

February 2017

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### Recommended Citation

Rev. Anthony J. Bevilacqua (2017) "Some Problems Regarding Episcopal Faculties," *The Catholic Lawyer*: Vol. 17 : No. 2 , Article 8.  
Available at: <http://scholarship.law.stjohns.edu/tcl/vol17/iss2/8>

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# SOME PROBLEMS REGARDING EPISCOPAL FACULTIES

REV. ANTHONY J. BEVILACQUA\*

**S**INCE Vatican Council II, bishops of dioceses have been granted many faculties to ease and expedite functions falling within their role as pastors of their flock. For many bishops and their chanceries the result of the issuance of these faculties at different times and from various sources was almost an overwhelming frustration. This frustration was due to an understandable ignorance of what faculties the bishops actually enjoy.

An attempt to alleviate the lack of knowledge of the existing faculties was made by a publication of the Canon Law Society in 1968 of a list of the powers of bishops. In preparation for a paper on faculties of bishops given at the Eastern Regional Canon Law Convention in May 1971, this writer revised and updated this list of powers of bishops.

The presentation of a compilation of faculties may lessen the frustration of bishops and chanceries but it will not resolve the doubts about the proper interpretation of some of the faculties. It is the purpose of this paper to consider a number of the recurring problems besetting chanceries in regard to the faculties and offer practical solutions.

Many of the topics in the first twelve sections of this article as well as all of the "Supplementary Questions" were selected from suggestions submitted by twenty-eight Chanceries throughout the country.

## **I. Additional Masses on Holy Thursday**

This past Holy Week, a certain amount of confusion arose over the number of Masses permitted on Holy Thursday in addition to the prin-

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cipal evening Mass. The confusion was created by the English translation of that section of the *Missale Romanum* which appeared as the: "Revised Rites of Holy Week." The rubrics for Holy Thursday read: "For pastoral reasons the local Ordinary may permit another Mass to be celebrated in the evening or, in the case of genuine necessity, even in the morning."

Some considered the "or" in a disjunctive sense so that only one additional Mass could be said and a choice had to be made between either the morning or the evening. But the "or" can also be understood in a conjunctive sense so that two additional Masses may be said, that is, one in the morning and another in the evening. This is the proper understanding of the faculty. This meaning is confirmed by the Latin text which has the word "et" as the original of the translation "or." Thus the translation should be that the local Ordinary "can permit another Mass to be celebrated in the evening and, in case of genuine necessity, also in the morning."

In 1968, the Holy See granted to United States Bishops the faculty for an additional Mass on Holy Thursday morning. This faculty was given for five years. On March 10, 1970, the Sacred Congregation for the Sacraments granted to all bishops the faculty for an additional Mass in the morning and in the evening. All these faculties are superseded and cancelled by the faculty of the *Missale Romanum* permitting only two extra Masses, one in the morning and one in the evening. The decree of the *Missale Romanum* is dated March 26, 1970 and revokes all contrary norms.

## II. Alienation

*Pastorale Munus*, in Faculty N. 32, grants to bishops the faculty "to grant permission, for a legitimate reason, to alienate, pledge, mortgage, rent out, or perpetually lease ecclesiastical property and to authorize ecclesiastical moral persons to contract debts to the sum of money determined by the National or Regional Conference of Bishops and approved by the Apostolic See."

At the April 1967 general meeting of the bishops of the United States, the following proposals were made as the norm for alienation, that is, below which no recourse to the Holy See was necessary.

1. \$300,000. Motion defeated.
2. Figures should be based on a percentage of the income of each diocese. Motion defeated.
3. Figures should be established by each Ordinary in consultation with his consultors and his council of administration. Motion defeated.
4. The Ordinary should have no limits placed on him but should consult with the consultors before incurring a substantial indebtedness. Action still pending.

The legislation of Canon 1532 and Canon 534 of the Code is, therefore, still in effect in the United States on this norm of alienation. In these canons, the ceiling below which the authorization from the Holy See is not required is 30,000 francs. In 1963, the Sacred Consistorial Congregation decreed that the 30,000 francs men-

tioned in the two canons should be understood as 66,000 Swiss francs. A safe norm for the United States equivalent of 66,000 Swiss francs would be a 1962 notification of the Sacred Congregation for Religious that 65,000 Swiss francs were equivalent to 15,000 United States dollars. On this basis, 66,000 Swiss francs are equal to \$15,230.<sup>1</sup>

One should recall that in cases of alienation by religious, the Apostolic Delegate has faculties to permit such transactions up to \$500,000.<sup>2</sup>

### III. Seminarians

1. The Ordinary may, by virtue of *De Episcoporum Muneribus*, allow admission to the seminary of candidates who are illegitimate. This includes adulterine or sacrilegious illegitimates. For the latter, however, recourse to the Holy See will be necessary for the reception of Orders.
2. Among the impediments for Orders, the more common would be that of non-Catholic parentage. This can now be dispensed by the local Ordinary. For the dispensation from the remaining impediments for Orders and from the various irregularities, consult *De Episcoporum Muneribus*: IX, 9, 10.
3. A special response from the Sacred

Congregation of Seminaries and Universities in 1967 stated that, in spite of *De Episcoporum Muneribus*, Ordinaries are still obliged to have recourse to the Holy See in cases of re-admission of ex-religious and ex-seminarians into the seminary. In other words, the prescriptions of the decree, *Consiliis Initis* of July 25, 1941, and the decree, *Sollemne Habet* of July 12, 1957, are still in force.<sup>3</sup>

