

KERALA AGREEMENT ON INTER-CHURCH MARRIAGES AND DISSOLUTION OF MARRIAGE BOND

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Sony Kadamthodu presents the issue of the dissolution of marriage bond and discusses how the separation of marriage takes place in the Malankara Syrian Orthodox Church. He considers the Decree of the *Apostolic Signatura* in relation to the Malankara Syrian Orthodox Church and the question of the joint consideration of inter-Church marriages. The author also mentions how through a verification process Orthodox Sentence on Marriage can be acknowledged by the Catholic Church.

Introduction

The Kerala Agreement¹ is the fruit of many joint sessions of the Joint International Theological Commission of the Catholic and Malankara

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¹The agreement between the Catholic and Malankara Syrian Orthodox Churches on inter-Church marriage is widely known as Kerala Agreement. The historic visit of Patriarch Ignatius Zakka I Iwas, the supreme head of the Malankara Syrian Orthodox Church (MSOC), to Pope John Paul II and the common declaration made by them in 1984 paved the way for the formulation of this agreement. Following Pope John Paul II's visit to India in 1986, Ignatius Zakka I Iwas requested the Pope to set up an

Syrian Orthodox Churches on inter-church marriages. The competent authorities of the Churches, Roman Pontiff and the Syrian Orthodox Patriarch of Antioch with his Synod, approved this agreement and it was promulgated on 25 January 1994.

The introduction to this agreement brings out various issues in the canonical orbit of both the Churches as the practices of these Churches are different. This idea has been clearly laid down in the agreement by the supreme authorities of both Churches: «Certain questions, in fact, still need to be resolved touching the Lord's will for His Church, as also the doctrinal implications and canonical details of the traditions proper to our communities which have been too long separated.”²

official Joint Dialogue Commission to approach pastoral problems faced by the clergy and faithful of both the. The members of this official Joint Dialogue Commission would be bishops and theologians, representing the Syrian Patriarchate of Antioch and the Catholic Church - the Secretariat for Promoting Christian Unity. Thus, a Joint Dialogue Commission was set up and its inaugural session at the local level was held at the Spirituality Centre, Manganam (Kottayam) on 15 December 1990. The Joint Dialogue Commission reached a decision to set up a sub-Committee to discuss the issue of Inter-Church marriage.

The first meeting of the Joint Dialogue Commission, held on 7 December 1991 discussed the report of the sub-committee on inter-Church marriage. The Commission formulated a draft of the agreement between the Churches on inter-Church marriages based on the Common Declaration of John Paul II and Ignatius Zakka I Iwas. The Joint Dialogue Commission, in its second and third meetings, formulated the final draft of the Agreement on inter-Church marriages and the Pastoral Guidelines that were to accompany it.

The Commission submitted the final draft to the competent authorities of both Churches for approval. After due consideration and discussion the competent supreme ecclesial authorities, the Pope of Rome and the Syrian Orthodox Patriarch of Antioch and his Synod, definitively approved the agreement. The agreement was promulgated on 25 January 1994, the last day of the Week of Prayer for Christian Unity. Pontifical Council for Promoting Christian Unity, “Agreement between the Catholic Church and the Malankara Syrian Orthodox Church on Inter-Church Marriages,” *Information Service* 84 (1993/III-IV) 159-161.

²John Paul II – Ignatius I Iwas, “Declaratio a Summo Pontifice et a Patriarca Antiocheno Syrorum Orthodoxorum,” 23 June 1984, *Acta Apostolicae Sedis* 85 (1993) 238-241.

1. The Issue of the Dissolution of the Marriage Bond

In this article we consider one of the issues related to the dissolution of the bond of marriage. In the pastoral guideline of the Kerala Agreement no. 24 we read: "Any declaration of the nullity of such marriages is only to be considered with the consent of the bishops concerned from both Churches."³

Unfortunately the agreement is silent concerning the manner of joint consideration of the bishops of both Churches, the competent forum in the case of the nullity of marriage, the legal process to arrive at a joint decision on the validity of marriage, the mode of declaration of the nullity of marriage, the extent of the effect of civil decree of divorce in this process etc. It should be noted that no part of the agreement mentions the fact that the practice of *Oikonomia* should not be used for dissolving the bond of marriage. Since there is no written agreement on indissolubility in the manner of the doctrine and practice of the Catholic Church, the Orthodox bishops can uphold their practice of *Oikonomia* in dissolving the bond of marriage.⁴ It is true that there are not many cases of nullity of

³ Pontifical Council for Promoting Christian Unity (PCPCU), *Agreement*, 161.

