptized into the Catholic Church or converted to her from heresy or schism, even if these or the others have left her later, as long as they enter marriage among themselves;

2°. All of those mentioned above if they contract marriage with non-Catholics, whether baptized or non-baptized, even after obtaining a dispensation from the impediment of mixed religion or disparity of cult;

3°. Orientals, when they contract with latins bound to this form.²¹⁹

Canon 90 § 1. Bound to observe the above prescribed form are:

1°. All persons baptized in the Catholic Church and converts to the Church from heresy and schism, though the former as well as the latter afterwards have fallen away, when contracting marriages among themselves;

2°. The same who are mentioned in 1°, when they contract marriage with non-Catholics, either baptized or non-baptized, even after they have obtained a dispensation from mixed religion or from disparity of worship.²²⁰

²¹⁷ Pospishil, *The Law on Marriage*, 173.

²¹⁸ Herman, *De Disciplina*, 183-184.

²¹⁹ 1917 *CIC*, c. 1099 § 1: “Ad statutam superius formam servandam tenentur: 1° Omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi, licet sive hi sive illi ab eadem postea defecerint, quoties inter se matrimonium ineunt; 2° Iidem, de quibus supra, si cum acatholicis sive baptizatis sive non baptizatis etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus matrimonium contrahant; 3° Orientales, si cum latinis contrahant hac forma adstrictis.”

Both Latin and Oriental law established similar norms regarding the subjects who were compelled to observe the canonical form of marriage. As a general rule, the law bound all those who had been at any time admitted into the Catholic Church. First were mentioned those baptized into the Catholic Church and then those converted to her. The law obliged these two categories of persons throughout their lives, even if they formally renounced their faith and left the Church. Those persons comprised in these two categories, when they contracted marriage among themselves, could not validly do so unless they observed the canonical form established by the ecclesiastical law. Moreover, they were bound by this law when they contracted a mixed marriage either with a baptized non-Catholic or a non-baptized person, provided they previously obtained a dispensation from the relevant impediment. With respect to mixed marriages contracted between an Oriental Catholic and a non-Catholic, baptized or not, Oriental law stipulated an exception in canon 32 § 2, 5°: “A patriarch, save for more extensive faculties belonging to him by privilege or by particular law ... can dispense: ... 5°. From the form of the marriage contract in the case mentioned in canon 90 § 1, 2°, but only for a grave reason.”²²¹ Because of their prominent position,

²²⁰ CA, c. 90 § 1: AAS 41 (1949) 109: “Ad statutam superius formam servandam tenentur: 1° Omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi, licet sive hi sive illi ab eadem postea defecerint, quoties inter se matrimonium ineunt; 2° Iidem, de quibus in n. 1, si cum acatholicis, sive baptizatis sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitas cultus, matrimonium contrahant.”

²²¹ CA, c. 32 § 2, 5°: AAS 41 (1949) 96: “Patriarcha, salve ampliora facultate quae ex privilegio vel iure particulari ei competat, ... dispensare potest: ... 5° A forma celebrationis matrimonii in casu de quo in can. 90 § 1, n. 2, gravissima tamen ex causa.”

substantiated by the tradition of the Church, patriarchs enjoyed extended faculties of dispensing from matrimonial impediments. Among these was the dispensation from the matrimonial form in the case of mixed marriages, which dispensation was to be granted only in extraordinary circumstances.

Finally, since both codes required basically the same form of marriage, the norm provided in canon 1099 § 1, 3° became redundant.²²²

Canon 1099 § 2. With due regard for the prescription of § 1, 1°, non-Catholics, whether baptized or non baptized, if they contract among themselves, are not in any way bound to observe the Catholic form of marriage; likewise, those born of non-Catholics, even if they are baptized in the Church, [but] who from infancy grow up in heresy or schism or infidelity or without religion, as often as they contract marriage with a non-Catholic.²²³

Canon 90 § 2. Save for the rules in §1, 1°, baptized non-Catholics are nowhere bound to observe the Catholic form of marriage when they contract marriage between themselves as well as with non-baptized non-Catholics.²²⁴

²²² For an extensive analysis of what rite is to be followed in the cases of inter-ritual marriages see Herman, “Adnotationes ad Motu Proprio *Crebrae allatae sunt*,” 118-123.

²²³ 1917 *CIC*, c. 1099 § 2: “Firmo autem praescripto §1, n.1, acatholici sive baptizati sive non baptizati, si inter se contrahant, nullibi tenentur ad catholicam matrimonii formam servandam; item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint.”

²²⁴ *CA*, c. 90 § 2: AAS 41 (1949) 109: “Firmo autem praescripto § 1, n. 1, acatholici baptizati, si inter se vel cum acatholicis non baptizatis contrahant, nullibi tenentur ad catholicam matrimonii formam servandam.”

Those who have never been acknowledged to be a member of the Church, namely, baptized non-Catholics and non-baptized persons, were not bound to the canonical form of marriage when they married among themselves. However, they were bound by impediments of divine law and baptized non-Catholics remained subject to all other matrimonial impediments of ecclesiastical institution.²²⁵

Unlike the decree *Ne temere*, canon 1099 § 2 of the 1917 *CIC* established initially that persons born of non-Catholic parents and baptized in the Catholic Church, but raised outside the Catholic faith from infancy, are exempted from the observance of the canonical form of marriage. According to an authentic interpretation of 1929, the exemption also included not only those children whose parents were both non-Catholics but also those children born of mixed marriages, even those contracted with a dispensation,²²⁶ as well as children born of apostate parents.²²⁷ Over the years, however, the canonical practice found that such an exception was very unfavorable to these persons, because, when they married among themselves, their marriage was valid and precluded them from entering a new Catholic marriage in the case the first one was broken. Therefore, Pius XII abolished this exemption by the motu proprio *Decretum Ne Temere*,²²⁸ promulgated on August 1, 1948 and

²²⁵ Cronin, *The New Matrimonial Legislation*, 301.

²²⁶ The Pontifical Commission for the Authentic Interpretation of the Code, response, July 20, 1929: AAS 21 (1929) 573.

²²⁷ The Pontifical Commission for the Authentic Interpretation of the Code, response, February 17, 1930: AAS 22 (1930) 195.

²²⁸ Pius XII, motu proprio *Decretum Ne Temere*, August 1, 1948: ASS 40 (1948) 305-306.

taking effect on January 1, 1949.²²⁹ Consequently, beginning with January 1, 1949, marriages of such persons entered into even with non-Catholics were invalid if the canonical form of marriage was not observed.²³⁰

V. The liturgical rite of marriage

Canon 1100. Outside the case of necessity, in the celebration of marriage there are to be observed the prescribed rites in the ritual books approved by the Church, or [those] laudably received [from] custom.²³¹ Canon 91. Outside the case of necessity, the rites and ceremonies which are prescribed in liturgical books approved by the Church or recognized by legitimate customs shall be observed at the celebration of a marriage.²³²

The rites of marriage which were essential for the celebration of the sacrament, namely, the expression of consent of both parties, were not to be omitted and were to be celebrated according to the approved liturgical books or lawful customs.²³³ Oriental rite churches had their own ceremonies, much more extensive than those of the Latin rite and

²²⁹ For an extensive analysis of this document see, Henri Beaumont, *Modification Introduite dans la Loi de la Forme Juridique du Mariage par le Motu Proprio "Decretum Ne Temere" di 1^{er} Août 1948* (Québec, 1955).

²³⁰ Cappello, *De Sacramentis*, 5 : 689, n. 703.

²³¹ 1917 *CIC*, c. 1100: "Extra casum necessitatis, in matrimonii celebratione servantur ritus in libris ritualibus ab Ecclesia probatis praescripti aut laudabilibus consuetudinibus recepti."

²³² *CA*, c. 91: AAS 41 (1949) 109: "Extra casum necessitatis, in matrimonii celebratione servantur ritus et caeremoniae in libris liturgicis ab Ecclesia probatis praescriptae aut legitimis consuetudinibus receptae."

²³³ Cappello, *De Sacramentis*, 5 : 692, n. 705.

richer in symbols, prayers, and chants.²³⁴ The same liturgical books provided a shorter form to be used in case of necessity, e.g., in danger of death, because of lack of time, in order to avoid grave damage.²³⁵

Canon 1101 § 1. The pastor will take care that the spouses receive a solemn blessing, which he can give to them even after they have lived in marriage for a long time, but only in Mass, observing the special rubrics, and outside of feast times.

§ 2. Only that priest, personally or through another, can give the solemn blessing who can validly and licitly assist at marriage.²³⁶

Besides the rites of marriage that were essential to the celebration of matrimony, the Latin rite included some ceremonies that might have been performed at any time after the marriage was celebrated, namely the nuptial blessing. The solemn nuptial blessing had to be distinguished from the regular blessing which is given during the liturgical ceremonies of the marriage. It consisted of three prayers to be said at precise moments during Mass. Because of this, the nuptial blessing could not be given outside Mass or outside the church without an

²³⁴ Raes, *Le mariage, sa celebration et sa spiritualite dans les Eglises d'Orient*, 49-52.

²³⁵ Cappello, *De Sacramentis*, 5 : 691, n. 705.

²³⁶ 1917 *CIC*, c. 1101: “§1. Parochus curet ut sponsi benedictionem sollemnem accipiant, quae dari eis potest etiam postquam diu vixerint in matrimonio, sed solum in Missa, servata speciali rubrica et excepto tempore feriato. §2. Sollemnem benedictionem ille tantum sacerdos per se ipse vel per alium dare potest, qui valide et licite matrimonio potest assistere.”

apostolic indult.²³⁷ As a rule, the solemn nuptial blessing was given on the same day and during the same Mass at which the marriage took place, but for a reasonable cause the blessing could be given at a later date.²³⁸ Finally, only the priest who could assist at marriage could give the solemn nuptial blessing. The reason for this requirement was that the blessing was attached to the matrimonial celebration and consequently was a function that should be fulfilled by the pastor.²³⁹

This canon did not have a counterpart in the Oriental law, which was perfectly comprehensible. The marriage rituals of the Oriental Churches necessarily included a special solemn benediction, without which the marriage could not be celebrated. In the Byzantine tradition, this blessing was expressed by the rite of the coronation. Consequently, a special reference of such a rite would have been superfluous.²⁴⁰

Canon 1102 § 1. In a marriage between a Catholic party and a non-Catholic party, the inquiries about consent must be done according to the prescription of canon 1095 § 1, 3°.

§ 2. But all other sacred rites are prohibited; but if from this prohibition more serious evils will flow, the Ordinary can permit others of the usual ecclesiastical ceremonies [to occur], excluding always

²³⁷ Cappello, *De Sacramentis*, 5 : 695-696, n. 709.

²³⁸ *Ibid.*

²³⁹ *Ibid.*, n. 710. See 1917 *CIC*, c. 462, 4°.

²⁴⁰ Pospishil, *Law on Marriage*, 192.

the celebration of Mass.²⁴¹

This canon expressed the Church's disapproval of mixed marriages. The Church did not endorse mixed marriages even when the non-Catholic spouse was willing to baptize and educate children in the Catholic faith. In these cases, only those ceremonies that were essential to a valid celebration of marriage were to be used, i.e., the priest should have simply asked for the consent of parties and received their responses. An instruction of the Secretariat of State from 1858 specified that the marriage must not be celebrated in the church, the priest was not to wear any liturgical vestments but just clerical attire, no blessing of the rings was to be given, and no liturgical prayers were to be pronounced.²⁴² An authentic interpretation also declared that not only was the Mass for spouses forbidden, but any other Mass was also forbidden if its celebration could be considered as a completion of the celebration of marriage.²⁴³ The law did allow, by way of exception, the Ordinary to permit some ceremonies to take place, if the denial of all ceremonies might produce serious

²⁴¹ 1917 *CIC*, c. 1102: “§ 1. In matrimoniis inter partem catholicam et partem acatholicam interrogations de consensu fieri debent secundum praescriptum can. 1095, §1, n. 3. §2. Sed omnes sacri ritus prohibentur; quod si ex hac prohibitione graviora mala praevideantur, Ordinarius potest aliquam ex consuetis ecclesiasticis caeremoniis, exclusa semper Missae celebratione, permittere.”

²⁴² Secretariat of the State, instruction *De mixtis coniugiis*, November 15, 1859, in *Collectanea*, 1 : 637-639, n. 1169.

²⁴³ The Pontifical Commission for the Authentic Interpretation of the Code, response, November 10, 1925: AAS 17 (1925) 583.

damage. The Ordinary could in no way permit the celebration of the Mass or the solemn nuptial blessing.²⁴⁴

This canon was also without counterpart in the Oriental law, which affirmed that marriages of Catholics of Oriental rite were to be always celebrated in the same manner, whether it was a marriage among Catholics or a marriage between a Catholic and a non-Catholic, baptized or not. However, particular legislation could provide a distinction in the external manner of the celebration of mixed marriages, without changing the prescriptions of the liturgical books.²⁴⁵

With respect to the provisions of this canon, a doubt emerged concerning the situation when a Latin pastor assisted at a marriage between an Oriental Catholic and a non-Catholic. Was he supposed to comply with the terms of canon 1102 of the 1917 *CIC* which required observing only the essential elements of the form and omitting all other ceremonies, including the blessing, which was essential for Orientals, or was he supposed to follow the norms of canon 85 of the motu proprio *Crebrae allatae*, which required him to employ all the ceremonies prescribed by the liturgical books? The Pontifical Commission for the Redaction of the Oriental Code of Canon Law decreed that a Latin priest who legitimately assisted at a marriage between an Oriental Catholic and a non-Catholic had to observe the stipulations of canon 1102. The same Commission also decreed that an Oriental rite priest who legitimately

²⁴⁴ Cappello, *De Sacramentis*, 5 : 701-702, n. 716.

²⁴⁵ Pospishil, *Law on Marriage*, 192.

assisted a marriage between a Latin Catholic and a non-Catholic had to observe the prescriptions of canon 85 of the motu proprio *Crebrae allatae*.²⁴⁶

VI. The recording of marriage

Canon 1103 § 1. The marriage having been celebrated, the pastor or one who acts in his place, as soon as possible, will write in the book of marriages the names of the spouses and witnesses, the place and date of the celebrated marriage, and another things according to the manner of the ritual books and by the proper Ordinary so prescribed; this is to be done even though another priest delegated by him or the Ordinary assisted at the marriage.

§ 2. Moreover, according to the norm of canon 470 § 2, the pastor will note in the book of the baptisms that the spouse on such-and-such a day contracted marriage in his parish. But if a spouse was baptized elsewhere, the pastor of the place where the marriage was entered into will transmit [notice] to the pastor of baptism, whether personally or through the episcopal Curia, so that the marriage can be recorded in the book of baptisms.

§ 3. Whenever marriage is entered into according to the norm of canon 1098, the priest, if present, otherwise the witnesses, are bound together with the contractants to have the entry into marriage recorded in the prescribed books as soon as possible.²⁴⁷

Canon 92 § 1. The pastor or he who takes his place shall after the celebration of the marriage as soon as possible enter into the marriage registers the names of the parties and witnesses, the place and date of the celebration of the marriage, the dispensation, if a dispensation had been granted, its granter, together with the impediment and its degrees, and other items, according to the manner prescribed in liturgical books and by the proper Hierarchy; and this although another priest, on the strength of a faculty obtained from him or from the Hierarchy, assisted at the marriage.

§ 2. Moreover, the pastor shall also indicate in the baptismal register that the spouse contracted marriage on a certain day in his parish. If the spouse was baptized elsewhere, the pastor shall directly or through the chancery office transmit the notice of the contracted marriage to the pastor where according to the canons the baptism of the spouse should have been recorded, in order to have the marriage annotated in the baptismal register.

§ 3. Whenever marriage was contracted according to canon 89, the priest, if one

²⁴⁶ The Pontifical Commission for the Redaction of the Oriental Code of Canon Law, response, January 8, 1953: AAS 45 (1953) 104.

²⁴⁷ 1917 *CIC*, c. 1103: “§ 1. Celebrato matrimonio, parochus vel qui eius vices gerit, quamprimum describat in libro matrimoniorum nomina coniugum ac testium, locum et diem celebrati matrimonii atque alia secundum modum in libris ritualibus et a proprio Ordinario

assisted, otherwise the witnesses as well as the contracting parties are obliged to see to it that the contracted marriage be recorded as soon as possible in the prescribed registers.²⁴⁸

Chapter six of both 1917 *CIC* and *Crebrae allatae* closed with provisions concerning the recording of marriage. The duty of recording marriages belonged to the pastor of the place where the matrimony was celebrated or to the priest who acted in his name. The recording of a marriage had to be done “as soon as possible”²⁴⁹ which meant, according to

praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio astiterit. §2. Praeterea, ad normam can. 470, §2, parochus in libro quoque baptizatorum adnotet coniugem tali die in sua paroecia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se sive per Curiam episcopalem transmittat, ut matrimonium in baptizatorum librum referatur. §3. Quoties matrimonium ad normam can. 1098 contrahitur, sacerdos, si eidem adstiterit, secus testes tenentur in solidum cum contrahentibus curare ut initum coniugium in praescriptis libris quamprimum adnotetur.”

²⁴⁸ CA, c. 92: AAS 41 (1949) 109-110: “§ 1. Celebrato matrimonio, parochus vel qui eius vices gerit, quamprimum describat in libro matrimoniorum nomina coniugum ac testium, locum et diem celebrati matrimonii, dispensationem, si dispensationem locum habuit, eiusque auctorem una cum impedimento eiusque gradu, atque alia secundum modum in libris liturgicis et a proprio Hierarcha praescriptum; idque licet alius sacerdos vel a se vel ab Hierarcha obtenta matrimonio adstiterit. § 2. Praeterea, parochus in libro quoque baptizatorum adnotet coniugem tali die in sua paroecia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, parochus notitiam initi matrimonii ad parochum, apud quem coniugis baptismus ad norma canonum adnotandus est, per se vel per curiam episcopalem transmittat, ut matrimonium in baptizatorum librum referatur. §3. Quoties matrimonium ad normam can. 89 contrahitur, sacerdos, si eidem adstiterit, secus tum testes tum contrahentes curare debent ut initum coniugium in praescriptis libris quamprimum adnotetur.”

²⁴⁹ 1917 *CIC*, c. 1103 § 1: “Quamprimum.”

Wouters, within three days after the marriage.²⁵⁰ The previous law contained in the decree *Ne temere*, stipulated that the recording had to be done “at once.”²⁵¹ The elements to be recorded were the names of spouses and witnesses, the place and the date of the celebrated marriage, and other elements prescribed by the Ordinary or Hierarch or by other liturgical laws. The motu proprio *Crebrae allatae* added another element and stipulated that all the information concerning any possible dispensations was to be recorded too. Besides, information about the marriage had to be noted in the register of baptisms and sent to the pastor of the place where one or both spouses were baptized in order for the marriage to be noted in that baptismal register. This obligation was to be fulfilled also in the case of marriage contracted with the extraordinary form of marriage.

Special situations concerning the recording of marriages emerged in communist countries and especially in the Soviet Union. First, in most of the Soviet Union, it was impossible to keep a record of any sacrament that was celebrated, especially baptisms and marriages. This record would constitute a clear proof that somebody was an active member of the Church and could produce grave harm to everybody involved. The second situation regarded the impossibility of communicating the data of recorded marriages to and from the communist countries. Any kind of communication between the ecclesiastical institutions from countries behind the Iron Curtain and their Western counterparts were censored by the communist regimes and often Church’s institutions were forbidden to communicate any data

²⁵⁰ Wouters, *De Forma*, 64. Other commentators are more flexible, mentioning three or four days.

²⁵¹ Sacred Congregation of the Council, Decree *Ne temere*, IX: ASS 40 (1907) 529: “Statim.”

outside the country. In this situation, emigrants from communist countries could not possibly obtain any information concerning their religious status, i.e., no proof of baptism, confirmation, free status or marital status. On the other side, pastors from free countries could not send the information concerning marriages celebrated in their parishes to the parishes where one or both spouses were baptized. This situation was only partially solved by a decree issued by the Sacred Congregation for the Oriental Church which specified that whenever the parish of baptism is located in territory which is under the control of Russia, the notification is to be sent to the Pontifical Commission for Russia.²⁵²

Conclusion

To summarize, the first section of this chapter considered the canonical form of marriage as established by the 1917 *CIC* and the motu proprio *Crebrae allatae*. For the Latin Code the essence of the canonical form remained the one established by the decree *Tametsi*, i. e., the expression of the consent before the pastor or Ordinary and two witnesses. The 1917 *CIC* did, however, remove the shortcomings and the ambiguities of certain terms of the decree *Tametsi* and established more exactly the person and the qualifications of the qualified witness, the time and the space in which he could act, the terms of proper delegation, and the subjects bound to observe the law. In addition to these elements necessary for the valid celebration of the marriage, the 1917 *CIC* established several other provisions required for liceity. The motu proprio *Crebrae allatae*, as a whole, followed the Latin Code, with a few differences. The most obvious difference was that marriage had to be celebrated with a sacred rite. This was a confirmation of the Eastern tradition - consistent at the time of the

²⁵² Sacred Congregation for the Oriental Church, decree, July 13, 1928: AAS 20 (1928) 260.

promulgation of the document - that the exchange of consent had to be associated with the blessing bestowed upon the spouses by the assisting priest. Nonetheless, as with any human undertaking, neither the 1917 *CIC* nor *Crebrae allatae* were perfect, and their deficiencies were soon noticed. Several authentic interpretations issued by various Roman dicasteries after the promulgation of the two Codes brought more clarity to various terms and facilitated the application of the law. Moreover, in Eastern Europe the implementation of the two codes was deterred by the establishment of communist governments which obstructed - in various degrees, according to the intensity of the religious persecution in a given country - the exercise of religious freedom. How documents of Vatican II and post-conciliar legislation addressed the issue of the canonical form of marriage constitutes the topic of the second section of the present chapter.

B. The Canonical Form of Marriage in Conciliar and Post-conciliar documents

Introduction

This section will scrutinize the approach to the canonical form of marriage of the Second Vatican Council and the post-conciliar development of the issue as expressed in the 1967 Synod of Bishops and the post-conciliar and post-synodal documents. As introductory and general remarks, it should be mentioned first that in the course of the conciliar debates, the subject of matrimonial form was mostly discussed in relation to the topic of mixed marriages, and not as a main topic by itself. Second, the principles of ecumenism and religious liberty enunciated during the Council sessions had a significant influence in considering the matter of mixed marriages. In this framework there were two conciliar

documents that touched on the issue of the canonical form of marriage: the decree on Eastern Catholic Churches and the unfinished decree on marriage.²⁵³

I. Canonical form at the Second Vatican Council

1. Canonical form in the decree on Eastern Catholic Churches²⁵⁴

The motu proprio *Crebrae allatae* not only brought a certain uniformity to the matrimonial law among various Oriental Catholic Churches but also generated a severe problem with regard to mixed marriages contracted between an Oriental Catholic and a non-Catholic Oriental Christian. According to the mandatory form established by *Crebrae allatae*, all marriages of Catholics of Oriental rite, mixed marriages included, must be celebrated before an authorized Catholic priest.²⁵⁵ Thus, when a Catholic woman of oriental rite married a non-Catholic man, the marriage had to be contracted before the Catholic priest, i.e., the bride's priest. However, in the East, especially in the Middle East, the social status of women is different than it is in the Western world. The principle that the woman, by contracting marriage, abandons the sphere of her family in order to enter totally into the

²⁵³ The schema of the decree on marriage went through four drafts. Conciliar Fathers made numerous suggestions and comments during conciliar debates but by the end it was clear that it was impossible to reach an agreement and the time had run out for more discussions. In this situation, Council Fathers agreed to refer to the Holy See the very last debated *Schema voti de matrimonii sacramento*, which in fact reflected the bishops' thinking.

²⁵⁴ For a thorough survey of discussions concerning the canonical form of marriage during the debates on the Decree on Eastern Catholic Churches, see Bernard A. Konda, *The Changing Attitudes of the Catholic Church towards Mixed Marriages*, Canon Law Studies 476 (Washington, DC: Catholic University of America, 1971) 14-47.

²⁵⁵ CA, cc. 85 1 and 90 § 1, 2°: AAS 41 (1949) 107.

husband's family is much more significant in the Orient than in the Occident.²⁵⁶ Accordingly, the Oriental custom, and sometimes the civil law, required that marriage be celebrated by the pastor of the man. As a result thousands of mixed marriages were invalid because of the mandatory canonical form introduced by *Crebrae allatae*, when the non-Catholic groom did not agree to marry before the Catholic pastor of the bride.²⁵⁷ The privilege to dispense from canonical form granted to the patriarch by canon 96 of *Crebrae allatae* and later extended to the local Ordinaries²⁵⁸ was considered ineffective because of the belief that the marriage cannot be celebrated without receiving the blessing from a priest. This was the main motivation for the conciliar Fathers from the Middle East to insist that the question of mixed marriages be settled, and they brought forward as the optimal solution that a marriage between an Oriental Catholic and a non-Catholic Oriental Christian celebrated by an Oriental non-Catholic priest be considered valid.²⁵⁹ Over a period of three years there was a great deal of discussion of this issue and the Schema on the Oriental Churches underwent many revisions, but ultimately this proposal was accepted, and the Conciliar Commission for Oriental Churches presented it to vote of the Council.²⁶⁰ The unified action of the Oriental Catholic bishops brought results. Introducing the fourth draft of the Schema, Cardinal

²⁵⁶ Pospishil, *The Law on Marriage*, 168.

²⁵⁷ Meletius Wojnar, "Decree on the Oriental Catholic Churches," *The Jurist* 25 (1965) 222.

²⁵⁸ Prader, *Il Matrimonio in Oriente e Occidente*, 198.

²⁵⁹ Wojnar, "Decree on the Oriental Catholic Churches," 222.

²⁶⁰ *Ibid.*

Cicognani, the president of the Commission, recommended that a marriage between an Oriental Catholic and an Oriental non-Catholic before a non-Catholic minister be recognized as valid, though illicit.²⁶¹ Of the thirty conciliar Fathers who presented their opinions during the general congregation of October 15, 1964, eight spoke directly to mixed marriages and the urgency of returning to the pre-*Crebrae allatae* legislation.²⁶²

During the debate in the conciliar aula, the Patriarch Bathanian of Cilicia of the Armenians presented a wide-ranging statement in which he pleaded for the acceptance of the proposal that a marriage between an Oriental Catholic and an Oriental non-Catholic before a non-Catholic minister be recognized as valid.²⁶³ His passionate statement sums up the arguments the other Council Fathers presented over the three years of debate over this document. He started by mentioning that, as far as the Oriental Churches were concerned, the matter of mixed marriages was of the greatest importance both pastorally and ecumenically. He then pointed out that the *motu proprio Crebrae allatae* had abrogated a long-standing tradition of considering valid marriages contracted before a non-Catholic priest and established a new law alien to the Oriental mindset, which could not accept that a man had to follow the rite of a woman just because she was Catholic. The attempt to solve this

²⁶¹ Vatican Council II, *Acta Synodalia Sacrosanti Concilii Oecumenici Vatican II, Congregationes generales*, Congregatio 102, Vol. 3, (*Periodus Tertia*), pars 4 (Vatican City: Typis Polyglottis Vaticanis, 1970) 519: “Commissio Orientalis, maiore suffragiorum parte habita, ad aliam sententiam venit, nempe ut exigeretur canonica forma tantum <<ad liceitatem>> dum ad Sacramenti validitatem satis est ut sacer administer adsit.”

²⁶² Konda, *The Changing Attitudes*, 34-35.

²⁶³ This paragraph represents only a short summary of the Patriarch Bathanian’s statement. For the whole text see *Acta Synodalia*, Vol. 3, (*Periodus Tertia*), pars 5: 15-19.

problem by granting local Ordinaries the faculty to dispense from form was unsuccessful because of the Oriental mentality which could not think of a marriage contracted simply by expressing consent and without the assistance and blessing of a priest. Accordingly, dispensations from canonical form were rarely requested. As a result, over the sixteen years since the new law was promulgated, thousands of marriages were contracted invalidly. Later, the Patriarch stated that for these reasons, and after carefully considering the proposals of conciliar Fathers, the Commission proposed the amended text of the number 18 of the draft, which stipulated that when a Catholic of Oriental rite married an Oriental non-Catholic, the canonical form was required only for liceity and that for validity the presence of a sacred minister would be sufficient.²⁶⁴ This provision, concluded the Patriarch, would give those whose marriages were invalidly contracted for this reason the possibility of reconciliation with the Church. This stipulation also corresponded to the pastoral goal of the council and would be able to broaden its ecumenical purpose.

The text of the decree *Orientalium Ecclesiarum*²⁶⁵ was approved by the Council Fathers by a vote of 2110 to 39 on November 21, 1964, and confirmed and promulgated by Paul VI on the same day with a *vacatio legis* of two months.²⁶⁶ The patriarchs received the

²⁶⁴ Ibid., 19: “Sancta Synodus statuit formam canonicam celebrationis pro his matrimoniis obligare tantum ad liceitatem; ad validitatem sufficere praesentiam ministri sacri, servatis aliis de ritu servandis.”

²⁶⁵ Vatican II, decree *Orientalium Ecclesiarum*, November 21, 1964: AAS 57 (1965) 76-85.

²⁶⁶ Paul VI, decree *De Ecclesiis Orientalibus Catholicis*, January 30, 1965: AAS, 57 (1965) 89.

faculty to reduce or to expand the *vacatio* if needed.²⁶⁷ Number 18 of the decree established the form to be observed in the case of a mixed marriage between a Catholic of Oriental rite with an Oriental non-Catholic.

To prevent invalid marriages when Eastern Catholics marry baptized Eastern non-Catholics, and to care for the interests of the stability and sanctity of the marriage and peace in the home, this synod decrees that the canonical form of the celebration of these marriages is required for liceity only; the presence of a sacred minister is enough for validity, provided all other things required by the law have been observed.²⁶⁸

The new form introduced by this decree concerned only the validity of marriage between Oriental Catholics and Oriental non-Catholics. With respect to liceity, the norms provided by *Crebrae allatae* remained in force. The decree affected only mixed marriages contracted between Oriental Catholics and Oriental non-Catholics. It was not relevant for Latin Catholics who contracted marriage with an Oriental non-Catholic. There was a doubt among canonists whether the provisions of this decree referred as well to marriages of Oriental non-Catholics among themselves or with other baptized Christians. Some authors, among them Wojnar, deemed that the provisions of this decree did not refer to marriages of Oriental non-Catholics among themselves or with other baptized Christians.²⁶⁹ However,

²⁶⁷ Ibid.

²⁶⁸ *OE* 18: *AAS* 57 (1965) 82: “Ad praecavenda matrimonia invalida, quando catholici orientales cum acatholicis orientalibus baptizatis matrimonium ineunt, et ad consulendum nuptiarum firmitati et sanctitati nec non domesticae paci, Sancta Synodus statuit formam canonicam celebrationis pro his matrimoniis obligare tantum ad liceitatem; ad validitatem sufficere praesentiam ministri sacri, servatis aliis de iure servandis.” Tanner, 2 : 905.

²⁶⁹ Wojnar, “Decree on the Oriental Catholic Churches,” 223. In fact this was the prevailing opinion prior to the promulgation of *Orientalium Ecclesiarum*. In a decision issued in 1964,

other authors, among them Pospishil²⁷⁰ and Prader,²⁷¹ considered that the Council intended to canonize an Oriental canonical form which would require the celebration of marriage before a priest. They believed that a legal consequence of the principle stated in the decree *Orientalium Ecclesiarum* was the invalidity of marriages contracted by Eastern Orthodox Christians before a Protestant minister or a civil magistrate. The Tribunal of the Apostolic Signature endorsed the later opinion when it passed a decision in 1970 in which it declared the nullity of a civil marriage contracted before a civil magistrate between two Romanian Orthodox Christians, because of defect of form, namely the lack of sacred rite.²⁷² The same Tribunal subsequently issued similar sentences.²⁷³

Another condition which was prescribed for validity in *Crebrae allatae* but which was no longer required in this specific situation was the active assistance of the priest, i.e.,

the Sacred Roman Rota considered valid a marriage contracted between two Orthodox Christians before a civil magistrate because being non-Catholics they were not bound by the Catholic form of marriage. See *Coram Sabattani*, December 11, 1964: *RRDec* 59 : 932.

²⁷⁰ Victor Pospishil, *Eastern Catholic Marriage Law according to the Code of Canons of the Eastern Churches* (Brooklyn, NY: Saint Maron Publications, 1991) 225-226.

²⁷¹ Prader, *Il Matrimonio in Oriente e Occidente*, 198.