### IV. Deacons

Since the issuance of the Apostolic Letter, *Sacrum Diaconatus Ordinem*, on the permanent diaconate and because of the extended service of deacons preparing for the priesthood, several canonical problems have arisen regarding the ministry of deacons. These problems have been the subject of a series of replies from the Pontifical Commission on the Interpretation of the Decree of the Second Vatican Council. The following are the interpretations given in these replies:

1. A deacon can officiate at a marriage when a priest is not present. This absence of a priest is not necessary for the validity of the delegation of the deacon.<sup>4</sup>
2. The functions listed in Number 29 of the Constitution, *Lumen Gentium*, and Number 22, of the Apostolic

<sup>1</sup> S.C. Consist., 13 July 1963 (*AAS* 55-656); S.C. Rel., 30 June 1962 (Private—V CANON LAW DIGEST 376-77).

<sup>2</sup> U.S. Apostolic Delegate, 6 January 1965 (Private—VI CANON LAW DIGEST 364).

<sup>3</sup> S. Congregation for Seminaries and Universities, Undated (Private—VI CANON LAW DIGEST 765-66).

<sup>4</sup> 4 April 1969 (*AAS* 61-348).

Letter, *Sacrum Diaconatus Ordinem*, for permanent deacons belong also to deacons advancing to the priesthood.<sup>5</sup>

3. The faculty of *De Episcoporum Muneribus* allowing the Ordinary to dispense a deacon from defect of age up to one year holds also for the ordination of permanent deacons.<sup>6</sup>
4. When a deacon has been given legitimately a stable assignment in a parish, he can be considered equivalent to a *vicarius cooperator* as regards marriage and, therefore, general delegation for marriages can be given to him.<sup>7</sup>

#### V. Exclaustation and Faculty 34 of *Pastorale Munus*

Faculty 34 of *Pastorale Munus* grants to residential bishops the faculty: "To enter for a just reason within the papal enclosure of nuns' monasteries which are located in his diocese and to permit, for a just and serious reason, that others may be admitted within the enclosure and that nuns may leave it. The permission is only for the amount of time truly necessary."

This faculty, which seems rather easy to understand, has engendered a great deal of confusion. This is due largely to a series of questions proposed by the Vicar General for Religious in Cleveland to the Apostolic Delegate and the April 26, 1965

reply of the Chargé d'Affaires. Cleveland wrote to the Delegation: "You indicated in a paragraph of your letter that if Sister requires a decree of exclaustation, Bishop Issenmann, will be able to provide this by virtue of N. 34 of *Pastorale Munus*." May I interpret this remark to mean that the faculties of *Pastorale Munus* allow the bishop to grant an exclaustation beyond the period allowed by Canon 606, § 2 of the Code, that is, beyond six months? May the Faculty N. 34 be used for pontifical institutes and may the same faculty be used for cloistered communities? May they be permitted to leave for a period of one year or two years without permission from Rome?" The Chargé d'Affaires replied: "I believe that the Most Reverend Apostolic Administrator may now provide for the case in virtue of his faculties from the Apostolic Letter, *Pastorale Munus*. From this you will also gather that I believe that all your questions may be answered affirmatively."<sup>8</sup>

The communications referred to fail to distinguish, in my opinion, between exclaustation and absence from a religious house. As a result, this reply is widely but wrongly used as a basis for Ordinaries granting exclaustation to religious of pontifical communities.

Canon 606, § 2 states that Superiors may allow their subjects to remain outside a house of their own institute for a just and grave cause, and for as brief a period as possible according to the constitutions; but for an absence of more than six

<sup>5</sup> 26 March 1968 (AAS 60-363).

<sup>6</sup> 19 July 1970 (AAS 62-571).

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Apostolic Delegate, 26 April 1965 (Private—VI CANON LAW DIGEST 387-88).

months, except by reason of studies, the permission of the Holy See is required.

In neither Faculty N. 34 nor in Canon 606 is there any reference to exclaustation which is a permission to remain outside the institute for a temporary though usually extended period of time. The legal effects of exclaustation highlight its difference from absence from a religious house. According to Canon 639, by an indult of exclaustation, a religious must lay aside the religious habit, is deprived of active and passive voice, and is subject to the local Ordinary of residence and not to the Religious Superior. None of these effects follow permission for absence from a religious house.

For a proper interpretation of Faculty N. 34, the following observations should be considered:

1. Faculty N. 34 refers only to cloistered communities of nuns and not to any other religious.
2. It refers only to a brief absence from the cloister for a special reason and not to exclaustation.
3. If this faculty allows a bishop to grant exclaustation of women religious of pontifical law, why is there no similar provision for men religious? Yet, it is clear that Faculty N. 34 refers solely to women.
4. Canon 606, § 2 is restricted to absences from a religious house and not to exclaustation. In practice, this canon is relevant only to Superiors of diocesan congregations since Superiors of pontifical com-

munities have special faculties permitting a leave to one year.