⁴While formulating the Pastoral Guidelines attached to the Kerala Agreement, the concern of the Catholic Church in this regard was expressed by the Congregation for the Doctrine of Faith in one of its observations. The Congregation insisted that the indissolubility of sacramental bond should be understood by the Malankara Jacobite Syrian Church in the same manner of the Catholic Church i.e., a consummated valid marriage excludes any type of divorce and any kind of tolerance with respect to a second marriage. (Letter dated 16 November 1992, from Alberto Bovone, the Secretary of the Congregation for the Doctrine of the Faith, to P. Duprey, the Secretary of the PCPCU, Prot. 5047/92, in the archive of the PCPCU). Clarence Gallagher, the then Rector of the Pontifical Oriental Institute and a member of the International Dialogue Commission, gave reply to this observation of the Congregation for the Doctrine of Faith: "I personally would not agree that the Pastoral note - which I presume is meant for members of the Catholic Church - should have to clarify that the Orthodox Church has exactly the same teaching as the Catholic Church on precisely what is intended by indissolubility etc. As everybody knows, it does not have exactly the same idea on all points, though the Orthodox Churches do teach sincerely that marriage is indissoluble. How these Churches deal with exceptional cases, (by economy), is a matter for the Orthodox Church, and not for a Pastoral Note within the Catholic Church. It should be also noted that the Catholic Church does not require such clarifications when it

marriage at present. So no difficulties are apparently seen at this initial stage of this agreement, but in the long run this vague guideline may cause many problems. If the Syrian Orthodox Metropolitan is very adamant in following the practice of *Oikonomia* for the second marriage, the Catholic Bishop cannot acknowledge such a practice. The agreement does not envisage such a conflicting situation and further clarifications are needed on this point due to the incompatibility of the practices of the Malankara Syrian Orthodox Church and those of the Catholic Church.

2. The Separation of Marriage in the Malankara Syrian Orthodox Church

A notion on the concepts that are used in the canonical sphere of the MSOC is essential to distinguish between the real significance of terms. In the MSOC's canonical tradition there are two words to denote "divorce" (*dulala*) and "separation" (*phesekh*). To denote separation the Church does not use the term "annulment" which belongs to the Western tradition. Once *Phesekh* (separation) is given, both parties can remarry. Divorce (*dulala*) is given only in case of adultery from either of the parties. Once it is granted only the

permits, as it regularly does, mixed marriages with Protestants and Anglicans. Therefore, why should such clarifications be demanded from our Orthodox brethren?" (This comment is kept in the archive of the PCPCU attached to the letter dated 16 November 1992, from Alberto Bovone to P. Duprey, Prot. no. 5047.)

In response to the above-mentioned observation of the Congregation for the Doctrine of Faith, concerning the indissolubility of marriage, Msgr. P. Duprey sent a letter to the Congregation for the Doctrine of Faith stating that he had discussed this matter with the members of the Syro-Malabar bishops of the International Dialogue Commission and these bishops were sure that the indissolubility of marriage would be interpreted and safeguarded in tune with the tradition of the Catholic Church since the validity of marriage may be considered by bishops of both the Churches as per number 24 of the Pastoral Guidelines attached to the Kerala Agreement. He added that the same matter was discussed in the presence of all members of Commission of both Churches and they accepted number 24 of the Pastoral Guidelines attached to Kerala Agreement. (Letter dated 22 November 1993, from Msgr. P. Duprey, the Secretary of the PCPCU to Msgr. Alberto Bovone, the Secretary to the Congregation for the Doctrine of Faith, Prot. 6449/93/b in the archive of the PCPCU). Thus the observation of the Congregation for the Doctrine of Faith was not adequately included in the Pastoral Guidelines attached to the Kerala Agreement when it was published.

innocent party is entitled to enter into a second marriage. Sacramentally there is no divorce but it is just a concession to human weakness based on Mt. 5: 31. Separation depends on the decision of the Church and the Holy Synod of the MSOC has the power to make new causes for separation from time to time. Separation is different from annulment. Annulment is the declaration of nullity. Separation is a pastoral means by which the Church allows the couple to separate from the bond of marriage and enter into a new marriage. It is a solution to the pastoral problems related to marriage. However, it seems that this Church is inconsistent with the use of terms to refer to "separation." The word "annulment" is also used in some of the official documents to denote the separation of marriage.⁵

The MSOC does not follow all the canonical prescriptions of the universal Antiochean Syrian Orthodox Church since she has an autonomous entity.⁶ In the context of India each marital case of

⁵G.Y. Ibrahim, "The Sacrament of Marriage in the Syrian Orthodox Church of Antioch," in P. Hofrichter - G. Wilflinger, ed., *Fifth Non-Official Consultation on Dialogue within the Syriac Tradition*, (Vienna 2003) 33, 38; Holy Synod of the Syrian Orthodox Church of Antioch, *Constitution of the Syriac Orthodox Church of Antioch*, art. 50 (Damascus 2002).

