

CATHOLIC-ORTHODOX MARRIAGE IN CANON LAW

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The increasing number of Orthodox-Catholic marriages in India constitute a canonical and pastoral reality. The author, first, analyses which type of norms regulate the celebration of Catholic-Orthodox marriages with regard to canonical form, impediments and the vices of consent. The second part of the article analyses, according to the type of norms, the validity of Orthodox marriages as judged by Catholic ecclesiastical tribunals, in case an Orthodox party decides to remarry a Catholic, since the Orthodox is bound by a prior matrimonial bond and since the Catholic Church does not recognize Orthodox judgments on marriage "annulment."

Introduction

Not only in Europe,¹ but also in India, the celebration of mixed marriage between Catholics and the Orthodox constitutes an

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¹ From the European, Italian perspective of the author, the Orthodox, due to migration during the last ten years, have become the second largest religious community in Italy. Circa 30% of all migrants originate from traditional Orthodox countries, especially from Eastern Europe such as Romania and Ukraine. See, *Caritas et Migrantes, Immigrazione, Dossier Statistico 2010*, 205 and 214. For this reason the Italian Episcopal Conference established in 2010 a pastoral *Vademecum* dealing with Orthodox faithful and mixed marriages. See, Ufficio nazionale per l'ecumenismo e il dialogo interreligioso della CEI - Ufficio nazionale per i problemi giuridici della CEI, *Vademecum per la pastorale delle parrocchie cattoliche verso gli orientali non cattolici*, to be found on <http://www.chiesa->

increasing pastoral reality due to greater social and economic mobility, migration and the intermingling of persons of different Christian denominations. On the internet (e.g., in *answers.yahoo.com/question/index?qid*) one frequently encounters questions such as: “I am a Malankara Syrian Orthodox boy and I am in love with a Roman Catholic girl; can we marry?” From a canonical point of view, this question raises two issues. The first issue concerns the increasing number of mixed marriages celebrated between Catholics and the Orthodox. The second issue concerns the increasing number of Orthodox, previously married, who wish to enter a second marriage with a Catholic partner and who therefore have to present before Catholic tribunals a nullity case concerning their previous marriage. On the pastoral level, this rather new reality imposes a specific burden on bishops, parish priests and pastoral workers, namely to become more familiar with the canonical and disciplinary norms regulating marriages between Catholics and the Orthodox. Also the judges of the ecclesiastical tribunals are expected to have a more profound knowledge of the law of matrimony governing the Orthodox faithful, especially when an Orthodox desires to celebrate a second marriage with a Catholic spouse.

Before we enter into the heart of the matter of these canonical issues, we must recall that from the Catholic point of view, the Orthodox Churches occupy a special position. The conciliar Decree on Ecumenism *Unitatis Redintegratio* (UR) declares that these Churches are “special” because they have preserved the ancient traditions that have come down from the Apostles (see, UR n° 14). Therefore: “These Churches, 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” (UR n° 15). In the words of Pope Paul VI we can speak of an “almost perfect communion” that exists between the Catholic Church and the Orthodox Churches. “Therefore some worship in common (*communicatio in sacris*), given suitable circumstances and the approval of Church authority, is not only possible but to be encouraged” (UR n° 15). It is generally overlooked that the celebration of mixed marriages is without any doubt the most common and frequent field of common worship (*communicatio in*

sacris) between Catholics and the Orthodox.² In general the majority of the Orthodox Churches³ make some provision for their faithful to marry Catholics,⁴ with the notable exception of the Coptic, Ethiopian,

²For this reason the March 1993 Ecumenical Directory (ED) already devotes a special section on mixed marriages (cf. ED nn° 143-160). Pontifical Council for Christian Unity, *Directory for the Application of Principles and Norms on Ecumenism*, http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/generaldocs/rc_pc_chrstuni_doc_19930325_directory_en.html.

³The Orthodox Churches may be divided into three groups: 1) the Assyrian Church of the East; 2) the Eastern Orthodox Churches: Armenian, Coptic, Ethiopian, Eritrean, Syrian and Malankara Indian Orthodox Churches and 3) the Orthodox Churches of Byzantine tradition: Greek, Russian, Romanian, Bulgarian, Serbian and several other Churches.

⁴Notwithstanding canon 72 of the Council of Trullo (691), which prohibits under pain of nullity marriages between Orthodox faithful and heretics, the majority of Orthodox Churches today admit mixed marriages with Catholics for reasons of *oikonomia* on two conditions. The first condition is that the wedding must be celebrated by an Orthodox priest with the permission of the Orthodox bishop. The second condition is that both spouses have to promise to baptize and educate their children in the Orthodox faith. This discipline is followed by the Russian and Greek Orthodox Churches. In general Orthodox Churches do not allow mixed marriages with Catholics to be celebrated in a Catholic church. Cf. J. Prader, *Il Matrimonio in Oriente e in Occidente*, *Kanonika* 1, Rome 2003, 163-165; D. Salachas, "La legislazione sui matrimoni misti in vigore in Grecia. Dati storici e giuridici," in *Nicolaus* 2 (1974) 335. Exceptions allowing a Catholic church wedding celebration are: 1) the 1976 Decision of the Conference of the Metropolitans of the European Eparchies of the Ecumenical Patriarchate taken at Chambésy (Switzerland) according to which mixed marriages with Christians of other denominations celebrated in their rites are considered valid. Cf. A. Basdekis, "Das ökumenische Patirachat und seine Auslandsdiözesen," in *Ökumenische Rundschau* 25 (1976) 412-416; 2) the October 1996 Agreement between the Catholic and Orthodox Patriarchs of the Middle East concluded at Charfeh (Lebanon) according to which the bride is allowed to remain faithful to her Church of origin; the marriage is celebrated in the Church of the bridegroom (Catholic or Orthodox) and the children are baptized in the Church of their father (Catholic or Orthodox). See, http://infocatho.cef.fr/fichiers_html/oecumenisme/accorddialogue/accorddialoguedaco.html, and 3) the January 1994 Agreement between the Catholic Church and the Malankara Syrian Orthodox Church on Inter-Church Marriages. See below.

Eritrean,⁵ Syrian Orthodox Churches⁶ and, until recently (1994),⁷ also the Malankara Syrian Orthodox Church, which do or did not bless mixed marriages under any circumstances.

1. First Issue: Which Norms Regulate Marriages between Catholics and the Orthodox?

The first question that immediately confronts us is: which norms regulate a mixed marriage between a Catholic and an Orthodox? The answer is that it is regulated by the following principle: “Even if only one party is Catholic, the marriage of Catholics is regulated not only by divine law but also by canon law, with due regard for the competence of civil authority concerning the merely civil effects of such a marriage” (CIC cc. 1059 and CCEO c. 780 §1).⁸ It is not abnormal that ecclesiastical law extends its application to baptized non-Catholics, especially when they maintain or initiate juridical relations with the Catholic faithful, for example, through establishing a matrimonial bond with Catholics. This implies that when an Orthodox marries a Catholic, or vice versa, he or she has to know that their marriage is subjected to Catholic matrimonial discipline, and in particular to the norms on mixed marriages (see, CIC cc. 1124-1129 and CCEO cc. 813-816, 834, 839). Without commenting in detail on each of these canons, it suffices to recall that in principle a mixed marriage, i.e. a marriage between two baptized persons, of whom one is a Catholic and the other a non-Catholic (Protestant, Orthodox),

⁵These three Churches do not admit mixed marriages at all. The Catholic spouse has to join the Orthodox Church and to be rebaptised. See, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 165.

⁶In the Syrian Orthodox Church a mixed marriage between a Syrian Orthodox and a non-Syrian Orthodox Christian is only allowed when the latter presents a written request to join the Syrian Orthodox Church. J. Prader, *Il Matrimonio in Oriente e in Occidente*, 165.

⁷Concerning the Malankara Syrian Orthodox Church and its stance on mixed marriages, mention will be made of the Interim Report on Marriage of 1990 and the Agreement between the Catholic Church and the Malankara Syrian Orthodox Church on Inter-Church Marriages of January 1994. See *infra*.