²⁷² The supreme Tribunal of Apostolic Signature, Decision of November 28, 1970: *Leges Ecclesiae* 5 : coll. 6394-6399.

²⁷³ The supreme Tribunal of Apostolic Signature, Decision of July 8, 1971: *Leges Ecclesiae* 5 : coll. 6135-6136 and Decision of April 18, 1972: *Leges Ecclesiae* 5 : coll. 6257-6258.

his asking and receiving of the matrimonial consent. It sufficed that the spouses exchanged their consent in the presence of a sacred minister.²⁷⁴

2. Canonical form during the discussion on mixed marriages²⁷⁵

As already mentioned, the issue of canonical form was discussed in relation to the problem of mixed marriages. However, some bishops, in their proposals sent to the Antepreparatory Pontifical Commission of the Council, raised the subject of the canonical form of marriage from another perspective. Their concerns regarded the great number of invalid marriages generated by the lack of proper delegation of the priest who assisted at a marriage celebration according to canon 1096 of the 1917 *CIC*.²⁷⁶ In order to remedy this situation, a number of bishops presented various proposals, some of which suggested the lightening of the provisions concerning delegation, while others suggested that canonical form be required only for the liceity of marriage.²⁷⁷ Nevertheless, these proposals did not find their way into the conciliar debates.

²⁷⁴ Meletius Wojnar, "Decree on Eastern Catholic Churches: Commentary," in *American Participation in the Second Vatican Council*, Vincent Yzermans ed. (New York: Sheed and Ward, 1967) 354.

²⁷⁵ For a comprehensive review of the discussions on mixed marriages at Vatican II, see Konda, *The Changing Attitudes*, 48-106.

²⁷⁶ Jozef Tomko, *Matrimoni Misti* (Naples: Edizioni Dehoniane, 1971) 158.

²⁷⁷ Vatican Council II, *Acta et Documenta Concilio Oecumenico Vaticano II Apparando*, Series 1 (*Antepreparatoria*), Vol. 2, (*Acta Summi Pontificis Ioannis XXIII*) (Vatican City: Typis Polyglottis Vaticanis, 1960) appendix, pars 2 : 166-174.

The 1962 *Schema decreti de matrimoniis mixtis* provided that mixed marriages be celebrated according to the canonical form established by 1917 *CIC*.²⁷⁸ The consolidated and abbreviated 1963 *Schema decreti de matrimonii sacramento* included the same provision in the second chapter, which was concerned with mixed marriages.²⁷⁹ The 1963 *Schema* dealt with the canonical form of marriage in chapter four. In the introduction, the use of canonical form was justified as follows: since marriage is one of the seven sacraments and Christ the Lord elevated the matrimonial contract to the dignity of a sacrament, the Church possesses the proper and exclusive right to determine conditions and solemnities for a valid and licit celebration of marriage.²⁸⁰ However, in the official comment that followed chapter four, some principles were provided for the interpretation of canons concerning the use of the extraordinary form. It was admitted that the ordinary form of marriage cannot always be used without offending the natural right of every person to marry. In these cases the use of the extraordinary form was permitted, after obtaining, if possible, the permission of the Ordinary. If no answer had been received within a month after the request was sent to the Ordinary, the parties were free to marry using the extraordinary form of marriage.²⁸¹ The text concerning the canonical form of marriage was taken without any changes in the 1964

²⁷⁸ *Schema decreti de matrimoniis mixtis*, in Vatican Council II, *Acta et Documenta Concilio Oecumenico Vaticano II Apparando*, Series 2 (*Preparatoria*), Vol. 3, (*Acta Summi Pontificis Ioannis XXIII*) (Vatican City: Typis Polyglottis Vaticanis, 1964) pars 1: 526.

²⁷⁹ *Schema decreti de matrimonii sacramento*, n. 7, f, in *Acta Synodalia*, Vol. 3, pars 8: 1072.

²⁸⁰ *Ibid.*, n. 12, in *Acta Synodalia*, Vol. 3, pars 8: 1074.

²⁸¹ *Ibid.*, n. 14, in *Acta Synodalia*, vol. 3, part 8: 1077.

Schema voti de matrimonii sacramento. During the elaboration of the *Votum*, several Council Fathers demanded that the Council settle the long-debated issue of the mandatory form of marriage, especially in the case of mixed marriages between Christians.²⁸² Among the proposals presented by the Council Fathers, there were two main tendencies. Some of the Council Fathers suggested that the canonical form of marriage be abrogated for mixed marriages, or required only for liceity. Others suggested that Ordinaries be permitted to dispense from canonical form “according to the necessities of the Church and for the good of souls.”²⁸³ In this context some Council Fathers suggested that such a faculty to dispense from canonical form should be left to the ruling of Episcopal Conferences, which could established for every region what is best for the common good of the Church.²⁸⁴ The Commission chose the second suggestion, which was included in the enlarged 1964 *Schema voti de matrimonii sacramento*:

Mixed marriages must be contracted with canonical form. If grave difficulties stand against observance of form, the faculty to dispense from the canonical form is to be granted to local Ordinaries so that that marriages celebrated publicly with true consent do not remain invalid.²⁸⁵

²⁸² *Schema voti de matrimonii sacramento, Relatio de laboribus a Commissione Conciliari de Sacramentorum disciplina peractis*, in *Acta Synodalia*, Vol. 3, pars 8: 1154-1155.

²⁸³ *Ibid.*, 1154: “Prout exigant bonum Ecclesiae et salus animarum.”

²⁸⁴ *Ibid.*

²⁸⁵ *Votum de matrimonii sacramento, textus emendatus*, 5b, in *Acta Synodalia*, Vol. 3, pars 8: 469: “Mixtae nuptiae forma canonica contrahendae sunt. Si autem graves huic servandae formae difficultates obstant, ne eae quae consensus vere matrimoniali publice celebrabuntur effectum validitatis careant, Ordinariis locorum facultas a forma canonica dispensandi tribuatur.”

This solution was considered sufficient to guarantee the validity of mixed marriages and assure the necessary contact of the Catholic spouse with the proper pastor.²⁸⁶ The opinions of the Council Fathers who spoke in the conciliar aula with regard to this matter were very diverse. Bishop Taguchi of Osaka recommended that the local Ordinaries be granted the authority to dispense from the form in grave situations.²⁸⁷ Bishop Renard of Versailles requested that a special canonical form of marriage be established for Catholics who abandoned the Church or the faith.²⁸⁸ Cardinal Ritter of Saint Louis supported the proposal but insisted on the necessity of keeping the canonical form mandatory. He justified his suggestion by pointing out that, although clandestine marriages are not frequent anymore, the phenomenon of marriages contracted hastily and without any assurance concerning their endurance is alarming. This phenomenon may be checked only by remaining faithful to the canonical form of marriage.²⁸⁹ Archbishop Krol of Philadelphia stated that the canonical form must be maintained and Ordinaries should not grant any dispensation except for truly ecumenical reasons.²⁹⁰ Cardinal Spellman sent an intervention read by Bishop Fearnese, Auxiliary of New York, in which the proposal to dispense from canonical form was

²⁸⁶ *Relatio super schema voti de matrimonii sacramento*, 5, in *Acta Synodalia*, Vol. 3, pars 8: 481.

²⁸⁷ *Patrum orationes, De matrimonii sacramento*, in *Acta Synodalia*, Vol. 3, pars 8: 656-657.

²⁸⁸ *Ibid.*, 652-653.

²⁸⁹ *Ibid.*, 629-631.

²⁹⁰ *Ibid.*, 635.

considered to be harmful if it was to be imposed on all countries of the world.²⁹¹ Finally, since it was clear that an agreement was not possible, Cardinal Dopfner of Munich, as the moderator of the session, proposed that the *Votum* be sent to the Holy See and that a motu proprio regarding mixed marriages be issued.²⁹² The Council Fathers voted in favor of this proposal, and the issue of mixed marriages was referred to the Holy See.²⁹³ Since the Council Fathers did not vote whether to accept upon the *Votum*, the text was never published as a conciliar decree and consequently never had legal force.

II. Canonical form of marriage in post-conciliar legislation

1. Instruction *Matrimonii Sacramentum*²⁹⁴

After the Council ended, the Congregation for the Doctrine of the Faith prepared a document concerning mixed marriages with provisions in conformity with the principles expressed in the *Votum* referred by the Council Fathers to the Holy See. The purpose of the instruction was to clarify the Church's position concerning mixed marriages and to update the laws governing these marriages in accord with various conciliar principles.²⁹⁵ The

²⁹¹ *Ibid.*, 631-633.

²⁹² *Ibid.*, 627.

²⁹³ *Ibid.*, 675.

²⁹⁴ Congregation for the Doctrine of the Faith, instruction, *Matrimonii Sacramentum*, March 18, 1966: AAS 58 (1966) 235-239.

²⁹⁵ Robert Banks, "The Instruction on Mixed Marriages," *The Homiletic and Pastoral Review* 67 (1966) 130.

Congregation consulted on this matter several bishops from areas where mixed marriages were more frequent. Most of the consulted bishops, while in favor of other innovations included in the proposed document, were opposed to the proposition made by the Congregation to give the Ordinaries or Episcopal Conferences the faculty to dispense from canonical form.²⁹⁶ The Congregation found a compromise solution which took into consideration the suggestions of the conciliar *Votum* and at the same time respected the opinions of the bishops who had been consulted.²⁹⁷ Concerning the canonical form of mixed marriages, the instruction reaffirmed its requirement as binding for validity; i.e., canon 1094 of the 1917 *CIC* must be observed for the validity of a mixed marriage. However, in difficult situations, the Ordinary might have recourse to the Holy See.²⁹⁸ Moreover, the instruction derogated from canon 1102 § 2 and gave the ordinary the authority to permit mixed marriages to be celebrated with sacred ceremonies, the nuptial blessing, and a sermon.²⁹⁹ Shortly afterwards, the motu proprio *De Episcoporum muneribus*³⁰⁰ explicitly established

²⁹⁶ Ladislaus Örsy, “Mixed Marriages: The New Instruction,” *The Dublin Review* 140 (1967) 360.

²⁹⁷ *Ibid.*, 362.

²⁹⁸ The Congregation for the Doctrine of the Faith, instruction *Matrimonii sacramentum*, III: AAS 58 (1966) 238: “In matrimoniis mixtis celebrandis forma canonica este servanda, de qua in can. 1094 agitur, et quidem ad validitatem. Si vero difficultates exoriuntur, Ordinarius ad Sanctam Sedem casum referat cum eius adiunctis.”

²⁹⁹ *Ibid.*, IV: “Quoad formam liturgicam, derogando cann 1102 § 2 ac 1109 § 3, conceditur locorum Ordinariis, ut permittant celebrationem matrimoniorum etiam mixtorum, adhibitis sacris ritibus cum suetis benedictionibus et sermone.”

³⁰⁰ Paul VI, motu proprio *De Episcoporum Muneribus*, June 15, 1966: AAS 58 (1966) 467-472.

that the authority to dispense from canonical form is reserved to the Holy See.³⁰¹ Thus, the instruction *Matrimonii Sacramentum* adopted some, but not all, of the recommendations included in the conciliar *Votum* and referred to the Holy See. This document, which joined both old traditions and the new thinking of Vatican II, was a result of an organic development of discipline on mixed marriages.³⁰²

2. The decree *Crescens matrimoniorum*³⁰³

After the conciliar decree *Orientalium Ecclesiarum* had recognized the validity of marriages contracted between Oriental rite Catholics and Oriental non-Catholics, solving in this manner many problems generated by mixed marriages among Orientals, Latin bishops petitioned to the Holy See to make available the same legislation available to all rites. In fact, after the promulgation of *Orientalium Ecclesiarum*, an atmosphere of confusion had been experienced, because two different disciplines concerning mixed marriages were in force at the same time. On the one hand, the marriage of a Catholic Oriental with an Oriental non-Catholic was valid if celebrated before a non-Catholic sacred minister, while on the other, the marriage of a Latin Catholic with an Oriental non-Catholic was invalid.³⁰⁴ The answer to the bishops' concerns was the release of the decree *Crescens Matrimoniorum* on

³⁰¹ *Ibid.*, 471.

³⁰² Örsy, "Mixed Marriages," 358.

³⁰³ Sacred Congregation for the Oriental Churches, decree *Crescens matrimoniorum*, February 22, 1967: *AAS* 59 (1967) 165-166.

³⁰⁴ Timothy Cunningham, "Mixed Marriages with Orientals," *The Irish Ecclesiastical Record* 107 (1967) 408-409.

February 22, 1967, which went into effect on March 25, the same year. The decree modifies the provisions of the 1917 *CIC* regarding the canonical form of marriage in several aspects.³⁰⁵

In its introduction, the decree noted that Vatican II, in order to adjust some contemporary problems regarding mixed marriages, recognized as valid marriages between Oriental Christians. Further on, the decree admitted that mixed marriages between Latin Catholics and non-Catholic Orientals have caused many problems both in the East and West.³⁰⁶ Therefore, in order to safeguard the sanctity of marriage as well as to promote Christian harmony, the canonical form of marriage would be required only for the liceity of marriages contracted between Catholics and Oriental non-Catholics. For the validity of these marriages the presence of a sacred minister was required.³⁰⁷ Next, the decree stipulated that the pastor was still obliged to record carefully the marriage of the Catholic party, even though the ceremony took place in a non-Catholic church.³⁰⁸ Finally, the decree provided that local Ordinaries who have the power to dispense from the impediment of mixed religion

³⁰⁵ For a meticulous analysis of the document see Clemens Pujol, “Adnotationes ad Decretum de Matrimonii Mixtis,” *Periodica* 56 (1967) 505-517.

³⁰⁶ Sacred Congregation for the Oriental Churches, decree *Crescens matrimoniorum*: AAS 59 (1967) 165.

³⁰⁷ Sacred Congregation for the Oriental Churches, decree *Crescens matrimoniorum*: AAS 59 (1967) 166: “Quando catholici sive orientales sive latini matrimonia contrahunt cum fidelibus orientalibus non catholicis, formam canonica celebrationis pro his matrimoniis obligare tantum ad liceitatem; ad validitatem sufficere praesentiam ministri sacri, servatis aliis de iure servando.”

³⁰⁸ *Ibid.*

also have the power to dispense from canonical form for liceity when, according to their prudent judgment, there is a difficult situation.³⁰⁹

To summarize, the decree *Crescens matrimoniorum* brought about two major changes concerning the canonical form of mixed marriages. First, the relaxation of the form introduced by *Orientalium Ecclesiarum* was expanded to include Latin Catholics also. Second, the dispensation from canonical form was not reserved to the Holy See anymore; any local Ordinary could grant this dispensation in difficult situations and allow a Catholic to marry a non-Catholic Oriental before a non-Catholic sacred minister. At this point, there was a uniform legislation concerning mixed marriages contracted between Catholics of any rite and Oriental Christians.

3. The 1967 Synod of Bishops

The Synod of Bishops met for the first time in Rome in 1967. One of the five items placed on the Synod's agenda was the question of mixed marriages. The debates on this issue started in the fourteenth Congregation of the Synod on October 16, 1967, and ended during the eighteenth Congregation on October 21, 1967.³¹⁰ The Draft on mixed marriages consisted of an introductory part and a list of eight questions concerning the canonical

³⁰⁹ Ibid.: "Ordinariis autem locorum, qui dispensationem super impedimentum mixtae religionis concedunt, facultas pariter fit dispensandi ab obligatione servandi formam canonicam ad liceitatem si difficultates exstent quae, eorum prudenti iudicio, hanc requirant dispensationem."

³¹⁰ Giovanni Caprile, *Il Sinodo dei Vescovi: Prima Assemblea Generale* (Rome: La Civiltà Cattolica, 1968) 325-438.

legislation of the time on mixed marriages.³¹¹ The various problems regarding canonical form were dealt with in three of the eight questions.

The fifth question suggested that the canonical form of marriage remain a matter of validity only for marriages between Catholics, while in the case of mixed marriages it would be a matter of liceity.³¹² The bishops were divided on this matter.³¹³ Reasons brought up in favor of suppressing canonical form for mixed marriages included the fact that the great numbers of Catholics who attempt marriage do so invalidly,³¹⁴ that the Church granted in particular situations a dispensation from canonical form, and that a certain public ceremony, according to local traditions, should be observed.³¹⁵ Among the arguments against the suppression of canonical form for mixed marriages were that the Church would not be able to determine the validity of marriages, and thus much harm would come to the pastoral work of the Church; in the absence of a religious ceremony people would be encouraged to divorce; a relaxation on this matter would open the way to similar demands in related issues which the

³¹¹ *Ibid.*, 331-337.

³¹² Urban Navarrete, "Matrimonia Mixta in Synodo Episcoporum," *Periodica* 57 (1968) 676: "Utrum forma canonica tolli possit ut deinceps sequens norma adhibeatur: catholici, qui pro validitate actus ad formam tenentur quando inter se contrahunt, ad illam autem tenentur solummodo pro liceitate si cum non catholicis contrahunt?"

³¹³ For a detailed overview of synodal debates and the positions bishops took in favor or against the suppression of canonical form for mixed marriages see Caprile, *Il Sinodo dei Vescovi*, 350-433 and Tomko, *Matrimoni Misti*, 164-180.

³¹⁴ The French bishop Puech mentioned that at the time about two thirds of the mixed marriages in Europe were contracted without canonical form. Tomko, *Matrimoni Misti*, 168.

³¹⁵ Navarrete, "Matrimonia Mixta," 676. Tomko, *Matrimoni Misti*, 168-170.

Church could not admit; and finally the suggestion would be of no use for Oriental Catholics, for whom a sacred rite would still be required for validity.³¹⁶ It is interesting to note that twelve bishops suggested the total suppression of canonical form for mixed marriages;³¹⁷ however, the majority supported the preservation of the canonical form for validity for mixed marriages. The final vote was 33 bishops in favor of the suppression of canonical form, 125 were opposed to it, 1 vote was null, and 28 were in favor but *iuxta modum*.³¹⁸

The sixth question inquired whether the faculty to dispense from canonical form in particular cases should no longer be reserved to the Holy See but be granted to the local Ordinary.³¹⁹ The main argument in the favor of this proposal was the fact that, in granting the dispensations from canonical form, the Holy See already relied heavily on the judgment of the local Ordinaries asking for the dispensation. The main reasons invoked against the proposal were two. First, there was the concern that local pronouncements would produce divergences and disagreements, which would cause the loss of unity. Second, the Holy See had much greater authority than a local bishop, whose decisions are easily subjected to controversies.³²⁰ In the balloting, 105 bishops voted in favor of granting the local Ordinaries

³¹⁶ Navarrete, “Matrimonia Mixta,” 676. Tomko, *Matrimoni Misti*, 170-177.

³¹⁷ Caprile, *Il Sinodo dei Vescovi*, 428. Tomko, *Matrimoni Misti*, 167.

³¹⁸ Navarrete, “Matrimonia Mixta,” 679. Caprile, 434.

³¹⁹ Navarrete, “Matrimonia Mixta,” 681: “Utrum, retenta forma canonica ad validitatem matrimonii Ordinario loci concedi oporteat facultas ab illa dispensandi, pro conscientia et prudentia, in casibus particularibus, ita ut non amplius soli Sanctae Sedi reservatur exercitium eiusmodi iuris?”

³²⁰ *Ibid.*, 681-682.

the faculty to dispense from canonical form for mixed marriages, 13 voted against, one vote was null, and 68 vote in favor but *iuxta modum*.³²¹

The seventh proposal dealt with the liturgical celebration of mixed marriages. After obtaining the permission of the local Ordinary, a mixed marriage may be celebrated either within Mass or outside Mass with a special ceremony. In this case, should the pastor suggest one or another liturgical form, according to the spiritual preparation of the spouses?³²² Some of the bishops noticed that the proposal seemed unnecessary, since the existing norms at the time provided that mixed marriages could be celebrated with a Matrimonial Mass when the Ordinary granted the permission. The reason for this proposal was to guide the consciences of future spouses in choosing the religious ceremonies for their marriage. The voting concluded with 155 bishops favoring the proposal, 5 opposed it, 2 votes were null, and 27 voted in favor but *iuxta modum*.³²³

The debates at the 1967 Synod of Bishops were very much in line with the discussions that took place at Vatican II.³²⁴ In fact, they indicated the direction that legislation would take in the future, namely, the canonical form of marriage would continue

³²¹ Ibid., 682. Caprile, 434.

³²² Ibid., 684: “Cum matrimonium mixtum sicuti quodvis matrimonium celebrari possit vel intra Missam vel ritu peculiari extra Missam . . . curator animarum, plene admissa libertate coniugum, nonne sollicitus esse deberet de una vel altera forma liturgica commendanda iuxta variam spiritualem coniugum praeparationem?”

³²³ Navarrete, “Matrimonia Mixta,” 684-685. Caprile, 435.

³²⁴ See above pages 166-170.

to be required for validity, but a greater freedom in its dispensation would be granted to bishops.³²⁵

4. Motu proprio *Matrimonia Mixta*³²⁶

The Synod of Bishops was established to offer information and advice to the Pope in planning and monitoring Church policy. Thus, the Synod's role was not legislative but consultative.³²⁷ With respect to mixed marriages, the 1967 Synod of Bishops recommended principles and guidelines meant to replace the 1966 instruction *Matrimonii Sacramentum*. These recommendations found their place in the next major piece of legislation concerning the canonical discipline of mixed marriages, namely the motu proprio *Matrimonia Mixta* which was issued on March 31, 1970.

With regard to the canonical form of marriage in the case of mixed marriages, *Matrimonia Mixta* endorsed the recommendations made by the 1967 Synod of Bishops. Therefore, the canonical form continued to be required for validity, with the exception of those situations governed by the provisions of the decree *Crescens matrimoniorum*.³²⁸ If serious difficulties obstructed the observance of canonical form, local Ordinaries have the

³²⁵ Ioannes Heimerl, "De Forma Matrimoniorum Mixtorum Propositio," *Periodica* 57 (1968) 472-473.

³²⁶ Paul VI, motu proprio, *Matrimonia Mixta*, March 31, 1970: AAS 62 (1970) 257-263.

³²⁷ Paul VI, motu proprio, *Apostolica Sollicitudo*, II, September 15, 1965: AAS 57 (1965) 776.

³²⁸ Motu proprio *Matrimonia Mixta*: AAS 62 (1970) 261: "8. Mixtae nuptiae forma canonica contrahendae sunt, quae forma ad validitatem matrimonii requiritur, salvo praescripto Decreti *Crescens matrimonium*, a S. Congregatione pro Ecclesiis Orientalibus die 22 mensis Februarii anno 1967 editi."

right to dispense from it in the case of mixed marriages. Conferences of Bishops were required to establish norms which would ensure a uniform and licit granting of such dispensations, provided that there would be some public form of celebration.³²⁹ The document did not specify whether the public form should be religious or civil; consequently both of them were admissible.³³⁰ All marriages validly contracted had to be recorded in the books according to the provisions of law. Again, Bishops' Conferences should issue norms which would ensure a consistent manner of recording mixed marriages contracted with a dispensation from canonical form.³³¹ With regard to liturgical ceremonies for mixed marriages, the document stipulated that use must be made of the rites of the ritual of marriage. In the case of a mixed marriage between a Catholic and a baptized non-Catholic, the wedding, with the permission of the local Ordinary, could be celebrated at Mass, provided that the general law on Eucharistic communion was observed.³³²

³²⁹ Ibid.: "9. Si graves difficultates formae canonicae servandae obstent, Ordinariis locorum ius est dispensandi a forma canonica matrimonii mixti; Conferentiae autem Episcoporum est normas statuere, quibus praedicta dispensatio in sua regione vel in suo territorio concorditer ac licite, salva tamen aliqua publica forma celebrationis, concedatur."

³³⁰ Tomko, *Matrimoni Misti*, 181.

³³¹ Paul VI, motu proprio, *Matrimonia Mixta*: AAS 62 (1970) 261-262: "10. Curandum est, ut omnia matrimonia valide contracta in libris, a iure canonico praescriptis, sedulo adnotentur ... Conferentiae vero Episcopales normas edant, quibus in earum regione vel territorio modus communi ratione determinetur, quo de matrimonio post obtentam dispensationem a forma canonica, publice contracto, in libris iure canonico praescriptis constet."

³³² Ibid., 262: "11. Quoad formam liturgicam celebrandi matrimonia mixta, si ea desumenda sit ex Rituali Romano, ritus adhiberi debent ex Ordine celebrandi Matrimonium, auctoritate Nostra promulgato ... Si autem casus ferat, in matrimonio inter partem catholicam et partem baptizatam non catholicam adhiberi possunt, de consensu Ordinaria loci, ritus celebrandi

Finally, another stipulation which had an impact on the canonical form was the one provided in article 13 of the motu proprio *Matrimonia Mixta*. “The celebration of a marriage in the presence of a Catholic priest or deacon and a non-Catholic minister in which each one simultaneously performs his ritual is prohibited.”³³³ The document added the deacon to the list of qualified witnesses. In fact, this was a confirmation of the statement made in article 29 of the Dogmatic Constitution on the Church *Lumen gentium*: “It is the duty of the deacon, according as it shall have been assigned to him by competent authority, ..., to assist at and bless marriages in the name of the Church.”³³⁴

The motu proprio *Matrimonia Mixta* was the last major piece of legislation issued after Vatican II and prior to the promulgation of the 1983 *CIC*. It is important to note that *Matrimonia Mixta* assigned to the Conferences of Bishops the task of enacting rules which would ensure a uniform and licit implementation of the norms provided in this document.

5. Subsequent interpretations and legislation

After the motu proprio *Matrimonia Mixta*, only a few norms concerning the canonical form of marriage were issued by various dicasteries of the Roman Curia. Therefore, the Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council,

matrimonium intra Missam (nn. 19-38), servato legis generalis praescripto quoad Communionem Eucharisticam.”

³³³ Ibid.: ”13. Matrimoni celebratio coram sacerdote vel diacono catholico et ministro non catholico, qui simul suum quisque ritum peragant, vetatur.”

³³⁴ Vatican II, *Lumen gentium*, 29, November 21, 1964: AAS 57 (1965) 36: “Diaconi est, prout ei a competenti auctoritate assignatum fuerit, ... matrimonio Ecclesiae nomine adsistere et benedicere.”

answering affirmatively to a question concerning the assistance of deacons at marriages, established that a deacon who was stable and lawfully assigned to a certain parish can be considered equivalent to a vicar cooperator as far as receiving general delegation to assist at marriages, according to canon 1095 § 2.³³⁵ Several bishops asked the Congregation for the Sacraments if, in the case of a shortage of priests and deacons, a properly delegated member of the Catholic faithful may act as a qualified witness and assist at marriages. The 1971 reply of the Congregation was negative, because such an act would produce prejudice to marriages contracted with the extraordinary form.³³⁶ Later on, however, the same Congregation published on May 15, 1974, the instruction *Sacramentalem indolem*, which stipulated that the Congregations of the Roman Curia could grant local Ordinaries the authority to select personally a Catholic layperson to act as the official witness at a marriage. Once again, Conferences of Bishops were entrusted with the approval of such a measure for their region or territory, and the Ordinary had to ask for such a person. However, canon 1098 of the 1917 *CIC*, concerning the extraordinary form of marriage, remained in effect, as well as all other rules concerning the canonical form of marriage.³³⁷ Finally, an inquiry was addressed to the Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council, about whether a bishop could attach a clause which would affect the validity of a marriage

³³⁵ Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council, responsum ad dubia of July 19, 1970: *AAS* 62 (1970) 571.

³³⁶ Sacred Congregation for the Sacraments, instruction, December 7, 1971: *CLD* 7: 753-756.

³³⁷ Sacred Congregation for the Sacraments, instruction *Sacramentalem indolem*, May 15, 1974: *CLD* 8 : 815-818.

while granting a dispensation from canonical form according to the provision of article 9 of motu proprio *Matrimonia Mixta*. In case the clause was not fulfilled, would the marriage be defective in form and consequently null? The reply of the Commission was affirmative.³³⁸

Conclusion

The second section of this chapter considered the subject of the canonical form of marriage as addressed by Second Vatican Council and its subsequent development up to the promulgation of the 1983 *CIC* and *CCEO*. It first examined the issue as addressed during conciliar debates and in the documents of Vatican II which considered the matter of canonical form, not as a topic in itself but in relation to the subject of mixed marriages. The most obvious change concerning the form of marriage was included in the decree on Eastern Catholic Churches which provided that, for a marriage between an Oriental Catholic and an Oriental non-Catholic, the canonical form of marriage was required for liceity only; the presence of a sacred minister was enough for validity. A few years later, through the decree *Crescens matrimoniorum*, the relaxation of form was expanded to include Latin as well as Oriental Catholics. This law was especially beneficial for many Christian faithful in Eastern Europe. The lack of proper pastors, sometimes the loss of their religious identity, at times the lack of proper religious education, the status of a religious minority, and other reasons led many Catholics of either rite to contract marriages in the Oriental non-Catholic churches, marriages which were invalid because of the lack of canonical form. The new law brought new perspectives and facilitated reconciliation with the Church of those who contracted

³³⁸ Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council, responsum ad dubia of April 9, 1979: *AAS* 71 (1979) 632.

marriage in a non-Catholic Oriental celebration. However, the law had a somehow negative secondary effect. Lack of information or insufficient religious education led many Catholics who contracted marriages in non-Catholic Oriental church to think that such marriages were not valid. In the unfortunate case that their marriage broke up, they found themselves confronted with the impossibility of contracting another marriage, because of the impediment of prior bond.

Unlike the decree on the Eastern Catholic Churches, the conciliar debates on mixed marriages were inconclusive. The Council Fathers decided that the *Schema voti de matrimonii sacramento* be referred to the Holy See. However, the proposals expressed during conciliar debates have gradually been converted into laws. First, the instruction *Matrimonii Sacramentum* established that the canonical form was to be observed for the validity of the marriage but, in difficult situations the Ordinary might have recourse to the Holy See. Then, the decree *Crescens matrimoniorum* established that, when Catholics married Oriental non-Catholics the canonical form bound only for liceity and the local Ordinary could even give a dispensation from the obligation of canonical form for liceity in difficult situations, and accordingly to allow a Catholic to marry a non-Catholic Oriental before a non-Catholic sacred minister. Finally, the 1967 Synod of Bishops reaffirmed the principles expressed during conciliar debates concerning mixed marriages. The Synod's recommendations were included in the motu proprio *Matrimonia mixta* which, with respect to the canonical form of marriage, reaffirmed those principles established previously in the decree *Crescens matrimoniorum*. Besides, it enabled Episcopal Conferences to issue norms which would assure a uniform and licit granting of dispensations.

After the motu proprio *Matrimonia Mixta*, a few minor norms with regard to the canonical form of marriage were issued by various Commissions and Congregations of the Roman Curia. The provisions of conciliar and post-conciliar legislation concerning the canonical form of marriage were included and at times expanded in the 1983 *CIC* and *CCEO*. A comparative study of these two codes will be the concern of the next chapter.

CHAPTER THREE

THE CANONICAL FORM OF MARRIAGE IN THE 1983 CODE OF CANON LAW AND IN CODE OF CANONS OF THE EASTERN CHURCHES

Introduction

The celebration of marriage is not only a sacramental act but a juridical act which is accomplished according to the provisions established by the law. Analyzing this law, the previous chapter considered the historical development of both the canonical form of marriage in the Latin Church and the provisions the Eastern law required for the celebration of marriage as legislated in the 1917 *CIC*, the motu proprio *Crebrae allatae*, as well as in subsequent ecclesiastical legislative acts and authentic interpretations issued by various dicasteries of the Roman Curia. This chapter will examine the canonical form of marriage as it is presented by the 1983 *CIC* and *CCEO*. Although the two Codes have their proper domain and their own subjects, they are not completely disconnected. On the contrary, both Codes reflect the spirit of the Second Vatican Council and at the same time, their own authentic canonical traditions. Both Latin and Oriental codes are expressions of the same ecclesiological and cultural context. Both contain certain norms that concern all the Catholic faithful, both Latins and Orientals. On the other hand, there remain many differences between the Latin and Oriental codes. In the section on matrimonial legislation, even if the norms are substantially the same, a comparative study reveals some important differences; one of the most significant dissimilarity concerns the canonical form of marriage. Faithful to the Eastern tradition, the *CCEO* continues to require *ad validitatem* that marriage be celebrated with a sacred rite by a priest who blesses the couple. This norm raises not a few

problems when it comes to interritual and mixed marriages. Thus, the same marriage celebrated validly between two Latin Catholics may not be considered valid when celebrated by two Oriental Catholics or between a Latin and an Oriental. This is only one reason for which a comparative study of the laws governing the canonical form of marriage in the Latin and Oriental Code may be extremely useful for those involved in pastoral, chancery and tribunal activities in places where Latin and Eastern faithful interact.