⁶A historical background of the canonical tradition is necessary for the better understanding while proceeding with the issue of the annulment of marriage. Till the coming of the Portuguese missionaries in 1499 there was only one Church in India - the Church of St. Thomas Christians with the apostolic heritage of the Apostle St. Thomas. When the Portuguese came to India the St. Thomas Christians had the tradition of receiving the bishops from the Chaldean Patriarch of Seleucia-Ctesiphon. Hence, without hesitation one can say that the ecclesiastical discipline of Malabar was mainly East Syrian till the 16th century. According to Cardinal Tisserant, the official ecclesiastical discipline in India before the coming of the Portuguese was determined by the Prelates from Seleucia (E. Tisserant, *Eastern Christianity in India*, 163).

We have some hints about the canonical practices of the St. Thomas Christians from the writings of historians and other writers and also from the decrees of the Synod of Diamper. Many innovations were made in the Synod of Diamper by the Portuguese authorities in the ecclesial life of the St. Thomas Christians. After the schism in 1653 one group from the Malabar Church accepted by degrees the Antiochean Patriarchs who succeeded to replace the Chaldean rite in course of time (E. Tisserant, *Eastern Christianity in India*, 150).

Since the MSOC was a part of the St. Thomas Church, the vestiges of social and cultural tradition are visible even today. Even though theoretically we

separation is considered by the Metropolitan.⁷ The *Catholicos* and the head of the MSOC, Baselius Marthoma I sent a circular letter to all members of his Church in 2006. Among other things he also affirmed that marriage separation cases should be solved by constituting a tribunal at the diocesan level under the supervision of the Metropolitan of each diocese with the help of legal experts and other priests.⁸ It would be useful here to analyse the present practice of divorce in the MSOC.

The Malankara Syrian Orthodox party, after having gained the decree of divorce from the civil court, submits the petition for separation from the bond of marriage to his/her bishop together with the recommendation of the parish priest. The civil decree of divorce and the marriage certificate must be attached to this request. The parish priest forwards this petition to the diocesan bishop requesting him to grant permission for a second marriage when

can say that the code of the Canon Law of the MSOC is the *Nomocanon* or *Hudaya Canon* of G. B. Hebraeus, ancient socio-ecclesiastical customs and the canons of the Synod of Diamper had a greater influence on their ecclesial life. The Constitution of the MSOC (number 7) stipulates that the canon of this Church shall be the *Nomocanon* or *Hudaya Canon* that was codified in 13th century by Gregory Bar Hebraeus (1226-1286) and was acknowledged by the Syrian Orthodox Patriarch of Antioch. Jacobite Syrian Christian Association, *Jacobaya Suriyani Cristiani Sabha Bharanaghadana*, (Puthencruz 2002), 9).

Cardinal E. Tisserant aptly observes: "Even today certain local characteristics have been preserved having their origin either in old law of the Chaldeans, or in local customs, or even in the legislation imposed by the Portuguese before 1653. Within the last 100 years the courts of Travancore and Cochin have had to interfere several times in the life of the Jacobite community and their decisions possess, it seems, the force of law" (E. Tisserant, *Eastern Christianity in India*, 172-173).

In short, the Canon Law of the MSOC (Jacobite Community) is influenced by the above said customs, the decisions of the local Synods, Orders of the Antiochean Patriarch and the verdicts of the civil courts. We have to add to this section the vestiges of the canonical traditions of the East Syrian Church and the decisions of the Synod of Diamper of 1599 because the MSOC was part of the St. Thomas Catholic Church before the separation and acceptance of the Antiochean Orthodox faith.

⁷In the Metropolitan of MSOC is a bishop who is head of a diocese and ranks next below the Patriarch. Jacobite Syrian Christian Association, *Jacobaya Suriyani Cristiani Sabha Bharanaghadana*, 32.

⁸Baselios Thoma I, *Catholicos*, *The Circular Letter n. 15* (13-11-2006), 1-2.

there is a just and reasonable cause. The diocesan bishop seeks at this stage the expert legal opinion. Having examined the documents, the civil advocates apprise the bishop that the marriage of the petitioner is dissolved as per law and he is eligible to remarry. The bishop duly considering the expert legal opinion gives permission for the second marriage by means of a decree. The diocesan secretary⁹ helps the bishops in all these matters.