⁸The English translation of the Code of Canons of the Oriental Churches (CCEO) is taken from <http://www.jgray.org/codes/cceo90eng.html>, while the English translation of the Code of Canon Law (CIC) is taken from <http://www.jgray.org/codes/cic83eng.html>. The civil effects of marriage deal with topics such as the name of the wife and the children, inheritance etc.

is prohibited without the prior permission of the local ordinary/hierarchy (see, CIC c. 1124 and CCEO c. 813). Mixed marriage however does not constitute a diriment impediment invalidating marriage, but falls under a mere prohibition touching only the lawfulness of marriage. The *ratio* of the prohibition is to safeguard and enhance the Catholic faith of the Catholic party and of the children. The March 1993 Ecumenical Directory recalls that “when members of the same family belong to different Churches and ecclesial Communities, when Christians cannot receive Communion with their spouse or children, or their friends, the pain of division makes itself felt acutely” (see, ED n° 27). Further it states: “In addition, practical experience and the observations obtained in various dialogues [...] indicate that mixed marriages frequently present difficulties for the couples themselves, and for the children born to them, in maintaining their Christian faith and commitment and for the harmony of family life. For all these reasons, marriage between persons of the same ecclesial Community remains the objective to be recommended and encouraged” (ED n° 144).⁹ In order to celebrate a mixed marriage, one needs from the local ordinary/hierarchy the prior permission, which however is not required for validity but only for liceity (*ad liceitatem tantum*). Three conditions are to be fulfilled: 1) the Catholic party must declare that he or she is prepared to remove dangers of falling away from the faith and makes a sincere promise to do all in his or her power to have all offsprings baptized and educated in the Catholic Church; 2) the non-Catholic party is to be informed at an appropriate time of these promises made by the Catholic party so as to be truly aware of the promise and the obligation of the Catholic party and 3) both parties are to be instructed on the essential aims and properties of marriage, which are not to be excluded by either spouse (see, CIC c.

⁹ED n° 145, quoting John Paul II’s Encyclical *Familiaris Consortio* n° 78, declares however on a more positive note that: “These marriages, even if they have their own particular difficulties, “contain numerous elements that could well be made good use of and develop both for their intrinsic value and for the contribution they can make to the ecumenical movement”. This is particularly true when both parties are faithful to their religious duties. Their common baptism and the dynamism of grace provide the spouses in these marriages with the basis and motivation for expressing unity in the sphere of moral and spiritual values.”

1125 and CCEO c. 814).¹⁰ It is interesting to note that the non-Catholic party does not have to promise anything at all, nor to convert or to be rebaptized in the Catholic Church; this in virtue of the principle of religious freedom (See, Conciliar Declaration on Religious Freedom *Dignitatis Humanae* (DH) n° 2).¹¹ It is even possible that a non-Catholic party explicitly objects against the Catholic baptism and education of the children. The Ecumenical Directory admits that “it should be recognized that the non-Catholic partner may feel a like obligation [i.e. to baptize and educate the children in his or her denomination] because of his/her own Christian commitment” and advises that “with regard to granting permission for this mixed marriage, the local Ordinary take account, among other things, of an explicit refusal on the part of the non-Catholic party” (ED n° 150). Without going into details, things are often not made easier by the rather strict attitude of some Orthodox Churches which, in order to accept a mixed marriage with a Catholic, require that the children be raised in the Orthodox faith (e.g., the Greek and Russian Orthodox Churches).¹² In such circumstances the Catholic party can only promise to do what is in his or her power, albeit it being not much (*ad impossibile nemo tenetur*), i.e. at least to share his or her Catholic faith with their

¹⁰The same conditions are to be fulfilled in the context of disparity of cult marriage (see, CIC c. 1086 and CCEO c. 803) and in the context of a marriage of a person who has publicly rejected the Catholic faith, even if that person did not become a member of a non-Catholic Church or ecclesial communion (see, CIC c. 1071 §2 and CCEO c. 789 n°6).

¹¹n° 2: “[...] the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.”

¹²See, supra note n° 4, also for the October 1996 Agreement between the Catholic and Orthodox Patriarchs of the Middle East, which provides a compromise, namely that the offspring be baptized and raised in the Church of the father (Catholic or Orthodox). This Agreement has been integrated in the particular law of the Syrian Catholic Church. For a comment on this Agreement, cf. D. Salachas, “I matrimoni misti nel Codice Latino e in quello delle Chiese orientali cattoliche,” in AA. VV. *I matrimoni misti*, Studi Giuridici XLVII, Città del Vaticano 1998, 86-91.

children (see, ED n° 151).¹³ In any case, both spouses need to be instructed in the essential aims (welfare of the spouses, the generation and education of children) and to the properties of marriage (unity and indissolubility). With regard to the Orthodox spouse it will be important to recall that, contrary to the Orthodox pastoral practice of *oikonomia* allowing a second or third wedding benediction,¹⁴ there is no divorce - not even in case of adultery - possible in the Catholic Church.

With regard to the application of substantial law to a mixed marriage between Catholic and Orthodox spouses, such a marriage is not only regulated by divine law and by Catholic canon law as stated above (see, CIC c. 1059 and CCEO c. 780 §1), but also by the law proper to the Church or ecclesial community to which the non-Catholic belongs (see, CCEO c. 780 §2 and art. 2 of the January 2005 Instruction *Dignitas Connubii* (DC)).¹⁵ This is also the result of the fact that merely ecclesiastical laws only bind Catholics but do not bind non-Catholics (CIC c. 11 for Latins, CCEO c. 1490 for Eastern Catholics). At this stage it is important to quote CCEO c. 780 §2: "In addition to divine law, marriage between a Catholic and a baptized non-Catholic is also regulated by: 1, the law proper to the Church or ecclesial community to which the non-Catholic belongs, if that community has its own matrimonial law; 2, the law that binds the non-Catholic, if it is an ecclesial community, if proper matrimonial law is lacking."¹⁶

The result of this norm is that when an Orthodox marries a Catholic, their marriage is not only regulated by Catholic canon law, but also by the Orthodox discipline to which the Orthodox spouse is

¹³DE n° 151: "If, notwithstanding the Catholic's best efforts, the children are not baptized and brought up in the Catholic Church, the Catholic parent does not fall subject to the censure of Canon Law" (i.e., CIC c. 1366 and CCEO c. 1439).

¹⁴On this Orthodox praxis cf. J. Prader, *Il Matrimonio in Oriente e in Occidente*, 34-39.

¹⁵Pontifical Council for Legislative Texts (PCTL), *Instruction Dignitas Connubii to be observed by Diocesan and Interdiocesan Tribunals in Handling Causes of the Nullity of Marriage*, http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html.

¹⁶DC, art. 2 reports the same norm for the Latin Church, completing by this the *lacuna legis* which existed on this issue in the 1983 Latin Code.

subjected. This rule originates in the affirmation by the Second Vatican Council that Orthodox Churches have “the power to govern themselves according to the disciplines proper to them” (UR n° 16). By this the Council explicitly recognizes that Orthodox Churches exercise a real power of governance or jurisdiction¹⁷ and by such have the capacity to enact marriage law, by which their Orthodox faithful are bound, as long as the Orthodox discipline is not contrary to divine law.¹⁸ After having defined which law regulates a mixed marriage (i.e. divine law, Catholic canon law, Orthodox law), let us now apply it to the three elements that make up a marriage: 1) the canonical form, 2) the impediments and 3) the consent.

1. 1 With Regard to the Canonical Form:

The Church requires canonical form for the celebration of a marriage, even if only one of the spouses is a Catholic (see, CIC c. 1127 §1 and CCEO c. 834 §1). Because the marriage celebration is one single act, it is impossible that two authorities (Catholic and Orthodox) could be simultaneously competent to determine the canonical form. The manifestation of consent is such one and indivisible act, which cannot be regulated at the same time by two different legislations (Catholic and Orthodox). This implies that also in a mixed marriage the Catholic canonical form - i.e., the presence of a competent minister (a priest, a deacon or exceptionally a lay person) and two witnesses according to the Latin form of CIC cc. 1108 §1, 1111 §1, 1112 §1; the presence of a priest blessing the marriage and two witnesses according to the Eastern Catholic form of CCEO c. 828 §1 - is required *ad validitatem*. However, in the case of a Catholic-Orthodox marriage, this canonical form is only required *ad liceitatem tantum*, while for validity the presence of a sacred minister/blessing priest suffices (CIC c. 1127 §1 and CCEO c. 834 §2).¹⁹ If, according to

¹⁷See, I. ŹuŹek, “La giurisdizione dei vescovi ortodossi dopo il Concilio Vaticano II,” in *La Civiltà Cattolica* 122/2 (1971) 550-562.