A comparative analysis is particularly useful for the Church in Eastern Europe. The promulgation of the two Codes coincided with a succession of social and political events that fundamentally changed the social, political and religious life in the countries of Central and Eastern Europe. The fall of communism in the late eighties and the collapse of the Soviet Union in the early nineties, brought about a new situation and new challenges for the Church in that part of the world. First of all, the Church, freed from restrictions imposed by totalitarian regimes for almost half a century, enjoyed the liberty to organize its activity without any significant limitation on the part of the newly installed democratic governments. This is particularly true for the Oriental Catholic Churches that had been closed down at the end of the 1940's and were only able to function in a very limited manner underground. Consequently, Oriental Catholics were able to reactivate their eparchies, parishes, seminaries, and religious institutes and their faithful could openly practice their faith. These events further led to a new level of relationship between the Latin and Oriental Churches. A better knowledge and understanding of each other's legislation, traditions, and ecclesiastical discipline resulted in more intense pastoral, theological and canonical cooperation between

the two Christian traditions. However, there remain situations for those involved in pastoral work where sufficient knowledge concerning traditions and ecclesiastical discipline is still lacking, especially with regard to matrimonial legislation. This study could be helpful in fulfilling these needs.

Second, the collapse of communism opened the borders between the countries formerly situated behind the Iron Curtain and the Western Europe. The long and painful period of transition from a centralized economy to a market economy, which brought about the phenomenon of greater unemployment, made more obvious the economical disparity between the two parts of Europe. This fact resulted in a massive emigration of people from Eastern European countries toward the more developed countries in Western Europe. Consequently, millions of Oriental Christians have been looking for better fortune in traditionally Latin Catholics countries such as Italy, Spain, Portugal, etc. It is not difficult to imagine that this exodus of population poses new challenges for those involved in pastoral work, particularly in regard to marriage. A better knowledge of each other's religious traditions and ecclesiastical discipline seems necessary in order to provide better pastoral care, Christian education, and matrimonial preparation for emigrants.

Therefore, this chapter will present a comparative analysis of the 1983 *CIC* and the *CCEO* concerning the canonical form of marriage, with references to the authentic interpretation issued by various dicasteries of the Roman Curia and to the changes made by the legislator. The 1983 *CIC* treats the canonical form of marriage in the fourth book – *The sanctifying function of the Church*, the first part – *The sacraments*, the seventh title –

Marriage, the fifth chapter - *The form of the celebration of marriage*, canons 1108 to 1123. The *CCEO* deals with the topic at hand in the sixteenth title – *Divine worship and especially the sacraments*, the seventh chapter – *Marriage*, the sixth article – *The form for the celebration of marriage*, canons 828 to 842. Since the legislation concerning the canonical form of marriage is substantially the same as in the previous legislation, the present analysis will highlight the new elements introduced in the present legislation and will also emphasize the differences that exist between the Latin and Oriental discipline. This chapter will consider only those norms that are common to both the 1983 *CIC* and the *CCEO*. Thus, the present chapter will not analyze the subjects of marriage celebrated by proxy (canon 837 of the *CCEO*) nor secret marriage (canon 840 of the *CCEO*) which the 1983 *CIC* treats in distinct chapters. However, because of its utmost importance with regard to the topic of this study, canon 1127 of the 1983 *CIC*, which deals with canonical form in mixed marriages, dispensation from canonical form and prohibition of double ceremonies, will be analyzed and compared with its Oriental counterparts even though it is included in the chapter treating mixed marriages. For analytic purposes, the third chapter will follow the same format used in the preceding chapter, namely, the texts of canons of the two codes are placed side-by-side on the page with the text of canons of the 1983 *CIC* on the left side and the text of canons of the *CCEO* on the right. Those canons or paragraphs which are without parallel in the other code are simply printed in the proper column. For the sake of clarity, whenever paragraphs of a certain canon are analyzed separately, the number of the respective canon will also be indicated.

I. The elements of Canonical Form

Canon 1108 §1. Only those marriages are valid which are contracted before the local ordinary, pastor, or a priest or deacon delegated by either of them, who assist, and before two witnesses according to the rules expressed in the following canons and without prejudice to the exceptions mentioned in cann. 144, 1112, §1, 1116, and 1127, §§1–2.

§2. The person who assists at a marriage is understood to be only that person who is present, asks for the manifestation of the consent of the contracting parties, and receives it in the name of the Church.¹

Canon 828 § 1. Only those marriages are valid which are celebrated with a sacred rite, in the presence of the local hierarch, local pastor or a priest who has been given the faculty of blessing the marriage by either of them, and at least two witnesses, according, however, to the prescripts of the following canons, without prejudice to the exceptions referred to in cann. 832 and 834, § 2.

§ 2. The very intervention of a priest who assists and blesses is regarded as a sacred rite for the present purpose.²

The fundamental structure of the canonical form of marriage for both Latin and Oriental law remains basically the same in the present legislation as it was expressed in 1917 *CIC* and motu proprio *Crebrae allatae*. It should be noticed that although, in fact, both canons lay down to a large extent the same rules, they differ evidently in the manner they express it. Thus, the Latin Code states that marriages are valid when contracted in the presence of a priest or deacon who assists actively by asking and receiving the consent of the

¹ 1983 *CIC*, c. 1108: “§ 1. Ea tantum matrimonia valida sunt, quae contrahuntur coram loci Ordinario aut parrocho aut sacerdote vel diacono ab alterutro delegato qui assistant, necnon coram duobus testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in cann. 144, 1112, § 1, 1116 et 1127, §§ 1-2. § 2. Assistens matrimonio intellegitur tantum qui praesens exquirat manifestationem contrahentium consensus eamque nomine Ecclesiae recipit.”

² *CCEO*, c. 828: “§ 1. Ea tantum matrimonia valida sunt, quae celebrantur ritu sacro coram Hierarcha loci vel parrocho loci vel sacerdote, cui ab alterutro collata est facultas matrimonium benedicendi, et duobus saltem testibus secundum tamen praescripta canonum, qui sequuntur, et salvis exceptionibus, de quibus in cann. 832 et 834, § 2. § 2. Sacer hic censetur ritus ipso interventu sacerdotis assistentis et benedicentis.”

parties. Meanwhile, the Oriental Code affirms that marriages are valid when they are celebrated with a sacred rite in the presence of a priest who assists and blesses the marriage. The Oriental sensibility toward the mystical and spiritual dimension of marriage is evident here.³

Both canons establish the constitutive elements of the ordinary canonical form for the valid celebration of the matrimony. For the Latin law, these elements are the active assistance of the qualified witness and the simultaneous presence of two common witnesses. For the Eastern law, the constitutive elements are the sacred rite, the presence of the sacred minister who assists and blesses the marriage, and the simultaneous presence of a least two witnesses. Moreover, both canons establish the exceptions to the general norm. For the Latin law these exceptions are those provided for in canons: 144, regarding the Church's supply in the case of common error and probable doubt of law or of fact; 1112 § 2, regarding the delegation of a lay person to assist at marriage; 1116, concerning the use of the extraordinary form of marriage; and 1127, concerning the validity of a mixed marriage contracted between a Catholic and an Oriental non-Catholic before an Oriental non-Catholic sacred minister. On the other hand, the Oriental law provides only two exceptions from the general norm, namely those provided for in canon 832, the use of extraordinary form of marriage, and in canon 834 § 2, concerning the celebration of marriage before an Oriental non-Catholic minister.

1. The qualified witness and the sacred minister

³ Clarence Gallagher, "Marriage in the Revised Canon Law for the Eastern Catholic Churches," *Studia Canonica*, 24 (1990) 76.

a. The local ordinary

Besides the Roman Pontiff, local ordinaries who have the authority to assist at marriages are first of all those to whom it is entrusted the care of a portion of the people of God, namely: the diocesan bishop,⁴ territorial prelate and territorial abbot,⁵ the apostolic vicar and the apostolic prefect,⁶ the apostolic administrator,⁷ and the diocesan administrator.⁸ The second group of local ordinaries who have by law the faculty to assist at marriages are those appointed to assist the diocesan bishop in the governance of the diocese in its whole or partially, namely: the bishop coadjutor and the auxiliary bishop with special faculties⁹ who are appointed as vicars general,¹⁰ the vicar general,¹¹ and the episcopal vicar.¹² The faculty of the episcopal vicar to assist at marriages is restricted to the area of competence of his appointment. In other words, an episcopal vicar appointed for a specific part of the diocese has the faculty to assist at marriages only in that specific territory, while an episcopal vicar

⁴ 1983 *CIC*, c. 376.

⁵ *Ibid.*, c. 370.

⁶ *Ibid.*, c. 371 § 1.

⁷ *Ibid.*

⁸ *Ibid.*, c. 427.

⁹ *Ibid.*, c. 405 § 2.

¹⁰ *Ibid.*, c. 406 § 1.

¹¹ *Ibid.*, c. 475.

¹² *Ibid.*, c. 476.

appointed for faithful belonging to a specific rite has the faculty over that group of faithful only. An episcopal vicar appointed for other type of affairs may validly assist at marriages only if the diocesan bishop intended to include this faculty in his assignment.¹³ The 1983 *CIC* maintains the norm expressed previously in 1917 *CIC* by not classifying the Cardinals, Apostolic Legates and Nuncios among ordinaries and accordingly, they do not possess the authority to assist marriages in virtue of their offices.

b. The local hierarch

The norms comprised in canon 984 § 2 of *CCEO*, which establishes those to be considered as local hierarchs¹⁴, are very similar to those formerly instituted in the motu proprio *Postquam Apostolicis Litteris*.¹⁵ Thus, the following are local hierarchs and enjoy the right to assist and bless marriages: the eparchial bishop,¹⁶ the exarch,¹⁷ the apostolic administrator,¹⁸ and the eparchial administrator.¹⁹ In addition, the bishop coadjutor²⁰ and the

¹³ Luigi Chiappetta, *Il Matrimonio nella Nuova Legislazione Canonica e Concordataria* (Rome: Edizioni Dehoniane, 1990) 271.

¹⁴ *CCEO*, c. 984 § 2.

¹⁵ *PAL*, c. 306 § 2, 1° and 2°: AAS 44 (1952) 145.

¹⁶ *CCEO*, c. 178.

¹⁷ *Ibid.*, c. 313.

¹⁸ *Ibid.*, c. 234.

¹⁹ *Ibid.*, c. 229.

²⁰ *Ibid.*, c. 215 § 1.

auxiliary bishop²¹ who are to be appointed protosyncellus, the protosyncellus,²² and the syncellus²³ have the authority to assist and bless marriages. In the Oriental law, protosyncellus and syncellus are the equivalent respectively of the vicar general and episcopal vicar in Latin law. Consequently, all limits of competence to assist at marriages mentioned with regard to the episcopal vicar in Latin law hold true for the syncellus in Oriental law.

c. The pastor

In Latin law, besides the local ordinary, the canon under consideration also designates the pastor as having the ordinary power to witness at marriages. Under the name of pastor is included first of all, the one indicated in canon 519, the proper pastor of the community that was entrusted to him by the Bishop.²⁴ The assistance at marriages is listed among the functions which are especially entrusted to a pastor.²⁵ In addition, under the term pastor are included the personal pastor²⁶ and the quasi-pastor.²⁷ Also able to assist at marriages is the

²¹ Ibid., c. 215 § 2.

²² Ibid., c. 245.

²³ Ibid., c. 246.

²⁴ 1983 *CIC*, c. 519.

²⁵ Ibid., c. 530, 4°.

²⁶ Ibid., c. 518.

²⁷ Ibid., c. 516 § 1.

parish administrator appointed when the parish is vacant or the pastor impeded,²⁸ or for other reasons.²⁹ In this case the priest appointed as parochial administrator has the same rights and duties as pastor.³⁰ Similarly, the right to assist at marriages is given to the parochial vicar or to the priest who assumes temporarily the governance of the parish when the parish is vacant or the pastor is impeded and a parochial administrator has not yet been appointed,³¹ as well as in the case when the pastor is absent from the parish.³² The law also grants the faculty to assist at marriages to each priest of the group to which the care of a parish is entrusted *in solidum*.³³

The Oriental law, compared to the Latin law, has fewer persons included under the concept of pastor. These are: the pastor of a territorial parish,³⁴ the personal pastor,³⁵ the

²⁸ *Ibid.*, c. 539.

²⁹ *Ibid.*, cc. 549, 1747 § 1, 1752.

³⁰ *Ibid.*, c. 540 § 1.

³¹ *Ibid.*, c. 541 § 1.

³² *Ibid.*, cc. 533 § 3, 549.

³³ *Ibid.*, c. 543 § 1.

³⁴ *CCEO*, cc. 280 § 1 and 281 § 1.

³⁵ *Ibid.*

parochial administrator,³⁶ and the parochial vicar, who assumes temporarily the care of the parish.³⁷

d. The deacon

The 1983 *CIC* confirms the statement made in article 29 of the Dogmatic Constitution on the Church *Lumen gentium*³⁸ and the norm established by motu proprio *Matrimonia Mixta*³⁹ and includes the deacon in the list of qualified witnesses.⁴⁰ However this Latin rule is not part of the Oriental matrimonial legislation. During the codification process of the Eastern Code it was debated whether or not the deacon should be given the faculty of blessing marriages. After considering carefully the Eastern tradition and the ecumenical aspects of the issue, the consultors came to a decision not to admit the deacon as a minister before whom a marriage might be celebrated in the ordinary form.⁴¹ The norm established by canon 828 § 1 of the *CCEO* stipulates that marriages are valid when “celebrated with a

³⁶ *Ibid.*, c. 299 § 1.

³⁷ *Ibid.*, c. 300 § 1.

³⁸ Vatican II, *Lumen gentium*, 29, November 21, 1964: AAS 57 (1965) 36.

³⁹ Paul VI, motu proprio *Matrimonia Mixta*: AAS 62 (1970) 262.

⁴⁰ 1983 *CIC*, c. 1108 § 1.

⁴¹ Joseph Prader, “Labor Consultorum Commissionis circa Canones de Matrimonio,” *Nuntia* 8 (1979) 21: “Discussio fit, utrum necne etiam diaconis tribuenda sit facultas matrimonium benedicendi. Consultores tenent diaconum, attenta traditione orientali et ratione habita criterii oecumenici, non admittendum esse ut ministrum coram quo matrimonium forma ordinaria ineatur.”

sacred rite.”⁴² Consequently, the deacon is excluded since the sacred rite is defined as the “intervention of a priest who assists and blesses” the marriage.⁴³ As a result of this important difference between the Latin and Oriental legislation, several canons of the two Codes concerning marriage are different. Thus, when the Latin law incorporates the deacon among those who may assist at marriages, the comparable canons of the Oriental law do not include the deacon among those assisting at and blessing marriages. With respect to the canonical form of marriage the following canons provide different norms concerning the deacon: canons 1111 § 1 of the 1983 *CIC* and 830 § 1 of the *CCEO* regarding the delegation of deacons to assist at marriages; canons 1116 § 2 of the 1983 *CIC* and 832 § 2 of the *CCEO* concerning the sacred minister that may be present at a marriage celebrated with the extraordinary form; and canons 1121 § 2 of the 1983 *CIC* and 841 § 3 of the *CCEO* with regard to the registration of a marriage celebrated with the extraordinary form.⁴⁴

2. The common witnesses

For the valid celebration of a marriage, the presence of two additional witnesses, whose duty is to testify to the fact that the marriage was dully celebrated, is required. Thus, they must have the use of reason and be capable of understanding that a specific marriage is taking place. Consequently, those who are mentally disabled or for some other reason (e.g. intoxication) are not capable of comprehending the event they witness may not serve as

⁴² *CCEO*, c. 828 § 1: “celebrantur rito sacro.”

⁴³ *Ibid.*, c. 828 § 2: “ipso interventu sacerdotis assistentis et benedicientis.”

⁴⁴ Each of these issues will be dealt with when the respective canons will be analyzed.

witnesses at marriage. Some commentators of the 1917 *CIC* held that deaf people could not act as common witnesses.⁴⁵ This exclusion reflected the mentality of the time that assimilated the deaf to mentally impaired persons. Contemporary studies show that this perception was mistaken. Although they cannot hear the words spoken by spouses, the deaf are able to witness the exchange of consent by reading the lips or by other gestures.⁴⁶ The law does not specify a minimum age required for witnesses. However, since the purpose of common witnesses is to insure that there will be people available later to attest to the celebration of marriage, they should be able to testify at trial. Accordingly, since persons who have not completed fourteen years of age may not serve as witnesses in canonical processes,⁴⁷ they should not be allowed to witness at marriages either.⁴⁸

In the Oriental churches, the common witnesses, called also paranympths, are witnesses not only to a juridic act but are also involved in the sacred rite of marriage. For this reason, besides the use of reason and the ability to comprehend the event that takes place,

⁴⁵ Gasparri, *De matrimonio*, 2 : 182, n. 1161.

⁴⁶ John Beal, "The Form of the Celebration of Marriage," in *New Commentary on the Code of Canon Law*, ed. John Beal et al. (New York/Mahwah, NJ: Paulist Press, 2000) 1328.

⁴⁷ 1983 *CIC*, c. 1550 § 1.

⁴⁸ Since neither 1883 *CIC* nor *CCEO* introduce new qualifications or restrictions for the unofficial witnesses, the commentaries made in chapter two of the present study concerning this issue are still valid.

the witnesses must actually believe in the sacrament of the matrimony and be willing to help out the spouses to live faithfully the sacred union of marriage.⁴⁹

3. The manner of assistance

Canon 1108 § 2 establishes that for a valid marriage the presence of the authorized witness must be active, namely he must ask for and receive the consent of both spouses in the name of the Church. When several sacred ministers, or in the case of a mixed marriage, non-Catholic ministers, are present, only the authorized witness must ask for and receive the consent of the parties⁵⁰ otherwise, the marriage is invalid.⁵¹ The 1917 *CIC* expressly established that the assistance of the official witness had to be free of any coercion.⁵² During the codification process this clause was considered to be superfluous since a general principle determined that a juridic act was null if it was placed out of force inflicted from outside.⁵³ Thus the norm established in 1917 *CIC* was not suppressed: the assistance at marriage must

⁴⁹ Salachas, *Il Sacramento del Matrimonio*, 193.

⁵⁰ Beal, 1328.

⁵¹ Sacred Congregation for the Doctrine of Faith, private reply, November 28, 1975: *CLD* 8 : 820-821.

⁵² 1917 *CIC*, c. 1095 § 1, 3°.

⁵³ 1983 *CIC*, c. 125. Pontifical Commission for the Revision of the Code of Canon Law, *Coetus studiorum de Matrimonio*, Conventus II – 11 October, 1970, *Communicationes* 8 (1976) 37.

be free. When the force or grave fear is inflicted upon the official witness with the purpose of extorting assistance at a marriage against his own will, that marriage is null.⁵⁴

4. The sacred rite

Canon 828 § 2 of the *CCEO* is quite different than the Latin law in the way it defines the form in which the expression of consent before the official representative of the Church is to occur. *CCEO* reiterates the norm established by the motu proprio *Crebrae allatae* and confirms that matrimonial blessing is the central act of the sacred rite required by the Oriental law for the valid celebration of the marriage. The celebration of the sacred rite of the marriage is considered to be sacred because of the intervention of the priest who assists and blesses the marriage.⁵⁵

It must be noticed that for the Latin Church the essential rite of matrimony has always been the manifestation of the consent by the spouses. This essential rite is performed exclusively by the man and woman who celebrate their marriage. They alone are the ministers of the sacrament. The assistance of the priest was, and continues to be required, not for the marriage to become sacred but because the marriage is sacred.⁵⁶ In the Oriental law, however, the assistance of the priest consists not only in asking for and receiving the

⁵⁴ Chiapetta, *Il matrimonio*, 279.

⁵⁵ Salachas, *Il Sacramento del Matrimonio*, 183.

⁵⁶ Urbano Navarrete, "Differenze essenziali nella legislazione matrimoniale del Codice latino e del Codice orientale," in *Acta Symposii Internationalis circa Codicem Canonum Ecclesiarum Orientalium, 24-29 April, 1995*, Al Ahmar et al. eds. (Kaslik, Liban: USEK, 1996) 302.

consent of the spouses but, above all, in granting the nuptial blessing which is an essential element of the ordinary canonical form of marriage.⁵⁷ Thus, concerning the canonical form of marriage, the *CCEO* provides a twofold action of the priest: the priest assists at and blesses the marriage. In other words, during the celebration of the sacred rite, the priest assists at marriage, asking for and receiving the consent of the spouses in the name of the Church, and blesses the marriage by “invoking the Holy Spirit upon spouses who pours upon them the grace of the sacrament.”⁵⁸ In fact, all canons of the *CCEO* which refer to the canonical form use the words “bless the marriage” unlike the 1983 *CIC* which uses “assist the marriage.” During the codification process there was the proposal to exclude the word *assistentis*, which in canon 828 § 2 refers to intervention of the priest, and to keep only the word *benedicentis*. The reason for this request was to avoid the suspicion that in the Oriental Churches the responsibility of the priest is similar to the one established by the Latin law, namely to be an authorized witness, while the spouse are the ministers of the sacrament. The

⁵⁷ Prader, *Il Matrimonio in Oriente e Occidente*, 201. Urbano Navarrete, “Questioni sulla forma Canonica ordinaria nei codici latino e orientale,” *Periodica* 85 (1996) 493.

⁵⁸ Salachas, *Il Sacramento del Matrimonio*, 184. The Oriental concept that marriage is a sacrament conferred upon the parties through the priest’s blessing brings out two other differences between Western and Latin traditions. First, in the Eastern tradition, marriage, as any sacrament, pertains to the eternal life in the Kingdom of God and cannot be dissolved by the death of the parties but creates between them an eternal bond, unlike the Latin belief where the matrimonial contract is dissolved by the death of one of the spouses. Second, in the Eastern tradition, marriage as a sacrament is a gift of grace. The parties might have made a mistake in asking the grace of marriage when they were not ready for it or they might show themselves unable to make this grace fructify. In these situations the Church may admit that in fact the grace was not received and consequently tolerate separation and allow remarriage. In opposition, in the Latin Church the matrimonial covenant has always been considered indissoluble. See Meyendorff, *Marriage: An Orthodox Perspective*, 54.

request was rejected because of the necessity of complete precision in the phrasing of the canon and the lack of a reasonable motive to go back to the state prior to the *motu proprio Crebrae allatae*.⁵⁹

Therefore, in the Oriental law there is an inseparable link between the canonical form and liturgical form of marriage and the latter cannot be excluded without incurring the invalidity of the marriage.⁶⁰ The importance of the sacred rite as an essential element of the canonical form for the Eastern tradition explains some other differences concerning the form of marriage between the 1983 *CIC* and *CCEO*. Thus, *CCEO* does not include the deacon and even less a lay person among those authorized to witness a marriage. Similarly, unlike the local ordinary,⁶¹ the local hierarch does not have the right to grant a dispensation from the form in the case of a mixed marriage. This right is reserved to the Holy See or to the Patriarch, who will grant it only for a most grave cause.⁶²

The fact that sacred rite is an essential element of the canonical form of marriage brings up another difference between the Eastern and Latin traditions, namely the minister, or

⁵⁹ Pontifical Commission for the Revision of the Oriental Code of Canon Law, *Denua Recognitio dello Schema dei Canonici sul Culto Divino e Sacramenti*, can. 163 (CA 85), *Nuntia* 15 (1982) 81.

⁶⁰ Urbano Navarrete, "Ius matrimoniale latinum et orientale. Collatio codicem latinum et orientalem," *Periodica* 80 (1991) 623.

⁶¹ 1983 *CIC*, c. 1127 § 2.

⁶² *CCEO*, c. 835.

the ministers, of the sacrament of marriage.⁶³ For the Latin tradition, the matrimony is a consensual contract which becomes a sacrament through the exchange of the consent between the two spouses.⁶⁴ In fact the *Catechism of the Catholic Church* states: “According to the Latin tradition, the spouses as ministers of Christ's grace mutually confer upon each other the sacrament of Matrimony by expressing their consent before the church.”⁶⁵ According to the doctrine of the non-Catholic Oriental churches the minister of the sacrament of marriage is the priest or the bishop who carries out the sacred rite through which the matrimonial sacrament is celebrated.⁶⁶ Considering the minister of the sacrament of marriage, the Russian contemporary theologian Evdokimov affirms: “The priest is the minister of the sacrament that is instituted by God; mutual consent indicates that the

⁶³ For a comprehensive analysis of this issue see, Grzegorz Kadzioch, *Il Ministro del Sacramento del Matrimonio nella tradizione e nel Diritto Canonico Latino e Orientale* (Rome: Editrice Pontificia Università Gregoriana, 1997).

⁶⁴ 1983 *CIC*, c. 1055 § 2.

⁶⁵ *Catechismus Catholicae Ecclesiae* (Vatican City: Libreria Editrice Vaticana, 1997), n. 1623: “Secundum traditionem latinam, sponsi, tamquam ministri gratiae Christi, sibi mutuo Matrimonii conferunt sacramentum, suum consensum coram Ecclesia significantes.” English translation from *Catechism of the Catholic Church*, second edition (United States Catholic Conference, Inc. - Libreria Editrice Vaticana, 1997). Hereafter cited as *Catechism of the Catholic Church*. All subsequent English translations of canons from this document will be taken from this source unless otherwise indicated.

⁶⁶ Joseph Prader, “La Forma di Celebrazione del Matrimonio,” in *Il Matrimonio nel Codice dei Canoni delle Chiese Orientali* (Città del Vaticano: Libreria Editrice Vaticana, 1994) 288.

betrothed are not bound by any other engagement, but the grace results only from the rite performed. In no way, nor in any sense, can the spouses be the ministers of the sacrament.”⁶⁷

In the Catholic Oriental Churches there are two opinions concerning the ministers of the sacrament of marriage.⁶⁸ One of them underlines the mystical and sacramental factor of the marriage and as a result considers the priest as the minister of the matrimony. The other opinion is closer to the Latin principle and regards the consent of the parties as the efficient cause of the marriage and consequently acknowledges the spouses as ministers of the matrimonial sacrament.⁶⁹ In fact, this difference of opinions made its way in the process of preparation of the *Catechism of the Catholic Church*. Thus, the first edition of the *Catechism of the Catholic Church* stated that in the Oriental liturgies the minister of the sacrament was the priest or the bishop who, after receiving the mutual consent of the spouses, crowned them as a sign of the matrimonial covenant.⁷⁰ Prader argued that this assertion referred only to the non-Catholic Oriental Churches.⁷¹ However, in the second edition there is no direct

⁶⁷ Evdokimov, *The Sacrament of Love: The Nuptial Mystery in the Light of the Orthodox Tradition*, 129.

⁶⁸ Janusz Kowal, “Causa Efficiens del Matrimonio, con uno speciale riguardo al dibattito nel contesto del CCEO,” *Folia Canonica* 4 (2001) 247.

⁶⁹ For an extensive analysis of the arguments of the authors who advocate each one of these two opinions see, Andrej Saje, *La Forma Straordinaria e il Ministro della Celebrazione del Matrimonio second il Codice Latino e Orientale* (Rome: Editrice Pontificia Università Gregoriana, 2003) 198-206.

⁷⁰ *Catechism of the Catholic Church*, first edition, n. 1623.

⁷¹ Prader, “La Forma di Celebrazione del Matrimonio,” 290.

affirmation that the priest is the minister of the sacrament of marriage: “In the traditions of the Eastern churches, the priests (bishops or presbyters) are witnesses to the mutual consent given by the spouses, but for the validity of the sacrament their blessing is also necessary.”⁷² This change is significant because on one hand it underlines the value of the Oriental tradition by maintaining the necessity of the nuptial blessing, while on the other hand prevents the supposition that the sacrament of marriage has a different configuration in the Eastern Catholic Churches than it does in to the Latin Church.⁷³

The two different opinions are indirectly present even in the current legislation. The *CCEO* does not specifically designate the minister of the sacrament of marriage but agrees with the 1983 *CIC* that consent constitutes the marriage.⁷⁴ However, in order to remain faithful to the Oriental tradition *CCEO* stipulates in canon 828 § 1 that only those marriages are valid which are celebrated with the sacred rite in the presence of the competent priest or bishop. The second paragraph of the same canon explains that the sacred rite is carried out through the intervention of the priest who assists at and blesses the marriage.⁷⁵

⁷² *Catechism of the Catholic Church*, second edition, n. 1623: “In traditionibus Ecclesiarum Orientalium, sacerdotes - Episcopi vel presbyteri - testes sunt consensus mutuo ab sponsis praestiti, sed etiam eorum benedictio ad validitatem sacramenti est necessaria.”

⁷³ Raimondo Girgis, *I Matrimoni Misti nelle Situazioni Particolari delle Chiese Patriarcali Cattoliche* (Beyrouth: Dar el Machreq Editeurs, 2002) 157.

⁷⁴ 1983 *CIC*, c. 1057. *CCEO*, c. 817.

⁷⁵ *CCEO*, c. 828 §§ 1 and 2.

A particular opinion with regard to the ministers of the marriage has been put forward by Urbano Navarrete. According to him, the Oriental Churches, following a long tradition, incorporated the necessity of the sacred rite carried out by the priest as an essential element of the sacrament of marriage. Accordingly, the priest who fulfills this sacred rite is called the minister of the sacrament. However, if only the priest is the minister of the sacrament, then what is role of the spouses? *CCEO* provides in canon 832 the possibility to celebrate the marriage with an extraordinary form without the intervention of the priest, i. e. without the sacred rite. In this case, even without the sacred rite the marriage celebrated only by spouses is a sacrament. The only coherent explanation is that the parties are ministers of the sacrament. Consequently, it should be admitted that for the ordinary form of marriage the ministers of the sacrament are the spouses along with the priest who grants the nuptial blessing. When the marriage is celebrated with the extraordinary form the only ministers of the sacrament are the spouses.⁷⁶

To summarize, in the Eastern Churches the liturgical form and the juridical form of marriage are inseparable; in the Latin Church the liturgical form is required only for liceity while the juridical form is required for the validity of marriage. Moreover, in the Oriental Churches the sacred rite carried out by the priest or bishop is an essential element of the canonical form of marriage.⁷⁷

II. Requirements for a valid celebration of marriage

⁷⁶ Urbano Navarrete, "De Ministro Sacramenti Matrimonii," 730-732.

⁷⁷ Prader, *Il matrimonio in Oriente e Occidente*, 228.

Canon 1109. Unless the local ordinary and pastor have been excommunicated, interdicted, or suspended from office or declared such through a sentence or decree, by virtue of their office and within the confines of their territory they assist validly at the marriages not only of their subjects but also of those who are not their subjects provided that one of them is of the Latin rite.⁷⁸

Canon 829 § 1. From the day of taking canonical possession of office and as long as they legitimately hold office, everywhere within the boundaries of their territory, local hierarchs and local pastors validly bless the marriage of parties whether they are subjects or non-subjects, provided that at least one of the parties is ascribed in his Church *sui iuris*.⁷⁹

After establishing the elements of the canonical form of marriage, both Codes lay down the prerequisites for valid assistance at and the celebration of marriage. It is worthwhile to note that although both canons establish the same norms, they do so in a different manner. The Latin canon has a somewhat negative structure because of the invalidating clause with which it begins, while the oriental counterpart has a more positive phrasing. Nevertheless, the two canons not only do not contradict each other but are complementary.

1. Authorization by office
 - a. Time of competence

⁷⁸ 1983 *CIC*, c. 1109: “Loci Ordinarius et parochus, nisi per sententiam vel per decretum fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati, vi officii, intra fines sui territorii, valide matrimoniis assistunt non tantum subditorum, sed etiam on subditorum, dummodo eorum alteruter sit ritus latini.”

⁷⁹ *CCEO*, c. 829 § 1: “Hierarcha loci et parochus loci capta possessione canonica officii, dum legitime officio funguntur, intra fines sui territorii ubique valide benedicunt matrimonium, sive sponsi sunt subditi sive, dummodo alterutra saltem pars sit ascripta propriae Ecclesiae sui iuris, non subditi.”