5. The Instruction, *Venite Seorsum*, on Contemplative Life and Enclosure of Nuns, states clearly that a bishop may allow a nun to leave the papal enclosure for a period not exceeding three months. Beyond that requires authorization of the Holy See.<sup>9</sup>
6. A letter from the Sacred Congregation for Religious addressed to the United States Apostolic Delegate on January 2, 1970, clarified certain doubts on the Instruction, *Venite Seorsum*. In this letter, it explained that Faculty N. 34 of *Pastorale Munus* was not derogated from by the new Instruction and then it gave an interpretation of the faculty. It observed that in accord with the faculty, the bishop could permit nuns to leave the cloister but he could not oblige them. It then emphasized that the serious reasons justifying the bishop's permission are the reasons that existed before *Pastorale Munus* gave this faculty and are found in N. 24 of the Instruction, *Inter Cetera*, of March 25, 1956.<sup>10</sup>

It must be concluded that Faculty N. 34 of *Pastorale Munus* does not allow a bishop to grant an indult of exclaustation to any religious. All indults of exclaustation for

<sup>9</sup> S.C. for Religious, 15 August 1969 (AAS 61-674).

<sup>10</sup> S.C. for Religious and Secular Institutes, 2 January 1970 (Private—N.C.C.B. CANONICAL REFERENCE MANUAL 9a-9b).

religious of pontifical law must be obtained from the Holy See.

### VI. Faculty N. 36 of *Pastorale Munus* on Illegitimacy

According to Faculty N. 36 of *Pastorale Munus*, the bishop "may dispense from the impediment of illegitimacy those to be admitted into religious life except those who are adulterously or sacrilegiously illegitimate."

*Cum Admotae* and *Religionum Laicalium* grant this same faculty to Superiors of pontifical communities. Since *Pastorale Munus* does not restrict the bishop's faculty to diocesan congregations, it would seem his faculty in this area is concomitant with the Superiors mentioned above. *Cum Admotae*, in fact, adds the following sentence after the faculty on illegitimacy: "Nevertheless, if a conflict on this matter arises between the bishop and the Superior General, the former's decision is to prevail." This phrase is not included in the later document, *Religionum Laicalium*.

On this point of illegitimacy, it is worth noting that the Sacred Congregation for Religious suspended the prohibition of Canon 504 which prevented illegitimates from being elected Major Superiors except for adulterous or sacrilegious illegitimates in public cases. In occult cases, recourse is to be made to the Holy See.<sup>11</sup>

### VII. Faculty to Permit Diocesan Religious to Cede Patrimony

The latest Quinquennial Faculties (1968) grant to the bishop the faculty

so that he "may, at the request of Superior General with the consent of General Council, permit professed of simple vows in diocesan congregations to cede their patrimonial property for a just cause and without prejudice to the norms of prudence, and provided said religious petition for it."<sup>12</sup>

This wording of this faculty is evolved from the original faculty similar to this which was given to Superiors of Pontifical Clerical Institutes. The rescript of the Secretary of State, dated November 6, 1964 and entitled, *Cum Admotae*, gave the following faculty in N. 16: "With the consent of their council, to grant their simply professed subjects who reasonably request it, the faculty to cede the property of their patrimony for a just cause with exception of property necessary for the support of the religious in case of departure from the religious institute."<sup>13</sup>

Sometime in 1965, in an undated letter reported in the *Commentarium Pro Religiosis*, Cardinal Antoniutti, Prefect of the Sacred Congregation of Religious, communicated to the President of the Roman Union of Superiors General the interpretation of Pope Paul on this faculty. The letter decreed that the text of the faculty should be interpreted as follows: "With the consent of their council, to grant their subjects professed of simple perpetual vows, who request it, the faculty to cede their patrimonial property for a just cause and without prejudice to the norms of justice."<sup>14</sup>

<sup>11</sup> S.C. for Religious, 17 March 1967 (Private—VI CANON LAW DIGEST 478).

<sup>12</sup> *Quinquennial Faculties* II, 1, a. (1968).

<sup>13</sup> *AAS* 59-374.

<sup>14</sup> *CPR* 44 (1965) 300-01.

### VIII. Parishes

#### A. National Parishes

The *Motu Proprio, Ecclesiae Sanctae*, which went into effect on October 11, 1966, gave diocesan bishops the faculty "to erect or suppress parishes or change them in any way, after hearing from the Council of Priests; but if there are agreements in effect between the Apostolic See and the civil government, or any extant acquired rights of any other physical or moral persons, the matter must be settled properly with them through the competent authority." (N. 21 § 3).

The question is asked if this faculty refers also to national parishes. It is the opinion of this writer that it does.

The Decree on Bishops of the Vatican Council urges that "provision should be made for the faithful of different language groups, either through priests or parishes of the same language." (N. 23).

The same decree states that "concern for souls should be the basis for determining or reconsidering the erection or suppression of parishes and any other changes of this kind, which the bishop will be able to bring about on his own authority." (N. 32). It is true that no special mention is made here of the national parishes referred to in Canon 216, § 4.

The section of the Decree on Bishops was implemented in *Ecclesiae Sanctae* given above. As in the Decree on Bishops, so also in *Ecclesiae Sanctae*, no special mention is made of national parishes. Yet it seems they are included within this authority of the bishop.

1. The decree on bishops and *Ecclesiae Sanctae* refer to parishes without specifying types, that is, without any limitations. Where the law does not distinguish, we should not distinguish. A national parish is a parish and therefore can be erected, changed, or suppressed by the bishop.
2. Canon 216, § 4 was the basis of reserving national parishes to the Holy See. It states: "Without special apostolic indult parishes cannot be established in the same city or territory for the faithful of diverse language or nationality, or merely family or personal parishes; in regard to such parishes already established, nothing is to be changed without consultation of the Holy See."