¹⁸This principle was explicitly noted by the PCTL, *Adnotatio circa validitatem matrimoniorum civilium quae in Cazastania sub communistarum regimine celebrata sunt* of 13th May 2003, in *Communicationes* 35 (2003) 197-210 (more precisely 209). See also P. Gefaell, “La giurisdizione delle Chiese ortodosse per giudicare sulla validità del matrimonio dei loro fedeli,” in *Ius Ecclesiae* 19 (2007) 779-782.

¹⁹CIC c. 1127 §1: “[...] 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

the Latin discipline, a deacon (see, CIC cc. 1108 §1, 1111 §1) may validly assist at a marriage, according to the Eastern Catholic discipline the blessing of a priest (Catholic or Orthodox) is always required for validity. As such neither a deacon nor a layperson can validly bless a marriage in which one party is an Eastern Catholic, for he or she is bound to observe the sacred rite of priestly blessing (CCEO c. 828 §2). This norm is considered to be a personal norm, to which Orientals, Catholics as well as Orthodox, are bound wherever they are present, even in Latin territories.²⁰ Neither do the Orthodox Churches recognize as valid a marriage blessed by a deacon. According to the *mens legislatoris*, the exemption of canonical form in case of a mixed marriage with an Orthodox is applicable only when such a marriage is celebrated in an Orthodox church.²¹ For the rest CIC c. 1127 §1 and CCEO c. 834 §2 insist on “observing the other requirements of law,” i.e., all other requisites for a licit and valid

presence of a sacred minister is required and the other requirements of law are to be observed.”

CCEO c. 834 §2: “If, however, a Catholic party enrolled in some 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.”

This flexible norm motivated by the ecumenical openness of the Second Vatican Council towards the Orthodox Churches, qualified as real Churches (see, supra UR n° 15), was laid down in the Conciliar Decree on the Eastern Catholic Churches *Orientalium Ecclesiarum* n° 18: “To obviate invalid marriages when Eastern Catholics marry baptized Eastern non-Catholics and in order to promote fidelity in and the sanctity of marriage, as well as peace within the family, the Sacred Council determines that the canonical “form” for the celebration of these marriages is of obligation only for liceity; for their validity the presence of a sacred minister is sufficient, provided that other prescriptions of law are observed.”

²⁰This implies that a Latin deacon, though competent to assist at a marriage according to CIC cc. 1108 §1, 1111 §1, cannot be delegated to assist or bless a marriage of which one of the spouses is an oriental (Catholic or Orthodox). See, D. Salachas, *Il sacramento del matrimonio nel Nuovo Diritto Canonico delle Chiese Orientali*, Roma-Bologna 1994, 230. For the opposite view see, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 53. Idem, “La forma di celebrazione del matrimonio,” in AA. VV., *Il matrimonio nel Codice dei Canonici delle Chiese orientali*, Città del Vaticano 1994, 298.

²¹According to Prader this *mens legislatoris* results from the discussion among the Conciliar Fathers on OE n° 18. See, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 159.

marriage celebration such as the freedom from impediments and the three above mentioned conditions to obtain permission for a mixed marriage. With regard to the canonical form of the celebration, some canonists²² argue that the presence of witnesses (i.e., the ordinary canonical form) is no longer required *ad validitatem* and maintain that the mere intervention of the sacred minister/blessing priest is enough. This implies that a mixed marriage with an Orthodox can be celebrated by a blessing priest only, even without the presence of witnesses. However, even if the canonical form is only required *ad liceitatem tantum*, this does not mean that the spouses are entirely free to do whatever they like. If they want their marriage to be blessed in an Orthodox church by an Orthodox priest, the Catholic spouse still needs from the local ordinary/hierarchy an exemption²³ *ad liceitatem* from the canonical form,²⁴ together with the already mentioned

²²Pujol, Abate, Chiapetta, Bersini and the former Dean of the Roman Rota Mgr Stankiewicz hold this view. See, J. Prader, "La forma di celebrazione del matrimonio," 297 note n° 27. Other canonists such as Abbas and Prader hold the opposite view and retain that the presence of witnesses is still required. Cf. J. Prader, "La forma di celebrazione del matrimonio," 298; J. Abbas, "I matrimoni misti," in AA. VV., *Il matrimonio nel Codice dei Canonici delle Chiese orientali*, Città del Vaticano 1994, 197-198.

²³This exemption of canonical form *ad liceitatem tantum* in a Catholic-Orthodox marriage granted by the local ordinary/hierarchy is different from the dispensation of canonical form required *ad validitatem* which according to CCEO c. 835 may only be granted by the patriarch or by the Holy See. Exemption is somehow similar to permission. It is also in these words that the 2010 *Vademecum* of the Italian Episcopal Conference (see, supra note n° 1) speaks of exemption and not of dispensation: "37. [...] Nei matrimoni misti con orientali non cattolici l'osservanza della forma canonica cattolica è necessaria solo per la liceità. Questo comporta che l'Ordinario del luogo può esimere dall'osservanza della forma canonica."

²⁴It is well to bear in mind what the Ecumenical Directory states in n° 155: "The obligation imposed by some Churches or ecclesial Communities for the observance of their own form of marriage is not a motive for automatic dispensation from the Catholic canonical form. Such particular situations should form the subject of dialogue between the Churches, at least at the local level." The exemption from canonical form or permission to celebrate the wedding in an Orthodox church may be granted for the following motives: "the maintaining of family harmony, obtaining parental consent to the marriage, the recognition of the particular religious commitment of the non-Catholic partner or his/her blood relationship with a minister of another Church or ecclesial Community." However, "Episcopal Conferences are to issue norms by which such a dispensation

permission, also *ad liceitatem*, to celebrate a mixed marriage according to CIC c. 1124 and CCEO c. 813. In case the mixed marriage is celebrated in a Catholic church and blessed by a Catholic priest, the ordinary canonical form is to be followed, including the presence of two witnesses.

Last but not least, it is important to recall the prescription of CIC c. 1127 §3 and CCEO c. 839 according to which “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.” Nevertheless, nothing impedes an Orthodox minister from participating at a Catholic marriage celebration, offering other appropriate prayers, readings from the Scriptures, giving a brief exhortation and blessing the couple, as long as there is only one ceremony in which the presiding cleric receives the marriage vows and performs the matrimonial blessing. On the same terms, a Catholic minister (a priest or a deacon) may be present and participate at an Orthodox marriage celebration (see, ED nn° 157, 158).

1. 2 With Regard to the Impediments:

In mixed marriages, Catholics are bound by divine law and by Catholic canon law in accordance with CIC c. 1059 and CCEO c. 780 §1, while the Orthodox are bound by their proper discipline, as long as it does not contradict divine law, this in accordance with the above quoted CCEO c. 780 §2 n°1 and DC, art. 2 n°1. In fact all Orthodox Churches possess norms of marriage law, which have more or less been developed and are based upon the sacred canons of councils and synods. This means that with regard to the impediments, both spouses must be free from them, according to their proper discipline (Catholic and Orthodox). If not, a dispensation is needed from the competent ecclesial authority according to the rules or practice of that Church. If the impediment is absolute (i.e., a party is impeded to marry any other person, e.g., impediment of age, impotence, prior matrimonial bond, sacred orders or a public perpetual vow of chastity...) both spouses must be free from any such impediment. When the impediment is relative

may be granted in accordance with a common practice” (ED n° 154). In case of “doubt about the sufficiency of the cause, the dispensation is granted licitly and validly” (CIC c. 90 §2 and CCEO c. 1536 §3).

(i.e., a party is blocked from marrying a specific person, e.g., an impediment of consanguinity, affinity, public propriety, coniugicide, abduction...) the discipline in which the impediment exists or is the most severe, is to be followed and the dispensation is granted by the competent authority (Orthodox or Catholic). For instance in the Orthodox Churches of the Byzantine tradition the impediment of consanguinity in the collateral line extends to the 6th degree (c. 54 Council in Trullo extended by the *Ecloga* (Selection) of Emperor Leo III the Isaurian of 726),²⁵ while according to Catholic discipline (see, CIC c. 1091 §2 and CCEO c. 808 §2) it is limited to the 4th degree included (i.e., between direct cousins). The more severe discipline - in this case the Orthodox Byzantine discipline - needs to be followed and dispensation is to be required from competent Orthodox authority. In no way is the party not subject to such a relative impediment - in this case the Catholic party - able to free or liberate the other party bound by the impediment in his/her discipline - in this case the Orthodox party. Besides, CCEO c. 790 §2 (no equivalent canon in CIC, apart from CIC c. 1073) notes explicitly that: "an impediment, even if binding only one of the two parties, still renders the marriage invalid."