Local ordinaries and hierarchs and pastors have the authorization to witness at and bless marriages by virtue of their office as long as they legitimately hold that office. Unlike the *CCEO*, the 1983 *CIC* does not expressly mention that this faculty is effective from the very day of taking canonical possession of the office as 1917 *CIC* did.⁸⁰ However, it is understood that the local ordinary and the pastor validly assist at marriages only from the moment they take canonical possession of their offices according to norms established by general and particular law.⁸¹

The power of the local ordinary and hierarch and of the pastor to assist at and bless marriages ceases when they lose their offices in the ways stipulated in canon 184 § 1 of the 1983 *CIC* and canon 965 § 1 of the *CCEO*. Besides, the local ordinary and hierarch and the pastor lose their authority to assist at and bless marriages when the penalty of excommunication, interdict or suspension from office has been imposed, or when these penalties have been declared by a judicial sentence or administrative decree. However, penalties *latae sententiae* do not deprive them of power to assist and bless marriages unless such censures have been declared following a judicial or administrative process. Canon 1109 establishes that the local ordinary or the pastor who incurs one of the penalties mentioned above is deprived of the authority to assist at marriages. The law says nothing concerning

⁸⁰ 1917 *CIC*, c. 1095 § 1, 1°.

⁸¹ The norms for taking canonical possession for bishops are established in canon 382 § 1 of the 1983 *CIC* and canon 189 § 1 of the *CCEO*. However, both Codes leave to the particular law the task to establish the specific manner in which pastors take possession of canonical office, see 1983 *CIC*, c. 527 § 1 and *CCEO*, c. 288.

priests and deacons who are delegated to assist at marriages and are punished by the same censures. Considering the purpose of the law, it seems appropriate to affirm that delegated priests and deacons lose their power to assist at marriages when the penalty of excommunication, interdict, or suspension from office is imposed or declared upon them. Although the *CCEO* does not specifically mention these ways of losing the authority to bless marriages, they are implicitly understood since the canon at hand spells out that the local hierarch and the pastor can exercise their power “as long as they legitimately hold office.”⁸²

b. Territorial limits

Both Codes establish two limits to the general norm governing the faculty of the local ordinary and hierarch and the pastor to solemnize marriages. First, according to the principle established by the Decree *Ne temere*⁸³ and confirmed later by the 1917 *CIC*⁸⁴ and the motu proprio *Crebrae allatae*,⁸⁵ the local ordinary and hierarch and the pastor exercise their authority to assist at and bless marriages only within the boundaries of their territories. Within the limits of their territory, they can assist at and bless marriages of their subjects as well as non subjects. Outside their territory, they cannot validly assist at and bless even

⁸² *CCEO*, c. 829 § 1: “dum legitime officio funguntur.”

⁸³ Sacra Congregatio Concilii, Decree *Ne temere*: AAS 40 (1907) 528.

⁸⁴ 1917 *CIC*, c. 1095 § 1, 2°.

⁸⁵ *CA*, c. 86 § 1, 2°.

marriages of their subjects unless they are properly delegated by the local ordinary or hierarch or the pastor of the place where the marriage is to be celebrated.⁸⁶

c. Limits established by ritual affiliation of spouses

Secondly, the competence of local ordinary and hierarch, as well as of the pastor to assist at and bless marriages is limited not only territorially but also personally.⁸⁷ Thus a Latin ordinary or pastor may validly assist at a marriage only if at least one of the parties “is of the Latin rite.”⁸⁸ Similarly, an Oriental hierarch or pastor may bless a marriage only if at least one of the spouses “is ascribed in his Church *sui iuris*.”⁸⁹ This clause was initially established by the *motu proprio Crebrae allatae*.⁹⁰ Since the 1917 *CIC* did not provide such a stipulation, it was commonly believed that the Latin pastor could validly assist at marriages of Catholic faithful, no matter what rite they belonged to, as long as he acted within the boundaries of his territory. When the doubt was proposed whether a Latin ordinary and pastor could validly assist at a marriage of two spouses who both belonged to an Oriental rite, the Pontifical Commission for the Redaction of the Code of Oriental Canon Law issued an authentic interpretation which specifically determined that a Latin rite pastor could not validly assist at a marriage of two Oriental rite Catholics, and an Oriental rite pastor could

⁸⁶ Beal, 1329.

⁸⁷ *Ibid.*

⁸⁸ 1983 *CIC*, c. 1109: “sit ritus latini.”

⁸⁹ *CCEO*, c. 829 § 1: “sit ascripta propriae Ecclesiae sui iuris.”

⁹⁰ *CA*, c. 86 § 1, 2°: *AAS* 41 (1949) 107: “modo sint sui ritus.”

not validly assist at a marriage of two Latin rite Catholics.⁹¹ This authentic interpretation is now incorporated in the 1983 *CIC*. Consequently, the clause “non-subjects” in canon 829 § of *CCEO* refers only to faithful ascribed to the Church *sui iuris* of the hierarch or the pastor of the place, but who do not have the domicile or quasi-domicile in their territory. Similarly, the same clause “non-subject” in canon 1109 of 1983 *CIC* refers to faithful of Latin rite who do not have a domicile or quasi-domicile in the territory where the marriage is taking place.⁹²

Therefore, the Latin ordinary and pastor, within the boundaries of their territory, cannot validly assist at a marriage of two spouses who are both of an Oriental rite and a local hierarch and pastor cannot validly bless the marriage of two Latin rite Catholics. Prader considers that this clause is superfluous in itself because the authorization to assist at and bless marriages is inseparably connected to the office of the ordinary, hierarch, and pastor of the place. Accordingly, a hierarch and a pastor of a Church *sui iuris* is not the ordinary and the pastor of a Latin diocese or parish and vice versa. However, the requirement that at least one of the parties must belong to the rite of the priest who assists at and celebrates the marriage was introduced into both Latin and Oriental legislation in order to avoid any subjective doubt concerning the territorial and personal competency in those regions where Latin and Oriental rite faithful live together.⁹³

⁹¹ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, May 3, 1953: AAS 45 (1953) 313.

⁹² Salachas, *Il Sacramento del Matrimonio*, 196.

⁹³ Prader, *La Legislazione Matrimoniale*, 30.

This clause is particularly relevant in several parts of Eastern Europe where a hierarchy for the Christian faithful of Oriental rite is not established. In this case, canon 916 § 5 of *CCEO* provides that “the local hierarch of another Church *sui iuris*, even the Latin Church, is to be considered as the proper hierarch of these faithful.”⁹⁴ Accordingly, members of Eastern Catholic Churches who have domicile or quasi-domicile in territories where only a Latin rite hierarchy is established, are subjected to the Latin ordinary of the place. However, they are not subjected to the Latin rite pastor of the place.⁹⁵ Consequently, in this case, the Latin rite pastor, within the boundaries of his parish, may validly assist and bless the marriage of two Oriental rite Catholics only if he is properly delegated by the ordinary of the place to whom Oriental rite Catholics are subjected.⁹⁶ In other words, without the authorization of the Ordinary of the place, the Latin rite pastor cannot validly assist at a marriage where neither party is of Latin rite.⁹⁷

Another situation arises in the case where there is a hierarchy established for the Christian faithful of a certain Church *sui iuris* but in a given place a parish is not established

⁹⁴ *CCEO*, c. 916 § 5: “Tamquam proprius eorundem christifidelium Hierarcha habendus est Hierarcha loci alterius Ecclesiae sui iuris, etiam Ecclesiae latinae.”

⁹⁵ Prader, *La Legislazione Matrimoniale*, 31.

⁹⁶ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, response, June 16, 1983: *Leges Ecclesiae* 6: coll. 8650-8651.

⁹⁷ Prader, *Il Matrimonio in Oriente e Occidente*, 208-209. See also Salachas, *Il Sacramento del Matrimonio*, 196; Lorenzo Lorusso, *Gli Orientali Cattolici e i Pastori Latini* (Rome: Pontificio Istituto Orientale, 2003) 257. Pospishil disagrees with this opinion and considers that in this instance the Latin pastor is competent for the marriage assistance in accordance with the Eastern Code. See Pospishil, *Eastern Catholic Marriage Law*, 375.

for them. Thus, the Oriental rite Catholics who have a local hierarchy but do not have a proper pastor are not subjected to the Latin rite ordinary; consequently, when they marry among themselves or with non-Catholics they cannot ask the Latin rite pastor to assist and bless their marriage. Latin rite priests, including the ordinary of the place and pastors, cannot validly assist at marriages of Catholics of an Oriental rite without the proper delegation of the hierarchy of the Church *sui iuris* in which the Oriental Catholics are ascribed.⁹⁸ According to canon 916 §4 of the *CCEO*, in case Oriental Catholics do not have a pastor of their own rite, the proper hierarchy is to designate a pastor of another Church *sui iuris* who is to assume their pastoral care.⁹⁹

2. Authorization by persons

Canon 1110. By virtue of office, a personal ordinary and a personal pastor assist validly only at marriages where at least one of the parties is a subject within the confines of their jurisdiction.¹⁰⁰

Canon 829 § 2. A personal hierarchy and a personal pastor, by virtue of their office, validly bless marriages within the limits of their jurisdiction only of those of whom at least one party is their subject.¹⁰¹

⁹⁸ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, response, June 16, 1983: *Leges Ecclesiae* 6: coll. 8650-8651.

⁹⁹ *CCEO*, c. 916 § 4.

¹⁰⁰ 1983 *CIC*, c. 1110: “Ordinarius et parochus personalis vi officii matrimonio solummodo eorum valide assistunt, quorum saltem alteruter subditus sit intra fines suae ditionis.”

¹⁰¹ *CCEO*, c. 829 § 2: “Hierarcha et parochus personalis vi officii matrimonium solummodo eorum, quorum saltem alteruter sibi subditus est, intra fines suae ditionis valide benedicunt.”

As a general rule dioceses and parishes have a territorial character, but for pastoral reasons like rite, language, nationality, etc., they may also have a personal character.¹⁰² Moreover, other groups of people, such as military personnel, may require the establishment of a personal jurisdiction.¹⁰³ Personal jurisdiction also includes personal prelatures which have the personal competence to assist at marriages only in the case this faculty is given to them in the document of their erection.¹⁰⁴ When established by the Apostolic See personal jurisdictions usually lack a territorial delimitation. However, when established by the authority of particular church, personal jurisdictions have a territorial delimitation as well.¹⁰⁵ Thus, the personal ordinary and hierarch and personal pastor, by virtue of their office and, when so established, within the territory of their competence, validly assist at and bless marriages when at least one of the parties is a member of the group entrusted to their pastoral care. The competence of personal pastors, ordinaries and hierarchs is cumulative with the competence of territorial pastors, ordinaries, and hierarchs who can validly assist at and bless marriages of those who are not their subjects, as long as at least one of the spouses is of Latin

¹⁰² 1983 *CIC*, cc. 373 and 518. *CCEO*, c. 280 § 1.

¹⁰³ Jurisdictions established for military personnel are governed by special laws such as Apostolic Constitution *Spirituali militum curae* issued by John Paul II at April 21, 1986. However, personal jurisdictions for military have not been established in those countries of Eastern Europe where the Catholic population is a minority. See, John Paul II, Apostolic Constitution *Spirituali militum curae*, April 21, 1986: *AAS* 78 (1986) 481-486.

¹⁰⁴ Navarro-Valls, 1457.

¹⁰⁵ Beal, 1330.

rite for Latin pastor or ordinary, or is member of his own church *sui iuris*, for the Oriental rite pastor or hierarch.¹⁰⁶

3. Privilege of the patriarch

Canon 829 § 3. By the law itself, the patriarch is endowed with the faculty personally to bless marriages everywhere, as long as at least one of the parties is ascribed to the church over which he presides, observing the other requirements of the law.¹⁰⁷

This Eastern norm, by its nature, has no Latin counterpart. Even in the *CCEO* this rule constitutes an exception to the general rule expressed by canon 78 § 2 which establishes that “the power of the patriarch is exercised validly only within the territorial boundaries of the patriarchal Church.”¹⁰⁸ The previous Eastern legislation granted the patriarch the privilege to assist at or to bless the betrothal and the celebration of marriage in the entire patriarchate.¹⁰⁹ The present norm is even wider since it extends the patriarch’s faculty to bless marriages not only within the boundaries of his patriarchate but all over the world, as

¹⁰⁶ Chiappetta, *Il matrimonio*, 282.

¹⁰⁷ *CCEO*, c. 829 § 3: “Patriarcha ipso iure facultate praeditus est servatis aliis de iure servandis matrimonia per se ipsum benedicendi ubique terrarum, dummodo alterutra saltem pars ascripta sit Ecclesiae, cui praeest.”

¹⁰⁸ *CCEO*, c. 78 § 2: “Potestates Patriarchae exerceri valide potest intra fines territorii Ecclesiae patriarchalis tantum.”

¹⁰⁹ *CS*, c. 284: *AAS* 49 (1957) 520: “Canon 284. Patriarcha in universo patriarchatu, ... potest: ... 2º Matrimonii sive promissioni sive celebrationi assistere seu benedicere.”

long as at least one of the spouses is ascribed in the patriarch's own Church *sui iuris*. This norm has consequences for the Latin Church. First, the Latin bishop to whom Eastern faithful are entrusted according to canon 916 § 5 of the *CCEO*, should be aware of the fact that the patriarch has by the law the personal faculty to bless marriages of his subjects anywhere in the world, without asking any authorization from the local Latin rite ordinary. Second, concerning interritual marriages, local Latin rite ordinaries and pastors should be mindful that the patriarch can also, by law, bless these marriages. However, since it is a personal faculty, the patriarch cannot delegate it.¹¹⁰

Commentators of the previous Eastern legislation considered that major archbishops did not enjoy the same privilege.¹¹¹ Today, commentators seem to share the opinion that major archbishops also have the faculty to bless the marriage of their faithful anywhere in the world.¹¹² This opinion is based on the provision established by canon 12 of the *CCEO*: “What is stated in common law concerning patriarchal Churches or patriarchs is understood to be applicable to major archiepiscopal Churches or major archbishops.”¹¹³

¹¹⁰ Salchas, *Il Sacramento del Matrimonio*, 198.

¹¹¹ Pospishil, *The Law on Persons*, 143.

¹¹² Jobe Abbas, “Marriage in the Codes of Canon Law,” *Appolinaris* 68 (1995) 543. Hanna Alwan, in *Commento al Codice dei Canonici delle Chiese Orientali*, ed. Pio V. Pinto (Rome: Urbaniana University Press, 2001) 711. In countries of Eastern Europe there are two Major Archiepiscopal Churches *sui iuris*: Ukrainian and Romanian Churches.

¹¹³ *CCEO*, c. 152: “Quae in iure communi de Ecclesiis patriarchalibus vel de Patriarchis dicuntur, de Ecclesiis archiepiscopalibus vel de Archiepiscopis maioribus valere intelleguntur.”

4. Delegation to assist at marriage

Canon 1111 § 1. As long as they hold office validly, the local ordinary and the pastor can delegate to priests and deacons the faculty, even a general one, of assisting at marriages within the limits of their territory.

§ 2. To be valid, the delegation of the faculty to assist at marriages must be given to specific persons expressly. If it concerns special delegation, it must be given for a specific marriage; if it concerns general delegation, it must be given in writing.¹¹⁴

Canon 830 § 1. As long as they legitimately hold office, the local hierarch and the local pastor can give the faculty to bless a determined marriage within their own territorial boundaries to priests of any Church *sui iuris*, even the Latin Church.

§ 2. However, only the local hierarch can give a general faculty for blessing marriages with due regard for can. 302, § 2.

§ 3. In order that the conferral of the faculty for blessing a marriage be valid, it must be expressly given to specified priests; further, if the faculty is general, it must be given in writing.¹¹⁵

a. Delegation of priests

While the present legislation concerning the delegation of power to assist and bless marriages is substantially the same as the previous legislation nonetheless, there are a few significant innovations. The general principles continue to be the same. The local and personal ordinaries and hierarchs, as well as local and personal pastors, as long as they

¹¹⁴ 1983 *CIC*, c. 1111: “§ 1. Loci Ordinarius et parochus, quamdiu valide officio funguntur, possunt facultatem intra fines sui territorii matrimoniis assistendi, etiam generalem, sacerdotibus et diaconis delegare. § 2. Ut valida sit delegatio facultatis assistendi matrimoniis, determinatis personis expresse dari debet; si agitur de delegatione speciali, ad determinatum matrimonium danda est; si vero agitur de delegatione generali, scripto est concedenda.”

¹¹⁵ *CCEO*, c. 830: “§ 1. Hierarcha loci et parochus loci, dum legitime officio funguntur, possunt sacerdotibus cuiusvis Ecclesiae sui iuris, etiam Ecclesiae latinae, facultatem conferre, intra fines sui territorii determinatum matrimonium benedicendi. § 2. Facultatem generalem vero matrimonia benedicendi conferre potest solus Hierarcha loci firmo can. 302, § 2. § 3. Collatio facultatis matrimonia benedicendi, ut valida sit, determinatis sacerdotibus expresse immo, si de facultate generali agitur, scripto conferri debet.”

legitimately fulfill their office and remain within the limits of their territorial or personal jurisdiction, they may delegate others to assist and bless marriages.¹¹⁶ Further, the delegation must be granted expressly, i. e., with a positive act, either explicit - in writing, by words, or by signs which directly and formally confer the faculty to assist and bless the marriage, or implicit – by words or acts through which the granting of the delegation is understood.¹¹⁷ A tacit or presumed delegation is not enough. Moreover, the delegation is to be granted to a specific person; a generic and indeterminate delegation is not valid.¹¹⁸

General delegation is granted to a determined person for all marriages celebrated within the territorial or personal jurisdictional limits of the delegator. In order to be valid the general delegation must be granted in writing.¹¹⁹ Unlike the 1917 CIC, in which a general delegation was permitted only to vicar cooperators, the 1983 *CIC* provides that delegation

¹¹⁶ There is an exception to the principle of territoriality of delegation given by the motu proprio *De apostolatu maritimo* for the maritime apostolate *Stella Maris* at January 31, 1997. The document establishes that for a chaplain of the maritime apostolate *Stella Maris* to validly and licitly assist at a marriage during a sea journey, he must first receive the delegation of the ordinary or the pastor of the parish where one of the parties has domicile or quasi-domicile, or month long residence or, if it concerns transients, the parish of the port where the boat cast anchor. See John Paul II, apostolic letter motu proprio *De apostolatu maritimo*, title 3, article 7 § 3, January 31, 1997: AAS 89 (1997) 213.

¹¹⁷ Marchesi considers that a delegation granted expressly in an implicit manner is not valid. See Mario Marchesi, “La Forma Canonica di Celebrazione del Matrimonio,” in *Il Matrimonio Canonico in Italia*, Ernesto Cappellini ed. (Brescia: Queriniana, 1984) 149.

¹¹⁸ Beal. 1331, Chiappetta, 284.

¹¹⁹ Ibid. For a contrary opinion see Velasio De Paolis, “Delega e Supplenza di Potestà per Assistere al Matrimonio,” *Periodica* 92 (2003) 472, where the author argues that the written form for the general delegation is required only for liceity not for validity, since canon 10 of the 1983 *CIC* establishes that laws are considered invalidating or disqualifying when it is expressly established so.

may be granted to any priest or deacon. The *CCEO* has a more restrictive approach with regard to general delegation. First, any kind of delegation, general or special, may only be granted to a priest, not to a deacon. Second, only the local hierarchs may grant a general delegation to any priest, while the pastors may do so only to their own parochial vicars.¹²⁰

Special delegation is expressly given to a specific person for a specific marriage. The norm does not require that the special delegation be granted in writing. However, some written information of such a delegation should be preserved since the validity of the marriage depends on whether the priest or the deacon was properly delegated.¹²¹

The *CCEO* brings in an additional specification with regard to the individual to whom the faculty to assist and bless marriages may be delegated. Canon 831 § 1 specifies that the local hierarch and pastor “can give the faculty to bless a determined marriage within their own territorial boundaries to priests of any Church *sui iuris*, even the Latin Church.”¹²² Obviously, although canon 1111 § 1 of the 1983 *CIC* does not explicitly provide it, the local ordinary and the Latin pastor can also delegate Oriental rite priests to assist at marriages within the limits of their territories.¹²³

¹²⁰ *CCEO*, c. 302 § 2.

¹²¹ Beal, 1331.

¹²² *CCEO*, c. 831 § 1: “possunt sacerdotibus cuiusvis Ecclesiae sui iuris, etiam Ecclesiae latinae, facultatem conferre, intra fines sui territorii determinatum matrimonium benedicendi.”

¹²³ Salachas, *Il Sacramento del Matrimonio*, 200. Navarrete considers however that a Latin ordinary, let alone a pastor, cannot delegate an Oriental priest to bless matrimony. See, “Questioni sulla Forma Canonica,” 503.

b. Delegation of deacons

A significant difference between Eastern and Latin norms concerning the delegation is the role of the deacon to assist at marriages. Canon 111 § 1 of the 1983 *CIC* clearly establishes that a deacon can be delegated to assist at marriages. The Eastern Churches have not given deacons such an authorization. Because of the norm requiring the celebration of a sacred rite by a priest *ad validitatem*, it seems clear that a deacon cannot be delegated to bless a marriage. However, the problem arises in the case of Oriental Catholics who are entrusted to the pastoral care of a Latin ordinary, according to canon 916 § 5 of the *CCEO*, which is the situation of numerous dioceses in Eastern Europe. Can the Latin ordinary delegate a Latin deacon to assist at and bless the marriage of two Oriental rite Catholics, or the marriage between a Latin rite Catholic and an Oriental rite Catholic? Similarly, in the case of a marriage celebrated in the Latin Church between two Catholics, one of whom is of Latin rite and the other is of Oriental rite, or in the case of a mixed marriage between a Latin rite Catholic and an Oriental non-Catholic, can a Latin deacon be delegated to assist at these marriages? Commentators have offered different answers. Faris¹²⁴ and Pospishil¹²⁵ hold that a local Latin ordinary can delegate a Latin deacon to bless a marriage between two Eastern rite Catholics subjected to him. They base their opinion on the axiom *locus regit actum*. Accordingly, when a marriage is legitimately assisted by a Latin deacon, that marriage is

¹²⁴ John D. Faris, "Canonical Issues in the Pastoral Care of Eastern Catholics," *CLSA Proceedings* 53 (1991) 163.

¹²⁵ Victor Pospishil, *Eastern Catholic Marriage Law*, 372.

valid because “the place rules the action.” In other words, when a juridical act is legitimately transferred elsewhere, in this particular case to the Latin Church, the norms of that place rule the legal requirements.¹²⁶ In addition, Faris and Pospishil affirm that, based on the same principle, a Latin ordinary may delegate a lay person to assist at a marriage of two Eastern Catholics subjected to him, with due respect to the rules provided by canon 1112 of the 1983 *CIC*.¹²⁷ Navarrete shares the same opinion but he bases his argument not on the principle *locus regit actum* but on the fact the Latin deacon is ontologically and legally qualified to bless marriages according to the provision of the Dogmatic Constitution on the Church *Lumen gentium*.¹²⁸ Furthermore, there is no formal stipulation that denies the local Latin ordinary the right to delegate a Latin deacon to bless a marriage of Orientals entrusted to his pastoral care according to canon 916 § 5 of the *CCEO*. Canon 828 § 1 of the *CCEO* refers only to the local hierarch and pastor of the Oriental Church *sui iuris* who can delegate a priest but not a deacon to bless marriages. Nevertheless, the canon, Navarrete argues, does not implicate the Latin Ordinary. However, a marriage of two Oriental rite Catholics entrusted to the pastoral care of a Latin ordinary, blessed by a Latin deacon delegated by the same ordinary, would be certainly valid and licit because, in this situation, there is a positive

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Vatican II, *Lumen gentium*, 29, November 21, 1964: AAS 57 (1965) 36.

and probable doubt of the law; consequently the Church supplies the power according to canons 144 of the 1983 *CIC* and 994 of the *CCEO*.¹²⁹

Regarding the same question, Prader also believes that a Latin ordinary can delegate a Latin deacon to bless a marriage of two Eastern Catholics subjected to him; however, he does not consider that the same delegation could be granted to a lay person.¹³⁰

Finally, Salachas and Abbas hold that a local Latin ordinary cannot validly delegate a Latin deacon to assist at and bless a marriage involving Oriental Catholics subjected to his pastoral care, since Oriental canonical form clearly requires the celebration of a sacred rite, which is explicitly defined as the intervention of a priest assisting and blessing.¹³¹ Salachas maintains that a Latin deacon cannot bless the marriage between two Oriental Catholics nor between a Latin rite Catholic and an Oriental because it is contrary to the theological and canonical tradition of the Oriental Churches.¹³² Consequently, according to these two authors, a marriage between two Oriental Catholics, or between a Latin and an Oriental Catholic, or between a Latin and an Oriental non-Catholic celebrated before a Latin deacon

¹²⁹ Navarrete, "Questioni sulla Forma Canonica," 505-506.

¹³⁰ Prader, *La Legislazione Matrimoniale*, 39-41.

¹³¹ Jobe Abbas, *Two Codes in Comparison* (Rome: Pontificio Istituto Orientale, 1997) 100-103.

¹³² Salachas, *Il Sacramento del Matrimonio*, 200-201.

or a lay person legitimately delegated by a Latin ordinary, would be invalid because of defect of form.¹³³

This discussion of different points of view on delegation of a deacon on the marriage of two Orientals subject to a Latin ordinary illustrates that the issue is still debated among the authors. Therefore, should a Latin ordinary delegate a deacon to assist at and bless a marriage of two Eastern Catholics entrusted to his pastoral care? Should a pastor delegate a deacon to assist at and bless a marriage involving an Eastern Catholic? After reviewing all the opinions expressed by scholars it seems prudent to affirm that, in order to avoid a probable invalid celebration of a marriage, the Latin ordinary and pastor should not delegate a deacon to assist at and bless a marriage involving an Eastern Christian faithful. However, in the case of a marriage involving an Eastern Christian faithful which has already been assisted and blessed by a deacon lawfully delegated, should this marriage be considered invalid? The best answer to this question seems to be Navarrete's opinion who considers that a marriage of two Oriental rite Catholics entrusted to the pastoral care of a Latin ordinary, blessed by a Latin deacon delegated by the same ordinary, would be certainly valid and licit because, in this situation, there is a positive and probable doubt of the law; consequently the Church supplies the power according to canons 144 of the 1983 *CIC* and 994 of the *CCEO*.

c. Delegation of lay persons

Canon 1112 § 1. Where there is a lack of priests and deacons, the diocesan bishop can delegate lay persons to assist at

¹³³ Abbas, *Two Codes in Comparison*, 103; Salachas, *Il Sacramento del Matrimonio*, 200.

marriages, with the previous favorable vote of the conference of bishops and after he has obtained the permission of the Holy See.

§2. A suitable lay person is to be selected, who is capable of giving instruction to those preparing to be married and able to perform the matrimonial liturgy properly.¹³⁴

In the Latin Church, assistance at marriage does not require sacred orders and consequently is not reserved to deacons and priests. Thus, the current law provides in particular circumstances that the diocesan bishop, not the other local ordinaries or pastors, may delegate lay men and women to assist at marriages. This type of delegation is not intended to be an alternative to ordained ministers as common authorized witness at marriages; it is only an exception to the general norm. This provision is an innovation for the 1983 *CIC*, but is not an innovation for the post-conciliar legislation. On May 15, 1974, the Congregation for the Sacraments published the instruction *Sacramentalem indolem* which determined that the Congregations of the Roman Curia could grant local Ordinaries the authority to personally select a Catholic layperson to act as the official witness at a

¹³⁴ 1983 *CIC*, c. 1112: “§ 1. Ubi desunt sacerdotes et diaconi, potest Episcopus dioecesanus, praevio voto favorabili Episcoporum conferentiae et obtenta licentia Sanctae Sedis, delegare laicos, qui matrimoniis assistant. § 2. Laicus seligatur idoneus, ad institutionem nupturientibus tradendam capax et qui liturgiae matrimoniali rite peragenda aptus sit.”

marriage.¹³⁵ The 1983 *CIC* integrates the provisions of *Sacramentalem indolem* into the present canon with a few changes.

Before the diocesan bishop can delegate lay people to assist at marriages, three conditions must be met. First, in the place where the matrimony or matrimonies are to be celebrated there must be a lack of priests and deacons. The absence could be physical, i. e., the absence of a pastor in an isolated community, or moral, i. e., the absence of priests and deacons who are familiar with the culture or the language of a specific group of people.¹³⁶ Second the bishop is required to obtain a favorable opinion of the conference of bishops. In the case the conference of bishops does not issue a favorable opinion, the bishop can nonetheless present his request to the Holy See, explaining the reasons of his application.¹³⁷ Finally, after receiving the favorable vote of the conference of bishops, the bishop must obtain the permission of the Holy See, namely from the Congregation for Sacraments or, for mission territories, from the Congregation for the Evangelization of People.¹³⁸ *Sacramentalem indolem* had required the bishop to personally select the lay person to act as the official witness, but the present canon no longer includes this provision. The implication

¹³⁵ Sacred Congregation for the Sacraments, instruction *Sacramentalem indolem*, May 15, 1974: *CLD* 8 : 815-818.

¹³⁶ Beal, 1331. See also Castaño, *Il Sacramento del Matrimonio*, 426.

¹³⁷ Chiappetta, 285.

¹³⁸ *Ibid.*

is that the bishop could delegate another official to subdelegate lay people for a special delegation to assist at a particular marriage.¹³⁹

Finally, the law requires that the lay person chosen to assist at marriages must possess the necessary qualities to prepare the pre-marital investigation, to instruct spouses for marriage, and to perform the wedding liturgy.¹⁴⁰ At the wedding liturgy, the delegated lay person asks and receives the consent of the spouses, presides at liturgy, and may give a sermon. Since lay people are allowed to administer sacramentals,¹⁴¹ they may perform the rite of blessing of the wedding rings.¹⁴² However, the delegated lay person cannot dispense from any matrimonial impediments nor can he or she give the nuptial blessing.¹⁴³

Obviously, this canon has no counterpart in Oriental law. According to Eastern legislation, marriages must be celebrated with a sacred rite which is identified as “the

¹³⁹ Beal, 1331. For a contrary opinion see Thomas Doyle, “Marriage,” in *The Code of Canon Law: A Text and Commentary*, ed. James A. Coriden et al. (New York/Mahwah, NJ: Paulist Press, 1985), 795.

¹⁴⁰ The 1991 edition of “Rite of Marriage” includes a rite for celebration of marriage before a lay person. See, Congregation for Divine Worship and Discipline of Sacraments, *Ordo Celebrandi Matrimonium, Editio Typica Altera* (Vatican City: Typis Polyglottis, 1991) 45-55. This rite was initially published in 1974. See, Sacred Congregation for Divine Worship, instruction, May 15, 1974: *Leges Ecclesiae*: 5: coll. 6954-6956.

¹⁴¹ 1983 *CIC*, c. 1168.

¹⁴² Beal, 1332. For a contrary opinion see Doyle, 795.

¹⁴³ *Ibid.*

intervention of a priest who assists and blesses.”¹⁴⁴ For this reason, a marriage of two Oriental Catholics celebrated before a lay person would be invalid for defect of canonical form. However, commentators have different opinions whether a Latin bishop to whom Oriental Catholics have been entrusted according to canon 916 § 5 of *CCEO*, may delegate a lay person to assist at a marriage between two Eastern Catholics or between a Latin Catholic and an Eastern rite Catholic. The issue was slightly touched upon earlier in this chapter when analyzing the role of the deacon in assisting marriages. Similarly, some authors believe that the Latin bishop can delegate lay persons to assist at marriages involving Eastern Catholics entrusted to his pastoral care.

Navarrette, for instance, does not see why the Latin bishop could not delegate a lay person to assist at marriages in a territory that has extraordinary pastoral circumstances. However, he argues, the question does not have great practical importance because, in extraordinary situations, the marriage contracted between two Catholics would be valid when celebrated according to the norms required for the extraordinary form of marriage provided by both Eastern and Latin law. This subject presents some difficulties when a Catholic marries an Oriental non-Catholic. In this case the marriage could be invalid because Oriental non-Catholics do not accept the celebration of marriage without the intervention of the sacred minister. However, the use of a lay person as an authorized witness is acceptable only in extraordinary circumstances - and in these circumstances the right of faithful to marry should

¹⁴⁴ *CCEO*, c. 828 § 2: “Sacer hic censetur ritus ipso interventu sacerdotis assistentis et benedicientis.”

prevail. This principle is valid for Oriental non-Catholics as well. In fact, no one can be coerced to renounce matrimony or to delay it for a long period of time because of a lack of pastoral and administrative structures. In this particular case, a marriage between a Catholic and an Oriental non-Catholic could be valid without the intervention of a sacred minister.¹⁴⁵

Regarding the same issue, Pospishil applies the same principle - *locus regit actum* – when he argues that a Latin deacon can be delegated by a Latin ordinary to assist at marriages involving Eastern Catholics entrusted to his pastoral care. Pospishil suggests that canon 1112 of the 1983 *CIC* applies in two cases involving Eastern rite Catholics. First, in the case of a marriage between Oriental rite Catholics who, lacking a proper hierarchy, are entrusted to the pastoral care of the Latin bishop of the place, and second, in the case of an interritual marriage between a Latin and an Oriental Catholic celebrated in the Latin Church. Such marriages, according to Pospishil, would be perfectly valid when assisted by a lay person properly delegated because when a juridical act is legitimately transferred to a different place, the norms of that place govern the legal requirements. Pospishil envisions yet a third situation: a mixed marriage between a Latin or an Oriental Catholic, subjected to a Latin bishop, and an Oriental non-Catholic. In this situation the Latin bishop can grant a dispensation from form according to canon 1127 § 2 of the 1983 *CIC* in order for a deacon (and even a lay person) to assist validly at such mixed marriage.¹⁴⁶

¹⁴⁵ Navarrete, “Questioni sulla Forma Canonica,” 506-509.