This norm was repeated in N. 4 of the Constitution, *Exsul Familia*, when speaking of establishment of parishes for the different language or nationalities of emigrants.

However, in the 1969 Instruction, *Cura Pastoralis Migratorum* (On the Pastoral Care of Migrants), the norm of Canon 216, § 4 is not repeated when it speaks of establishing parishes for immigrants. Instead it directs: "Where there are great numbers of immigrants of the same language living either stably or in continuous movement, the erection of a personal parish can be advisable. It is to be appropriately set up by the Ordinary of the place." (N. 33). To this directive is added a



footnote in which the source given is the Decree on Bishops, N. 32, and also N. 21, § 3 of *Ecclesiae Sanctae* including the full text of this section on the erection and suppression of parishes.

Though this article in *Cura Pastoralis Migratorum* refers to a personal parish instead of a national parish, it is clear that the concept is the same. Furthermore, personal parishes are reserved by Canon 216, § 4 to the Holy See. Since N. 33 of *Cura Pastoralis Migratorum* states that personal parishes are to be set up by the bishop and quotes N. 21, § 3 of *Ecclesiae Sanctae* as the authority, it follows that Canon 216, § 4 is considered abrogated.

3. Any canonical studies referring to national parishes take for granted that *Ecclesiae Sanctae*, N. 21, gives complete authority to the bishop over the erection, change or suppression of national parishes.<sup>15</sup>

#### B. Two Canonical Pastors in Same Parish

The January 29, 1971 issue of *Crux* announced that the Diocese of Cleveland had inaugurated co-pastorates in one of its parishes. Most dioceses that have initiated the co-pastorate or team ministry concept have, for canonical purposes, appointed one man as pastor or administrator. In

the case of the Diocese of Cleveland, it was clearly stated that two men were appointed simultaneous canonical pastors.

Canon 460, § 2 states: "In the same parish there must be only one pastor who carries out the *cura animarum* and any contrary custom is rejected as unreasonable and any contrary privilege is revoked."

The only possible authority used by Cleveland for appointing two pastors in the face of such a strong prohibition of the Code must be a dispensation in virtue of *De Episcoporum Muneribus*. It is the author's opinion that such a dispensation is not possible from *De Episcoporum Muneribus*.

That there be only one pastor in a parish seems to be part of the constitutive law or at least is not disciplinary law and hence not dispensable in virtue of *De Episcoporum Muneribus*. Canon 451 defines a pastor as a priest or moral person to whom a parish is entrusted with the care of souls. Canon 216 attempts to give a definition of a parish when it states that it is a part of a diocese to which shall be assigned its own Church, with a definite group of faithful and its own particular rector as its proper pastor for the requisite care of souls.

### IX. Inter-ritual Marriages

By virtue of *De Episcoporum Muneribus*, diocesan bishops may dispense from the prescription of Canon 1097, § 2 so that in a mixed rite marriage, the ceremony may be in the rite of the bride.

The usual case is that of an Oriental

<sup>15</sup> Theoret, *The Post-Conciliar Parish*, *STUDIA CANONICA* 1 (1967) 191-203; Nessel, *The National Parish Revisited*, *THE JURIST*, 28 (Jan. 1968) 89-92; Robleda, *Innovationes Concilii Vaticani II*, in *Theoria de Officiis et Beneficiis Ecclesiasticis*, *PERIODICA* 59 (1970) 277-314.

Catholic boy and Latin Catholic girl who wish to marry in the Latin Rite. Less frequent but falling clearly within the faculty is the case of a Latin Catholic boy and Oriental Catholic girl wishing to marry in her rite.

Beyond these two cases, we are in the area of confusion and doubt. It is important to remember that Canon 1097 from which the bishop can dispense refers only to the marriage of two Catholics who happen to be of different rites.

It can be asked if the faculty of the bishop will allow:

1. A marriage between two Catholics in a rite to which neither belongs. Examples:
  - a) Two Oriental Catholics wish to marry in the Latin Rite.
  - b) Two Latin Catholics wish to marry in an Oriental Rite.
  - c) A Latin Catholic and a Ukrainian Catholic wish to marry in the Melkite Rite.
2. A mixed marriage in a rite to which the Catholic party does not belong. Examples:
  - a) Latin Catholic and a non-Catholic wish to marry in the Ukrainian Rite.
  - b) An Oriental Catholic under the jurisdiction of a Latin Bishop and a non-Catholic wish to marry in the Ukrainian Rite.
  - c) A Ukrainian Catholic and a non-Catholic wish to marry in the Latin Rite.

The National Conference of Bishops, in its November 1967 general meeting, directed that the two *dubia* given above be referred to the Sacred Congregation for the Doctrine of the Faith. The author was able to determine that the *dubia* were sent to the Congregation. In turn, they were presented to the Oriental Congregation. No responses have been received and, therefore, the action is still pending.

In the meanwhile, Chanceries must act in the cases falling within these *dubia*. What is given here is the policy followed in the Chancery of Brooklyn:

1. In the cases of a marriage between two Catholics who wish to marry in a rite to which neither belongs, we request the dispensation from the Apostolic Delegation.
2. In the cases of mixed marriages when the parties wish to marry in a rite different from the rite of the Catholic party, we grant the dispensation if the Catholic party is of the Latin Rite or of an Oriental Rite which has no Ordinary in the United States. (In granting the dispensation we invoke Canon 15 and Canon 81 because of the *dubium*.) If the Catholic party belongs to an Oriental Rite which has an American Ordinary, we request the dispensation from that Oriental Ordinary.