In this domain conflicts may still arise between Churches. As mentioned earlier, the Coptic, Ethiopic and Eritrean Orthodox Churches do not allow any mixed marriages to take place, unless the Catholic spouse converts to the Orthodox Church and is rebaptized. Such conflicts can only be solved or softened through dialogue between the Catholic and the Orthodox ecclesial authorities which must adopt a more flexible attitude regarding their own discipline taking into account pastoral sensitivity, the good of souls and ecumenical goodwill. At this stage, mention might be made of the remarkable developments achieved in the ongoing relations between the Malankara Syrian Orthodox Church and the Catholic Church. The *Interim Report on Marriage* of December 1990 still stated that:

7. Our two churches are not now in Eucharistic communion with each other. This situation makes it difficult for members of the two different Churches to be united in matrimony and to continue in one Eucharistic Fellowship. The Roman Catholic Church has special provisions for "mixed marriages" and for pastoral care of the "mixed" married couple and their

²⁵In the Ethiopic Orthodox Church the impediment of consanguinity extends to the 7th degree in the collateral line.

children. The Malankara Orthodox Church does not now permit its members to continue in that Church after marrying someone not in that Communion.²⁶

But a positive result was achieved due to ongoing dialogue in the January 1994 *Agreement between the Catholic Church and the Malankara Syrian Orthodox Church on Inter-Church Marriages* clearing the path for mixed Catholic - Malankara Orthodox marriages (no conversion or rebaptism is required from any of the spouses, each spouse is allowed the freedom to retain his/her ecclesial membership and the religious education of the children is left to the responsibility and the mutual accord of the spouses). Even Eucharistic hospitality for the spouses and their families during the marriage celebration (either in the Catholic Church, or in the Malankara Syrian Orthodox Church) is permitted:

Our two Churches desire to foster marriages within the same ecclesial communion and consider this the norm. However, we have to accept the pastoral reality that inter-Church marriages do take place. When such occasions arise, both Churches should facilitate the celebration of the sacrament of matrimony in either Church, allowing the bride/bridegroom the right and freedom to retain her/his own ecclesial communion, by providing necessary information and documents. On the occasion of these celebrations, the couple as well as their family members belonging to these two Churches are allowed to participate in the Holy Eucharist in the Church where the sacrament of matrimony is celebrated. We consider it also the great responsibility of the parents to pay special attention to impart to the extent possible and in mutual accord proper ecclesial formation to their children in full harmony with the tradition of the ecclesial communion to which they have to belong.²⁷

²⁶The Joint International Commission for Dialogue between the Roman Catholic Church and the Malankara Orthodox Syrian Church of India, *Interim Report on Marriage* of December 1990, to be found on http://www.prounione.urbe.it/dia-int/oo-rc_india/doc/e_oo-rc_india-_1990mar.html. The problem focused essentially on the impossibility of Eucharistic intercommunion between the two Churches.

²⁷The Joint International Commission for Dialogue between the Roman Catholic Church and the Malankara Orthodox Syrian Church of

With regard to impediments, two final observations need to be added. The first one is that a mixed marriage is still required to comply with civil law. Even if the parties are free from any canonical (Catholic and Orthodox) impediment, they still have to be able to celebrate their marriage according to civil law. For instance, according to Indian civil law, the minimum age of for the boy is 21 years and for the girl 18, while the minimal canonical age to marry according to Catholic discipline is 16 years for the boy and 14 for the girl (see, CIC c. 1083 and CCEO c. 800). In such cases, one may be confronted with a canonical marriage which cannot be recognized or entered into according to the norms of civil law. To celebrate such a marriage the permission of the local ordinary/hierarchy is needed (*ad liceitatem*) in accordance with CIC c. 1071 §1 n° 2 and CCEO c. 789 n° 2.

The second observation is that the impediments of impotence, a previous marriage bond and consanguinity in direct line in the first degree cannot be dispensed, since they are impediments of divine law. As such they impede all marriages, since all human beings (Catholics, non-Catholics and even the non-baptized) are bound by divine law. With regard to the first impediment, “the antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or of the woman, which is either absolute or relative, of its very nature invalidates a marriage” (CIC c. 1084 §1 and CCEO c. 801 §1).²⁸ This is usually called *impotentia coeundi* as distinct from *impotentia generandi* (i.e., not being able to produce children),²⁹ and is due to physical or anatomical defects or to functional (i.e., psychological) disturbances either of the man or of the woman. This impotence must be antecedent to the marriage, perpetual, absolute (it involves not being able to have intercourse with any other person of the opposite sex) or relative (it involves not being able to have intercourse with a particular given person of the opposite sex) and certain³⁰. Regarding the second impediment of divine law, “a person

India of 25th January 1994, http://www.prounione.urbe.it/dia-int/oo-rc_syrindia/doc/e_oo-rc_syrindia_1994agr.html.

²⁸In almost all Orthodox Churches impotence, even if not considered an impediment, constitutes a motive for divorce.

²⁹Sterility neither prohibits nor invalidates a marriage, except when it is the object of fraud by one of the parties (CIC c. 1084 §3 and CCEO c. 801 §3).

³⁰In case the “impotence is doubtful [...], the marriage is neither to be impeded nor is it to be declared null as long as the doubt exists” (CIC c. 1084 §2 and CCEO c. 801 §2).

who is held to a bond of a prior marriage invalidly attempts marriage" (CIC c. 1085 §1 and CCEO c. 802 §1). As long as the marriage lasts, both spouses are not able to contract another marriage. And "even if the first marriage is invalid or dissolved for any reason, it is not licit to celebrate another marriage before the invalidity or dissolution of the first is legitimately and certainly established" (CIC c. 1085 §2 and CCEO c. 802 §2). A marriage ends with the death of one of the spouses, with the dissolution of the first bond³¹ or with a declaration of nullity. The unity and indissolubility of marriage, both essential (divine law) properties of marriage (see, CIC c. 1056 and CCEO c. 776 §3) exclude all types of bigamy, polygamy or polyandry. At this stage, a delicate issue arises with regard to the discipline and pastoral praxis of the Orthodox Churches: in the case of adultery, or if for other reasons the marriage is broken or failed, the Orthodox spouses can obtain from their Orthodox ecclesial authorities on the basis of *oikonomia* the permission to conclude a second and even a third wedding.³² It has already been mentioned that under no circumstances - even in the

³¹Dissolution of a valid marriage bond is only possible in the context of 1) a dispensation of a marriage *ratum sed non consummatum* (see, CIC c. 1142 and CCEO c. 862), 2) the application of the Pauline privilege in favor of the faith (see, CIC c. 1143 and CCEO c. 854) and 3) the dissolution of a marriage in favor of the faith or Petrine privilege (see, CCEO c. 1384, the 2001 norms of the Congregation of the Doctrine of the Faith). See, CDF, *Normae "Potestas Ecclesiae" de conficiendo processu pro solutione vinculi matrimonialis in favorem fidei*, 30 aprile 2001. English translation in J. Kowal & W. Woestman, *Special Marriage cases and Procedures*, Ottawa 2008.

³²This Orthodox praxis is based upon the term *porneia* in Mt 19, 9 and subscribed by c. 9 of the Canons of Saint Basil, c. 87 of the Council in Trullo (adultery as ground for divorce) and by various other Byzantine legal sources such as the *Ecloga* (726) of Leo III the Isaurian, the *Novella* 89 (893) of Leo VI the wise, according to which the Orthodox Church is obliged to bless second marriages, and finally the Decree (1086) of Alexis I Komnenos. Meyendorff affirms that: "Only after the tenth century was the Church obliged to issue divorces. It did so generally in conformity with civil legislation of the Roman Empire, and later with that of the various countries." J. Meyendorff, *Marriage: an Orthodox Perspective*, New York 1970, 46. See also supra note n° 14.