Since the Malankara Syrian Orthodox Church does have a system of declaring the annulment of marriage as in the Catholic Church, she the Malankara Syrian Orthodox Church accepts the civil divorce decree and confirms it. Usually the Metropolitan considers cases in which divorce has already been granted by civil courts. This means that the ecclesiastical annulment is granted to the members of MSOC by means of a simple procedure by which the Metropolitan declares the nullity of marriage of those parties who gained civil divorce. In this procedure without mentioning the law and facts of the case annulment is granted. The decree of the bishop for granting permission for a second marriage contains just the facts that the bishop has examined the request of the petitioner and the recommendation of the parish priest and having duly examined the documents that are needed for the second marriage (mainly civil decree of divorce) the permission for the second marriage is accorded.¹⁰ After this affirmation of the civil divorce decree the party who wishes to have another marriage is provided with a Free State Certificate for the second marriage. This certificate does not contain any mention of the reasons for the annulment of prior marriage

⁹"Each Malankara Syrian Orthodox diocese should have a diocesan secretary who is elected by the diocesan General Assembly (representatives of all parishes from the diocese). Among other duties his main task is to help the bishop in the daily administration of the diocese." Jacobite Syrian Christian Association, *Jacobaya Suriyani Cristiani Sabha Bharanaghadana*, 38-39.

¹⁰There is no ecclesiastical verdict in the MSOC in which the judge concerned adjudicates the case declaring that the marriage is null and void on the basis of such and such causes and in accordance with such and such canonical norms of the Church. Hence, it cannot be distinguished which party is guilty and which party is innocent. Moreover, there are no legal methods in the canonical practice of the MSOC to prohibit a person to enter into another marriage when he lacks sufficient use of reason and discretion or incapable of assuming the obligation of marriage and other faults that make the consent of marriage defective.

bond. It does not contain any prohibition taking into consideration the special situation of the person for a second marriage.

The Free State Certificate issued by the MSOC just contains the fact that a particular person is free to marry. Usually it does not supply any further information or any judicial ban. Here it is noteworthy to mention the canonical tradition of the Catholic Church that issues a judicial ban, if necessary, in the verdict of the nullity of marriage in accordance with CIC c. 1684 §1 and CCEO c. 1370. The Church authority can prohibit a person who is incapable of entering into a second marriage due to the reasons envisaged in the legal system. In such situations the person needs the prior permission of the competent ecclesiastical authority for his second marriage. This permission helps the authority concerned to ascertain that the defect of the person that makes the marriage invalid does not exist. When a judicial ban is attached to the verdict of the ecclesiastical court, the competent ecclesiastical authority can permit the second marriage having duly considered the existence of judicial ban by factual analysis and the opinion of the experts.

The Free State Certificate of the MSOC is not acknowledged by the Catholic Church as a valid document. It has no qualification of a judicial sentence of the Catholic Church that declares the validity of marriage on the basis of canons. In pastoral milieu there are situations in which the Malankara Syrian Orthodox faithful argues for the need of acceptance of the Free State Certificate that is issued by their competent ecclesial authority pointing out the fact of acknowledgement of the disciplinary patrimony of the non-Catholic Church by the Catholic Church. But the Catholic Church has officially stated the impossibility of the reception of the Free State Certificate of the Orthodox Churches including the MSOC as a valid document for the second marriage. Salachas rightly points out this:

In practice, in many countries, this “declaration of nullity” for example, by an Orthodox bishop, is nothing but the confirmation of the divorce decreed by the civil tribunal, that is, in conformity with the civil judicial sentence the religious marriages is declared null and non-existent with a certificate of the Orthodox bishop. The Catholic Church cannot recognize the sentence of divorce of the civil tribunal and the confirmation of this sentence by the Orthodox Church.

Therefore, a divorced party cannot marry a Catholic party *ob impedimentum ligaminis*.¹¹

There were attempts in some of the ecclesiastical tribunals in India to acknowledge the Free State Certificate of the MSOC. The parish priests and the tribunal personnel are sometimes in confusion as regards the Free State Certificate because of the acknowledgment of the ecclesial identity and the power of jurisdiction of the non-Catholic Churches to govern themselves according to their own disciplines by the Catholic Church.¹² But the canons of the Catholic Church vividly stipulate that in such situations the validity of the marriage should be decided by the Catholic tribunal.¹³

3. The Decree of the *Apostolic Signatura*

It is important to note the admonition of the *Apostolic Signatura* in 2006 to the Catholic bishops of Romania urging them to follow canonical procedure for the annulment of the prior marriage bond of the faithful of the Romanian Orthodox who wishes to have another marriage in the Catholic Church. The *Apostolic Signatura* stated obviously that the Free State Certificate issued by the competent Romanian Orthodox ecclesial authority is not sufficient.