¹⁴⁶ Victor Pospishil, *Eastern Eatholic Church Law* (Staten Island, NY: Saint Maron Publications, 1996) 574.

Other authors, however, strongly disagree. While Prader agrees that a Latin ordinary can delegate a Latin deacon to bless a marriage of two Eastern Catholics subjected to him, he considers that the same delegation could not be granted to a lay person. The form of the celebration of marriage, considers Prader, is not governed by the principle *locus regit actum* as is the case with civil laws, but rather by the personal law which binds the Christian faithful, even when they are outside the territory of their own Church *sui iuris*.¹⁴⁷ Salachas and Abbas also agree on this issue. Besides, canon 38 of the *CCEO* states that Oriental Catholics remain enrolled in their own Church *sui iuris* even though they are entrusted to a hierarch or a pastor of another Church *sui iuris*.¹⁴⁸ Consequently, they remain obliged to observe the marriage norms proper to the discipline of their own legislation. Therefore, canon 1112 of the 1983 *CIC*, which allows lay people to act as an official witness at marriages, does not apply to marriages involving Oriental rite Catholics.¹⁴⁹

III. Requirements for a licit celebration of marriage

1. Responsibility of the delegator

Canon 1113. Before special delegation is granted, all those things which the law has established to prove free status are to be fulfilled.¹⁵⁰

¹⁴⁷ Prader, *La Legislazione Matrimoniale*, 39-41.

¹⁴⁸ *CCEO*, c. 38.

¹⁴⁹ Abbas, *Two Codes in Comparison*, 98-99.

¹⁵⁰ 1983 *CIC*, c. 1113: “Antequam delegatio concedatur specialis, omnia provideantur, quae ius statuit adlibertatem status comprobendam.”

It is the responsibility of the local ordinary or the pastor who grants a special delegation to ascertain that all the requirements established by law with regard to the free status of the parties are fulfilled. The manner in which the free status is proved is established in canons 1066-1068 of the 1983 *CIC*. Canon 1067 commissions the conferences of bishops to establish more detailed norms concerning the prenuptial investigation which ought to be diligently conducted by the pastor.¹⁵¹ Failure to carry out the provision established by canon 1113 of the 1983 *CIC* does not affect either the validity or the liceity of the delegation but it does constitute a major dereliction of pastoral responsibility.¹⁵²

2. Responsibilities of all authorized witness

Canon 1114. The person assisting at marriage acts illicitly unless the person has made certain of the free status of the contracting parties according to the norm of law and, if possible, of the permission of the pastor whenever the person assists in virtue of general delegation.¹⁵³

While the previous canon regarded the obligation of the delegator to fulfill the requirements of the law concerning the free status of the parties, the present canon has to do

¹⁵¹ 1983 *CIC*, c. 1067.

¹⁵² Beal, 1332.

¹⁵³ 1983 *CIC*, c. 1114: “Assistens matrimonio illicite agit, nisi ipsi constiterit de libero statu contrahentium ad normam iuris atque, si fieri potest, de licentia parochi, quoties vi delegationis generalis assistit.”

with the official assistant who actually assists at marriage either in virtue of his office or by delegation.¹⁵⁴ In order to act licitly, the official witness must make sure that the prenuptial investigation has established the parties' free status to marry, even though the investigation was carried out by somebody else. The second part of this canon refers to the person who acts in virtue of a general delegation. The 1983 *CIC* lists assistance at marriages among the functions "especially entrusted"¹⁵⁵ to the pastor who is the proper pastor of the community entrusted to him.¹⁵⁶ Accordingly, the pastor should be informed of the public events that take place in his parish and be given the opportunity to express his opinion and advice, if necessary. However, the absence of the pastor's permission does not make the marriage invalid and, most probable not even illicit, since the text of the canon includes the clause "if possible".¹⁵⁷

3. The canonical place of celebration

<p>Canon 1115. Marriages are to be celebrated in a parish where either of the contracting parties has a domicile, quasi-domicile, or month long residence or, if it concerns transients, in the parish where they actually reside. With the permission of the proper ordinary or proper pastor, marriages can be</p>	<p>Canon 831 §1 The local hierarch or local pastor licitly bless the marriage: 1° after he has established the domicile, quasi-domicile, or month-long residence, or, if I is a case of a transient, the actual residence of either party in the place of the marriage; 2° if, when these conditions are lacking he</p>
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¹⁵⁴ Beal, 1332. For a contrary opinion see Castaño, *Il Sacramento del Matrimonio*, 430, where the author states that the first part of this canon concerns only those who assist at marriage in virtue of special delegation.

¹⁵⁵ 1983 *CIC*, c. 540, 4°.

¹⁵⁶ *Ibid.*, c. 519.

¹⁵⁷ *Ibid.*, c. 1114: "Si fieri potest." Beal, 1333.

celebrated elsewhere.¹⁵⁸

has the permission of the hierarch or pastor of the domicile or quasi-domicile of either of the parties, unless a just cause excuses; 3° also, in a place exclusively of another Church *sui iuris*, unless the hierarch who exercises power in that place expressly refuses.

§2 The marriage is to be celebrated before the pastor of the groom, unless particular law determines otherwise or a just cause excuses.¹⁵⁹

The general norm establishes that the pastor and the ordinary, as well as the hierarch, validly assist and bless marriages celebrated within the boundaries of their jurisdiction. Present canons specify additional norms which are to be observed for the licit celebration of marriages. Both Codes provide basically the same norms, although the wordings of the canons are different. Thus, when both parties are Catholics of Latin rite, the celebration of marriage is to take place in the parish where at least one of them has domicile, quasi-domicile, or a month long residence. In the case of a mixed marriage, the celebration is to take place in the parish of the Catholic party unless a dispensation from form has been

¹⁵⁸ 1983 *CIC*, c. 1115: “Matrimonia celebrentur in paroecia ubi alterutra pars contrahentium habet domicilium vel quasi-domicilium vel menstruam commorationem, aut, si de vagis agitur, in paroecia ubi actu commorantur; cum licentia proprii Ordinarii aut parochi proprii, alibi celebrari possunt.”

¹⁵⁹ *CCEO*, c. 831: “§ 1. Hierarcha loci vel parochus loci matrimonium licite benedicunt: 1° postquam sibi constitit de domicilio vel quasi-domicilio vel menstrua commoratione aut, si de vago agitur, actuali commoratione alterutrius sponsi in loco matrimonii; 2° habita, si hae condiciones desunt, licentia Hierarchae vel parochi domicilii vel quasi domicilii alterutrius partis, nisi iusta causa excusat; 3° in loco quoque exclusivo alterius Ecclesiae sui iuris, nisi Hierarcha, qui in hoc loco potestatem suam exercet, expresse renuit. § 2. Matrimonium coram sponsi parochi celebretur, nisi vel ius particulare aliud fert vel iusta causa excusat.”

obtained.¹⁶⁰ The marriage of those who have neither domicile nor quasi-domicile is to be celebrated in the place where they actually reside after the approval of the local ordinary has been obtained.¹⁶¹ It is evident that these provisions indicate, for pastoral reasons, the proper parochial community of the parties as the most excellent place for the celebration of marriage.¹⁶² However, in case the parties wish to celebrate their marriage elsewhere they can do so after the proper pastor or ordinary, or hierarch, has granted the permission. The Eastern Code further states that the marriage may be celebrated outside the parish where at least one of the parties has domicile or quasi-domicile without the permission when “a just cause excuses.”¹⁶³

Besides these common norms the *CCEO* contains two other provisions which are specific to Eastern tradition. The first norm establishes that the local hierarch and pastor licitly bless a marriage within the limits of his own territory even in a place of exclusive jurisdiction of another Church *sui iuris*, “unless the hierarch who exercises power in that place expressly refuses.”¹⁶⁴ This matter was not included in the previous Oriental legislation

¹⁶⁰ 1983 *CIC*, c. 1127 § 2. *CCEO*, c. 835.

¹⁶¹ 1983 *CIC*, c. 1071 § 1, 1°. *CCEO*, c. 789, 1°.

¹⁶² Pontifical Commission for the Revision of the Code of Canon Law, *Coetus studiorum de iure matrimoniali*, adunatio diei 17 octobris 1977, canon 317, *Communicationes*, 10 (1978) 91.

¹⁶³ *CCEO*, c. 831 §1, 2°: “nisi iusta causa excusat.”

¹⁶⁴ *Ibid.*, c. 831 § 1, 3°: “nisi Hierarcha, qui in hoc loco potestatem suam exercet, expresse renuit.”

but it was addressed by the Pontifical Commission for the Redaction of the Code of Oriental Canon Law through an authentic interpretation¹⁶⁵ of canon 86 § 1, 2° of the motu proprio *Crebrae allatae*. The Commission established at the time that in order to bless a marriage in a place which was exclusively of another rite, the hierarch or the pastor needed the express consent of the hierarch or pastor of the above mentioned place. The *CCEO* reverses this interpretation and grants local hierarchs and pastors more freedom. According to Salachas and Abbas, this norm is also relevant for the Latin Church in the case of Oriental rite Catholic spouses who request to celebrate their marriage in a Latin church or chapel. In this instance, the Oriental rite pastor or hierarch of that territory can validly and licitly bless a marriage in a Latin church or chapel without asking an express permission from the local pastor or ordinary. It is enough that the local ordinary does not expressly refuse the celebration of the marriage in that specific place.¹⁶⁶

The second norm specific to Eastern tradition is the precedence given to the pastor of the groom regarding the marriage celebration. The present Eastern norm continues the general rule enacted by *Crebrae allatae* which established that “marriage should be celebrated before the pastor of the bridegroom.”¹⁶⁷ The 1917 *CIC* gave precedence, as a

¹⁶⁵ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, authentic interpretation, May 3, 1953: AAS 45 (1953) 313.

¹⁶⁶ Salachas, *Il Sacramento del Matrimonio*, 204. Abbas, *Two Codes in Comparison*, 112. The latter builds his argument on the fact that in the Latin Code itself, the Latin Church is indirectly understood as one of the Church *sui iuris* according to canon 112 §2 of the 1983 *CIC*.

¹⁶⁷ *CA*, c. 88 § 3: AAS 41 (1949) 108-109: “Matrimonium coram sponsi parrocho celebretur.”

general norm, to parish of the bride, but in inter-ritual marriages admitted the Oriental tradition.¹⁶⁸ The 1983 *CIC* left out the provision that gave preference to the parish of the bride for the celebration of marriage. The present law gives the parties more liberty to celebrate their marriage in the parish of either spouse. The *CCEO* preserves the rule which requires that marriage is to be celebrated in the parish of the groom but the norm is not very restrictive since a just cause, not a grave one, or the particular law of any Church *sui iuris* may decide otherwise.¹⁶⁹ This norm is also relevant for the Latin Church with respect to inter-ritual marriages. As a general norm, an Oriental rite Catholic and a Latin rite bride should celebrate their marriage before the groom's pastor unless a just cause excuses or the particular law of the Church *sui iuris* provides otherwise. However, the celebration of matrimony before the pastor of the bride, without a just cause or in the absence of a particular law providing otherwise, would not invalidate the marriage.¹⁷⁰ Nonetheless, in this case, in order to celebrate the marriage both validly and licitly, before the celebration of the sacred rite in the bride's parish, the permission of the groom's pastor should be obtained.¹⁷¹

IV. The extraordinary form of marriage

Canon 1116 § 1. If a person competent to assist according to the norm of law cannot be present or approached without grave	Canon 832 § 1. If the priest who is competent in accord with the norm of law cannot be present or be approached without
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¹⁶⁸ 1917 *CIC*, c. 1097 § 2.

¹⁶⁹ Abbas, *Two Codes in Comparison*, 114.

¹⁷⁰ *Ibid.*

¹⁷¹ Beal, 1334.

inconvenience, those who intend to enter into a true marriage can contract it validly and licitly before witnesses only: 1° in danger of death; 2° outside the danger of death provided that it is prudently foreseen that the situation will continue for a month.

§ 2. In either case, if some other priest or deacon who can be present is available, he must be called and be present at the celebration of the marriage together with the witnesses, without prejudice to the validity of the marriage before witnesses only.¹⁷²

grave inconvenience, those who intend to celebrate a true marriage can validly and licitly celebrate it in the presence of witnesses only: 1° in danger of death; 2° apart from the danger of death, provided it is prudently foreseen that this state of affairs will continue for a month.

§ 2. In either case, if another priest is at hand, he is to be called upon, if it is possible, to bless the marriage, without prejudice to the validity of the marriage celebrated in the presence of only the witnesses; in such cases even a non-Catholic priest may be called.

§ 3. If the marriage was celebrated in the presence only of witnesses, the spouses shall not neglect to receive the nuptial blessing from a priest as soon as possible.¹⁷³

Besides the ordinary form of marriage, the law also provides a valid and licit celebration of the matrimony before witnesses only, when in extraordinary circumstances, it

¹⁷² 1983 *CIC*, c. 1116: “§ 1. Si haberi vel adiri nequeat sine gravi incommodo assistens ad normam iuris competens, qui intendunt verum matrimonium inire, illud valide ac licite coram solis testibus contrahere possunt: 1° in mortis periculo; 2° extra mortis periculum, dummodo prudenter praevideatur earum rerum condicionem esse per mensem duraturam.

§ 2. In utroque casu, si praesto sit alius sacerdos vel diaconus qui adesse possit, vocari et, una cum testibus, matrimonii celebrationi adesse debet, salva coniugii validitate coram solis testibus.”

¹⁷³ *CCEO*, c. 832: “§ 1. Si haberi vel adiri non potest sine gravi incommodo sacerdos ad normam iuris competens, celebrare intendentes verum matrimonium illud valide ac licite coram solis testibus celebrare possunt: 1° in periculo mortis; 2° extra periculum mortis, dummodo prudenter praevideatur earum rerum condicionem esse per mensem duraturam.

§ 2. In utroque casu, si praesto est alius sacerdos, ille, si fieri potest, vocetur, ut matrimonium benedicat salva matrimonii validitate coram solis testibus; eisdem in casibus etiam sacerdos acatholicus vocari potest. § 3. Si matrimonium celebratum est coram solis testibus, coniuges a sacerdote quam primum benedictionem matrimonii suscipere ne neglegant.”

would be difficult, if not impossible, to have a competent authorized witness or a sacred minister present at the celebration of marriage. The reason the law makes available this extraordinary form is to respect the natural right to marry by giving everybody the possibility to contract a true and authentic marriage while preserving its public character.¹⁷⁴ This is comprehensible in the Latin tradition where the sacred minister or the lay person properly delegated is a qualified witness who assists at marriage in order to ask and receive the parties' consent in the name of the Church, while the spouses themselves are the ministers of the sacrament. Consequently, under extraordinary circumstances which are precisely established by the law, the marriage may be contracted before witnesses only, whose task is simply to witness the exchange of parties' consent. However, it is more difficult to reconcile the extraordinary form with the Oriental canonical tradition and theology which requires that the sacrament of matrimony be celebrated with a sacred rite. In fact, during the codification process there was the proposal to omit entirely the norm that allows the celebration of the marriage in the presence of witnesses only because it is contrary to Oriental theology of marriage. The Commission did not accept the proposal because the canon providing the celebration of marriage with extraordinary form is based on the natural right and because the use of the principle of *economia*¹⁷⁵ in the Oriental tradition allows it.¹⁷⁶ Nonetheless,

¹⁷⁴ Beal, 1334. Salachas, *Il Sacramento del Matrimonio*, 208.

¹⁷⁵ The term *economia* indicates the loving and condescending concern of the Church toward her members who find themselves in a objective impossibility to observe the law of the Church or who cannot do so because of the subjective human frailness. In other words, the term *economia* describes the condescendence the Church applies anytime it is required for

Salachas considers that Oriental tradition has never applied the principle of *economia* in the sense of canon 832 of the *CCEO*. However, Salachas admits that the celebration of the marriage with the extraordinary form finds its theological explanation in the fact that the Church, the depository of the mysteries of Christ and dispensator of the graces which arise from it, taking into account the natural right of people to marry, in certain extraordinary circumstances, supplies the sacred rite accomplished by the priest in such a manner that a marriage celebrated without the priestly blessing is still a sacrament. Obviously, in this case the validity of the sacrament is not based on the fact that the marriage is celebrated before two witnesses, but because the Church so established, in the extraordinary circumstances provided by the law.¹⁷⁷

The conditions to be fulfilled in order to celebrate a marriage with the extraordinary form are the same as in the previous legislation, namely: the unavailability of the competent person, the danger of death, or, outside the danger of death, the fact that it is prudently foreseen that the competent person cannot be present or approached for a month.¹⁷⁸ There are however a few new elements in the present law. First, both 1983 *CIC* and *CCEO* require

the salvation of the souls and their spiritual welfare. See, Salachas, *Il Sacramento del Matrimonio*, 208-209.

¹⁷⁶ Pontifical Comission for the Revision of the Oriental Code of Canon Law, *Denua Recognitio dello Schema dei Canonici sul Culto Divino e Sacramenti*, can. 168 (CA 89), *Nuntia* 15 (1982), 84.

¹⁷⁷ Salachas, *Il Sacramento del Matrimonio*, 209.

¹⁷⁸ These conditions were considered in detail in the second chapter of the present study on pages 145-152.

that the parties have the intention to enter a true marriage. In fact, their intention was always required for the valid celebration of all sacraments.¹⁷⁹ The present law iterates that for the celebration of marriage with extraordinary form it is necessary to have the same intention as in the ordinary celebration.¹⁸⁰ It is possible that when spouses, out of ignorance or prejudice, might consider that their matrimony contracted before witnesses only not be valid before God. In order to avoid such an error, during the revision process it was considered opportune to add this explicative clause which makes clear that the marriage celebrated with the extraordinary form is valid and licit if the parties have the intention, explicit or implicit, to enter a true marriage.¹⁸¹

Whenever a priest or deacon, for the Latin Code, and a priest for the Eastern Code, who is not authorized to assist at the marriage, is available, he should be called to participate in the extraordinary form of celebration. Both the 1983 *CIC* and the *CCEO* replaced the word *assistere*, which in the former legislation designated the participation of an unauthorized priest at a marriage celebrated with extraordinary form, with the term *adese*, which clarified the fact that the participation of the priest or deacon is not a qualified assistance; he need neither interrogate the spouses nor receive their consent. Concerning this issue the *CCEO* performs an obvious modification of the previous law. Motu proprio

¹⁷⁹ Cappello, *De Matrimonio*, nr. 32, 29.

¹⁸⁰ Abate, "La Forma della Celebrazione del Matrimonio," 158-159.

¹⁸¹ Pontifical Commission for the Revision of the Code of Canon Law, *Coetus studiorum de iure matrimoniali*, adunatio diei 18 octobris 1977, can. 318, *Communicationes*, 10 (1978) 95. See also, Chiappetta, *Il Matrimonio*, 291.

Crebrae allatae specifically established that the priest invited to participate at the celebration must be Catholic.¹⁸² *CCEO* specifically established that the priest so invited may be a non-Catholic one. This fact, while a result of the ecumenical opening of Vatican II, underlines the importance of the celebration of marriage with the sacred rite in the Eastern Churches.

The emphasis of the sacred rite for the Eastern Churches is also highlighted by the third paragraph of canon 832 of the *CCEO* which has no counterpart in 1983 *CIC* and was not contained in the previous Eastern legislation. Thus, under extraordinary circumstances, Oriental rite Catholics can validly marry in the presence only of witnesses but the law requires that spouses are not to neglect to have their marriage blessed by a priest as soon as possible. This norm does not mention, as the previous paragraph did, that it may be a non-Catholic priest who blesses the marriage, which leads to the conclusion that it should be a Catholic one. Once the extraordinary situation came to an end, the spouses enjoy the liberty to look for a Catholic priest.

V. Faculty to bless marriages of non-Catholic Eastern faithful

Canon 833 § 1. The local hierarch can give any Catholic priest the faculty of blessing the marriage of the Christian faithful of an Eastern non-Catholic Church if those faithful cannot approach a priest of their own Church without great difficulty and if they voluntarily ask for the blessing as long as nothing stands in the way of a valid and licit celebration.

§ 2. If possible, before blessing the marriage, the Catholic priest is to notify the competent authority of those Christian

¹⁸² *CA*, c. 89, 2°: AAS 41 (1949) 109.

faithful about the matter.¹⁸³

This norm is new in the Oriental law but without counterpart in Latin law. Both 1983 *CIC* and *CCEO* envision *communicatio in sacris* regarding the sacraments of penance, the Eucharist, and anointing of the sick with Eastern non-Catholic Churches, if the faithful ask for these sacraments on their own and are properly disposed.¹⁸⁴ The *CCEO* also provides this possibility for the sacrament of baptism¹⁸⁵ and for the sacrament of marriage. However, while with regard to other sacraments it is up to priests who celebrate them to decide whether Oriental non-Catholic faithful may be admitted, with concern to the sacrament of matrimony the law reserves to the local hierarch the right to grant the faculty of blessing a marriage of two Oriental non-Catholics to any Catholic priest. The faculty to bless the marriage may be granted when Oriental non-Catholic faithful experience great difficulty in approaching their own priests. This difficulty may result from physical circumstances or from moral causes. Besides, the parties must be free of any matrimonial impediments that may obstruct the licit and valid celebration of their marriage. In this case, in addition to divine law, the

¹⁸³ *CCEO*, c. 833: “§ 1. Hierarcha loci cuilibet sacerdoti catholico facultatem conferre potest matrimonium christifidelium alicuius Ecclesiae orientalis acatholicae, qui sacerdotem propriae Ecclesiae sine gravi incommodo adire non possunt, benedicendi, si sua sponte id petunt et dummodo nihil validae vel licitae celebrationi matrimonii obstet.
§ 2. Sacerdos catholicus, si fieri potest, antequam matrimonium benedicat, auctoritatem competentem illorum christifidelium de hac re certiolem faciat.”

¹⁸⁴ 1983 *CIC*, c. 844 § 3 and *CCEO*, c. 671 § 3.

¹⁸⁵ *CCEO*, c. 681 § 5.

matrimonial law of their respective Church, must be observed.¹⁸⁶ The norm provided by this canon applies independently of the doctrine and discipline of the Oriental non-Catholic Church regarding the validity or invalidity of the marriage of their own faithful before a Catholic priest. However, the second paragraph of the canon requires the Catholic priest to inform, if possible, the proper authorities of those Oriental non-Catholic faithful. If it is impossible to present this information prior to the celebration of marriage, it should be done afterwards so that the matrimony may be recorded in the marriage register.¹⁸⁷

This canon derives from principles originated by Vatican II concerning the *communicatio in sacris* and the special consideration given to Oriental Orthodox Churches.¹⁸⁸ Thus, the present norm comes to fulfill both the pastoral needs and the ecumenical concern toward those Oriental non-Catholic faithful who cannot approach their own sacred minister without grave inconvenience and voluntarily ask for the matrimonial blessing.¹⁸⁹

VI. Persons subject to canonical form of marriage

Canon 1117. The form established above must be observed if at least one of the parties contracting marriage was baptized

Canon 834 § 1. The form for the celebration of marriage by law is to be observed if at least one of the parties

¹⁸⁶ Salachas, *Il Sacramento del Matrimonio*, 210.

¹⁸⁷ *Ibid.*

¹⁸⁸ Vatican II, decree *Unitatis redintegratio*, 8, 14-17, November 21, 1964: AAS 57 (1965) 98, 101-103; Vatican II, decree *Orientalium Ecclesiarum*, 26, November 21, 1964: AAS 57 (1965) 84.

¹⁸⁹ Salachas, *Il Sacramento del Matrimonio*, 210.

in the Catholic Church or received into it [and has not defected from it by a formal act], without prejudice to the prescripts of can. 1127, §2.¹⁹⁰ celebrating the marriage was baptized in the Catholic Church or was received into it.¹⁹¹

The canonical form must be observed by all who have been baptized in the Catholic Church or have been received into full communion with it when they marry amongst themselves or with a non-Catholic. Presently, both 1983 *CIC* and *CCEO* have the same norm regarding this issue. Initially, canon 1117 of the 1983 *CIC* exempted Catholics from the requirement of observing canonical form if they defected from the Church by a formal act.¹⁹² This norm was an innovation for the Latin canonical tradition and was intended to establish an exception from the general rule established by canon 11 of the 1983 *CIC* which declared that ecclesiastical laws bind all those baptized in the Catholic Church or received into it. The purpose of the exception was to facilitate the exercise of their natural right to marry to those faithful who, because of their defection, would have found it difficult to

¹⁹⁰ 1983 *CIC*, c. 1117: “Statuta superius forma servanda est, si saltem alterutra pars matrimonium contrahentium in Ecclesia catholica baptizata vel in eandem recepta sit [neque actu formali ab ea defecerit], salvis praescriptis can. 1127, § 2.”

¹⁹¹ *CCEO*, c. 834: “§ 1. Forma celebrationis matrimonii iure praescripta servanda est, si saltem alterutra pars matrimonium celebrantium in Ecclesia catholica baptizata vel in eandem recepta est.”

¹⁹² The 1983 *CIC* also prescribed that the faithful who have left the Church by a formal act were not bound by the laws regarding the dispensation from the impediment of disparity of cult (see, canon 1086 § 1) and the requirement for permission in the case of mixed marriage (see, 1124).

observe the canonical form for the validity of their marriage.¹⁹³ However, from the very beginning, difficulties arose in the process of interpreting and applying this new norm. First of all, there was no consensus with regard to the exact meaning of the concept of “defection from the Catholic Church by a formal act.”¹⁹⁴ Consequently, it was difficult to determine whether, in given case, a formal act of defection took place. The new rule also was unfavorable to those persons who, after coming back in the communion with the Church, wanted to enter a new marriage in the case the first one was broken.¹⁹⁵

As a result of the confusion that was created by this clause, in 1997 the Pontifical Council for the Interpretation of the Legislative Texts considered the suitability of removing this clause from the text of canon 1117 and conducted a survey among the dioceses concerning the usefulness of this new norm. As a result, in 1999 the Pontifical Council for the Interpretation of the Legislative Texts unanimously approved the elimination of this clause and presented their proposal to the Supreme Pontiff who confirmed the decision. Nonetheless, at that time the norm was not published.¹⁹⁶ However, the same Pontifical Council, with the approval of the Supreme Pontiff, sent on March 13, 2006, to the presidents

¹⁹³ Francesco Coccopalmerio, “The Presentation of Motu Proprio *Omnium in mentem*,” in *Osservatore Romano*, December 16, 2009, 7.

¹⁹⁴ 1983 *CIC*, c. 1117: “actu formali ab ea defecerit.”

¹⁹⁵ Since the promulgation of 1983 *CIC*, canonists have published several studies concerning this issue.

¹⁹⁶ Francesco Coccopalmerio, “The Presentation of Motu Proprio *Omnium in mentem*,” in *Osservatore Romano*, December 16, 2009, 7.

of Conferences of Bishops a Circular Letter¹⁹⁷ which very narrowly defined what would count as formal defection sufficient to exempt one from observing canonical form. The publication of this Circular Letter strengthened the arguments in favor of the suppression of the above mentioned clause.

In the light of these events, the Supreme Pontiff issued by motu proprio the Apostolic Letter *Omnium in mentem*¹⁹⁸ signed on October 26, 2009 and published on December 15, 2009 wherein the norm in discussion was removed:

In light of the above, and after carefully considering the views of the Fathers of the Congregation for the Doctrine of the Faith and the Pontifical Council for Legislative Texts, as well as those of the Bishops' Conferences consulted with regard to the pastoral advantage of retaining or abrogating this exception from the general norm of can. 11, it appeared necessary to eliminate this norm which had been introduced into the corpus of canon law now in force. Therefore I decree that in the same Code the following words are to be eliminated: "and has not left it by a formal act" (can. 1117); "and has not left it by means of a formal act" (can. 1086 § 1); "and has not left it by a formal act" (can. 1124).¹⁹⁹

¹⁹⁷ Pontifical Council for the Interpretation of the Legislative Texts, circular letter, March 13, 2006, *Communicationes* 38 (2006) 170-184.

¹⁹⁸ Benedict XVI, Apostolic Letter Motu Proprio *Omnium in mentem*, October 26, 2009: AAS 102 (2010) 8-10. English translation from http://www.vatican.va/holy_father/benedict_xvi/apost_letters/documents/hf_ben-xvi_apl_20091026_codex-iuris-canonici_en.html All subsequent English translations from this document will be taken from this source unless otherwise indicated.

¹⁹⁹ Ibid., 9: "His omnibus positis, atque accurate perpensis sententiis sive Patrum Congregationis pro Doctrina Fidei et Pontificii Consilii de Legum Textibus, sive etiam Conferentiarum Episcopaliū quibus consultatio facta est circa utilitatem pastoralem servandi aut abrogandi hanc exceptionem a norma generali canonis 11, necessarium apparuit abolere hanc regulam in canonicarum legum corpus nunc vicens introductam. Auferenda proinde decernimus in eodem *Codice* verba: "neque actu formali ab ea defecerit" canonis 1117, "nec actu formali ab ea defecerit" canonis 1086 § 1, et "quaeque nec ab ea actu formali defecerit" canonis 1124."

Consequently, after its entry in force, this motu proprio eliminated the impact on marriage of defection by formal act and required that defectors follow the canonical form when they marry. Now both Latin and Eastern Codes have the same rule concerning the form of marriage for all the faithful including those who formally abandoned the Church. The *CCEO* did not have an exception similar to that initially included in 1983 *CIC* because “it is unconceivable for a Catholic of an Eastern Church, even apostate, to be able to contract the sacrament of marriage only in civil form.”²⁰⁰

One cannot but notice the resemblance with a similar alteration that was performed in the 1917 *CIC*. Canon 1099 § 2 stated that persons born of non-Catholic parents and baptized in the Catholic Church, but raised outside the Catholic faith from infancy, are exempted from the observance of the canonical form of marriage.²⁰¹ The canonical practice found that the imprecision of the terms of the exemption generated serious problems in the application of this norm; accordingly, Pius XII abolished this exception by the motu proprio *Decretum Ne Temere*.²⁰² It should be also mentioned that long before the promulgation of the motu proprio *Omnium in mentem*, scholars warned that the exemption provided in canon 1117 of the 1983 *CIC* for those who abandon the Catholic Church might have the similar fate of

²⁰⁰ Prader, *Il Matrimonio in Oriente e Occidente*, 219.

²⁰¹ 1917 *CIC*, c. 1099 § 2.

²⁰² Pius XII, motu proprio *Decretum Ne Temere*, August 1, 1948: *ASS* 40 (1948) 305-306.

canon 1099 § 2 from the 1917 *CIC* because of its “vagueness and difficulty in its practical application.”²⁰³

VII. Canonical form of mixed marriages

Canon 1127 §1. The prescripts of can. 1108 are to be observed for the form to be used in a mixed marriage. Nevertheless, if a Catholic party contracts marriage with a non-Catholic party of an Eastern rite, the canonical form of the celebration must be observed for liceity only; for validity, however, the presence of a sacred minister is required and the other requirements of law are to be observed.²⁰⁴

Canon 834 § 2. If, however, a Catholic party ascribed to an Eastern Church celebrates a marriage with one who belongs to an Eastern non-Catholic Church, the form for the celebration of marriage prescribed by law is to be observed only for liceity; for validity, however, the blessing of a priest is required, while observing the other requirements of law.²⁰⁵

The general norm provides that even in the case of a mixed marriage, the parties are bound to observe canonical form. However, both Codes admit an exception in the case of a marriage contracted between a Catholic and an Oriental non-Catholic, in which situation the observance of the form is required for liceity but not for validity. This norm takes up the rule already established in the conciliar decree *Orientalium Ecclesiarum*²⁰⁶ for Eastern Catholics

²⁰³ Beal, 1336.