Also other Orthodox Churches such as the Assyrian Church of the East, the Syrian, the Armenian and Coptic Orthodox Churches accept divorce, while for the Ethiopian Orthodox Church a marriage becomes indissoluble only by means of a solemn marriage ceremony in which both spouses receive Holy Communion. See, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 38-39.

case of adultery or of a broken marriage - divorce is allowed according to the Catholic doctrine of indissolubility.³³ This implies that an Orthodox who has divorced and been allowed to enter a second wedding according to Orthodox pastoral praxis and discipline, remains according to the Catholic doctrine bound by the impediment of previous marriage bond and therefore not able to remarry a Catholic party. In order to remarry the divorced Orthodox needs to previously obtain from the competent Catholic authorities either the dissolution of his/her marriage bond or a declaration of nullity. As already said, the impediment of the previous marriage bond cannot be dispensed by any human authority. "What God has joined together, let man not separate" (Mt 19, 6). If a marriage ends with the death of one of the spouses, it is important to keep in mind that neither a lengthy absence, nor the presumption of the death of a spouse suffices to prove his/her death. In order to remarry, one

³³This goes back as far as the Council of Trent, Session XXIV, c. 7: "If anyone says that the Church errs in that she taught and teaches that in accordance with evangelical and apostolic doctrine the bond of matrimony cannot be dissolved by reason of adultery on the part of one of the parties, and that both, or even the innocent party who gave no occasion for adultery, cannot contract another marriage during the lifetime of the other, and that he is guilty of adultery who, having put away the adulteress, shall marry another, and she also who, having put away the adulterer, shall marry another,^[13] let him be anathema." (DS n° 1807). See also the Vatican II conciliar Constitution *Gaudium et Spes* n° 48 and the *Catechism of the Catholic Church* n° 1640.

Pope John Paul II in his January 2000 Allocation to the Roman Rota affirmed in clear terms the principle of indissolubility of marriage: "It seems quite clear then that the non-extension of the Roman Pontiff's power to dissolve ratified and consummated sacramental marriages is taught by the Church's Magisterium as a doctrine to be held definitively, even if it has not been solemnly declared by a defining act. This doctrine, in fact, has been explicitly proposed by the Roman Pontiffs in categorical terms, in a constant way and over a sufficiently long period of time. It was made their own and taught by all the Bishops in communion with the See of Peter, with the knowledge that it must always be held and accepted by the faithful." John Paul II, *Allocuzione alla Rota Romana del 21 gennaio 2000*, in *AAS* 92 (2000) 350-355. English translation to found on http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/jan-mar/documents/hf_jp-ii_spe_-20000121_rota-romana_en.html.

needs an authentic ecclesiastical or civil document certifying the death of the spouse.³⁴

The third impediment of divine law is constituted by consanguinity in direct line in the first degree (parents-children), see, CIC c. 1091 §1 and CCEO c. 808 §1. Concerning the second degree in the collateral line (brother-sister) it is doubtful whether the impediment is of divine law; however the Catholic Church and also the Orthodox Churches never allow the celebration of such a marriage (see, CIC c. 1078 §3 and CCEO c. 795 §3).³⁵

All other impediments in Catholic canon law are of ecclesiastical positive law and as such do not bind the Orthodox, since merely ecclesiastical laws only bind Catholics (see, CIC c. 11 and CCEO c. 1490).

1. 3 With regard to The consent as a Constitutive Element of Marriage:

Matrimonial consent has to be free of any vice or defect. To the extent that a vice or defect of consent is of divine law or only of ecclesiastical positive law, are the Orthodox are bound by it or not? In other words, the Orthodox are bound by the Catholic discipline on the vices or defects of consent, if their invalidating effects on marriage are rooted in divine law. For all other defects of consent, they remain subject to their own Orthodox discipline in accordance with CCEO c. 780 §2 and DC, art. 2 §2. Without analyzing in detail every vice or defect of consent, we will only indicate their divine or merely ecclesiastical law character, bearing in mind that vices or

³⁴However CIC c. 1707 and CCEO c. 1383 are of some help in the sense that the eparchial/diocesan bishop may issue a declaration of presumed death, when the death of a person cannot be proven by an authentic ecclesiastical or civil document. For instance, if a person disappears in a war, a shipwreck, an earthquake, a tsunami...

³⁵There have been some rare cases in which the Roman Pontiffs, such as Paul III and Paul VI, have convalidated marriages between half brothers and sisters (i.e., when one of the parents is common to both) who have been raised separately. But normally, even if there arises a doubt whether the parties are related through consanguinity in any degree of the direct line or in the second degree of the collateral line, marriage is never permitted, see, CIC c. 1091 §4 and & CCEO c. 808 §3.

defects which may invalidate the consent must be present and verified at the time of the marriage celebration³⁶.

Psychological incapacity, as developed as a ground of marriage nullity by Roman Rotal jurisprudence and codified in the three cases of CIC c. 1095 and CCEO c. 818,³⁷ is considered as clarifying natural divine law. It is obvious that when a spouse is affected by a lack of sufficient use of reason (e.g., in case of psychosis, autism, schizophrenia, Down syndrome, etc.), or by a grave lack of discretion to judge their essential matrimonial rights and duties (e.g., various forms of psychopathy and neuroses such as hysteria, neurasthenia, manic depression, also certain forms of affective immaturity and the lack of internal freedom due to psychological factors, etc.), or still is not capable for psychological reasons to assume the essential obligations of marriage (e.g., the various types of “borderline” personalities, also psychosexual anomalies such as nymphomania, sadomasochism, fetishism, and also homosexuality), he or she is judged incapable of producing a valid consent. Aside from his or her confessional status, this renders the marriage null and void. As such, this defect of consent is applicable to non-Catholics as well.

Error regarding the essence of marriage (see, CIC c. 1096 and CCEO c. 819) vitiates matrimonial consent in accordance with divine law. In order to marry, a person should at least not be ignorant of the fact that marriage is a permanent *consortium* between a man and a woman ordered toward the procreation of offspring by means of some sexual cooperation. The CIC adds that such ignorance is not presumed after puberty (see, CIC c. 1096 §2).

³⁶For example, the Alzheimer disease of one of the spouses after 20, 30 years of marriage cannot be verified at the time of the marriage celebration.

³⁷CIC c. 1095 and CCEO c. 818: “They are incapable of contracting marriage: 1, who lack the sufficient use of reason; 2, who suffer from grave lack of discretion of judgment concerning essential matrimonial rights and duties which are to be mutually given and accepted; 3, who are not capable of assuming the essential obligations of matrimony due to causes of a psychic nature.” Cf. AA. VV., *L’incapacità di intendere e di volere nel diritto matrimoniale canonico (can. 1095 nn° 1 - 2)*, Città del Vaticano 2000; AA. VV., *L’incapacità di assumere gli oneri essenziali del matrimonio*, Città del Vaticano 1998.

In the case of error concerning the person³⁸ (see, CIC c. 1097 §1 and CCEO c. 820 §1), doctrine and jurisprudence have always upheld that such a marriage is null by divine law. The Orthodox Churches also hold the same position. As to error concerning a quality of a person (see, CIC c. 1097 §2 and CCEO c. 820 §2), in principle such an error, even if is the cause of marriage, does not invalidate matrimony unless this quality was directly and principally intended. This means that the consent of a spouse is made directly and principally dependent upon the presence of the quality intended. The quality intended constitutes in this way the object of consent (e.g., "I take you in marriage because you are a virgin"; "I want you to be a virgin and my consent depends on it"). J. Prader makes a difference between substantial qualities that are identical to the essence of marriage itself (e.g., the quality of belonging to the opposite sex, of being capable to give a valid consent...) and accidental qualities (e.g., the quality of being an engineer...) that do not affect the essence of marriage. According to Prader, only an error affecting the substantial qualities directly and principally intended invalidates a marriage by natural divine law, while on the contrary an error concerning mere accidental qualities only invalidates a marriage by positive ecclesiastical law.³⁹ It is left to doctrine and jurisprudence to indicate which qualities are substantial and which are accidental. In the case of doubt, a marriage may only be considered null by positive ecclesiastical law.

A marriage of a spouse deceived by fraud, perpetrated by a person (the other spouse or a third person) concerning some quality of the other spouse which of its very nature can seriously affect the partnership of conjugal life, and this with the purpose to obtain his/her matrimonial consent, is considered null (see, CIC c. 1098 and CCEO c. 821). For instance,⁴⁰ a girl hides that she is no longer a virgin although she knows this is vital for her boyfriend; the parents hide or lie about some serious psychological illness or genetic disease of their son, or a girl pretends that she is pregnant of her boyfriend in order to make him marry her. This ground of marriage nullity was

³⁸For instance, the biblical example of Jacob who wanted to marry Rachel, but found himself with Lea in his tent (see, Gn. 29: 15-31). This is of course a very rare ground of marriage nullity; it may be encountered when a marriage is celebrated by proxy (see, CIC c. 1105 and CCEO c. 837 §2).

³⁹See, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 177.