## X. Mixed Religion and Disparity of Cult

### A. Cases When Dispensation can be Granted

By virtue of *Pastorale Munus* and *De Episcoporum Muneribus* these two imped-

iments can be dispensed from by the Ordinary in all cases except when the requirements of Nos. 4 and 5 of *Matrimonia Mixta* are not fulfilled.<sup>16</sup> These requirements refer to the promises to be made by the Catholic party and the notification of these promises to the non-Catholic party. Therefore, the Ordinary may dispense from these impediments even:

1. In cases involving a Mohammedan.<sup>17</sup>
2. In cases of the Pauline Privilege: This would happen if the convert who has received the Pauline Privilege wishes to marry a baptized or unbaptized non-Catholic.<sup>18</sup>
3. In cases of dissolution because of non-consummation, if the subsequent marriage is to be a mixed marriage.<sup>19</sup>
4. In cases of "In Favor of the Faith" dissolutions, if the subsequent marriage is to be a mixed marriage.<sup>20</sup>

The practice of obtaining dispensations from Mixed Religion and Disparity of Cult from the Holy See whenever it involved a non-consummation, In Favor of the Faith, or a document of liberty case was based on Canon 1050. This canon states:

If with a public impediment from which

a person can, in virtue of an indult, dispense, there should concur another impediment from which one has no power to dispense, he should have recourse to the Holy See in regard to them all.

This norm does not affect the validity of a dispensation granted contrary to the rule.<sup>21</sup>

*De Episcoporum Muneribus* does not expressly or implicitly reserve to the Holy See the dispensation from Mixed Religion or Disparity of Cult in such cases. Therefore, it is within the power of the local Ordinary to grant it.

B. *Are the Promises Required by Matrimonia Mixta Necessary for the Validity of Dispensation?*<sup>22</sup>

1. Formal Promises. From a study of the text, it would seem that formal promises would not be required for the validity of either a dispensation from Mixed Religion or from Disparity of Cult.
  - a. There is no phrase in the text which even remotely hints that the giving of the promises is an essential condition for validity of the dispensation.
  - b. *Matrimonia Mixta* has completely

<sup>16</sup> *Motu Proprio*, 31 March 1970 (AAS 62-257).

<sup>17</sup> *De Episcoporum Muneribus*: IX, 10.

<sup>18</sup> *Pastorale Munus*: I, 20.

<sup>19</sup> *De Episcoporum Muneribus*: IX, 16; VI *Pastorale Munus*: I, 20; Cf. also CANON LAW DIGEST, 393-94.

<sup>20</sup> *De Episcoporum Muneribus*: IX, 16.

<sup>21</sup> T. Lincoln Bouscaren, Adam C. Ellis, Francis N. Korth, CANON LAW 511 (4th rev. ed. 1963); John A. Abbo, Jerome D. Hannan, *The Sacred Canons*, (1957), p. 226; Eduardus F. Regatillo, *Ius Sacramentarium* 685 (Santander 1960).

<sup>22</sup> For a complete study of the observations made in this section, consult Urbanus Navarrete, *Commentarium Canonicum ad Litt. AP. Motu Proprio Datas Matrimonia Mixta*, PERIODICA 59 (1970) 422-69.

revised the whole subject matter of the former law on Mixed Marriage and therefore, according to Canon 22, has abrogated the former law. This abrogation includes the abrogation of the necessity of the promises for the validity of the dispensation.

- c. The general trend in legislation since the Council on Mixed Marriage has been toward leniency and flexibility. This general tendency would not be in agreement with the severity of a legislation making the dispensation invalid if the promises are not made and in the case of Disparity of Cult, making the marriage invalid.
  - d. There is a serious doubt of law about the necessity of the formal promises for validity of the dispensation. Therefore, by virtue of Canon 15 it cannot have an invalidating effect.
2. Implicit or Equivalent Promises. Even though formal promises are not required for validity, it can be asked if, because of the requirements of the divine law, the nature of the mixed marriage complexus demands for validity that moral certitude of the promises be obtained. There seems to be sufficient evidence to state that not even implicit or equivalent promises are required for validity of the dispensation and therefore it is no longer necessary to have any certitude or even well-founded hope that the promises will be fulfilled.
- a. Moral certitude of the fulfillment of the promises over the years has diminished to the degree that all that is required is a "well-founded hope." Neither in *Matrimonii Sacramentum* nor in *Matrimonia Mixta* is there a mention of the necessity of moral certitude or well-founded hope as required by positive law.
  - b. The nature of mixed marriages does not require moral certitude nor a well-founded hope of the fulfillment of the promises. The divine law on the preservation of the Catholic faith and on the baptism and education of children in the Catholic faith need not be protected solely by the positive laws establishing and regulating the impediments of Mixed Religion and Disparity of Cult. The divine law can be protected through other pastoral measures. Therefore, the Church can change or even abolish the institution of promises if there is some other way of protecting the divine law in question.
  - c. Since neither positive law nor the nature of the mixed marriage complexus requires moral certitude or a well-founded hope of the fulfillment of the promises, it seems that neither is a necessity for the validity of the dispensation.
  - d. Because of the doubt of law, in virtue of Canon 15, the invalidating effects do not bind.