Quapropter pars orthodoxa, quae eiusmodi documento munita novum matrimonium inire intendit in Ecclesia catholica, non consideratur libera, quousque nullitas praecedentis eius matrimonii declarata non fuerit a Tribunali ecclesiastico catholico per decisionem executivam (cf. can. 781; 802 § 2 CCEO; cann. 1085 § 2; 1671 CIC; art. 4, § 1; 5, § 1 Instr. Dignitas connubii) vel idem matrimonium, si adsint necessariae condiciones, a Romano Pontifice solutum fuerit ob inconsummationem.¹⁴

In the declaration of the *Apostolic Signatura*, it recalls the canonical tradition of the Catholic Church that the marriage possesses the favour of law; therefore, in a case of doubt, the validity of a marriage

¹¹D. Salachas, "Mixed Marriages: Legal Aspects," *Eastern Legal Thoughts* 4 (2005) 53.

¹²*Unitatis redintegratio* 16.

¹³CCEO c. 780.

¹⁴*Communicationes* 39 (2007) 66-67.

must be upheld until the contrary is proven.¹⁵ The Catholic Episcopal Conference of Italy declared: "I cattolici non possono essere ammessi al matrimonio con persone battezzate non cattoliche né con persone non battezzate che sono legate da precedente vincolo con altro contraente non cattolico, anche se il precedente vincolo fosse sciolto da qualche autorità religiosa non cattolica o civile osservando il can. 1085."¹⁶ Hence the judicial procedure is indispensable. Here comes the role of the tribunal personnel who have to deal with the authenticity of the marriage bond in accordance with the canons of the Catholic Church. The law stipulates that in deciding the validity of a marriage between baptised non-Catholics the divine law and the law proper to the MSOC should be considered.¹⁷

On the basis of this reasoning the Catholic Church cannot accept the decree issued by the Syrian Orthodox bishop that is nothing other than the confirmation of the civil divorce. Here the intervention of the competent tribunal is necessary to determine the juridical status of the prior marriage of the Orthodox party according to the laws of both Churches. The above mentioned declaration of the *Apostolic Signatura* echoes the same practice.

4. The Question of the Joint Consideration of Inter-Church Marriages

The question remains: what would be the mode of joint consideration of the nullity of marriage as per n. 24 of the Kerala Agreement? Since the MSOC does not have a system of the declaration of the nullity of marriage as the Catholic Church and her present practice is unacceptable to the Catholic Church, bishops of both Churches cannot come to a decision that is suitable for both Churches in tune with their tradition.

While considering the problem of joint consideration of the nullity of marriage the main area of disagreement would be the use of *Oikonomia* by the MSOC. This concept of *Oikonomia* is widely used as a pastoral solution to the marriage problems and this practice has not been acknowledged by the Catholic Church. It is important to note the letter written by Msgr. Duprey to Msgr. A. Bovone, the Secretary

¹⁵CIC c. 1060; CCEO c. 779.

¹⁶ Conferenza Episcopale Italiana, "Decreto generale sul matrimonio canonico," in *Enchiridion della conferenza episcopale italiana*, IV (Bologna 1996²), 1333.

¹⁷CCEO c. 780 §2.

to the Congregation of Doctrine of Faith underlining the following facts.

Nell'ambito della "Malankara Syrian Orthodox Church" non esiste una procedura per il divorzio. Essa lo rifiuta. Nei confronti di alcune situazioni di rottura che siano di pubblica ragione e durevoli, si può indirizzare un appello al Santo Sinodo ed il *Catholicos* può eventualmente risolvere il caso "per economia." Si tratta di casi eccezionali nei quali, dopo che uno dei coniugi ha condotto per dieci anni una vita separata con un altro partner, è stata pronunciata una sentenza di divorzio da parte di un tribunale civile. La società cristiana del Kerala è particolarmente contraria al divorzio, data la solidità dei legami familiari nel suo ambito. Il n. 24 delle "Pastoral Guidelines" che accompagneranno l'accordo sui matrimoni, prevede che la richiesta di dichiarazione di nullità - unico caso che possa essere accolto sia dai cattolici che dagli ortodossi per un matrimonio misto -, sia trattata in comune dai due vescovi interessati, cattolico ed ortodosso. I vescovi sono certi che, in questo modo, l'indissolubilità del matrimonio sarà interpretata e salvaguardata nel senso cattolico.¹⁸

The assurance of P. Dupre is not a solution to the problem of the canonical practice of indissolubility between the two Churches. This guarantee is not officially acknowledged by the MSOC. It is not written in any part of the Kerala Agreement that in case of nullity of marriage the concept of indissolubility in tune with the Catholic Church would be taken care of. The MSOC agrees absolutely with the Catholic notion of the doctrine of indissolubility. This has been inserted in the first and fifth paragraphs of the Pastoral Guidelines attached to the Kerala Agreement.¹⁹ The use of *Oikonomia*, however, disintergrates the concept of indissolubility. The Syrian Orthodox

¹⁸Letter dated 22-11-1993, addressed to Msgr. Alberto Bovone, Secretary to the Congregation for the Doctrine of Faith, Prot. 6449/93/b.