⁴⁰CCEO cc. 1084 §3 and 801 §3 mention as example sterility.

introduced by the 1983 Latin Code, but unanimity is lacking if a marriage entered in by fraud is invalid by divine natural law or not.⁴¹ According to the Roman Rota, fraud does not invalidate marriage by divine natural law, but only by positive ecclesiastical law. This implies that this vice or defect of consent as such is not applicable to non-Catholics. However fraud concerning the virginity of the bride invalidates the marriage in the Greek, Coptic, Ethiopian Orthodox Churches and also in the Chaldean Church.

An error concerning the unity, indissolubility or sacramental dignity of matrimony does not vitiate matrimonial consent as long as it does not affect the will (see, CIC c. 1099 and CCEO c. 822). By itself, error (e.g., the Orthodox spouse is convinced that the Catholic Church also employs the Orthodox pastoral praxis of second and third weddings) or ignorance is not enough to render a marriage null. The marriage is only invalidated if the error affects the will of the spouse. The error, for example due to a mentality which regards divorce as normal or as a result of accepting a relativistic hedonistic culture which accepts free temporary unions (“as long as we are happy”), of a spouse must enunciate itself as a positive act of the will to conclude a marriage which is not indissoluble, monogamic or sacramental. This vice or defect of consent, almost identical to that of simulation or of a marriage based on condition (see, *infra*), is of divine right and as such applicable to non-Catholics.

⁴¹An interesting opinion is that of Daniel Faltin, a former Roman Rota judge. Departing from the contractualistic (Latin) view of marriage where fraud can only derive from positive ecclesiastical law, Faltin invokes the Eastern conception of marriage, i.e. marriage is a sacred reality in the image of the spousal union between Christ and His Church; the marriage between two spouses is then inserted in God’s Alliance or in other words God also enters with His Grace in their alliance. Faltin raises the question asking how one can speak of a *foedus*, an alliance between spouses in the image of the spousal union of Christ and His Church, if one of the parties uses fraud to establish a *consortium totius vitae* that is inserted in God’s project and in which God Himself is involved. Cf. D. Faltin, “Il consenso matrimoniale: incapacità, errore e dolo,” in AA. VV., *Il matrimonio nel Codice dei Canonici delle Chiese Orientali*, Città del Vaticano 1994, 227-230. Prader in turn argues that fraud derives only from divine law when it provokes an error regarding a substantial quality that is directly and principally intended by the other spouse. Cf. J. Prader, *Il Matrimonio in Oriente e in Occidente*, 181-182. In this case, the ground of nullity is based rather on an error concerning the quality of a person of CIC c. 1097 §2 and CCEO c. 820 §2, than on fraud.

Excluding marriage itself (i.e., excluding every form of conjugal life, e.g., he/she enters a marriage only to obtain citizenship) or some essential element of marriage (i.e., excluding the good of the spouses, the procreation and education of offspring, e.g., one or both of the spouses exclude having children in an absolute and perpetual act of the will) or some essential property of marriage (i.e., unity and indissolubility, e.g., one or both of the spouses insist on the right to divorce if things do not turn out as he/she/they wish, or a spouse reserves the right to have or continue extramarital relationships) is a vice of consent invalidating a marriage (see, CIC c. 1101 §2 and CCEO c. 824 §2). This vice is also called simulation, simply because what is externally affirmed does not correspond to the inner act of the will. Marriage is feigned or simulated. It is obvious that such a vice is not in accord with the full matrimonial consent in the way the Church intends a marriage. By a positive act of the will, one or both spouses decide to exclude marriage itself (i.e., total simulation) or some essential element or property (i.e., partial simulation of marriage) from his/her/their consent. Since both, the essential elements and properties of marriage are of divine law, such a vice of consent invalidates marriage by divine law and as such is applicable to non-Catholics.

With regard to a marriage based on a condition (e.g., “I marry you on the condition that you are a virgin”), there is a notable difference between the CIC and the CCEO. Although CIC c. 1102 stipulates: “A marriage entered into subject to a condition about the past or the present is valid or not insofar as that which is subject to the condition exists or not,”⁴² CCEO c. 826 says: “Marriage based on a condition cannot be validly celebrated.” This is due to a different conception of marriage: the CIC holds a contractualistic (derived from Roman law) view of marriage, while the CCEO holds a sacramental view of marriage. The Eastern conception of marriage insists on the sacred character of a matrimonial alliance in which a man and a woman give and receive each other mutually in the image of the spousal union of Christ and His bride, the Church. Through a sacred rite, both spouses are united in God, who in His turn engages Himself in their marital bond by bestowing His Grace on the spouses. In this Eastern conception of the sacred, it is perceived as odd that it would

⁴²According to CIC c. 1101 §1: “A marriage subject to a condition about the future cannot be contracted validly”, because the marriage bond would only come into existence if the condition verifies itself in the near or far future, while in the meantime spouses would not be strictly married.

be possible to make the efficiency of divine grace, received through the priestly blessing, dependent upon the verification or not of a condition (including about the past or the present). This norm both in the CIC and in the CCEO is considered to be of merely positive ecclesiastical law and as such not applicable to non-Catholics. Nevertheless, Eastern discipline, both Catholic and Orthodox, does not admit the possibility of any form of conditional consent. For the Orthodox such marriages are also inconceivable.

A marriage entered into on the basis of physical force (see, CIC c. 1103 and CCEO c. 825) is of course invalid by divine law. A marriage celebrated because of grave fear from without, compelling a person to choose marriage in order to be free from that fear (see, CIC c. 1103 and CCEO c. 825) is a case worthy of our attention. The Latin Church has discussed this case for centuries to determine if this vice of consent invalidates a marriage by divine law or not.⁴³ On the other hand, the Eastern Churches have no doubt about the fact that grave fear invalidates consent by divine natural law.⁴⁴ Already in 1736, the Maronite Synod of Mount Lebanon, approved by the Holy See, declared unambiguously that: "*Iure naturali error personae et metus cadens in constantem virum [...] irritum faciunt matrimonium.*"⁴⁵ In November 1986, the Pontifical Council for Legislative Texts affirmed that the canon on grave fear could also be applied to marriages of non-Catholics, and as such is of divine natural law.⁴⁶ It is essential

⁴³See, C. Gullo, "Simulazione e metus," in AA. VV., *Il matrimonio nel Codice dei Canonici delle Chiese Orientali*, Città del Vaticano 1994, 259-267

⁴⁴See, A. Coussa, *Epitome praelectionum de iure ecclesiastico orientali*, Roma 1950, 175-176; E. Hermann, *De disciplina sacramenti matrimonii pro Ecclesia Orientali*, Roma 1964, 202.

⁴⁵G. Mansi, *Sacrorum Conciliorum nova et amplissima collectio*, Graz 1961, vol. XXXVIII, pars II, cap. XI, c. 11, I.

⁴⁶PCLT, AAS 79 (1987) 1132: "*Utrum vitium consensus de quo can. 1103 matrimoniis non Catholicorum applicari possit.*" "*Affirmative.*" This decision received papal approval.

Carlo Gullo also argues that grave fear invalidates a marriage by divine natural law, quoting three instructions from the Holy Office regarding Eastern Catholic Churches: the first one sent to the Ethiopian Catholics on 20th of June 1866, the second one to the bishops of the Churches of oriental rite on 20th of June 1883 and the third one sent to the bishops of Albania on 15th of February 1901. C. Gullo, "Simulazione e metus," 266: "[...] già il 20 giugno 1866 nell'Istruzione inviata ai cattolici etiopi (Galla) scriveva che nessuno può essere costretto al matrimonio "*quia matrimonium iure naturae*

that a person choosing his/her state of life should be absolutely immune from every form of grave physical or moral force. Grave fear precisely constitutes a defect that hinders a person's freedom to choose and determine his/her life (to marry or not, to marry this particular person or not). In the Orthodox Churches grave moral violence or threat is also considered to act as a vice of consent.

The majority of vices or defects of consent, except fraud and consent based on a condition, are of divine law, because they affect the essence of marriage itself. As such the Catholic discipline on vices and defects of consent is also applicable to the Orthodox. In the case of doubt or controversy whether a vice (e.g., error concerning the accidental quality of a person and to a certain extent also fraud) is of divine law or of mere positive ecclesiastical law and as a result binds or does not bind the Orthodox, it must be held that this is of mere ecclesiastical law and as such is not applicable to the Orthodox. But, in case of doubt, "the validity of a marriage is to be upheld until the contrary is proven," since "marriage enjoys the favor of the law" (CIC c. 1060 and CCEO c. 779).