### Dispensation from the Form

#### A. *Place of the Marriage*

The first two drafts of the American Bishops' directives on the decree, *Matrimonia Mixta*, recommended in case of a dispensation from the form that the non-Catholic minister officiate at the marriage in a Catholic Church. The final and official directives omitted this suggestion.

In spite of publicity several years ago given to three marriages before a non-Catholic minister in a Catholic Church, the Holy See has never permitted this. We checked the three dioceses in which these marriages had occurred and learned that the rescript from Rome had only granted a dispensation from the form. The rescript did not grant any permission for the marriage in the Catholic Church.

The Diocese of Brooklyn, three years ago, petitioned for this permission. We did so only after having read that it had occurred in two other dioceses. The Sacred Congregation for the Doctrine of the Faith refused in no uncertain terms, informing us that it had never granted the favor and that there were no exceptions to this. The dispensation from form was granted, but only in order that the parties could contract marriage in a non-Catholic religious edifice before the non-Catholic minister.<sup>23</sup> When, therefore, the Ordinary grants a dispensation from the form, he cannot allow the marriage before the non-Catholic minister to take place in a Catholic Church.

This exclusion, however, would not refer to marriages between a Catholic and an Orthodox Christian before a sacred minister of the Orthodox Church. In clarifying several difficulties of the decree, *Crescens Matrimoniorum*, on marriages between Latin Catholics and Orthodox Christians, the Oriental Congregation stated that for a sufficient reason the Ordinary could permit in cases of dispensation from the form that the marriage take place in the Catholic Church with the Orthodox sacred minister witnessing the marriage. This would not be considered *participatio in sacris*.<sup>24</sup>

#### B. *Competent Ordinary*

The directives of the United States Bishops implementing *Matrimonia Mixta* make it clear that in mixed marriages the competent Ordinary to grant the dispensation from the form is the local Ordinary of the Catholic party or the Ordinary of the place of the marriage.

In regard to mixed marriages between Latin Catholics and Orthodox Christians, the decree, *Crescens Matrimoniorum*, states that the Ordinary who grants the Mixed Religion dispensation can grant the dispensation from the form. However, in a response to a query from Italian bishops, the Oriental Congregation designated the competent Ordinary as the Ordinary of the Catholic party or the Ordinary where the marriage is to take place.<sup>25</sup>

My problem with the norm enunciated by the United States Bishops and the

<sup>23</sup> A similar letter addressed to the Archdiocese of St. Paul-Minneapolis can be found in the N.C.C.B. CANONICAL REFERENCE MANUAL 26.

<sup>24</sup> Undated Reply, N.C.C.B. CANONICAL REFERENCE MANUAL 24.

<sup>25</sup> Undated Reply, N.C.C.B. CANONICAL REFERENCE MANUAL 23.

Oriental Congregation is that both seem to go beyond the well-known rules of jurisdiction. In a dispensation from the form, a person, the Catholic party, is dispensed from the obligation of the form. To be dispensed, a person must be in some way a subject of the one dispensing. If then neither party in a mixed marriage is domiciled or actually present in the diocese where the marriage is to take place, it can be asked, where is the jurisdiction of the Ordinary of the place of marriage so that he can dispense the Catholic party from the obligation to the form? The only explanation seems to be that the Ordinary acquires jurisdiction over a Catholic party not resident or physically in his diocese by the fact that the marriage is scheduled to take place in his diocese.

If this be so, why do we deny the Ordinary of the place of marriage the power to dispense from Disparity of Cult or Mixed Religion unless the Catholic party is domiciled in the diocese or actually present in the diocese? Or can we say here also that by the fact that a marriage is to take place in a diocese, the Ordinary acquires jurisdiction to grant any dispensation relating to that marriage even though neither party is in any way domiciled or present in the diocese? *De Episcoporum Muneribus*, possibly allows this when it says: "The faithful upon whom the power of dispensing is exercised according to law are all those who are subject to the bishop by reason of domicile or *on some other ground*."<sup>26</sup>

The above comments are presented only

as a query and not as an opinion or mode of action.

### C. *Deacons Assisting at Marriages*

The Decree, *Sacrum Diaconatus Ordinem*, allows a deacon to assist at a marriage when a priest is absent. A response from the Holy See stated that the condition of the absence of a priest is not necessary for the validity of the delegation of the deacon.

In many cases of a deacon assisting at a marriage, a priest is present and available. This often happens when a deacon is permitted to officiate at a marriage of a relative. It would seem, therefore, that in such instances, a dispensation from the form should be granted for the liceity of the delegation, by virtue of *De Episcoporum Muneribus*. This dispensation would not be required if the condition of the absence of the priest is present.

## Sanation

### A. *When Sanation can be Granted*

By virtue of the faculties granted to him, the Ordinary may grant a *sanatio in radice* of all marriages except in the following cases:

1. When a dispensation is required for an impediment reserved to the Holy See.
2. When there is a question of an impediment of the natural or divine law which has ceased.
3. In Mixed Marriages, when the requirements for the promises in Nos.

<sup>26</sup> DE EPISCOPORUM MUNERIBUS, VII.

4 and 5 of the Decree, *Matrimonia Mixta*, are not fulfilled.<sup>27</sup>

What are the impediments reserved to the Holy See?