²⁰⁴ 1983 *CIC*, c. 1127: “§ 1 Ad formam quod attinet in matrimonio mixto adhibendam, servantur praescripta can. 1108; si tamen pars catholica matrimonium contrahit cum parte non catholica ritus orientalis, forma canonica celebrationis servanda est ad liceitatem tantum; ad validitatem autem requiritur interventus ministri sacri, servatis aliis de iure servandis.”

²⁰⁵ *CCEO*, c. 834: “§ 2. Si vero pars catholica alicui Ecclesiae orientali sui iuris ascripta matrimonium celebrat cum parte, quae ad Ecclesiam orientalem acatholicam pertinet, forma celebrationis matrimonii iure praescripta servanda est tantum ad liceitatem; ad validitatem autem requiritur benedictio sacerdotis servatis aliis de iure servandis.”

²⁰⁶ *OE* 18: *AAS* 57 (1965) 82.

and extended to Latin Catholics by the decree *Crescens matrimoniorum*.²⁰⁷ This norm is based on the sacramentality and ecclesiality of the Oriental Churches which, “although separated from us, yet possess true sacraments and above all, by apostolic succession, the priesthood and the Eucharist, whereby they are linked with us in closest intimacy.”²⁰⁸ The purpose of this exception is to diminish the number of invalid marriages, to make more stable the institution of marriage by protecting its sanctity, and to promote ecumenical charity between Catholics and Oriental non-Catholics.²⁰⁹

However, there are a few differences both between the previous legislation and the present one, and between the 1983 *CIC* and *CCEO* concerning this matter. Both the conciliar decree *Orientalium Ecclesiarum* and the decree *Crescens matrimoniorum* established as the unique condition for the validity of the marriage “the presence of the sacred minister.”²¹⁰ The 1983 *CIC* expands the norm and requires “the intervention of a sacred minister”²¹¹ and not merely his presence. The *CCEO*, faithful to the Eastern tradition, establishes more

²⁰⁷ Decree *Crescens matrimoniorum*: AAS 59 (1967) 165. This issue, as presented by both *Orientalium Ecclesiarum* and *Crescens matrimoniorum*, is considered in the second chapter of this study at pages 171-173 and 180-182.

²⁰⁸ *Unitatis redintegratio* 15.

²⁰⁹ Salachas, *Il Sacramento del Matrimonio*, 215.

²¹⁰ *OE* 18: AAS 57 (1965) 82: “Ad validitatem sufficere praesentiam ministri sacri.” Tanner, 2 : 905. Decree *Crescens matrimoniorum*: AAS 59 (1967) 166: “Ad validitatem sufficere praesentiam ministri sacri.”

²¹¹ 1983 *CIC*, c. 1127 § 1: “interventus ministri sacri.” Surprisingly, the 1999 English version translates the Latin *interventus* by the English *presence*.

exactly that the sacred minister must be a priest, not a deacon, and he must impart the nuptial blessing to the couple. Several canonists, commenting on canon 1127 § 1 of the 1983 *CIC*, consider that for the validity of a such a marriage it is enough to have the active intervention of any sacred minister (bishop, priest, or deacon), Oriental non-Catholic or Catholic, even without being properly delegated. Even the presence of the two common witnesses would not be necessary.²¹² This interpretation, however, is based only on the proper meaning of the words, without taking into account the purpose of the law as expressed in the conciliar decree *Orientalium Ecclesiarum*²¹³ and the decree *Crescens matrimoniorum* – namely, to acknowledge the validity of a such a marriage even if celebrated before an Oriental non-Catholic priest in order to prevent the grave pastoral consequences that might result from the multiplication of invalid marriages.²¹⁴ Consequently, considering the mind of the legislator it might be concluded that the exemption from the ordinary canonical form for a mixed marriage contracted between a Catholic and an Oriental non-Catholic is authorized only when the marriage is celebrated in an Oriental non-Catholic Church,²¹⁵ in the presence of a non-Catholic Oriental priest who performs the sacred rite according to the laws of his own

²¹² Francesco Bersini, *Il Nuovo Diritto Canonico Matrimoniale: Commento Giuridico-Teologico-Pastorale* (Torino: Editrici Elle Di Ci, 1983) 150. Mario Pompeda, in *Commento al codice di Diritto Canonico*, ed. Pio V. Pinto (Rome: Urbaniana University Press, 2001) 669-670. Chiappetta, *Il Matrimonio*, 327. Abate, *La Forma della Celebrazione*, 161-163.

²¹³ The discussions of the conciliar Fathers on this issue are analyzed in the second chapter of this study at pages 160-164.

²¹⁴ Prader, *La Legislazione Matrimoniale*, 53-54. Girgis, *I Matrimoni Misti*, 160-167.

²¹⁵ Salachas, *Il Sacramento del Matrimonio*, 217.

church, and bestows the nuptial blessings upon the spouses²¹⁶ and in the presence of two common witnesses.²¹⁷

The willingness of the Catholic Church to accept, in this particular situation, the Oriental sacred rite as a valid alternative of the canonical form of marriage should not be mistaken for permission to chose freely whether to celebrate the marriage before a Catholic or an Oriental non-Catholic priest. In principle, if a Catholic intends to marry an Oriental non-Catholic in a non-Catholic Oriental Church, for the licit celebration of their marriage, the Catholic party must obtain authorization from the proper authority. For Latin rite Catholics, the dispensation from the obligation to observe canonical form in a mixed marriage may be obtained from the local ordinary.²¹⁸ For Eastern rite Catholics, the right to dispense from the canonical form of marriage, outside the danger of death,²¹⁹ is reserved to the Apostolic See or the patriarch.²²⁰

Both Latin and Oriental law establish that in addition to the sacred rite being conducted by a non-Catholic Oriental priest, for the validity of marriage all other requirements of the law must be observed.²²¹ In other words, such a marriage continues to be

²¹⁶ Beal, 1348.

²¹⁷ Prader, *La Legislazione Matrimoniale*, 54.

²¹⁸ 1983 *CIC*, c. 1127 § 2.

²¹⁹ *CCEO*, c. 796 §1.

²²⁰ *Ibid.*, c. 835.

²²¹ 1983 *CIC*, c. 1127 §1 and *CCEO*, c. 834 §2: “servatis aliis de iure servandis.”

subject to all matrimonial laws both divine and canonical, e. g., concerning impediments, free status, etc.

VIII. Dispensation from canonical form

Canon 1127 §2. If grave difficulties hinder the observance of canonical form, the local ordinary of the Catholic party has the right of dispensing from the form in individual cases, after having consulted the ordinary of the place in which the marriage is celebrated and with some public form of celebration for validity. It is for the conference of bishops to establish norms by which the aforementioned dispensation is to be granted in a uniform manner.²²²

Canon 835. Dispensation from the form for the celebration of marriage required by law is reserved to the Apostolic See or the patriarch, who will not grant it except for a most grave cause.²²³

The 1983 *CIC* incorporates this norm, already established by motu proprio *Matrimonia Mixta*,²²⁴ according to which local ordinaries are empowered to dispense from the observance of canonical form. The present rule continues to demand the same requirements as did the previous legislation. First, there must be grave difficulties which obstruct the observance of the canonical form. Second, the marriage must be celebrated with some form of a public ceremony which would allow the marriage to be proved in external

²²² 1983 *CIC*, c. 1127: “§ 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 concordi ratione concedatur.”

²²³ *CCEO*, c. 835: “Dispensatio a forma celebrationis matrimonii iure praescripta reservatur Sedi Apostolicae vel Patriarchae, qui eam ne concedat nisi gravissima de causa.”

²²⁴ Paul VI, Motu proprio *Matrimonia Mixta*, 9: *AAS* 62 (1970) 261.

forum. The law does not specify whether the public form should be religious or civil; consequently both are acceptable.²²⁵ Finally, the conference of bishops is to issue norms concerning the concession of dispensation from canonical form in order to assure consistency for the whole territory of the episcopal conference. As an innovation, the present law requires that the dispensation be granted by the local ordinary of the Catholic party, namely, the local ordinary where the Catholic spouse has domicile or quasi-domicile. When the marriage is celebrated in another place, the local ordinary of the Catholic party is required to consult the local ordinary of the place of celebration. Although the failure to consult the local ordinary of the place of celebration does not affect the validity of the dispensation, the consultation is a sign of pastoral courtesy and prudence. It is intended to prevent misunderstandings and unpleasant consequences on account of those faithful who might not be accustomed to such a celebration of marriage.

Therefore, the local ordinary may grant a dispensation from the observance of canonical form to a Catholic, his subject, who marries a non-baptized or a baptized non-Catholic. The competence to dispense from the observance of canonical form of marriage between two Catholics is reserved to the Apostolic See.²²⁶

In the Eastern Catholic Churches, the dispensation from canonical form is reserved to the Apostolic See or the patriarch. During the revision process there were several proposals

²²⁵ Beal, 1127.

²²⁶ Pontifical Commission for the Authentic Interpretation of the Code of Canon Law, reply, July 5, 1985: AAS 77 (1985) 771.

that the Oriental bishops should have, like the Latin bishops, the faculty to dispense from canonical form in the case of mixed marriages.²²⁷ The proposal was not accepted. The faculty to dispense from the canonical form remained reserved to the Apostolic See in order to safeguard the sacred rite which is so deeply rooted in the Oriental tradition.²²⁸ Thus, outside the danger of death, the dispensation from canonical form is reserved to the Apostolic See without any limitative clause, and to patriarchs only for a grave cause.²²⁹ According to canon 152 of the *CCEO* the major archbishops also possess the same faculty by law.

A particular problem concerning the dispensation is whether the Latin ordinary, in virtue of his power to dispense provided by canon 1127 § 2, may grant a dispensation from canonical form in case of a marriage between a Latin Catholic and an Oriental non-Catholic. A similar problem is whether a Latin bishop, to whom is entrusted the pastoral care of Eastern Catholics according to canon 916 § 5, may dispense from canonical form an Oriental-rite Catholic subject of his in a case of a mixed marriage. In regard to this situation it seems that the legislator did not intend to authorize the Latin ordinary the faculty to dispense from the sacred rite, namely without the priest's blessing. Even canon 1127 § 1 of the 1983 *CIC* establishes that in the case of a marriage between a Latin and an Oriental non-

²²⁷ For a more detailed analysis of the development of this issue during the revision process, see Salachas, *Il Sacramento del Matrimonio*, 220-222.

²²⁸ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, "Le Osservazioni dei Membri della Commissione allo 'Schema Codicis Iuris Canonici Orientalis' e le Risposte del 'Coetus de Expensione Observationum'," *Nuntia*, 28 (1989) 116-117.

²²⁹ Hanna Alwan, 716.

Catholic the canonical form is needed only for liceity; but for validity the “intervention of a sacred minister”²³⁰ is required. “Intervention” is understood here in the sense of canon 828 of the *CCEO*, namely the accomplishment of the sacred rite by “a priest who assists and blesses”²³¹ the marriage. The Oriental Catholic entrusted to the care of a Latin ordinary does not lose his or her status as an Oriental Catholic faithful ascribed to his or her proper Church *sui iuris*. Consequently, an Oriental Catholic faithful is governed, as much as possible, by the Oriental law;²³² accordingly, the right to dispense from the observation of canonical form of marriage is reserved to the Apostolic See or the patriarch.²³³ Therefore, in ordinary circumstances Latin bishops cannot dispense from the canonical form in the case of a marriage between a Latin and an Oriental Catholic or non-Catholic, nor in the case of a marriage between an Oriental Catholic his subject and a baptized non-Catholic.²³⁴

However, with regard to the conditions which are present in many Eastern European dioceses, this issue may raise situations of pastoral inequality between Latin-rite and Oriental-rite Catholics and even between members of the Latin Church. For instance, a Latin bishop can grant a dispensation from the observance of canonical form to a Latin Catholic who marries a Protestant but cannot do the same for a Latin Catholic who marries an Oriental

²³⁰ 1983 *CIC*, c. 1127 § 1: “*interventus ministri sacri.*”

²³¹ *CCEO*, c. 828 § 2: “*interventu sacerdotis assistentis et benedicens.*”

²³² *Ibid.*, c. 1491 § 3, 3°.

²³³ Navarrette, “Questioni sulla Forma Canonica,” 501-502.

²³⁴ Salachas, *Il Sacramento del Matrimonio*, 223.

rite Catholic or an Oriental non-Catholic. A similar situation rises in the case of a Latin bishop to whom Oriental-rite Catholics are entrusted according to canon 916 § 5 of the *CCEO*. When an Oriental non-Catholic enters in full communion with the Catholic Church he or she is formally ascribed to the Oriental Catholic Church *sui iuris* of the same rite,²³⁵ even though he or she may frequent the Latin Church because there is no Oriental Church on the territory of that diocese. In this case, the Latin bishop may dispense a Latin Catholic from the observance of canonical form but cannot do the same for a formally Oriental-rite Catholic who in fact frequents the Latin Church.

With respect to the subject of dispensation from canonical form there is a question on which authors have two different opinions. This issue regards the mixed marriage between an Oriental Catholic and an Oriental non-Catholic. In this case, canon 834 § 2 of the *CCEO* provides that canonical form is to be observed only for liceity; for validity of such marriage is required the blessing of a priest. Some authors affirm that in the case of a marriage celebrated in a non-Catholic Oriental Church, the Catholic party does not need a dispensation from form, since the priest's blessing is sufficient for the validity of the marriage. In this case, for liceity, permission of the proper hierarch²³⁶ or the proper bishop would be satisfactory.²³⁷ Other authors rejoin that there is no canonical basis for such an opinion.

²³⁵ *CCEO*, c. 35.

²³⁶ Salachas, *Il Sacramento del Matrimonio*, 216. Prader, *Il Matrimonio in Oriente e Occidente*, 223.

²³⁷ Pospishil, *Eastern Catholic Marriage Law*, 390. Bruno Gianesin, *Matrimoni Misti* (Bologna: Edizioni Dehoniane, 1991) 165.

Canon 835 of the *CCEO* does not specify that the dispensation from the canonical form is reserved to the Apostolic See and patriarch only for the valid celebration of the marriage. Moreover, throughout the Eastern Code, there is no mention that the bishop may grant a dispensation from canonical form for the liceity of marriage.²³⁸

IX. The liturgical place of celebration

Canon 1118 §1. A marriage between Catholics or between a Catholic party and a non-Catholic baptized party is to be celebrated in a parish church. It can be celebrated in another church or oratory with the permission of the local ordinary or pastor.

§2. The local ordinary can permit a marriage to be celebrated in another suitable place.

§3. A marriage between a Catholic party and a non-baptized party can be celebrated in a church or in another suitable place.²³⁹

Canon 838 §1. Marriage is to be celebrated in a parish church, or with the permission of the local hierarch or the local pastor, in another sacred place; however, it cannot be celebrated in other places without the permission of the local hierarch.

§2. Concerning the time of the celebration of marriage, the norms established by the particular law of the respective Church *sui iuris* are to be observed.²⁴⁰

²³⁸ Jobe Abbas, "I Matrimoni Misti," in *Il Matrimonio nel Codice dei Canonici delle Chiese Orientali* (Vatican City: Libreria Editrice Vaticana, 1994) 199-200.

²³⁹ 1983 CIC, c. 1118: "§ 1. Matrimonium inter catholicos vel inter partem catholicam et partem non catholicam baptizatam celebretur in ecclesia paroeciali; in alia ecclesia aut oratorio celebrari poterit de licentia Ordinarii loci vel parochi. § 2. Matrimonium in alio convenienti loco celebrari Ordinarius loci permittere potest. § 3. Matrimonium inter partem catholicam et partem non baptizatam in ecclesia vel in alio convenienti loco celebrari poterit."

²⁴⁰ *CCEO*, c. 834: "§ 1. Matrimonium celebretur in ecclesia paroeciali aut de licentia Hierarchae loci vel parochi loci in alio loco sacro; in aliis autem locis celebrari non potest nisi de licentia Hierarchae loci. § 2. Circa tempus celebrationis matrimonii servandae sunt normae iure particulari propriae Ecclesiae sui iuris statutae."

When contracted between two Catholics or between a Catholic and another baptized person, marriage is a sacrament and it should be celebrated in a sacred place and inserted into a liturgical celebration, with the participation of the community to which the two spouses belong. For this reason both Latin and Eastern law lay down requirements concerning the place and the time of matrimonial celebration. The actual norms concerning the place of the celebration of marriage are now more flexible than in previous legislation. Both the 1917 *CIC* and the motu proprio *Crebrae allatae* treated this issue in a separate chapter from the one which dealt with the canonical form of marriage.²⁴¹ The 1917 *CIC* required that marriages between Catholics should take place in the parochial church and, only with the permission of the ordinary or pastor, in another church or oratory.²⁴² Mixed marriages could be celebrated in the church only with the ordinary's dispensation.²⁴³ *Crebrae allatae* provided that marriages of all Oriental Catholics were to be celebrated always in the same manner, even when they married non-Catholics or non-baptized, i. e., in the church and with the sacred rite.²⁴⁴ With proper permission, marriage could be celebrated in a private building. While the 1917 *CIC* authorized the ordinary to give such permission only in an

²⁴¹ 1917 *CIC*, cc. 1108 and 1109. *CCEO*, cc. 98 and 99.

²⁴² 1917 *CIC*, c. 1109 § 1.

²⁴³ *Ibid.*, c. 1109 § 3.

²⁴⁴ *CA*, c. 98 § 1.

extraordinary situation,²⁴⁵ the motu proprio *Crebrae allatae* ruled that the local hierarch needed only a just and reasonable cause.²⁴⁶

The current canonical discipline regarding the location of the matrimonial celebration includes the norms already introduced by the instruction *Matrimonii Sacramentum*²⁴⁷ and the motu proprio *Matrimonia Mixta*.²⁴⁸ Accordingly, the 1983 *CIC* dropped the prohibition concerning the celebration of mixed marriages in the church. On the contrary, in either case, a marriage between Catholics, or between a Catholic and a baptized non-Catholic, is to be celebrated in the parish church. The current norms indicate the parish church as the preferred place for the celebration of marriage and strongly emphasize the importance of the role of the parish community called to participate actively at matrimonial celebrations.²⁴⁹ Both the ordinary and the pastor can give the permission that marriage be celebrated in another church or oratory. The law does not specify any reason which would justify the matrimonial celebration outside the parish church. Thus, the local ordinary or the pastor is free to decide the opportunity of granting such permission.

²⁴⁵ 1917 *CIC*, c. 1109 § 2.

²⁴⁶ *CA*, c. 98 § 2.

²⁴⁷ The Congregation for the Doctrine of the Faith, instruction, *Matrimonii Sacramentum*, IV: AAS 58 (1966) 238.

²⁴⁸ Paul VI, motu proprio, *Matrimonia Mixta*, 11: AAS 62 (1970) 262.

²⁴⁹ *Ordo Celebrandi Matrimonium, Editio Typica Altera*, Praenotanda, n. 28, 6.

With the permission of the local ordinary, not of the pastor, marriage can be celebrated in place other than a Catholic church or oratory. By requiring a suitable place, the law stresses that the celebration of marriage is a religious event. Consequently, the character of the place chosen for this occasion must be in harmony with the religious nature of the celebration.²⁵⁰

Mixed marriages between a Catholic and a non-baptized party can be celebrated in a church or other suitable place and no permission is required other than the dispensation from the impediment of disparity of cult.²⁵¹

The *CCEO* establishes similar norms concerning the location of matrimonial ceremonies and also stresses the parochial church as the proper place for the celebration of marriage. Unlike the Latin law, the Eastern law makes no distinction between the different types of marriage, namely, marriage between Catholics or between Catholics and non-Catholics, baptized or not, establishing that all marriages should be celebrated in a parish church or other sacred place, unless the proper permission has been obtained for marriage to be celebrated some other place. In doing so, *CCEO* is faithful to Eastern tradition, expressed previously in motu proprio *Crebrae allatae*, which vigorously stresses the sacred character of marriage, which must be celebrated with the sacred rite accomplished by a priest.

The 1917 *CIC* established that marriage could be contracted at any time of the year but forbade the solemn blessing of marriage during Advent and Lent,²⁵² authorizing local

²⁵⁰ Beal, 1338.

²⁵¹ 1983 *CIC*, c. 1086 § 1.

ordinaries to permit it only for a just cause and without much display.²⁵³ The 1983 *CIC* removed any mention regarding the time of celebration of marriage. The *CCEO* simply entrusts Churches *sui iuris* the task to establish norms concerning the time of the celebration of marriage according to their proper traditions and customs. The Byzantine rite, which is largely present in Eastern European countries, forbids the celebration of marriage during Advent, Lent, and other sacred penitential times which precede the most important solemnities during the liturgical year, during which the faithful should observe fasting and abstinence.²⁵⁴

X. The liturgical rite of celebration

Canon 1119. Outside the case of necessity, the rites prescribed in the liturgical books approved by the Church or received by legitimate customs are to be observed in the celebration of a marriage.²⁵⁵

Canon 836. Outside the case of necessity, in the celebration of marriage the prescriptions of the liturgical books and the legitimate customs are to be observed in the celebration of marriage.²⁵⁶

²⁵² 1917 *CIC*, c. 1108 § 1.

²⁵³ *Ibid.*, c. 1108 §§ 2 and 3.

²⁵⁴ A complete list of forbidden times for the celebration of marriage for the Byzantine Church is offered by Pospishil in *Law on Marriage*, 198.

²⁵⁵ 1983 *CIC*, c. 1119: “Extra casum necessitatis, in matrimonii celebratione servantur ritus in libris liturgicis, ab Ecclesia probatis, praescripti aut legitimis consuetudinibus recepti.”

²⁵⁶ *CCEO*, c. 836: “Extra casum necessitatis in matrimonii celebratione servantur praescripta librorum liturgicorum et legitimae consuetudines.”

The liturgical form of marriage consists of rites and ceremonies which accompany the exchange of the parties' consent and the nuptial blessing.²⁵⁷ These rites are contained in liturgical books approved by the ecclesiastical authority or received by legitimate customs. For the Latin rite the norms to be observed for the liturgical form are comprised in the official liturgical book "The Rite of Marriage," which provides several options for celebration depending on the type of marriage. In the case of a marriage between Catholics, as a rule, the marriage is celebrated during Mass. When a just cause demands it, the marriage may take place outside the Mass.²⁵⁸ When a Catholic marries a baptized non-Catholic the marriage is normally celebrated outside the Mass, unless the local ordinary grants permission for a specific marriage to take place during Mass.²⁵⁹ When the marriage involves a Catholic and a non-baptized the marriage always takes place outside Mass.²⁶⁰

For Oriental Churches liturgical form and canonical form of the marriage are inseparable;²⁶¹ the sacred rite, i. e., the intervention of the priest who assists and blesses, is the liturgical form which is to be observed, outside cases of necessity, according to the prescriptions of the liturgical books and the legitimate customs. The diversity of the Oriental rites and the richness of their traditions and customs makes impossible the promulgation of a

²⁵⁷ *Ordo Celebrandi Matrimonium, Editio Typica Altera, Praenotanda*, n. 35, 8.

²⁵⁸ *Ibid.*, n. 29, 7-8.

²⁵⁹ *Ibid.*, n. 36, 8.

²⁶⁰ *Ibid.*

²⁶¹ Prader, *Il Matrimonio in Oriente e occidente*, 228.

single liturgical book for the celebration of marriage; each Church *sui iuris* is to respect its own liturgical rite.

What rite should follow a priest who was delegated to assist at and to bless a marriage of the faithful of another rite? Canon 831 § 1 specifies that the local hierarch and pastor “can give the faculty to bless a determined marriage within their own territorial boundaries to priests of any Church *sui iuris*, even the Latin Church.”²⁶² Obviously, although canon 1111 § 1 of the 1983 *CIC* does not explicitly provide it, the local ordinary and the Latin pastor can also delegate Oriental rite priests to assist at marriages within the limits of their territories.²⁶³ Both Oriental and Latin codes establish as a general norm that the sacred minister is to celebrate the sacraments according to his own rite.²⁶⁴ The Congregation for the Oriental Churches established an exception with regard to this norm in an instruction issued on January 6, 1996:

It should be kept in mind that, with the exception of case where the hierarch or pastor are, according to canon 916 of the CCEO of another Church *sui iuris*, the celebration should take place, *ad liceitatem*, according to the liturgical rite of the spouses or of the one of them in case of an interritual marriage. Therefore, a celebration in another rite is illicit, but can be authorized case by case by the Apostolic See.²⁶⁵

²⁶² *CCEO*, c. 831 § 1: “possunt sacerdotibus cuiusvis Ecclesiae sui iuris, etiam Ecclesiae latinae, facultatem conferre, intra fines sui territorii determinatum matrimonium benedicendi.”

²⁶³ Salachas, *Il Sacramento del Matrimonio*, 200.

²⁶⁴ 1983 *CIC*, c. 846 § 2. *CCEO*, 674 §2.

²⁶⁵ Congregation for the Oriental Churches, instruction, *Il Padre incomprendibile*, 83, January 6, 1996: *Enchiridion Vaticanum* 15 (1996) 71: “Occorre tuttavia tener presente che, con l’eccezione de caso in cui il Gerarca o il parroco siano a norma del can. 916 del Codice

Therefore, for liceity, the Latin priest properly delegated, is to celebrate a marriage of two Orientals following the Oriental liturgical rite; similarly, the Oriental priest, properly delegated, is to assist at a marriage of two Latins according to the Latin liturgical rite. However, the Latin priest, who acts according to provisions of canon 916 §§ 4 and 5 of the *CCEO*, licitly celebrates the marriage of two Orientals according to the Latin liturgical rite.²⁶⁶ It is useful to mention that the Latin priest mentioned above, is the one designated by the proper bishop or by the eparchial bishop of a Church *sui iuris* with the consent of Latin priest's own bishop, to assume the pastoral care of Oriental rite faithful who do not have a pastor of their own Church *sui iuris*.

Canon 1120. The conference of bishops can produce its own rite of marriage, to be reviewed by the Holy See, in keeping with the usages of places and peoples which are adapted to the Christian spirit; nevertheless, the law remains in effect that the person who assists at the marriage is present, asks for the manifestation of consent of the contracting parties, and receives it.²⁶⁷

dei Canone delle Chiese orientali, di un'altra Chiesa *sui iuris*, la celebrazione deve avvenire, *ad liceitatem*, secondo il rito liturgico degli sposi, o di uno di loro in caso di un Matrimonio interrituale. Una celebrazione in un altro rito è dunque illicita, ma può essere autorizzata caso per caso dalla Sede Apostolica.”

²⁶⁶ Dimitrios Salachas, Krzysztof Nitkiewicz, *Rapporti Interecclesiali tra Cattolici Orientali e Latini; Sussidio Canonico-Pastorale* (Rome: Pontificio Istituto Orientale, 2007) 79.

²⁶⁷ 1983 *CIC*, c. 1120: “Episcoporum conferentia exarare potest ritum proprium matrimonii, a Sancta Sede recognoscendum, congruentem locorum et populorum usibus ad spiritum

Episcopal conferences may prepare their own rite of marriage which may include and adapt customs pertaining to their own traditions. However, such individual rituals of marriage must respect the norm provided by canon 1108, namely that the spouses have to exchange their consent in the presence of an authorized minister.²⁶⁸ Prior to their usage, these particular rites of marriage must be reviewed the Apostolic See.²⁶⁹ Obviously, this norm has no equivalent in the *CCEO*, since every Church *sui iuris* has its own rite of marriage which reflects the local customs and traditions.

XI. Prohibition of double celebration

Canon 1127 § 3. It is forbidden to have another religious celebration of the same marriage to give or renew matrimonial consent before or after the canonical celebration according to the norm of §1. Likewise, there is not to be a religious celebration in which the Catholic who is assisting and a non-Catholic minister together, using their own rites, ask for the consent of the parties.²⁷⁰

Canon 840. Before or after the canonical celebration of marriage, it is forbidden to have another religious celebration of the same marriage to furnish or renew consent; likewise, a religious celebration is forbidden in which both the Catholic priest and non-Catholic minister ask for the consent of the parties.²⁷¹

christianum aptatis, firma tamen lege ut assistens matrimonio praesens requirat manifestationem consensus contrahentium eamque recipiat.”

²⁶⁸ Beal, 1339.

²⁶⁹ 1983 *CIC*, c. 838 § 3.

²⁷⁰ 1983 *CIC*, c. 1127: “§ 3. Vetatur, ne ante vel post canonicam celebrationem ad normam § 1, alia habeatur eiusdem matrimonii celebratio religiosa ad matrimoniale consensum praestandum vel renovandum; item ne fiat celebratio religiosa, in qua assistens catholicus et

In order to avoid confusion among the faithful this norm intends to exclude some form of erroneous expression of ecumenism. The canon consists of two prohibitions. The first one rules out double ceremonies of marriage. When a mixed marriage takes place according to the canonical form, it is absolutely forbidden to celebrate another ceremony during which the spouses duplicate their consent, both before and after the Catholic celebration. Similarly, in the case of a marriage celebration in which a dispensation from canonical form had been obtained, a Catholic ceremony which would duplicate the public celebration is forbidden.²⁷² This canon does not expressly forbid a subsequent religious ceremony during which a blessing is imparted to spouses without the renewal of the consent.²⁷³ Obviously, this prohibition concerns only religious celebrations. Most of the Eastern European countries require marriages to be celebrated before the civil authorities in order to be recognized by the government. Thus, a civil ceremony of marriage during which the spouses exchange their consent is not considered to be repetition of the canonical form.

minister non catholicus insimul, suum quisque ritum peragens, partium consensum exquirant.”

²⁷¹ *CCEO*, c. 839: “Vetita est ante vel post canonicam celebrationem alia eiusdem matrimonii celebratio religiosa ad matrimonialem consensum praestandum vel renovandum; item vetita est celebratio religiosa, in qua et sacerdos catholicus et minister acatholicus partium consensum exquirunt.”

²⁷² Beal, 1351.

²⁷³ Sacred Congregation for the Doctrine of the Faith, private reply, June 16, 1966: *CLD* 6: 22-23.

However, if necessary, bishops should issue norms in order to dispel the ignorance among those faithful who would consider the civil marriage a true marriage.²⁷⁴

The second prohibition prevents common ceremonies during which both the Catholic and the non-Catholic minister would ask and receive the consent of the parties. In the case of a matrimonial celebration with the participation of two ministers, only one may be authorized to ask and received the consent. The law does not prohibit the participation of a non-Catholic minister of the non-Catholic party at the celebration of marriage during which the Catholic minister alone asks and receives the parties' consent. The non-Catholic minister may read selections from the Sacred Scriptures or prayers. Similarly, when a marriage is celebrated with the dispensation of the form in a non-Catholic Church, the Catholic priest may participate but it is the non-Catholic minister who asks for and receives the consent.²⁷⁵

XII. The recording of marriages

<p>Canon 1121 §1. After a marriage has been celebrated, the pastor of the place of the celebration or the person who takes his place, even if neither assisted at the marriage, is to note as soon as possible in the marriage register the names of the spouses, the person who assisted, and the witnesses, and the place and date of the</p>	<p>Canon 841 §1. As soon as possible after the celebration of the marriage, the pastor of the place where it was celebrated or the one who acts in his place, even if neither blessed the marriage, is to record in the marriage register the names of the couple, of the priest who blessed the marriage, of the witnesses, the place and date of the</p>
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²⁷⁴ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, "Le Osservazioni dei Membri della Commissione allo 'Schema Codicis Iuris Canonici Orientalis' e le Risposte del 'Coetus de Expensione Observationum'," *Nuntia*, 28 (1989) 117.

²⁷⁵ Salachas, *Il Sacramento del Matrimonio*, 231.

celebration of the marriage according to the method prescribed by the conference of bishops or the diocesan bishop.

§3. For a marriage contracted with a dispensation from canonical form, the local ordinary who granted the dispensation is to take care that the dispensation and celebration are inscribed in the marriage registers of both the curia and the proper parish of the Catholic party whose pastor conducted the investigation about the free status. The Catholic spouse is bound to notify as soon as possible the same ordinary and pastor about the marriage celebrated and also to indicate the place of the celebration and the public form observed.²⁷⁶

celebration of the marriage and, if the case warrants, the dispensation from form or from impediments along with who granted it and what the impediment was and its degree, the faculty granted to bless the marriage, and other details in the manner prescribed by the respective eparchial bishop.²⁷⁷

After the marriage has taken place, the law requires the fulfillment of several formalities regarding the registration of the celebrated matrimony and various annotations.