2. Second Issue: Which Norms Regulate a Judgment on the Validity of Previous Orthodox Marriages?

We now arrive at the second issue raised by the increasing phenomenon of mixed marriages between Catholics and the Orthodox, namely that concerning the increasing number of nullity cases affecting previous marriages concluded by an Orthodox who later desires to enter a second marriage with a Catholic partner. A serious pastoral and canonical problem arises when a divorced or separated Orthodox wants to remarry a Catholic. Even if, as already mentioned, the Orthodox pastoral praxis allows, for reasons of *oikonomia*, to conclude a second and even a third wedding, the Orthodox partner is barred by the impediment of a prior matrimonial bond. This impediment is of divine law and cannot be dispensed. This implies that the Orthodox, even if he/she is free to

liber esse debet;" la stessa Congregazione del S. Ufficio il 20 giugno 1883 nella sua Istruzione ai Vescovi delle Chiese di Rito Orientale dichiarava come certo che il *metus*, anche se non previsto dalla disciplina dei singoli Riti, rendeva nullo il matrimonio anche per fedeli delle Chiese di Rito orientale, che per sé non sarebbero state tenute alla disciplina della Chiesa latina; ancora la Congregazione del S. Ufficio nell'Istruzione data ai Vescovi dell'Albania il 15 febbraio 1901, dichiarava esplicitamente che il *metus*, colpendo il consenso, "in ipso iure naturali fundamentum habet [...]"

marry according to the Orthodox discipline, cannot remarry a Catholic partner. Neither is it possible to accept or recognize a document by which Orthodox authorities have “annulled”⁴⁷ the previous marriage, have ratified a civil divorce decree, or have otherwise established the free state of the Orthodox party.

In May 2003 the Pontifical Council for Legislative Texts issued a note according to which:

A non-Catholic oriental Christian might present to Catholic authorities a document of declaration of marriage nullity of his/her Church. Such a judgment of nullity cannot as such be recognized by the Catholic Church, for the reason that various theological and juridical questions regarding the validity of a sacramental marriage of oriental non-Catholics are not yet clarified. Only in the case of a defect or lack of form prescribed by the law of their Church may the judgment of the Orthodox authority be recognized, save divine law.⁴⁸

In the following declaration of October 2006, the Apostolic Signatura, confirmed that the Church cannot recognize Orthodox judgments of marriage “annulment,” since in reality these are decrees or judgments of divorce.⁴⁹ The motive is that Orthodox authorities apply *oikonomia* (condescendence)⁵⁰ and at the end accept whatever

⁴⁷See, J. S. Saad, *La dissolution matrimoniale dans les communautés Orthodoxes au Liban*, Doctoral thesis PIO, Rome 2002; P. Gefaell, “La giurisdizione delle Chiese ortodosse per giudicare sulla validità del matrimonio dei loro fedeli,” 790.

⁴⁸PCLT, *Adnotatio circa validitatem matrimoniorum civilium quae in Cazastania sub communistarum regimine celebrata sunt* of 13th May 2003, in *Communicationes* 35 (2003) 197-210. Translation, by the autor of this article.

⁴⁹Tribunale Supremo della Segnatura Apostolica, *Dichiarazione* del 20 ottobre 2006, in *Communicationes* 93 (2007) 66f. Already in 1991 the Apostolic Signatura responded in the same way that the case present was a divorce case and not one of nullity declaration. See, Segnatura Apostolica, Prot. 22343/90 V.T. del 7 gennaio 1991, in J. Llobell, “La giurisdizione della Chiesa sul matrimonio degli acattolici”, in J. Carreras (ed.), *La giurisdizione della Chiesa sul matrimonio e sulla famiglia*, Milano 1998, 88.

⁵⁰On the topic of *oikonomia*, see P. Gefaell, “Fondamenti e limiti dell’*Oikonomia* nella tradizione orientale,” in *Ius Ecclesiae* 12 (2000) 419-436.

grave motive for which the marriage is broken⁵¹ and allow remarriage, without investigating properly if the previous marriage is invalid. These judgments are not to be considered as proper nullity declarations as understood by Catholic discipline for they do not accord with the doctrine of marriage indissolubility. It is therefore still required that the previous Orthodox marriage be declared null by the Catholic tribunals (with a double conform judgment) or be dissolved (e.g., by the dispensation of a *ratum sed non consummatum* marriage)⁵² or ended by the death of the previous spouse.⁵³

In fact the number of cases in which divorced Orthodox ask Catholic ecclesiastical tribunals to declare null their previous Orthodox marriage, is steadily on the increase. According to CIC c. 1671 and CCEO c. 1357 marriage cases of the baptized, including the Orthodox, belong to the Church by proper right.⁵⁴ As such non-Catholic Christians are not barred from introducing a case before a

⁵¹For instance the Rumanian Orthodox Church accepts up to 25 grounds for divorce. Cf. P. Gefaell, "La giurisdizione delle Chiese ortodosse per giudicare sulla validità del matrimonio dei loro fedeli," 788.

⁵²It might be interesting to recall that if the previous marriage was between an Orthodox party and a non-baptized party, the Orthodox party is entitled to petition the Roman Pontiff for a dissolution of the previous bond (non-sacramental marriage) based on the dissolution of a marriage in favor of the faith (Petrine privilege). See, CCEO c. 1384 and more particular the 2001 norms of the CDF. See, *supra* note n° 31.

⁵³In order to establish the free state of an Orthodox party who only contracted a civil marriage, the Apostolic Signatura in a *Responsum* of 3th of January 2007, explicitly admitted that the free state to marry may be asserted during the marriage preparation time, without having to present a case before the ecclesiastical tribunals. See, Tribunale Supremo della Segnatura Apostolica, *Responsum* del 3 gennaio 2007, in *Periodica* 97 (2008) 45-46. See, G. P. Montini, "La procedura di investigazione prematrimoniale è idonea alla comprovazione dello stato libero di fedeli ortodossi che hanno attentato il matrimonio civile," in *Periodica* 97 (2008) 47-98. A similar norm was already foreseen by CCEO c. 1372 §2: "[...] if it is the case of one who would have been obliged to observe the prescribed form for the celebration of marriage required by law, but who attempted marriage before a civil official or a non-Catholic minister, the pre-nuptial investigation mentioned in can. 784 suffices to prove his or her free status."

⁵⁴This is confirmed by DC, art. 3 §1: "The matrimonial causes of the baptized pertain by right to the ecclesiastical judge."

Catholic tribunal⁵⁵ in order to obtain a declaration of nullity of their marriage, even if this marriage was not with a Catholic party. However DC, art. 3 §2 specifies that “an ecclesiastical judge hears only those causes of the nullity of marriage of non-Catholics, whether baptized or unbaptized, in which it is necessary to establish the free state of at least one party before the Catholic Church [...].” A new question arises: A Catholic judge should evaluate the validity of an Orthodox marriage according to which substantial law? The answer lies in CCEO c. 781, assumed by DC, art. 4 §1 for the Latin Church:

If the Church must judge the validity of a marriage between baptized non-Catholics: 1, there is to be concern for the law by which the parties were bound at the time of the celebration of marriage in the light of can. 780 §2;

2, with regard to the form of the celebration, the Church recognizes any form prescribed or admitted by the law to which the parties were subject at the time of the celebration of the marriage, provided that the consent be expressed in a public form and, when at least one of the parties is a baptized member of an Eastern non-Catholic Church, the marriage be celebrated with a sacred rite.

The validity of an Orthodox marriage is to be judged according to the law to which the marriage was subject at the moment of its celebration, in conformity with CCEO c. 780 §2 and DC, art. 2 §2, which means, according to Orthodox law, except for divine law. The application of divine law, also to Orthodox marriages, implies that if the ground of nullity rests in an impediment of divine law (i.e., the impediment of a prior marriage bond, impotence and consanguinity in direct line in the first degree) or rests in a vice or defect of consent rooted in divine law (e.g., psychological incapacity, physical violence, simulation with regard to essential elements or properties of marriage, error concerning the person or concerning the unity, indissolubility or sacramental dignity of matrimony and grave fear), Catholic canonical norms rooted in divine law are to be applied.⁵⁶ It

⁵⁵This is also confirmed by CIC c. 1476 and CCEO c. 1134, according to which: “Anyone, whether baptized or not, can act in a trial [...].”