¹⁹The first paragraph of Agreement states "This marital communion is divinely confirmed by Christ with the seal of unity and of indissolubility." The fifth paragraph affirms "our two Churches accept the sacredness and indissolubility of the sacramental bond of marriage and consider the conjugal relationship as an expression of the communion between Jesus Christ and his Church and a means to achieve self-effacing mutual love and freedom from selfishness."

bishop while considering the nullity of marriage in accordance with the Kerala Agreement can disagree with the Catholic bishop insisting on the Orthodox practice of *Oikonimia*. Hence, further discussion is needed leading eventually to an official agreement in writing. This should affirm that the principle of *Oikonomia* would not be used in the case of nullity of marriage undermining the divine command of indissolubility and the nullity of the marriage would be adjudicated in tune with the Catholic canon law giving due importance to the Malankara Syrian Orthodox canonical tradition.

If the decision of one Church is acceptable to the other Church the joint consideration may take place. At present in the case of the decision of the MSOC, the Catholic Church can acknowledge only a decision that is taken due to lack of the canonical form of marriage. The Pontifical Council for the Legislative Texts affirmed that the judgment issued by the Orthodox authority as regards the nullity of marriage may be acknowledged by the Catholic Church if it is a case that treats the lack of form of marriage without prejudice to the divine law. It states:

Potrebbe presentarsi all'autorità cattolica un cristiano acattolico orientale con il documento di dichiarazione di nullità di matrimonio della sua Chiesa ortodossa. Questa sentenza di nullità non può essere riconosciuta senz'altro dalla Chiesa cattolica, non essendo chiarite le diverse questioni teologiche e giuridiche riguardanti la validità del matrimonio sacramentale degli acattolici orientali. Solo in mancanza della forma prescritta dal diritto della propria Chiesa può essere riconosciuta la sentenza dell'autorità competente ortodossa, salvo sempre il diritto divino.²⁰

The Pontifical Commission for the Authentic Interpretation of the Code of Canon Law stated that when a marriage is invalid for lack or absence of canonical form of marriage, it is sufficient that the freedom of the party or parties is established through the pre-nuptial investigation process. It is unnecessary to approach the tribunal for the declaration of invalidity of a marriage celebrated without the

²⁰Pontifical Council for Legislative Texts, "Adnotatio circa validitatem matrimoniorum civilium quae in Cazastania sub communistarum regimine celebrate sunt," *Communicationes* 35 (2003) 197-210.

canonical form.²¹ This response of the Pontifical Commission is found in CCEO c. 1372 §2 and is incorporated into the Instruction, *Dignitas Connubii* (DC art. 5 §3).

While considering the nullity of marriage as per the Kerala Agreement, from the Catholic point of view, we have to follow the stipulation of the canons of code. CCEO c. 780 delineates the declaration of nullity of marriage in such case should be treated by the Catholic tribunal. Here the legislator indicates what criteria must be applied by a judge for assessing the validity of the marriage, and also provides some rules regarding which laws may be applied in adjudicating such marriages.²²

In this application of laws the ecclesiastical judge follows an order of analyzing the three elements that constitute the validity of marriage: the absence of impediments, the form of marriage and the consent. If there is the defect of the form of the celebration of marriage, the marriage can be declared null. In this case avoiding the formalities of the ordinary judicial process, the validity of the marriage can be duly established. If the form of marriage is valid, the defect of consent and the impediments are to be studied in order to determine the validity or invalidity of the marriage. J. Prader explains:

If the motive of nullity arises from a defect of consent based on the natural law or arises from an impediment based on divine or natural law, the norms of the Canon Law should be applied. But if the nullity of marriage is due to a defect of consent founded on merely ecclesiastical law (for example grave fear, malicious error, conditional consent) or because of a diriment impediment of human law or because of defect of form, the judge should take into account the respective Orthodox discipline.²³

It is true that the non-Catholics are certainly bound by divine positive and natural laws related to matrimonial impediments and

²¹Pontifical Commission for the Authentic Interpretation of the Code of Canon Law, "Responsa ad proposita dubia," AAS 76 (1984) 746-747.

²²U. Navarrete, "La giurisdizione delle chiese orientali non cattoliche sul matrimonio (c. 780)," *Studi Giuridici* 32 (1994) 122.