²⁷⁶ *CCEO*, c. 841: “§ 1. Celebrato matrimonio parochus loci celebrationis vel is, qui eius vices gerit, etsi neuter matrimonium benedixit, quam primum adnotet in libro matrimoniorum nomina coniugum, sacerdotis benedicientis ac testium, locum et diem celebrati matrimonii, dispensationem, si casus fert, a forma celebrationis matrimonii vel ab impedimentis eiusque auctorem una cum impedimento eiusque gradu, facultatem matrimonium benedicendi collatam atque alia secundum modum a proprio Episcopo eparchiali praescriptum.”

²⁷⁷ 1983 *CIC*, c. 1121: “§ 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 dioecesano praescriptum. § 3. Ad matrimonium quod attinet cum dispensatione a forma canonica contractum, loci Ordinarius, qui dispensationem concessit, curet ut inscribatur dispensatio et celebratio in libro matrimoniorum tum curiae tum paroeciae propriae partis catholicae, cuius parochus inquisitiones de statu libero peregit; de celebrato matrimonio eundem Ordinarius et parochum quam primum certiore reddere tenetur coniux catholicus, indicans etiam locum celebrationis necnon formam publicam servatam.”

The purpose of the registration is to guarantee in a juridical manner that the marriage has been celebrated, but failure to record it does not affect its validity. Both Codes provide that the responsibility to record the information concerning the celebrated matrimony in the proper register rests upon the pastor of the place where the marriage was celebrated, or the one who replaces him, regardless of the person who assisted at or blessed the marriage. The information to be recorded includes the names of the spouses, the name of the one who assisted at or blessed the marriage, the names of witnesses, and the date and place of the celebration. These entries are to be recorded “as soon as possible” - which customarily means within three days from the day of the celebration of marriage.²⁷⁸ The Episcopal conferences or the bishop and the hierarch should provide the method by which all the information is to be recorded.

In the case of a marriage celebrated with a dispensation from canonical form there is a difference between Latin and Oriental law concerning the person who is responsible for entering the information in the register of marriage. The 1983 *CIC* entrusts the local ordinary who granted the dispensation with seeing that both the dispensation and the celebration are entered in the marriage registers of the curia and of the parish of the Catholic party. In the case where the Catholic party has more than one proper parish - i. e., one where the domicile is and another which is a quasi-domicile, or a one month residence,²⁷⁹ - then the information is to be registered in the parish where the prenuptial investigation was carried out. The

²⁷⁸ Wouters, *De Forma*, 64.

²⁷⁹ 1983 *CIC*, c. 1115.

Catholic party is bound to inform the proper ordinary and pastor about the date, place, and the public form which was employed for the celebration of his or her marriage. The Oriental law reserves dispensation from canonical form to the Apostolic See or the patriarch. Thus, the norm specifies that a marriage celebrated after a dispensation from canonical form has been granted is to be recorded by the pastor of the place of celebration. Additionally, the *CCEO*, unlike the 1983 *CIC*, stipulates that all the information concerning any possible dispensation is also to be recorded in the marriage register.

<p>Canon 1121 §2. Whenever a marriage is contracted according to the norm of can. 1116, a priest or deacon, if he was present at the celebration, or otherwise the witnesses in solidum with the contracting parties are bound to inform as soon as possible the pastor or local ordinary about the marriage entered into.²⁸⁰</p>	<p>Canon 841 §3. If the marriage was celebrated in accord with the norm of can. 832, the priest, if he blessed it, or the witnesses and the spouses, must see to it that the celebration of the marriage is entered in the prescribed books as soon as possible.²⁸¹</p>
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When a marriage has been contracted according to the extraordinary form, the responsibility to report the celebrated matrimony to the local ordinary or pastor devolves first of all upon the priest or the deacon who was present at the marriage, if this has been the case. Otherwise, the spouses and witnesses together are responsible for informing the same

²⁸⁰ *Ibid.*, c. 1121: ‘§ 2. Quoties matrimonium ad normam can. 1116 contrahitur, sacerdos vel diaconus, si celebrationi adfuerit, secus testes tenentur in solidum cum contrahentibus parochum aut Ordinarium loci de inito coniugio quam primum certiozem reddere.’

²⁸¹ *CCEO*, c. 841: “§ 3. Si matrimonium ad normam can. 832 celebratum est, sacerdos, si illud benedixit, secus testes et coniuges curare debent, ut celebratio matrimonii in praescriptis libris quam primum adnotetur.”

authorities that such marriage took place. The obligation to record the marriage rests on the pastor of the place where the marriage was celebrated.

Canon 1122 §1. The contracted marriage is to be noted also in the baptismal registers in which the baptism of the spouses has been recorded. §2. If a spouse did not contract marriage in the parish in which the person was baptized, the pastor of the place of the celebration is to send notice of the marriage which has been entered into as soon as possible to the pastor of the place of the conferral of baptism.²⁸²

Canon 841. §2. Furthermore, the local pastor is to record in the baptismal register that the spouse celebrated marriage in his parish on certain day. If the spouse was baptized elsewhere, the local pastor is to send an attestation of marriage himself or through the eparchial curia to the pastor of the place where the spouse's baptism was recorded. He is not to be satisfied until he receives notification that information has been entered in the baptismal register.²⁸³

Along with the matrimonial registration, the information about the marriage is also to be entered in the baptismal register of the parish where the spouses were baptized. The pastor of the place of marriage is responsible for entering the information in the baptismal register if the party or parties were baptized in the same parish. Otherwise, the pastor has the duty to notify the pastor of the place where the party or parties were baptized about the marriage that was celebrated and the later should introduce the information in the baptismal register. The *CCEO* is more firm in asking the pastor to make sure the information he sent

²⁸² 1983 *CIC*, c. 1122: “§ 1. Matrimonium contractum adnotetur etiam in registis baptizatorum, in quibus baptismus coniugum inscriptus est. § 2. Si coniux matrimonium contraxerit non in paroecia in qua baptizatus est, parochus loci celebrationis notitiam initi coniugii ad parochum loci collati baptismi quam primum transmittat.”

²⁸³ *CCEO*, c. 841: “§ 2. Praeterea parochus loci in libro baptizatorum adnotet coniugem tali die in sua paroecia matrimonium celebravisse; si vero coniux alibi baptizatus est, parochus loci testimonium matrimonii mittat per se vel per curiam eparchialem ad parochum, apud quem coniugis baptismus adnotatus est, nec acquiescat, donec notitiam de adnotatione matrimonii in libro baptizatorum receperit.”

about the marriage to the place of baptism of the party or parties has been entered in that baptismal register.²⁸⁴

Canon 1123. Whenever a marriage is either convalidated in the external forum, declared null, or legitimately dissolved other than by death, the pastor of the place of the celebration of the marriage must be informed so that a notation is properly made in the marriage and baptismal registers.²⁸⁵

Canon 842. If a marriage is convalidated for the external forum, or is declared null or is legitimately dissolved other than by death, the pastor of the place of the marriage celebration must be notified, so that an entry may be made in the marriage and baptismal registers.²⁸⁶

After the celebration of a marriage, there can be particular circumstances which change the juridical status of the parties. For instance, a marriage invalidly contracted may be convalidated in the external forum, a marriage may be declared null by the competent ecclesiastical authority, or may be lawfully dissolved by the Roman Pontiff according to

²⁸⁴ A similar norm was issued for the Latin Church by the Sacred Congregations for the Discipline of Sacraments which published an instruction on June 29, 1941, providing that the pastor of the place of baptism had to send back an official notification of having entered the proper information in the baptismal register. The pastor of the place of marriage celebration should have not considered having a clear conscience until he had made sure that the notice had been received and entered into the proper register. See, Sacred Congregations for the Discipline of Sacraments, instruction, June 29, 1941: *AAS* 33 (1941) 305.

²⁸⁵ 1983 *CIC*, c. 1123: “Quoties matrimonium vel convalidatur pro foro externo, vel nullum declaratur, vel legitime praeterquam morte solvitur, parochus loci celebrationis matrimonii certior fieri debet, ut adnotatio in registis matrimoniorum et baptizatorum rite fiat.”

²⁸⁶ *CCEO*, c. 842: “Si matrimonium vel convalidatur pro foro externo vel nullum declaratur vel legitime praeterquam morte solvitur, parochus loci celebrationis matrimonii certior fieri debet, ut adnotatio in libris matrimoniorum et baptizatorum fiat.”

canon 1142. In any of these situations, the information must be sent to the pastor of the place of celebration in order to be entered in the marriage and baptismal registers.

Conclusion

To summarize, one of the reasons the Church maintains the requirement of canonical form is to ascertain the existence of a publicly manifested consent and consequently to avoid the serious disadvantages of clandestine matrimones, which was in fact the principal reason of the decree *Tametsi*. However, a more important reason is that canonical form expresses the sacred and sacramental form of marriage, which is why the Church requires the presence of the ecclesial community.²⁸⁷ This chapter analyzed the elements of the canonical form of marriage as established by the 1983 *CIC* and the *CCEO*. Both codes maintain the essence of the canonical form established by the 1917 *CIC* and the motu proprio *Crebrae allatae*, but include also the authentic interpretations and the pieces of legislation issued during the Second Vatican Council and afterwards. This chapter considered especially the innovations of the present law as opposed to the former norms of the previous legislation. A particular emphasis has been given to the differences between the two codes concerning those elements of the canonical form that might affect the validity of marriage. These elements include the obligation of sacred rite for Oriental Catholics, observation of the ritual affiliation, and the delegation of deacons and lay people to assist marriages. This chapter also emphasized those subjects which, because of a certain ambiguity of the terms, resulted in a difference of opinion among the canonists. Finally, this chapter also considered the most recent change in

²⁸⁷ Joseph Prader, *Il Matrimonio in Oriente e Occidente*, 200.

the legislation, which was made by the motu proprio *Omnium in mentem*, which removed the norm wherein those baptized in the Catholic Church or received in full communion with it but left by a formal act were exempt from the observation of the canonical form of marriage.

Throughout the chapter, whenever necessary, references were made with regard to the practical application of these norms in Eastern Europe. However, selected pastoral issues peculiar to Eastern European countries will be analyzed from a canonical approach and a tentative solution will be proposed on the next chapter.

CHAPTER FOUR

SELECTED PASTORAL ISSUES PECULIAR TO EASTERN EUROPE AFTER THE FALL OF THE COMMUNIST GOVERNMENTS

Introduction

The previous chapter analyzed the canonical form of marriage as it is presented in the 1983 *CIC* and the *CCEO* and showed that both codes reflect the spirit of the Second Vatican Council and, at the same time, acknowledge the authentic canonical traditions of their respective Churches. The comparative examination of the norms governing the canonical form of marriage revealed that, even though the legislation of the two codes was substantially the same, there were some important dissimilarities. These differences raise not a few problems in Eastern European countries where Oriental and Latin faithful interact, especially after the fall of communist governments. This chapter will consider, from a canonical perspective, a few concrete problem situations related to the canonical form of marriage and will propose a tentative solution for each one.

In order to have a better understanding of the canonical issues peculiar to Church in Eastern Europe it would be useful to shortly present a few historical events which took place in the last century and greatly influence the life of Christian faithful in countries ruled by communist governments. Territorial and political changes that followed the end of the World War II proved to be tragic for both Catholic and Orthodox Churches. The religious persecution that began in 1940's continued, with different intensity, until the end of 1980's. This persecution was truly catastrophic for the Byzantine Catholic Churches established in

Ukraine, Romania and other Eastern European nations. The communist authorities ruthlessly liquidated the Oriental Catholic Churches and imprisoned all their bishops and hundreds of priests and lay people. In 1945 the Ukrainian Greek-Catholic Church was the first to be dismantled; the dismantling of the Romanian Greek-Catholic Church followed in 1949. The same fate awaited the Byzantine Catholic Churches in Slovakia, Hungary, and former Yugoslavia. Overall, more than five million Catholics of Byzantine rite were deprived of their Churches and constrained to join the local Orthodox churches.¹ All these Byzantine Catholic Churches survived underground for more than forty years. With the fall of the communism in the late 1980s and the collapse of the Soviet Union on the early 1990s Catholic Churches of Byzantine rite emerged from the catacombs and enjoyed the freedom to organize their activities.

One of the events that greatly influenced the Christian life during the difficult time of religious persecution was the phenomenon of migration of populations which was promoted or imposed by communist regimes. As a result, Catholic faithful belonging to Oriental and Latin rites lived in territories without the pastoral assistance of their proper pastors. Most of the time, it was the Byzantine Catholics who were the ones who after leaving their homelands settled in territories without a proper hierarchy. This situation lasts until the present day as new generations of descendents of those first immigrants continue to live in the same territories. Thus, with regard to the subject of the present study, the first section of this chapter will consider the requirements of canonical form to be observed in the

¹ Ronald Roberson, *The Eastern Christian Churches: A Brief Survey* (Rome: Edizioni Orientalia Christiana, 1999) 198.

celebration of marriage by the Catholic faithful of Oriental rite who live in territories where a hierarchy of their own rite was not established. The second section of this chapter will consider the issue of civil marriages. First, it will analyze the canonical status of civil marriages contracted by Oriental non-Catholics. Second, this section will examine the canonical condition of civil marriages contracted by non-baptized persons in the former Soviet Union.

- I. The requirements of the canonical form to be observed in the celebration of marriage by the Catholic faithful of Oriental rite who live in territories where a hierarchy of their own rite was not established.

1. The statement of the subject

As it was already mentioned, several Eastern European countries experienced in the second half of the last century a considerable phenomenon of migration of population. One of the consequences of this transmigration that influenced the religious life of Oriental rite Catholics was that they found themselves living in territories where a hierarchy of their own rite was not established. This fact had double outcome. First, faithful of an Oriental rite had to live their Christian life among faithful of another rite, without the pastoral assistance of their own pastors, devoid of their Christian customs, under the pastoral care of pastors who more often than not, knew little about their discipline and traditions.

On the other hand, Latin pastors found themselves in the situation of taking care of Oriental rite Catholics without having sufficient knowledge concerning traditions and

ecclesiastical discipline of Eastern Churches. In this situation, Latin pastors who are entrusted with the pastoral care of Eastern rite Catholics are encouraged to deepen and extend their knowledge of the liturgical, spiritual and canonical patrimony of Oriental Churches. In doing so, Latin pastors will be able to support Eastern rite faithful to live their Christian life according to their traditions and customs. This section intends to provide Latin pastors entrusted with the pastoral care of Eastern rite Catholics some significant and useful information in the area of Oriental matrimonial legislation.

Canons 1108 of the 1983 *CIC* and 828 of the *CCEO* establish the general norm governing the canonical form of marriage. Both codes consider valid only those marriages involving Catholics celebrated before the local ordinary and the hierarch and the pastor of the place, or before a person delegated by one of them, and in the presence of two other additional witnesses. The person assisting the marriage must ask for and receive the parties' consent. Moreover, the Oriental law requires, for the valid celebration of marriage, the sacred rite, i.e., the nuptial blessing imparted by the priest.

The competence of local ordinary and hierarch, as well as of the pastor to assist at and bless marriages is limited both territorially and personally.² A Latin ordinary or pastor may validly assist at a marriage only if at least one of the parties "is of the Latin rite."³ Similarly, an Oriental hierarch or pastor may bless a marriage only if at least one of the spouses "is

² Beal, 1329.

³ 1983 *CIC*, c. 1109: "sit ritus latini."

ascribed in his Church *sui iuris*.”⁴ Although canon 829 § 1 of the *CCEO* mentions the authority of hierarchs and pastors to bless the marriages of “non-subjects,” the term “non subject” refers here only to faithful ascribed to the Church *sui iuris* of the hierarch or the pastor of the place, who do not have a domicile or quasi-domicile in their territory. Similarly, the same term “non-subject” in canon 1109 of 1983 *CIC* refers to faithful of Latin rite who do not have a domicile or quasi-domicile in the territory where the marriage is taking place.⁵ Therefore, the Latin ordinary and pastor, even within the boundaries of his territory, cannot validly assist at a marriage of two spouses who are both of an Oriental rite, and an Oriental local hierarch and pastor cannot validly bless the marriage of two Latin rite Catholics.

This restriction on the authority to witness and bless marriages is particularly relevant in several parts of Eastern Europe where faithful of both Latin and Oriental rites live together. The lack of knowledge of this limit on his competence could induce a pastor to assist and bless a marriage of two persons both of whom belong to a Church *sui iuris* different than his own. This norm presents a particular problem in territories where the hierarchy for the Christian faithful of an Oriental rite is not yet established. In this case, canon 916 § 5 of *CCEO* provides:

In places where not even an exarchy has been erected for the Christian faithful of a certain Church *sui iuris*, the local hierarch of another Church *sui iuris*, even the Latin Church, is to be considered as the proper hierarch of these faithful, with due regard for can. 101. If, however, there are several local

⁴ *CCEO*, c. 829 § 1: “sit ascripta propriae Ecclesiae sui iuris.”

⁵ Salachas, *Il Sacramento del Matrimonio*, 196.

hierarchs, that one whom the Apostolic See designated is to be considered as their proper hierarch or, if it concerns the Christian faithful of a certain patriarchal Church, the one whom the patriarch has designated with the assent of the Apostolic See.⁶

Accordingly, members of Eastern Catholic Churches who have domicile or quasi-domicile in territories where only a Latin rite hierarchy is established are subject to the Latin ordinary of the place. However, they are not subject to the Latin rite pastor of the place.⁷ Consequently, in this case, the Latin rite pastor, within the boundaries of his parish, may validly assist and bless the marriage of two Oriental rite Catholics only if he is properly delegated by the ordinary of the place to whom Oriental rite Catholics are subject.⁸ In other words, without the authorization of the Ordinary of the place, the Latin rite pastor cannot validly assist at marriage where neither is of Latin rite.⁹

A similar situation arises in the case where there is a hierarchy established for the Christian faithful of a certain Church *sui iuris* but, in a given place, a parish is not established for them. In these circumstances, the Oriental rite Catholics who have a local hierarch but do

⁶ *CCEO*, c. 916 § 5: “In locis, ubi ne exarchia quidem pro christifidelibus alicuius Ecclesiae sui iuris erecta est, tamquam proprius eorundem christifidelium Hierarcha habendus est Hierarcha loci alterius Ecclesiae sui iuris, etiam Ecclesiae latinae, firmo can.101; si vero plures sunt, ille habendus est tamquam proprius, quem designavit Sedes Apostolica vel, si de christifidelibus alicuius Ecclesiae patriarchalis agitur, Patriarcha de assensu Sedis Apostolicae.”

⁷ Prader, *La Legislazione Matrimoniale*, 31.

⁸ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, response, June 16, 1983: *Leges Ecclesiae* 6: coll. 8650-8651.

⁹ Prader, *Il Matrimonio in Oriente e Occidente*, 208-209. See also Salachas, *Il Sacramento del Matrimonio*, 196; Lorenzo Lorusso, *Gli Orientali Cattolici e i Pastori Latini*, 257.

not have a proper pastor are not subjected to the Latin rite ordinary; consequently, when they marry among themselves or with non-Catholics they cannot ask the Latin rite pastor of the place where they live to assist and bless their marriage. Latin rite priests, including the ordinary of the place and pastors, cannot validly assist at marriages of Catholics of an Oriental rite without the proper delegation of the hierarch of the Church *sui iuris* in which the Oriental Catholics are ascribed.¹⁰ According to canon 916 §4 of the *CCEO*, if Oriental Catholics do not have a pastor of their own rite, the proper hierarch is to designate a pastor of another Church *sui iuris* who is to assume their pastoral care.¹¹

2. The ritual affiliation of Eastern Christians who enter into full communion with the Catholic Church.

These norms have an important practical significance. The rite to which persons seeking to marry belong may affect the requirements of the canonical form to be observed in the celebration of marriage. In order to avoid invalid celebrations of marriage, those involved in the process of carrying out premarital investigations should carefully ascertain the ritual membership of those preparing for marriage. The process of establishing one's ritual affiliation is quite simple when the person is aware of the fact that he or she is ascribed to an Oriental Church *sui iuris*. However, there are instances when somebody is not aware of his or her ritual affiliation. Usually it is the case of baptized Oriental non-Catholic persons,

¹⁰ Pontifical Commission for the Redaction of the Code of Oriental Canon Law, response, June 16, 1983: *Leges Ecclesiae* 6: coll. 8650-8651.

¹¹ *CCEO*, c. 916 § 4.

living in Latin rite territories, who entering into full communion with the Catholic Church are ascribed to an Oriental Church *sui iuris*. In this situation it is the pastor's duty both to inform such persons of their ritual affiliation and to make sure they will observe the requirements established by law with regard to the valid celebration of marriage. The following consideration will offer some guidelines which might help in establishing the ritual ascription of Orientals entering into full communion with the Catholic Church.

The norms concerning the membership in a Church *sui iuris* are established in canons 111 and 112 of the 1983 *CIC* and in canons 29 through 38 of the *CCEO*. Canon 35 of the *CCEO* requires special consideration because it establishes a relatively new norm which regulates the ascription to a Church *sui iuris* of baptized non-Catholic adults entering into full communion with the Catholic Church. This norm is particularly relevant for the canonical form of marriages celebrated in those places where an Oriental Catholic hierarchy has not been established.

Baptized non-Catholics coming into full communion with the Catholic Church should retain and practice their own rite and should observe it everywhere in the world as much as humanly possible. Thus, they are to be ascribed to the Church *sui iuris* of the same rite with due regard for the right of approaching the Apostolic See in special cases of persons, communities or regions.¹²

The concern for the preservation of the proper rite of Oriental non-Catholics coming into full communion with the Catholic Church is not a new one. Pope Leo XIII in the

¹² *Ibid.*, c. 35: "Baptizati acatholici ad plenam communionem cum Ecclesia catholica convenientes proprium ubique terrarum retineant ritum eumque colant et pro viribus observent, proinde ascribantur Ecclesiae sui iuris eiusdem ritus salvo iure adeundi Sedem Apostolicam in casibus specialibus personarum, communitatum vel regionum."

apostolic letter *Orientalium Dignitas*¹³ required Orientals “who came to Catholic unity”¹⁴ to retain their rite. However, he did allow Orientals to become Latin rite Catholics but only if they made their enrollment in the Latin rite a necessary condition of their joining the Catholic Church.¹⁵ The motu proprio *Cleri sanctitati* had established that Oriental non-Catholics who joined the Catholic Church could embrace any rite they preferred, although it encouraged them to retain their native rite.¹⁶ This norm was then modified at the Second Vatican Council by the Decree on the Eastern Catholic Churches, *Orientalium Ecclesiarum*, which reaffirmed the importance of the liturgical rites, ecclesiastical traditions, and Christian way of life of Oriental Catholic Churches.¹⁷ As a practical consequence of these principles, *Orientalium Ecclesiarum* established with regard to the enrollment in a Church *sui iuris* that “baptized members of any non-Catholic church or community coming to the fullness of the

¹³ Leon XIII, apostolic letter *Orientalium dignitas*, November 30, 1894: ASS 27 (1894-1895) 257-264

¹⁴ *Ibid.*, art. 11: ASS 27 (1894-1895) 262: “ad unitatem catholicam venerit.”

¹⁵ *Ibid.*

¹⁶ CS, c. 11 § 1: AAS 49 (1957) 439: “Baptizati acatholici ritus orientalis, qui in catholicam Ecclesiam admittuntur, ritum quem maluerint amplecti possunt; optandum tamen ut ritum proprium retineant.”

¹⁷ OE, 1: AAS 57 (1965) 76.

Catholic communion, should keep, follow and as far as possible observe their own rite everywhere in the world.”¹⁸

Unlike the 1983 *CIC* which has no provision concerning the ritual ascription of those being received into full communion, the *CCEO* repeats the norm instituted by *Orientalium Ecclesiarum* and rules that Christians who enter into the full communion with the Catholic church are no longer free to choose the church *sui iuris* in which they will enroll but must be ascribed to the Church *sui iuris* which corresponds to the Church or ecclesial tradition from which they come.¹⁹ This norm raises some delicate aspects with regard to the topic of the present study especially in places where the Oriental Catholic hierarchy has not been established because there are very few, if any Oriental Catholics there. In such places, those who choose to enter the Catholic Church are inspired toward this decision by their encounter with the Latin tradition, which is in fact the only Catholic tradition they know. Often, these persons who were baptized in infancy in an Oriental non Catholic Church have received little Christian formation, if any at all, and, usually, they have had little, if any, religious practice. In their situation one can hardly talk about retaining and observing their own rite since, in

¹⁸ *Ibid.*, 4: *AAS* 57 (1965) 77: “Baptizati cuiusvis Ecclesiae vel communitatis acatholicae ad plenitudinem communionis catholicae convenientes, proprium ubique terrarum retineant ritum eumque colant et pro viribus observent.” Tanner, 2 : 901.

¹⁹ *CCEO*, c. 35. In Eastern Europe the most prevalent and widespread Oriental non-Catholic Churches are the Eastern Orthodox Churches of the Byzantine rite. Consequently, when an Orthodox Christian faithful enters into full communion with the Catholic Church is ascribed to the Oriental Catholic Church present in the territory where he or she lives. For instance, an Ukrainian Orthodox is ascribed to the Ukrainian Greek-Catholic Church; a Romanian Orthodox is ascribed to the Romanian Greek-Catholic Church.

most of the cases, they have had no previous religious practice. However, according to the norm established by canon 35 of the *CCEO*, these persons are, often unknowingly, ascribed to the Church *sui iuris* of the rite they acquired through their baptism and they remain ascribed to that Church *sui iuris* even if they are committed to the pastoral care of a Latin ordinary.²⁰

This fact is of utmost importance because the validity of certain important acts in a person's life depends on the Church *sui iuris* to which that person belongs. With regard to the canonical form of marriage, the question of the Church *sui iuris* to which one belongs, may affect the validity of one's marriage. Thus, in a place where an Oriental Catholic hierarchy has not been established, an Oriental non-Catholic person entering into full communion with the Catholic Church automatically becomes a Catholic of an Oriental rite²¹ but subject to the Latin ordinary of the place.²² However, with regard to marriage, the same person is not subject to the Latin rite pastor of the place.²³ Consequently, if the same person enters a marriage with a party who is a Catholic of Oriental rite or enters a mixed marriage with an Oriental non-Catholic, the Latin pastor of the place cannot validly assist at the marriage because neither of the spouses is of Latin rite.²⁴

²⁰ *CCEO*, c. 38.

²¹ *Ibid.*, c. 35.

²² *Ibid.*, c. 916 § 5.

²³ 1983 *CIC*, c. 1109.

²⁴ *Ibid.*

To illustrate the practical relevance of these norms, consider a few examples of the competence of the Latin pastor to assist at and bless marriages involving Oriental Catholics.²⁵

- In a place where an Oriental Catholic hierarchy has not been established and within the boundaries of his parish, the Latin pastor validly assists at and blesses an interritual marriage, i.e., a marriage between a Latin Catholic and an Oriental rite Catholic;
- In a place where an Oriental Catholic hierarchy has not been established and within the boundaries of his parish, the Latin pastor validly assists at and blesses a marriage between two Oriental Catholics only after the local ordinary has delegated him the requisite faculty;
- In a place where an Oriental Catholic hierarchy has not been established and within the boundaries of his parish, the Latin pastor validly assists at and blesses a mixed marriage between an Oriental catholic and a non-Catholic only after the local ordinary has delegated him the requisite faculty along with the necessary permission or dispensation;²⁶
- In a place where there is an Oriental Catholic hierarchy of a certain Church *sui iuris*, but on the place of the celebration of marriage the Oriental Catholic hierarchy did not establish a parish for its faithful, the Latin pastor may assist at and bless a marriage

²⁵ These examples are taken, with few modifications, from Salachas, *Il Sacramento del Matrimonio*, 197-198.

²⁶ 1983 *CIC*, cc. 1086 § 1 and 1124.

between two Oriental Catholics of that Church *sui iuris* only after he was properly delegated by their Oriental hierarch.

3. Practical guidelines

The earlier analysis showed that presence of Eastern Catholics in traditionally Latin territories could raise a few problems which Latin priests preparing couples for marriage should give a particular attention. One of the principles that should be kept in mind is that the matrimonial legislation of the Eastern and Latin codes are not identical. Although the parallel norms are substantially the same, differences that exist between Latin and Eastern norms will sometimes have an effect even on the validity of marriage. Here are a few guidelines which may be helpful to those involved in the pastoral activity in Latin territories where Catholic faithful of Oriental rite are present. First of all, the ritual affiliation of each spouse should be established. The norms concerning the membership in a Church *sui iuris* are established in canons 111 and 112 of the 1983 *CIC* and in canons 29 through 38 of the *CCEO*. Here are a few practical situations which are most likely to be met in the process of establishing one's ritual affiliation. In the case of an adult who enters into full communion with the Catholic Church, he or she retains his or her own rite and will be ascribed to the Church *sui iuris* of the same rite. More explicitly, persons baptized in an Oriental non-Catholic Church are to be ascribed to the Church *sui iuris* which corresponds to the Oriental Church from which they come. Persons baptized in a Protestant ecclesial community are to

be ascribed to the Latin rite. When person is baptized in infancy,²⁷ the child is ascribed to the Church *sui iuris* of the parents. In the case of an interritual marriage, the child is to be ascribed to the Church *sui iuris* to which the father belongs; the child may be ascribed to mother's rite only upon the request of both parents. In the case a mixed marriage the child is to be ascribed to the rite of the Catholic parent.²⁸

In determining one's ritual affiliation, the pastors should be conscious of the fact that Oriental rite Catholics who live in traditionally Latin territories and are entrusted to the pastoral care of a Latin bishop, remain ascribed to their own Church *sui iuris* and are not enrolled in the Latin Church.²⁹ The 1983 *CIC*, provides explicitly in canon 122 § 2: "The practice, however prolonged, of receiving sacraments according to the rite of another Church *sui iuris* does not entail enrollment in that Church."³⁰ Therefore, the Eastern rite Catholics, even if they attend a Latin rite parish on a regular basis and they regularly receive the sacraments there, they continue to remain ascribed to their own Church *sui iuris*. Thus, in determining one's ritual enrollment, the pastor should not be misled by the fact that somebody regularly attends the sacraments in a Latin parish, but should carefully inquire about his or her initial ritual enrollment.

²⁷ The rules to be observed with regard to the ritual affiliation children under fourteen years of age are established in canon 111 § 1 of the 1983 *CIC* and canon 29 of the *CCEO*.

²⁸ For a detailed analysis of the ritual affiliation, see Lorusso, *Gli Orientali Cattolici e i Pastori Latini*, 49-79.

²⁹ *CCEO*, c. 38.

³⁰ 1983 *CIC*, c. 122 § 2: "Mos, quamvis diuturnus, sacramenta secundum ritum alicuius Ecclesiae ritualis sui iuris recipiendi, non secumfert adscriptionem eidem Ecclesiae."

After determining the ritual affiliation of spouses, the pastor should ascertain whether he is authorized to assist and bless the marriage. In the case both spouses are of Eastern rite, he must obtain the proper authorization from his ordinary. In the case at least one of the spouses is of Eastern rite, the priest should not omit during the celebration of marriage to impart the nuptial blessing which for the Oriental Christians is required for validity.

Conclusion

To summarize, in the process of preparing couples for the celebration of marriage, the Latin pastor whose parish is in a place where an Oriental Catholic hierarchy has not been established, should be concerned with two issues which might affect the validity of the canonical form. First, at least one of the parties must be of the Latin rite. In the case that both parties are Catholic of an Oriental rite, the pastor can validly celebrate their marriage only after having received the proper authorization from his ordinary. In the case of a mixed marriage between a Catholic Oriental and a non-Catholic, the Latin pastor must seek the proper authorization from his Ordinary along with the necessary permission or dispensation. Second, in marriages involving Oriental faithful, the Latin pastor must keep in mind that besides asking and receiving the consent of the parties, he must impart the nuptial blessing, which for Orientals is required for validity.³¹ Accordingly, the Latin pastor shall not omit to

³¹ *CCEO*, c. 829.

impart on the spouses the nuptial blessing during the matrimonial celebration,³² a blessing which is included in the *Rite of Marriage*.³³

II. The canonical condition of civil marriages.

1. The canonical status of civil marriages contracted by Oriental non-Catholics.

The communist ideology implemented by communist governments discouraged or even forbade the celebration of Christian sacraments including marriage. As a result, numerous Christians, although baptized, refused to celebrate their marriage before a priest in order to avoid a conflict with the authorities or simply because they considered the religious celebration of their marriage unnecessary. When such a marriage ends in a divorce and one of the parties wants to enter a new marriage with a Catholic, the question arises whether the marriage contracted before the civil authority is to be considered valid. What are the factors which an ecclesiastical tribunal should consider when it comes to judge such a situation?