⁵⁶At the same time nothing precludes taking inspiration from Catholic doctrine and Roman Rotal jurisprudence with regard to these norms rooted in divine law.

is still debated as a point of doctrine whether error concerning an accidental quality of a person and to a certain extent also fraud invalidate a marriage by divine law or by mere ecclesiastical positive law. Taking also into account the law to which parties were bound at the time of their marriage celebration in accordance with CCEO c. 781 n°1 and DC, art. 4 §1 n°1, this implies that if the ground of nullity resides in an impediment of mere ecclesiastical positive law (e.g., public perpetual vow of chastity, sacred orders, affinity, public propriety, adoption, disparity of cult...) or resides in a vice or defect of consent rooted in ecclesiastical law (e.g., fraud, consent based on condition), Orthodox law is to be applied. However, in Orthodox discipline it is quite often not certain whether a given impediment invalidates a marriage or merely prohibits it, whether it is still applicable or whether it has been abandoned or abrogated,⁵⁷ whether it has been dispensed from or not. In any case ordinary judicial process ought to be followed, with the exception provided by CIC c. 1686 and CCEO c. 1372 §1 on documentary process.⁵⁸

⁵⁷For example, c. 72 of the Council in Trullo according to which mixed marriages between Orthodox and heretics are prohibited under pain of nullity. This impediment originally invalidating such marriages is not applicable anymore to mixed marriages with Catholics, who are no longer anymore, at least according to the leading Orthodox opinion, viewed as heretics. Above we have indicated that nowadays those marriages are accepted by way of *oikonomia* (see, supra note n° 4).

⁵⁸CIC c. 1686: "After receiving a petition proposed according to the norm of can. 1677, the judicial vicar or a judge designated by him can declare the nullity of a marriage by sentence if a document subject to no contradiction or exception clearly establishes the existence of a diriment impediment or a defect of legitimate form, provided that it is equally certain that no dispensation was given, or establishes the lack of a valid mandate of a proxy. In these cases, the formalities of the ordinary process are omitted except for the citation of the parties and the intervention of the defender of the bond."

CCEO c. 1372 §1: "After a petition has been admitted, the judicial vicar or a judge designated by him, omitting the formalities of the ordinary process but having cited the parties and with the intervention of the defender of the bond, can declare the nullity of a marriage by a sentence, if from a document which is subject to no contradiction or exception there is certain proof of the existence of a diriment impediment or a defect of the form for the celebration of marriage required by law, provided that it is clear with equal certitude that a dispensation was not granted; this can also

With regard to the form of marriage, CCEO c. 781 n° 2 and DC, art. 4 §1 recognize whatever form is prescribed or admitted by the law to which the parties were subject at the time of the celebration of their marriage, provided that their consent be expressed in a public form. The Church wants to avoid at any cost clandestine or private marriages. As such the civil form would also be sufficient. However, if at least one of the parties is Orthodox, the marriage ought to have been celebrated with a sacred rite, i.e. the intervention of a blessing priest (not a deacon nor a layperson). Aside from this, reference should be made to the discipline or praxis of the Orthodox Churches, of which almost all require a priestly blessing as a constitutive element for the validity of marriage as a sacrament.⁵⁹ On the basis of UR n° 16 which recognizes that the Orthodox Churches have “the power to govern themselves according to the disciplines proper to them” (see, *supra*), also with regard to marriage, including marriage form, the Apostolic Signatura from the 1970’s onwards has not hesitated to declare as null the marriages of Orthodox spouses due to lack of the canonical form (i.e., the priestly blessing): e.g., a marriage between two Rumanian Orthodox before a civil servant; a marriage between a Greek Orthodox and an Anglican before an Anglican minister (who is not considered to be a validly ordained minister); a marriage between an Armenian Orthodox and a Presbyterian before a Presbyterian minister etc.⁶⁰ Since Orthodox Churches, with the notable exception of the Assyrian Church of the East,⁶¹ do not admit any extraordinary canonical form (i.e. in the absence of a competent blessing priest), a Catholic judge should also declare as invalid a marriage between two Orthodox spouses that were without the

be done if there is certain proof of the defect of a valid mandate of procurator.”

⁵⁹See, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 221-223.

⁶⁰The first judgment from the Apostolic Signatura in this matter dates from 28th November 1970 and received pontifical approval and as such acquired normative character. See, X. Ochoa, *Leges Ecclesiae*, V, 6394-6399. For other examples, see, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 56 and J. Prader, “La forma di celebrazione del matrimonio,” 293 note n° 22.

⁶¹Based on an ancient source of the VIIIth century the Assyrian Church of the East allows both spouses to marry before at least two witnesses in those regions where there are no priests available, provided they receive later as soon as possible a priestly blessing. See, J. Prader, *Il Matrimonio in Oriente e in Occidente*, 223.

impossibility of having access to a priest. For the Orthodox Churches (e.g. as for the Russian Orthodox Church) such a marriage - without being a sacrament, since for the Orthodox the priest is the minister of the sacrament of matrimony and not the spouses - would simply be considered a lawful and valid contract.⁶² In such cases, in order to establish the free state of an Orthodox party to remarry with a Catholic, a pre-matrimonial investigation completed by the local ordinary/hierarch or parish priest is enough.⁶³ Let us also recall that in the case of lack or a defect of marriage form prescribed by Orthodox discipline, Catholic authorities are allowed to recognize a judgment of the competent Orthodox authority, but only in this matter.⁶⁴

Conclusion

We would like to make two concluding reflections. The first is that the Orthodox faithful, marrying Catholics, are not exempted from Catholic canon law, but are indirectly subject to it, for the simple reason that the canons on marriage are still applicable even if only one of the spouses is Catholic. The second one is that Orthodox faithful, marrying Catholics, are not only indirectly subject to Catholic canon law, but also continue to be subject to their Orthodox discipline, as long as it is not in contradiction with divine law.

Indeed, Vatican II recognized the power of the Orthodox Churches "to govern themselves according to the disciplines proper to them" (UR n° 16). This principle stands at the root of CCEO c. 780 §2, 781, assumed by the 2005 Instruction *Dignitas Connubii* (artt. 2 §2, 4§1) for the Latin Church. These norms deal with two canonical pastoral issues.

The first issue deals with the norms regulating mixed Catholic-Orthodox marriages. These are: divine law, Catholic canon law regulating: a) the possibility of a mixed marriage (i.e., the permission

⁶²J. Prader, "La forma di celebrazione del matrimonio," 295.

⁶³See, Tribunale Supremo della Segnatura Apostolica, *Responsum* del 3 gennaio 2007. This is also provided by CCEO c. 1372 §2. See, supra note n° 53.

⁶⁴See, PCLT, *Annotatio circa validitatem matrimoniorum civilium quae in Cazastania sub communistarum regimine celebrata sunt* of 13th May 2003: "[...] Only in the case of a defect or lack of form prescribed by the law of their Church may the judgment of the Orthodox authority be recognized, aside from divine law." See, supra note n° 48.

ad liceitatem tantum to celebrate a mixed marriage), b) canonical form, even if only required *ad liceitatem* in case of a Catholic-Orthodox wedding, as long as a sacred minister/blessing priest intervenes (*ad validitatem*), c) impediments of divine law (impotence, prior marriage bond, consanguinity in direct line in the first degree), and finally d) vices or defects of consent rooted in divine law (though doubt remains regarding the error concerning an accidental quality of a person and to a certain extent also fraud). Orthodox legislation is applied in all other fields of discipline that are not of divine law, but only of ecclesiastical positive law, i.e., with regard to impediments (e.g., minimal canonical age) and to vices or defects of consent (e.g., a marriage based on a condition).

The second issue deals with the norms regulating the judgment on the validity of previous marriages of the Orthodox, who want to remarry with Catholics. Because of the impediment of their prior marriage bond and because the Catholic Church does not recognize the “annulments” granted by Orthodox authorities, many Orthodox introduce a case before Catholic ecclesiastical tribunals in order to obtain a declaration of nullity of their previous marriage.⁶⁵ Not only the Orthodox discipline, to which the parties were bound at the time of their marriage celebration, but also Catholic norms with regard to impediments, vices or defects of consent rooted in divine law, are applicable. Concerning the form of celebration of those marriages, Orthodox regulations should be applied, bearing in mind that for validity the marriage must at least have been celebrated with a sacred rite (i.e., intervention of a blessing priest).

⁶⁵Bearing in mind the possibility of the dissolution of a marriage *ratum sed non consummatum* or a dissolution in favor of the faith (Petrine privilege) in case the previous marriage bond was between an Orthodox party and a non-baptized party. Cf. *supra* note n° 52.