²³J. Prader, *Il matrimonio in Oriente e Occidente*, in *Kanonika* 1, Rome 1997, 2003²) 40.

defects of consent.²⁴ In considering the validity of an inter-Church marriage merely ecclesiastical law of the non-Catholic Churches may be applied. This is so because, no interpretation of the divine positive or natural law by other non-Catholic Churches can be admitted if it is not in tune with that of the Catholic Church.²⁵ If the ground for the nullity of marriage is the defect of consent based on the divine or natural law the Catholic canonical norms are to be applied.²⁶

In the adjudication of the validity of marriage of a person belonging to the non-Catholic Church, the Catholic Church applies the Catholic legislation. But the application of the proper law of the non-Catholic Church or ecclesial community concerns only the diriment impediments of merely ecclesiastical law.²⁷ The acceptance of the Syrian Orthodox canonical tradition does not mean that all the canon laws of that Church have been canonised by the Catholic Church. It is only a formal acceptance of the discipline to which the non-Catholics are bound.²⁸

5. The Acknowledgement of Orthodox Sentence on Marriage

On the basis of the above mentioned facts at present the possibilities of the joint consideration of the nullity of marriage in accordance with the Kerala Agreement are limited. It is mainly because of the lack of a legal procedural system in the MSOC and the use the concept of *Oikonomia* for granting second marriage. It does not mean

²⁴Augustine Mendonç, "What is New? A Brief Analysis of Selected Themes Found in *Dignitas Connubii*," *Studies in Church Law* 2 (2006) 184.

²⁵"Consultoribus visum est christianos non catholicos, in re matrimoniali, praeterquam a normis mere praeceptivis aut prohibitivis et a forma catholica celebrationis, eximendos esse ab omnibus impedimentis dirimentibus iuris ecclesiastici, non vero a legibus de defectibus aut vitiis consensus, de solutione vinculi, de convalidatione et sanatione in radice, quatenus de normis agitur quae ius divinum positivum aut naturale contineant vel ipsa rei natura etiam ipsos afficiant." J. Prader, "Labor Consultorum Commissionis circa canones de Matrimonio," *Nuntia* 8 (1979) 6.

²⁶P.V. Pinto, ed., *Comento al codice dei canoni delle chiese orientali*, (Città del Vaticano 2001) 655.

²⁷D. Salachas, "Mixed Marriages: Legal Aspects," 49.

²⁸"Nec agitur de "canonizatione" legum non catholicarum, sed de mera acceptatione formali disciplinae qua non catholici de facto tenentur." J. Prader, J. Prader, "Labor Consultorum Commissionis circa canones de Matrimonio," 6.

that other means are closed. The Catholic bishop can acknowledge the verdict of the Malankara Syrian Orthodox bishop that is pronounced in conformity with the existing legal procedures in their canonical tradition.

To explain this fact we may begin with a decree issued by the *Apostolica Signatura* that is mentioned above. This decree of 20 October 2006 does not close all the possibilities of considering the validity of the verdict of a non-Catholic ecclesial tribunal²⁹ and does not insist on the normal canonical procedure in such cases.³⁰ This indicates indirectly the possibility of the canonical reception of an authentic declaration of the nullity of marriage pronounced by the legitimate authority of another legal system applying the particular law and respecting the divine natural law.³¹

It is an established fact that the non-Catholic Church has the power to govern their subjects in accordance with their law in force. In fact, the MSOC possesses a valid hierarchy, the apostolic succession, a true legislative power and true jurisdiction. The decree of the *Apostolic Signatura* on 20 October 2006 does not deny the authority of the Orthodox Church, but prohibits the practice of accepting the Free State Certificate as a sufficient basis for allowing a second marriage. The *Apostolic Signatura* rather demands the involvement of the Catholic marriage tribunal in determining the validity of marriage. In such circumstances each case should be considered by the Catholic ecclesiastical tribunal to acknowledge the free state of the Orthodox party for the marriage with Catholic.

This decree of the *Apostolic Signatura* does not close our discussion on the merit of the decree issued by the MSOC for a second marriage. If this Church issues such decrees basing on a legal procedure for pronouncing the nullity of marriage, the Catholic Church can think of acknowledging them. Such a judicial process exists at least in theory in their tradition. The constitution of the Antiochean Syrian

²⁹*Communicationes*, 39 (2007) 66-67.

³⁰“quousque nullitas praecedentis eius matrimonii declarata non fuerit a Tribunale ecclesiastico catholico per decisionem executivam,” *Communicationes* 39 (2007) 66-67.

³¹J. Llobell, “La giurisdizione della Chiesa sul matrimonio degli acattolici,” (“La giurisdizione della Chiesa sul matrimonio degli acattolici,” in J. Carreras Cared., *La giurisdizione della Chiesa sul matrimonio e sulla famiglia*, Milano 1998) 88.