Prior to the Second Vatican Council, Oriental non-Catholics were considered exempt from the canonical form of marriage when they married among themselves or with Protestants.³⁴ Moreover, at that time the common understanding was that non-Catholics of Oriental rite were not even required to observe their own proper form of marriage, namely to

³² Joseph Prader, "Differenze fra il Diritto Matrimoniale del Codice Latino e quello del Codice Orientale che Influisce sulla Validità del Matrimonio," *Ius Ecclesiae* 5 (1993) 484.

³³ *Ordo Celebrandi Matrimonium, Editio Typica Altera*, nn. 73-74, 20-27.

³⁴ *CA*, c. 90 § 2.

celebrate the marriage in the presence of priest who would give the blessing. For this reason, the civil marriages of Oriental non-Catholics were considered to be valid, at least with regard to the form, if consent was publicly exchanged in a form *naturaliter valida*.³⁵ Thus, the Congregation for the Oriental Church in response to a question presented to it declared valid a marriage contracted between a Russian Orthodox and a non-baptized Methodist before a civil authority alone.³⁶ Similarly, the Holy Office declared valid a marriage between a Baptist and a Greek-Orthodox entered only before civil authority.³⁷ Finally, in a decision issued in 1964, the Sacred Roman Rota considered valid a marriage contracted between two Orthodox Christians before a civil magistrate because as non-Catholics, they were not bound by the Catholic form of marriage and their consent was valid insofar as it was expressed in form *naturaliter valida*.³⁸

However, the jurisprudence underwent a radical change after the publication of the Decree on Ecumenism *Unitatis redintegratio*, which enunciated a new principle with regard to the legislation and customs of Eastern Churches:

³⁵ *Coram Sabattani*, December 11, 1964: *RRDec* 59 : 932.

³⁶ The Congregation for the Oriental Church, Response of April 12, 1945: *Leges Ecclesiae* 2 : col. 2277.

³⁷ The Holy Office, Response of December 11, 1962, *Leges Ecclesiae* 3 : col. 4265.

³⁸ *Coram Sabattani*, December 11, 1964: *RRDec* 59 : 932.

This holy Council solemnly declares that the Churches of the East, while remembering the necessary unity of the whole Church, have the power to govern themselves according to the disciplines proper to them.³⁹

The Tribunal of the Apostolic Signature applied this principle when it issued a decision in 1970 in which it declared the nullity of a civil marriage contracted before a civil magistrate between two Romanian Orthodox Christian faithful, because of defect of form, namely the lack of sacred rite.⁴⁰ Therefore, it was acknowledged that the sacred rite, i.e., the priestly blessing, constitutes, for the Oriental Churches, a constitutive element of the canonical form required for the valid celebration of marriage.⁴¹ The *animadversions* annexed to the sentence specified that in the future tribunals called upon to decide in similar situations must carefully examine two factors. First, it must determine with certainty that the marriage was celebrated without the blessing of the priest. Second, it must establish that parties could have resorted to a priest without a grave inconvenience. The same Tribunal restated these dispositions in two other similar sentences⁴² and in two letters; one addressed to the bishop of Mainz and the

³⁹ Vatican II, decree, *Unitatis redintegratio*, November 21, 1964: AAS 57 (1965) 103: “16. Sacra Synodus declarat Ecclesias Orientis, memores necessariae unitatis totius Ecclesiae, facultatem habere se secundum proprias disciplinas regendi.” Tanner, 2 : 917.

⁴⁰ The supreme Tribunal of Apostolic Signatura, Decision of November 28, 1970: *Leges Ecclesiae* 5 : coll. 6394-6399.

⁴¹ Prader, *La Legislazione Matrimoniale*, 60.

⁴² The supreme Tribunal of Apostolic Signatura, Decision of July 8, 1971: *Leges Ecclesiae* 5 : coll. 6135-6136 and Decision of April 18, 1972: *Leges Ecclesiae* 5 : coll. 6257-6258.

other to a tribunal official in Paris.⁴³ The sentence made reference to the discipline of the Oriental Churches only with regard to ordinary celebration of marriage, i.e., when a priest was available and the parties could have asked him to bless their marriage but they did not. In extraordinary situations, when a priest could not be present without a grave inconvenience, the matrimony was to be considered valid. In other words, in extraordinary circumstances the law regarding the extraordinary form was to be applied even in cases of marriages among Oriental non-Catholics.⁴⁴

On the other hand, the *CCEO* provides in canon 781, 2°:

If the Church must judge the validity of a marriage between baptized non-Catholics: ... 2° regarding the form of marriage celebration, the Church recognizes any form prescribed or admitted by the law to which the parties were subject at the time of their wedding, provided that the consent be expressed publicly and, if at least one of the parties is a baptized member of an Eastern non-Catholic Church, the marriage was celebrated with a sacred rite.⁴⁵

Thus, the *CCEO* recognizes the proper law of Eastern Churches with regard to the form of marriage celebration which requires the sacred rite. The impossibility of finding a priest without grave inconvenience is of no importance since the Oriental non-Catholic Churches

⁴³ Zenon Grocholewski, *Documenta Recentiora circa Rem Matrimoniale et Processualem*, 2 (Rome: Pontificia Universita Gregoriana, 1980) 111-113.

⁴⁴ Prader, *La Legislazione Matrimoniale*, 60-61.

⁴⁵ *CCEO*, c. 781, 2°: “Si quando Ecclesia iudicare debet de validitate matrimonii acatholicorum baptizatorum: ... 2° quod attinet ad formam celebrationis matrimonii, Ecclesia agnoscit quamlibet formam iure praescriptam vel admissam, cui partes tempore celebrationis matrimonii subiectae erant, dummodo consensus expressus sit forma publica et, si una saltem pars est christifidelis alicuius Ecclesiae orientalis acatholicae, matrimonium ritu sacro celebratum sit.”

do not have the institute of the extraordinary form of marriage. Consequently, a competent tribunal of an Oriental Catholic Church will consider null the marriage contracted between two Oriental non-Catholics before civil authority, i.e., without the priestly blessing, even though it was impossible to have a priest without a grave inconvenience.⁴⁶

The 1983 *CIC* does not have a norm similar to canon 781, 2° of the *CCEO*. However, the Pontifical Council for Legislative Texts, on January 25, 2005 published the Instruction *Dignitas connubii*⁴⁷ which provides for the Latin tribunals a norm similar to canon 781, 2° of the *CCEO*. Thus, prior to the instruction *Dignitas connubii*, when a competent tribunal of the Latin Church was called to make a decision in a similar case, it would follow the rules established by the Apostolic Signatura.⁴⁸ In other words, in the case of a marriage of two Oriental non-Catholics contracted before the civil authorities only, the marriage was to be considered null only if a priest was available but was not called to bless the marriage. In the case the parties could not resort to a priest without a grave inconvenience, the marriage was to be considered valid.⁴⁹ Therefore, with regard to

⁴⁶ Pontifical Council for Legislative Texts, explanation of May 13, 2003, *Adnotatio circa Validitatem Matrimoniorum Civilium quae in Cazastania sub Communistarum Regimine Celebrata sunt, Communicationes* 35 (2003) 209. See also Prader, *La Legislazione Matrimoniale*, 61.

⁴⁷ Pontifical Council for Legislative Texts, Instruction of January 25, 2005, *Dignitas connubii, Communicationes* 37 (2005) 11-89.

⁴⁸ In this situation the principle of *analogia legis* provided by canon 19 of the 1983 *CIC* is applicable.

⁴⁹ Pontifical Council for Legislative Texts, explanation of May 13, 2003, *Adnotatio*, 207-209. See also Prader, *La Legislazione Matrimoniale*, 61.

canonical form, Latin tribunals which were called to decide in cases concerning civil marriages contracted by Oriental non-Catholics would examine two aspects. First, it had to determine with certainty that the marriage was celebrated without the blessing of the priest. Secondly, it had to establish that parties could resort to a priest without a grave inconvenience. If these two elements were present, the marriage was to be considered null because of lack of form.

However, with the publication of the instruction *Dignitas connubii* these norms of the Latin law were changed and became similar to the norms provided by the *CCEO*. Thus, in article 4 § 1, 2° the Instruction provides:

In regard to the form of celebration of marriage, the Church recognizes any form prescribed or accepted in the Church or ecclesial community to which the parties belonged at the time of the marriage celebration, provided that, if at least one party is a member of a non-Catholic Eastern Church, the marriage was celebrated with the sacred rite.⁵⁰

Consequently, the Church recognizes as valid marriages between two baptized non-Catholics which were contracted according to the form of marriage valid for the Church or ecclesial community to which the spouses belonged at the time of the celebration of their marriage. Moreover, the Instruction provides, using the same words as in canon 781, 2° of the *CCEO*,

⁵⁰ Pontifical Council for Legislative Texts, Instruction *Dignitas connubii*, art. 4 § 1, 2°: “Quod attinet ad formam celebrationis matrimonii, Ecclesia agnoscit quamlibet formam iure praescriptam vel admissam in Ecclesia vel Communitate ecclesiali ad quam partes tempore celebrationis matrimonii pertinebnt, dummodo, si una saltem pars est christifidelis alicuius Ecclesiae orientalis acatolicae, matrimonium ritu sacro celebratum sit.” *Communicationes* 37 (2005) 16.

that when the matrimony involves at least one party that belongs to an Oriental non-catholic Church, the marriage must be celebrated with the sacred rite.

In conclusion, both Latin and Oriental tribunals have now a unique norm for this issue. When they which are called to pronounce a judgment in cases concerning civil marriages contracted by Oriental non-Catholics, ecclesiastical tribunals will considered null such a marriage if it is certain that it was celebrated without the sacred rite. The impossibility to find a priest without grave inconvenience is of no importance since the Oriental non-Catholic Churches do not have the institution of the extraordinary form of marriage and both Latin and Oriental laws recognize the proper law of these Churches with regard to the form of marriage celebration.⁵¹

2. The canonical condition of civil marriages contracted by non-baptized in the former Soviet Union.

The issue of canonical condition of civil marriages in the former Soviet Union raises additional issues. In the Soviet Union religious persecution started in 1917 and was much more violent than in other Eastern European countries where communism was imposed only after the World War II. The Catholic Church was almost completely suppressed and all its priests exiled, imprisoned, or executed. The Russian Orthodox Church also underwent a

⁵¹ *CCEO*, c. 781, 2°. Pontifical Council for Legislative Texts, explanation of May 13, 2003, *Adnotatio*, 209. Pontifical Council for Legislative Texts, Instruction *Dignitas connubii*, art. 4 § 1, 2°. *Communicationes* 37 (2005) 16.

violent persecution and its activity was reduced to a very restricted sphere of activity.⁵² Consequently, whole generations grew up without being baptized and without any kind of religious education. On the contrary, people were subjected to a continuous and aggressive antireligious propaganda that started in kindergartens, continued in school, universities, and in all work places. As a result, the vast majority of marriages were contracted only before the civil authorities. With the dissolution of the Soviet Union, the Orthodox Church was able to organize its activity and in a short period of time a large number of people were baptized. What is the canonical condition of a marriage contracted civilly between two non-baptized parties who subsequently receive baptism in the Orthodox Church? When such a marriage has ended in a divorce and one of the parties wanted to enter a new marriage with a Catholic, is he or she free to marry in the Catholic Church?

In order to understand better this issue it is useful to have a short overview of the civil matrimonial legislation in force in the former Soviet Union. The first family code promulgated in 1918 stipulated that, in order to enter a marriage, it was enough to register the marriage with the appropriate civil authority. Similarly, in order to obtain a divorce it was enough to declare it with the same civil authority. The next family code promulgated in 1926 was even more permissive and considered the unions of fact equal before the law to marriages contracted before the civil authority. Ten years later, a new law required that in

⁵² Roberson, *The Eastern Christian Churches*, 61-62. Just to give an idea of the catastrophic tragedy of the Orthodox Church it is enough to mention that in the period between 1917 and 1939, between 80% and 85% of the prerevolutionary Russian Orthodox Church clergy disappeared. While in 1917, the Russian Orthodox Church had 77,767 churches, in the late 1970's there were only about 6,800.

order to be considered married the parties had to register their marriage with the proper civil authority. Finally, in 1968 a new family code was promulgated for the entire territory of the Soviet Union. According to this code the marriage had to be contracted before an officer at the city hall, but there was no mention whatsoever concerning the presence of witnesses. A divorce could have been obtained either administratively or through a judicial process.⁵³ The general norm was that it was the common will of the parties that brought about the marriage and the same common will ended the marriage. This matrimonial legislation based on the Marxist ideology resulted in a de-Christianization of marriage which was now perceived as simple union that could be broken at any time for any reason. Families were emptied of the faith in God and lost the sense of the faithful and exclusive love of their marriage. Whole generations were educated in this understanding of marriage as a union based on a totally free love, where the religion has nothing to say whatsoever, a union that can be easily ended through divorce in order to enter a new marriage based on the same principle.

Presently, it often happens that person who was civilly married during the Soviet regime and subsequently divorced, desires to enter a new marriage with a Catholic party. In these situations, the Church is called to judge whether such marriages were invalid and the persons involved could subsequently marry a Catholic party. With regard to the form of marriage, the two following situations are frequently presented to ecclesiastical tribunal of the various dioceses and eparchies in the countries that used to be part of the Soviet Union.

⁵³ Ibid., 198-199.

- a. Civil marriage of two non-baptized persons who subsequently received baptism in the Orthodox Church.

The Catholic Church considers that the marriage validly contracted by two non-baptized persons becomes a valid sacramental marriage after both parties have received baptism.⁵⁴ The Orthodox Churches also admit the validity of marriages entered among themselves by the non-baptized and by Christians of other denominations when marriages are contracted according to their own law.⁵⁵ Non-baptized couples who are validly married before the civil authority are confirmed and receive the Eucharist after baptism, but they do not receive the nuptial blessing “because their acceptance to the Eucharist implies that the Church blesses them as husband and wife. The practice of ‘re-marrying’ such couples can be due only to a complete misunderstanding of the Orthodox doctrine of marriage.”⁵⁶ Thus, such a sacramental marriage, if consummated after both spouses received the baptism, becomes indissoluble.⁵⁷ Consequently, when such a marriage ends in divorce, neither party would be free to enter a new marriage in the Catholic Church.

- b. Civil marriage of two non-baptized persons one of whom subsequently receives the baptism in the Orthodox Church.

⁵⁴ Cappello, *De Sacramentis*, 5: 31-32, n. 35.

⁵⁵ Zhishman, *Das Eherecht der Orientalischen Kirche*, 162. See also Matthias Saruga, *De Notione et de Dissolutione necnon de Fine Matrimonii in Ecclesia Orientali Serbica*, (Rome: Pontificio Instituto Orientalium Studiorum, 1939) 58-59.

⁵⁶ Meyendorff, *Marriage: An Orthodox Perspective*, 27.

⁵⁷ Cappello, *De Sacramentis*, 5: 31-32, n. 35.

In this situation there are two possible scenarios. First, if one of the spouses receives baptism in the Orthodox Church and the non-baptized spouse agrees to continue conjugal life with the newly baptized party, the Orthodox Church acknowledges such a marriage to be valid. Thus the spouses do not have to convalidate their matrimony with the sacred rite.⁵⁸ If the marriage later ends in a divorce, neither party may enter a new marriage in the Catholic Church. Second, if the non-baptized party refuses to continue the conjugal life with the baptized party, the competent authority of the Orthodox Church may dissolve the marriage by means of the Pauline Privilege.⁵⁹ In this instance, if either party, after having obtained the civil divorce, desires to enter a new marriage with a Catholic party, he or she should present to the local ordinary of the Catholic party the documentation of the Orthodox Church concerning the dissolution of his or her first marriage. The local ordinary will refer the case to the Congregation for the Doctrine of the Faith which will decide whether the application of the Pauline Privilege on the part of the Orthodox Church was lawful.⁶⁰

3. Practical guidelines

The preceding analysis considered various situations which chanceries and ecclesiastical tribunals from Eastern Europe may encounter in the process of determining the free status of parties preparing for the celebration of marriage in the Catholic Church. Here are a few issues which the tribunals should consider when previously married Oriental non-

⁵⁸ Pontifical Council for Legislative Texts, explanation of May 13, 2003, *Adnotatio*, 205-206.

⁵⁹ *Ibid.*, 206.

⁶⁰ *Ibid.*

Catholics intend to celebrate their marriage in the Catholic Church. First of all, it should be determined whether the marriage was contracted before or after the person has received baptism. In the case a couple married after having been baptized and contracted marriage before the civil authorities only, that marriage is invalid because Eastern Christians must celebrate the matrimony with the sacred rite, namely to receive the priest's blessing. In this situation, if the couple subsequently divorced they are free to marry. On the other hand, a marriage contracted before civil authorities by a non-baptized couple, becomes a sacramental marriage after both spouses received the baptism. In this situation, such a sacramental marriage, if consummated, becomes indissoluble. Thus, if this marriage ends in a divorce the spouses are not free to marry again in the Church. Finally, when two non-baptized persons married civilly and subsequently one of the parties received baptism in the Orthodox Church, that marriage is recognized by the Orthodox Church as valid and consequently indissoluble if the non-baptized party agrees to continue conjugal life with the newly baptized party. If the marriage later on ends in a divorce, neither party may enter a new marriage in the Catholic Church. If the non-baptized party refuses to continue conjugal life with the baptized party, the Orthodox Church may dissolve the marriage by means of Pauline Privilege. In this situation, after having obtained the civil divorce, either party may enter a new marriage in the Catholic Church after the documentation of the Orthodox Church concerning the dissolution of the first marriage have been revised by the proper authorities of the Catholic Church and had been considered lawful.

Conclusion

This chapter analyzed selected pastoral issues peculiar to Eastern Europe after the fall of the communist governments. Several concrete situations were examined from a canonical perspective and tentative solutions were proposed. The first section of this chapter considered the issue of the canonical form of marriage of the Catholic faithful of Oriental rite who live in territories where a hierarchy of their own rite was not established. In order to bring more clarity to this matter it was noted that canon 916 § 5 of the *CCEO* which establishes that faithful of Eastern Catholic Churches who have the domicile or quasi-domicile in territories where only a Latin rite hierarchy is established, are subjected to the Latin ordinary of the place. This canon prompted an examination of the circumstances in which Latin pastors are authorized to assist at and bless the marriage of Oriental Catholics within the boundaries of their parish. It was also analyzed canon 35 of the *CCEO* which lays down the norms concerning the ritual enrollment of Oriental non-Catholics coming into full communion with the Catholic Church. Finally, several practical examples concerning the competence of a Latin pastor to assist and bless marriages involving Oriental Catholics were suggested.

The second section of this chapter dealt with the canonical condition of civil marriages. First, it was considered the canonical condition of civil marriages contracted by Oriental non-Catholics. The analysis included the position taken on this subject by various Roman Tribunals and how their decisions were influenced by documents of the Second Vatican Council. Then, based on the canonical jurisprudence and in the light of the present

legislation, there were listed the elements which an ecclesiastical tribunal should consider when it is called to judge such a cause. Second, this section examined the canonical condition of civil marriages contracted in the former Soviet Union. Within the context of the special circumstances existing in the Soviet Union until early 1990's, this section evaluated two scenarios which are most frequently presented to chanceries and ecclesiastical tribunals of the Catholic Church in order to establish the freedom of a person to marry in the Catholic Church. First, it analyzed the canonical condition of a marriage between two non-baptized persons who subsequently receive the baptism in the Orthodox Church. Second, it scrutinized the canonical condition of marriage of two non-baptized persons one of whom subsequently receives the baptism in the Orthodox Church. The solution proposed took into account the Oriental matrimonial discipline and the present legislation of the Catholic Church.

Themes analyzed in this chapter are not the only ones that are presented to Catholic ecclesiastical tribunals in Eastern Europe in order to be solved. However, these are frequently met and a better knowledge of canonical norms concerning these issues may be of great help in taking a correct and just decision.

GENERAL CONCLUSION

The basic institution of the human society and, in a particular way, of the ecclesial society, is the family which, on its turn, is founded on marriage. This principle explains the importance of matrimony in society and especially in the Church, for which marriage has a sacramental character. Given the importance of marriage, the celebration of matrimony is more than a private matter between the spouses and, consequently, must be governed by human law, both religious and civil. Therefore, it is understandable the importance Canon Law gives to marriage: Canon Law establishes a detailed set of matrimonial norms which are meant to promote a harmonious growth of matrimonial life of the spouses. Among these norms are comprised those concerning the canonical form of marriage. This dissertation presented a comparative study of the canonical form of marriage in the Latin and in the Oriental Catholic law which was structured in four chapters.

The first chapter considered the historical development of both the canonical form of marriage in the Latin Church and the provisions in the Eastern law governing the celebration of marriage. The first section of the first chapter reviewed the birth of the canonical form of marriage in the Latin Church and the subsequent attempts to improve it and to make it more effective and convenient. The conclusion of this analysis was that the Church remained faithful to the belief that consent freely expressed by the two contracting parties was the essential element, the only one necessary and sufficient to constitute the matrimonial covenant. In order to underline the sanctity of this sacrament and to overcome the unwanted

and at time damaging practice of clandestine marriages, the Church added a public solemnity to the expression of the consent, namely the canonical form of marriage. The law was not perfect and because of its shortcomings it did not entirely achieve its desired effects. Several pieces of legislation subsequently improved the initial provisions of decree *Tametsi*. Finally, it can be said that this solemnization enriched the austerity typical of the Latin rite bringing it closer to the complexity and richness of the Eastern rites of the sacrament of marriage, which was considered in the second section of the first chapter. This section analyzed the development of the matrimonial rite in the Eastern liturgical and canonical tradition. It first considered the liturgical evolution in the Byzantine tradition of the matrimonial rite followed by a short overview of the rite of marriage in a few other Eastern traditions. Subsequently, there followed a discussion of the matrimonial legislation in the Eastern Roman Empire, studying both imperial legislation and the theological and canonical approach as well. The final part of the chapter examined the development of the Oriental rite of marriage in selected countries of Eastern Europe from the seventeenth into the nineteenth centuries. First, it scrutinized the conception of marriage of Metropolitan Petru Movila and its consequences on the Russian Orthodox Church matrimonial legislation. Then it investigated the understanding of the marriage in Moldavia and Wallachia as presented in the collection of laws *Pravila Mare*. Lastly, it considered the marriage legislation of the Romanian Oriental Catholic Church in Transylvania, especially the relevant provisions of the two Provincial councils of the second half of the nineteenth century. The conclusion of the second section of the first chapter was that until the eighteenth century there coexisted in the Eastern

Byzantine Tradition two doctrines concerning marriage: one that considered consent as the fundamental element of the constitution of marriage and the other one which considered the blessing mandatory for the validity of marriage. It was not until the second half of the nineteenth century that the matrimonial doctrine underwent a significant change and the priestly nuptial benediction was considered to be the most important element of the sacrament of marriage.

The second chapter considered the historical development of both the canonical form of marriage in the Latin Church and the provisions the Eastern law required for the celebration of marriage as legislated in the 1917 *CIC*, the motu proprio *Crebrae allatae*, as well as in subsequent ecclesiastical legislative acts and authentic interpretations issued by various dicasteries of the Roman Curia. This second chapter was also structured in two sections. The first section of this chapter considered the canonical form of marriage as established by the 1917 *CIC* and the motu proprio *Crebrae allatae* and concluded that for the Latin Code the essence of the canonical form remained the one established by the decree *Tametsi*, i. e., the expression of the consent before the pastor or ordinary and two witnesses. The analysis done in this section also proved that the 1917 *CIC* removed the shortcomings and the ambiguities of certain terms of the decree *Tametsi* and established more exactly the person and the qualifications of the qualified witness, the time and the space in which he could act, the terms of proper delegation, and the subjects bound to observe the law. In addition to these elements necessary for the valid celebration of the marriage, the 1917 *CIC* established several other provisions required for liceity. The motu proprio *Crebrae allatae*,

as a whole, followed the Latin Code, with a few differences. The most obvious difference was that marriage had to be celebrated with a sacred rite. This was a confirmation of the Eastern tradition - consistent at the time of the promulgation of the document - that the exchange of consent had to be associated with the blessing bestowed upon the spouses by the assisting priest. The analysis also pointed to the fact that several authentic interpretations issued by various Roman dicasteries after the promulgation of the two Codes brought more clarity to various terms and facilitated the application of the law. The analysis also illustrated, whenever was the case, how in Eastern Europe the implementation of the two codes was deterred by the establishment of communist governments which obstructed - in various degrees, according to the intensity of the religious persecution in a given country - the exercise of religious freedom.

The second section of the second chapter considered the subject of the canonical form of marriage as addressed by Second Vatican Council and its subsequent development up to the promulgation of the 1983 *CIC* and *CCEO*. It first examined the issue as addressed during conciliar debates and in the documents of Vatican II which considered the matter of canonical form, not as a topic in itself but in relation to the subject of mixed marriages. The most obvious change concerning the form of marriage was included in the decree on Eastern Catholic Churches which provided that, for a marriage between an Oriental Catholic and an Oriental non-Catholic, the canonical form of marriage was required for liceity only; the presence of a sacred minister was enough for validity. A few years later, through the decree *Crescens matrimoniorum*, the relaxation of form was expanded to include the Latin as well

as Oriental Catholics. Further on, the second section of this chapter reviewed the conciliar debates on mixed marriages which, unlike the decree on the Eastern Catholic Churches, were inconclusive. The Council Fathers decided that the *Schema voti de matrimonii sacramento* be referred to the Holy See. However, the proposals expressed during conciliar debates have gradually been converted into laws.

First, the instruction *Matrimonii Sacramentum* established that the canonical form was to be observed for the validity of the marriage but, in difficult situations the Ordinary might have recourse to the Holy See. Then, the decree *Crescens matrimoniorum* established that, when Catholics married Oriental non-Catholics the canonical form bound only for liceity and the local Ordinary could even give a dispensation from the obligation of canonical form for liceity in difficult situations, and accordingly to allow a Catholic to marry a non-Catholic Oriental before a non-Catholic sacred minister. Finally, the 1967 Synod of Bishops reaffirmed the principles expressed during conciliar debates concerning mixed marriages. The Synod's recommendations were included in the motu proprio *Matrimonia mixta* which, with respect to the canonical form of marriage, reaffirmed those principles established previously in the decree *Crescens matrimoniorum*. Besides, it enabled Episcopal Conferences to issue norms which would assure a uniform and licit granting of dispensations. After the motu proprio *Matrimonia Mixta*, a few minor norms with regard to the canonical form of marriage were issued by various Commissions and Congregations of the Roman Curia.

The third chapter of this dissertation analyzed the elements of the canonical form of marriage as established by the 1983 *CIC* and the *CCEO*. The analysis illustrated that both

codes reflect the spirit of the Second Vatican Council and, at the same time, acknowledged the authentic canonical traditions of their respective Churches. The comparative examination of the norms governing the canonical form of marriage revealed that, even though the legislation of the two codes was substantially the same, there were some important dissimilarities. The analysis also revealed that both codes maintain the essence of the canonical form established by the 1917 *CIC* and the motu proprio *Crebrae allatae*, but include also the authentic interpretations and the pieces of legislation issued during the Second Vatican Council and afterwards. This chapter considered especially the innovations of the present law as opposed to the former norms of the previous legislation. A particular emphasis has been given to the differences between the two codes concerning those elements of the canonical form that might affect the validity of marriage. These elements include the obligation of sacred rite for Oriental Catholics, observation of the ritual affiliation, and the delegation of deacons and lay people to assist marriages. This chapter also emphasized those subjects which, because of a certain ambiguity of the terms, resulted in a difference of opinion among the canonists. Finally, this chapter also considered the most recent change in the legislation, which was made by the motu proprio *Omnium in mentem*, which removed the norm wherein those baptized in the Catholic Church or received in full communion with it but left by a formal act were exempt from the observation of the canonical form of marriage. Throughout the chapter, whenever necessary, references were made with regard to the practical application of these norms in Eastern Europe.

Finally, the fourth and last chapter of this dissertation analyzed selected pastoral issues peculiar to Eastern Europe after the fall of the communist governments. Several concrete situations were examined from a canonical perspective and tentative solutions were proposed. The first section of this chapter considered the issue of the canonical form of marriage of the Catholic faithful of Oriental rite who live in territories where a hierarchy of their own rite was not established. In order to bring more clarity to this matter it was noted that canon 916 § 5 of the *CCEO* which establishes that faithful of Eastern Catholic Churches who have the domicile or quasi-domicile in territories where only a Latin rite hierarchy is established, are subjected to the Latin ordinary of the place. This canon prompted an examination of the circumstances in which Latin pastors are authorized to assist at and bless the marriage of Oriental Catholics within the boundaries of their parish. It also analyzed canon 35 of the *CCEO* which lays down the norms concerning the ritual enrollment of Oriental non-Catholics coming into full communion with the Catholic Church. Finally, several practical examples concerning the competence of a Latin pastor to assist and bless marriages involving Oriental Catholics were suggested. The second section of the fourth chapter dealt with the canonical condition of civil marriages. First, it was considered the canonical condition of civil marriages contracted by Oriental non-Catholics. The analysis included the position taken on this subject by various Roman Tribunals and how their decisions were influenced by documents of the Second Vatican Council. Then, based on the canonical jurisprudence and in the light of the present legislation, there were listed the elements which an ecclesiastical tribunal should consider when it is called to judge such a

cause. Second, this section examined the canonical condition of civil marriages contracted in the former Soviet Union. Within the context of the special circumstances existing in the Soviet Union until early 1990's, this section evaluated two scenarios which are most frequently presented to chanceries and ecclesiastical tribunals of the Catholic Church in order to establish the freedom of a person to marry in the Catholic Church. First, it analyzed the canonical condition of a marriage between two non-baptized persons who subsequently receive the baptism in the Orthodox Church. Second, it scrutinized the canonical condition of marriage of two non-baptized persons one of whom subsequently receives baptism in the Orthodox Church. The solution proposed took into account the Oriental matrimonial discipline and the present legislation of the Catholic Church.

The purpose of this dissertation was to examine the canonical form of marriage by comparing the Latin and Oriental canonical legislations and to analyze the pastoral consequences that came up when laws concerning canonical form of marriage were applied in areas of Eastern Europe in light of recent political and social changes which took place during the second half of the past century. This study revealed how important is to be acquainted with both Latin and Oriental matrimonial legislation within the context of interecclesial relationships and within the prospect of today's increasing global mobility. The ignorance of these norms may bring about misunderstandings and divisions among Christian faithful who belong to different Churches *sui iuris*, may harm the peace within families, and damage the stability and even the validity of marriage. The present study is a

contribution which may be useful to those involved in pastoral activity and may help them to better serve the people of God entrusted to their care.

ABBREVIATIONS

1917 <i>CIC</i>	<i>Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus</i> . Rome: Typis Polyglottis Vaticanis, 1917.
1983 <i>CIC</i>	<i>Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus</i> . Vatican City: Libreria Editrice Vaticana, 1983.
AAS	<i>Acta Apostolicae Sedis</i>
ASS	<i>Acta Sanctae Sedis</i>
CA	Pius XII, motu proprio <i>Crebrae allatae</i> .
CCEO	<i>Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus</i> . Vatican City: Libreria Editrice Vaticana, 1990.
<i>Collectanea</i>	<i>Collectanea Constitutionum, Decretorum, Indultorum ac Instructionum Sanctae Sedis ad Usus Operariorum Apostolicorum Societatis Missionum ad Exteros; Selecta et Ordine Digesta Cura Moderatorum Seminarii Parisiensis ejusdem Societatis, ann. 1622-1906</i> , 2 vols. Congregation for the Propagation of the Faith. Rome: Typographia Poliglota, 1907.
CS	Pius XII, motu proprio <i>Cleri Sanctitati</i> .
<i>Fontes</i>	<i>Codici Iuris Canonici Fontes</i> . Ed. P. Gasparri and I. Deredi, 9 vols. Rome: Typis Polyglottis Vaticanis, 1923-1939.
<i>Fonti CCO</i>	<i>Codificazione Canonica Orientale, Fonti</i> , 3 series. Città del Vaticano: Tipografia Poliglotta Vaticana, 1931.
LG	Dogmatic constitution <i>Lumen gentium</i> .
Mansi	<i>Sacrorum conciliorum nova et amplissima collectio</i> , 54 vols. Ed. Joannes Dominicus Mansi, et al. 1759-1927.
OE	Decree <i>Orientalium Ecclesiarum</i> .

- PAL* Pius XII, motu proprio *Postquam Apostolicis Litteris*.
- PG* *Patrologiae Cursus Completus: Series Graeca*. 161 vols. Ed. J. P. Migne. Paris: J. P. Migne, 1844-1865.
- UR* Decree *Unitatis redintegratio*.

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