1. Age when it exceeds one year.
2. Diaconate, priesthood, solemn religious profession.
3. Crime of the second and third degree.
4. Consanguinity in the direct line and in the collateral line to the second degree mixed with first.
5. Affinity in the direct line.

Putting it positively, the Ordinary can grant a sanation as often as the marriage is invalid:

1. because of an impediment from which he can dispense;
2. because of an impediment of ecclesiastical law which has ceased;
3. because of defect of form of any kind.

The Ordinary can grant the sanation even when both parties are unaware of the invalidity of the marriage and even when both parties are Catholics. The faculties of *De Episcoporum Muneribus* include and go beyond those in *Pastorale Munus* in regard to sanations. Hence, there is no reason to resort to *Pastorale Munus*. The

latest *Quinquennial Faculties* omit all reference to sanations because of the ample faculties of *De Episcoporum Muneribus*.

#### B. *Retroactive Effects*

Buijs, in his article on the faculties of bishops, makes a distinction between sanation *ex nunc* (partial or imperfect) and sanation *ex tunc* (complete or perfect). Radical sanation *ex nunc* involves a dispensation from the renewal of consent for the convalidation but does grant retroactive effects. This, according to Buijs, is the type of sanation which *De Episcoporum Muneribus* permits Ordinaries to grant.

Radical sanation *ex tunc* involves a dispensation from the renewal of consent and also grants retroactive effects. This, according to Buijs, is the type of sanation which *Pastorale Munus* permits Ordinaries to grant in its limited cases.<sup>28</sup>

Buijs' interpretation is based on the wording of *De Episcoporum Muneribus* which states that reserved to the Holy See is the dispensation "from the law requiring renewal of consent in a *sanatio in radice*, whenever etc. . . ."

By this reservation, I do not feel that *De Episcoporum Muneribus* is reserving also the concession of the retroactive effects. The *Motu Proprio* is dealing only with reservations of dispensations. Retroactivity of effects is not a disciplinary law from which a dispensation can be obtained. It is a concession through a fiction of law of certain effects retroactively. It is prac-

<sup>27</sup> DE EPISCOPORUM MUNERIBUS: IX, 18; MATRIMONIA MIXTA, N. 16; cf. PASTORALE MUNUS: I, 21, 22.

<sup>28</sup> Buijs, *De Potestate Episcoporum Dispensandi*, PERIODICA 56 (1967), 628-34.

tically equivalent to a favor or privilege. Since *De Episcoporum Muneribus* speaks of a *sanatio in radice*, it seems to me that it is including the retroactivity of effects contained in the notion of sanation.

If the retroactive effects are not produced, there really is no *sanatio in radice* in the authentic sense of the term. If to produce the retroactive effects, a pontifical indult is needed, of what value is the dispensation of the bishop in sanation cases? If retroactive effects were not to be included, then the *Motu Proprio* should instead have reserved to the Holy See in certain cases the dispensation from renewal of consent required in simple convalidation. (C. 1133, § 1)

Furthermore, most authorities writing on this subject consider that by virtue of *De Episcoporum Muneribus* Ordinaries can grant the *sanatio in radice* in the full sense of the term, that is, with retroactive effects.<sup>29</sup>

### C. Promises in Sanation of Mixed Marriages

Is the requirement of the promises in Nos. 4 and 5 of *Matrimonia Mixta* necessary for the validity of a sanation of a mixed marriage?

<sup>29</sup> T.P. Cunningham, *De Episcoporum Muneribus*, THE IRISH ECCLESIASTICAL RECORD 107 (1967), 58-59; Ch. Berutti, *De Episcoporum Muneribus*, MONITOR ECCLESIASTICUS 97 (1967) 577-78; Villarino, *Los Obispos y La Sede Apostolica*, III REVISTA ESPAÑOLA DE DERECHO CANONICO 455-57 (1966). Regatillo, *Facultad de los Obispos par Dispensar de las Leyes Generales de la Iglesia*, 55 SAL TERRAE 776 (1967); James Madden, *The Dispensing Power of the Bishops*, 44 AUSTRALASIAN CATHOLIC RECORD 140-43 (1967).

The phrase used in *Matrimonia Mixta* on sanations seems to require the fulfillment of Nos. 4 and 5 of the document for validity. It states that the sanation can be granted "when the conditions spoken of in Nos. 4 and 5 of these norms have been fulfilled." (Impletis condicionibus . . .) This clause is very similar to the clauses of *Quinquennial Faculties*, *Pastorale Munus* and *De Episcoporum Muneribus*, which determined the validity of the granting of the sanation.

In spite of this, it seems that the phrase in *Matrimonia Mixta* is not for validity of the sanation. It does not seem possible that the legislation would want the validity of a sanation dependent on norms that are so mild and indefinite. Recall that norm N. 4 states that the Catholic party shall declare he is ready to remove dangers to the faith and shall promise to do all in his power to have children baptized and raised in the Catholic Church. Norm 5 states that the non-Catholic party is to be informed of these promises.

In this instance, we have at least a doubt of law and by virtue of Canon 15, the invalidating effects do not bind. A sanation granted by a bishop in such a situation would be valid at least by Canon 209.<sup>30</sup>

### Supplementary Questions

1. Q. Which of the faculties may be delegated and to whom?
- A. Unless otherwise stated, all of the faculties of *Pastorale Mu-*

<sup>30</sup> Navarrete, *Commentarius Canonicum ad . . . Matrimonia Mixta*, PERIODICA 465-68.