Orthodox Church gives this possibility. The constitution of the Universal Antiochean Syrian Orthodox Church affirms:

The Metropolitan presides over the Preliminary Spiritual Court in his Archdiocese. He can hire one or more legal consultant to give him legal advice. Verdicts rendered by the Preliminary Spiritual Court are subject to be appealed at the Patriarchal Spiritual Appeal Court. No divorce or marriage annulment verdict will be considered executable unless it is lawfully, positively, and undoubtedly proven, and approved by His Holiness the Patriarch³²

Here we see a legal system in the Antiochean Orthodox Church which has some similarity with the Catholic procedure of declaring the nullity of marriage. If the MSOC uses this legal procedure for the declaration of the nullity of marriage without using the concept of *Oikonomia* the Catholic Church can consider the acknowledgement of the verdict of the MSOC with due discretion.

6. A Verification Process

P. Gefaell scholarly proposes some means by which the Catholic Church can acknowledge the Orthodox verdict of the nullity of marriage. He suggests the study of the Orthodox sentence of the nullity of the marriage by means of a process of scrutiny so that it would have validity in the Catholic sphere. This process can be similar to those procedures used in the appeal tribunal for the confirmation of the sentence. This verdict may be ratified either by decree or the case could be admitted for ordinary examination in a second grade (CIC c. 1682 and CCEO c. 1368). In the latter, it should always be considered as the first grade of instance.³³ Here the Catholic tribunal adjudicates the case taking into consideration the observations of the defender of the bond and that of the parties. P. Gefaell states:

On the basis of the principles contained in CCEO can. 781 and in the *Dignitas Connubii* art. 4 §1, I would venture to say that if the competent authority of the Orthodox Church issues

³²The Holy Synod of the Syrian Orthodox Church of Antioch, *Constitution of the Syriac Orthodox Church of Antioch*, art. 50.

³³P. Gaffaell, "La giurisdizione delle Chiese ortodosse," ("La giurisdizione delle Chiese ortodosse per giudicare sulla validità del matrimonio dei loro fedeli," *Ius Ecclesiae* 19 (2007) 790-791.

a declaration of the nullity of marriage which is not contrary to divine law, the Catholic Church could recognize this sentence after the necessary verifications.³⁴

But these verifications should be in compliance with the canonical patrimony of the Catholic Church.

Conclusion

If the MSOC promotes a judicial process for determining the validity of marriage, the decree of annulment achieves more authoritativeness. Avoiding the practise of *Oikonomia* for the permission of the second marriage would be beneficial to the MSOC to protect the sacredness of the marriage and at the same time the Catholic Church could acknowledge such decrees of annulment after due verification.

The MSOC can establish a procedural law for determining the validity of marriage taking into consideration the present canons and customs of the Church. The present practice of the Catholic Church is a good example for them and the possibilities are wide open for them to make such a legal method for determining the validity of marriage. The Common Declaration between the Pope and the Patriarch also envisaged the sharing of theological faculties for the formation of clergy of both Churches.³⁵ Those students who gain formation in the Catholic theological faculties where they are acquainted with the Catholic disciplinary patrimony can help the MSOC in forming a procedural law system incorporating the relevant norms of CCEO, CIC, the *Hudaya Canon* and the Constitution of the Syrian Orthodox Church of Antioch.

It is worthwhile to note the observation of Mar Bawai, one of the bishops of the Assyrian Church of the East, in this regard:

My understanding of the position of the Church of the East is as follows. Despite the fact that our rites allow divorce, I have not seen any theological explanation or interpretation as to why a marriage can be divorced, except for pastoral provisions. But pastoral provisions do not explain the theological path from the establishment of the marriage to the divorce or the annulment. In recent years, at least in the diocese that I serve, what we have done is to issue a letter of

³⁴P. Gefaell, "La giurisdizione delle Chiese ortodosse," 785.

³⁵John Paul II - Ignatius Zakka I Iwas, *Declaratio*, 241.

annulment or a letter of divorce. This is an Old Testament term. We have taken the Old Testament concept of divorce without really interpreting it or giving a theological account. The most suitable criterion that I have found is to restate the Western methodology.³⁶

The International Dialogue Commission also has a role of jointly studying the possibility of establishing a procedural law to determine the validity of an inter-Church marriage and can submit suggestions to the competent authorities of both Churches for further verification and approval.

³⁶M.J. Birnie, "A Reply to the Paper of Metropolitan Gregorios Y. Ibrahim," ("A Reply to the Paper of Metropolitan Gregorios Y. Ibrahim," in P. Hofrichter, - G., Wilflinger, ed., *Fifth Non-Official Consultation on Dialogue within the Syriac Tradition*, Vienna 2003) 38.