*nus* and *De Episcoporum Muneribus* may be delegated. *Pastorale Munus* may be delegated to Coadjutors, Auxiliary Bishops, Vicars General and Chancellors. *De Episcoporum Muneribus* may be delegated to any priest.

2. *Q.* Can these faculties be subdelegated?

*A.* In virtue of Canon 199, § 3 the faculties of *De Episcoporum Muneribus* may be subdelegated in individual cases provided the power of the delegate was *ad universitatem negotiorum*. This would be the situation if the Ordinary delegated these faculties to his Chancellor. If the Ordinary delegated one of these faculties to a priest for a particular case, then it could not be subdelegated unless the Ordinary stipulated that it could be (C. 199, § 4). Since the faculties of *Pastorale Munus* can be delegated only to certain persons, it would follow that those who had been delegated *ad universitatem negotiorum* could subdelegate in single cases only those certain persons capable of being delegated.

3. *Q.* Does the Bishop have the faculty to delegate for serious reasons a priest to confer tonsure and minor orders?

*A.* No. Cappello feels that the

Bishop can permit it in theory but the Holy See has expressly reserved it to itself.<sup>31</sup>

4. *Q.* In cases where Uniate parishes are far removed from their Ordinaries here in the United States, does the local Latin Ordinary have secondary jurisdiction?

*A.* The Latin Ordinary has concomitant jurisdiction with the Melkite and Maronite Ordinaries, not with the United States Ordinary of the other Oriental rites no matter how distant they are from their parishes.

5. *Q.* What faculties can be delegated to Deans?

*A.* All of *De Episcoporum Muneribus*. None of *Pastorale Munus* (consult reply to Q. 1 above).

6. *Q.* Can the Ordinary grant a dispensation from Disparity of Cult when the Catholic party is not domiciled and not yet in the diocese?

*A.* To be safe, the answer is negative. Consult text under "Dispensation from the Form."

7. *Q.* Can the Ordinary authorize Chancery officials, without naming them Vicars General, to delegate a priest for marriage?

<sup>31</sup> FELIX M. CAPPELLO, IV DE SACRAMENTIS 193-94 (1951).

- A. No. Canon 1066, § 6 excludes general delegation for marriages except to a *vicarius co-operator*. By virtue of Canon 199, §§ 3 and 4, without general delegation, a Chancery official cannot subdelegate.
8. Q. Since *De Episcoporum Muneribus*, is the delegation of *Pastorale Munus* still limited to the Vicar General and Chancellor?
- A. Yes, except that it also can be given to Coadjutors and Auxiliary Bishops (consult reply to Q. 1).
9. Q. Can you discuss the limitation on delegating authority to dispense from marriage impediments?
- A. *De Episcoporum Muneribus* gives the Ordinary ample faculties to dispense from marriage impediments. All of the faculties of the Ordinary in regard to marriage impediments can be delegated to all priests.
10. Q. Clarify the extent of the faculties of Vicar General and Episcopal Vicar?
- A. Within the express limitations stated in the law, the Bishop can grant all his powers to the Vicar General. The Episcopal Vicar enjoys the same powers as the Vicar General except that they are limited for a particular territory or over a particular group of persons.
11. Q. In the absence of the Bishop or Vicar General can the Chancellor be empowered to execute rescripts?
- A. Yes, in accordance with the limitations of Canon 57, that is, unless a substitute executor is forbidden or the executor was chosen *industria personae*.
12. Q. Which Ordinary can or should grant the dispensation from form and impediments when the Catholic party resides outside the diocese of place of marriage?
- A. Consult text under "Dispensation from the Form." From a practical point of view, in ordinary circumstances, the Bishop of the Catholic party should grant all the required dispensations.
13. Q. Can the Ordinary permit more than one Mass on the eve of Sundays and Holy Days of Obligation in order that the faithful may fulfill the precept?
- A. Yes. The faculty of the Sacred Congregation for the Clergy granted to Bishops of the United States in this matter puts no limit on the number of Masses. The faculty granted reads: "permitting that the faithful, whenever the Ordinary judges it to be pastorally necessary or useful, may satisfy their Mass attendance obligation in the afternoon

hours preceding Sundays and Holy Days of Obligation." It should be noted that the faculty granted does not limit Masses to the evening as was true when the faculty was granted to individual Bishops. This faculty to all the United States Bishops uses the phrase *horis postmeridianis*. The Bishops may, therefore, permit such Masses at any time after 12:00 P.M.

14. Q. Can the Bishop permit a non-Catholic or a person who was cause of the nullity of a marriage *jus standi in judicio*?

A. Yes. Consult *The Jurist* (July 1970) at 373-74; *Canon Law Digest*, VI, at 827-28. In the same volume of the *Canon Law Digest*, at 839 under Canon 1892, there is a reply which seems to contradict this affirmative answer. It speaks

of a ligamen case which went into solemn process. When it did, the tribunal of first instance did not obtain a standing in court for the non-Catholic plaintiff. The court of second instance questioned the validity of the process in first instance. The matter was sent to the Sacred Congregation for Doctrine of the Faith. This Congregation stated it lacked the faculties to resolve the question. The question was referred to the Holy Father. It was then sent to the Secretary of State and then to the Rota. The final resolution was a sanation of the process and decision of first instance. This reply in fact does not contradict the faculty. It seems from the text that the court of first instance never used its faculty to grant the *jus standi in judicio*.