

Principal Canonical Issues In A Muslim Man - Catholic Woman Marriage

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Abstract: Marriage is a covenant, an irrevocable sacred bond which establishes the totality of conjugal love. In a marriage between a Muslim man and a Catholic woman, the differences of faith, the conflict of laws, and the spiritual education of children are canonical issues and sources of tension which could ultimately disrupt the totality of conjugal living. The pre-marital period for the Muslim man and the Catholic woman offers them precious time to discern their marital decision and vocation for marriage. Some of these essential elements for discernment from a canonical viewpoint have been raised in this article.

Keywords: Catholic, Muslim, Conjugal life, Divorce, Faith.

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Marriage in Canon Law; A Summary

Marriage draws its constitutive origin from the consent of a man and a woman. This exchange of consent is a private juridic act.¹ Consent makes marriage by an irrevocable and positive act of the will which entails essential rights and obligations expressed as *bonum sacramenti*, *bonum fidei* and *bonum prolis*, elements which form the basic structure on which the good of the spouses can be built (cc. 1055-1057; CCEO cc. 776 §§ 1-2; 726 §3; 817).² Of these, *bonum sacramenti* as an essential property implies indissolubility or the perpetuity of the union.³ *Bonum fidei*, as another essential property of marriage consists in the exclusivity of the union, as opposed to adultery and polygamy, such that one who does not give exclusive conjugal rights for the whole of life excludes *bonum fidei*. Spousal love is also fulfilled in the exercise of the right to procreation or *bonum prolis*, since the good of the spouses implies not only a spousal gift to each other, but also their unreserved openness to children (c. 1055 §1, CCEO, c. 776 §1).⁴ These

¹ John Paul II, Allocution to the Roman Rota, 21 January, 1999, in AAS, 91 (1999), 622-627, in W.H. Woestman, (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, Ottawa, Faculty of Canon Law, Saint Paul University, 2011, 251: “Consent is none other than the conscious and responsible assumption of an obligation by means of juridic act through which on their reciprocal giving, the spouses promise total and definite love to each other [...] at the moment they posit this act, they establish a personal state in which love becomes a kind of duty that is also endowed with a juridic character” (hereafter W.H. Woestman, [ed.], *Papal Allocutions to the Roman Rota 1939-2011*).

² English translation *Code of Canon Law. Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington DC, CLSA, 2012 (hereafter CIC). CIC, cc. 1055-1057; CCEO, cc. 776 §§1, 2; 817. This translation is used for all subsequent citations of the canons of the 1983 Code. *Code of Canons of the Eastern Churches. Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington DC, CLSA, 2011 (hereafter CCEO). This translation is used for all subsequent citations of the canons of the 1990 Code. Paul VI, Allocution to the Roman Rota, 9 February, 1976, in AAS, 68 (1976), 204-208, English translation in W.H. Woestman, (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, 135 states: “Consequently, once the consent has produced its juridical effect, it automatically becomes irrevocable and lacks the power to destroy what it created.” See also S. Villeggiante, “Matrimonio cattolico e matrimonio musulmano. Due mondi a confronto nel matrimonio dispari,” in *Seminarium*, 25 (1985), 198: “dal combinato disposto della prima parte del can. 1055, §1 e della prima parte del can. 1056 col secondo paragrafo del can. 1057, appare chiaro, che la Chiesa oggi ci presenta una concezione del matrimonio unitaria, assoluta e universal.”

³ The adjective ‘*essentialis*’ in c. 1056 implies that if these properties were lacking, the act of marriage consent would be invalid. For an elaboration of the use of the term ‘essential’ in the Code, see J.H. Huels, “Constitutive Law and Juridic Institutes (c. 86),” in *Ius Ecclesiae* 16 (2004), 719-721. See also L.G. Wrenn, *Annulments*, Washington, D.C., CLSA, 1996, 137: “Permanence is a divisible notion. One could, for example, enter a permanent, that is, a lasting contract, say for twenty-five years [...]. Permanence in other words, admits of degrees, Perpetuity on the other hand, is an indivisible notion. A thing cannot be moderately perpetual or somewhat indissoluble.”

⁴ Second Vatican Council, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, 7 December, 1965, no. 24, in AAS, 68 (1968), 1025-1115, English translation in A. Flannery (gen. ed.), vol. 1, *Vatican Council II: The Conciliar and Post-Conciliar Documents*, New Delhi, St. Paul Publications, 2010, 813 (= Flannery 1). See also John Paul II, Allocution to the Roman Rota, in AAS,

three *bona* are reflected in the *bonum coniugum* which as the source of the essential rights and obligations of marriage therefore includes perpetuity, exclusiveness, and procreativity.⁵ In sum, the nature and essence of marriage which is established by God and based on natural law, entails that its essential elements and properties are intricately bound with every valid sacramental or non-sacramental marriage.⁶

With this in perspective, one is in a position to better comprehend the preoccupation of the Church concerning a non-sacramental marriage between a Muslim man and a Catholic woman. This concern dates back to the doctrinal differences that have led “over the centuries, [to] many quarrels and dissensions.”⁷ Even today, this concern has not ebbed. This is why, when a Catholic woman and a Muslim man wish to be married, the Church, true to her maternal nature and for the stability of the marital union, seeks to ensure that the Catholic party is aware of the beliefs and legal traditions which regulate Muslim society and that the Muslim man is well informed of the purposes and essential properties of marriage.⁸ Such a marriage can only be performed *ad validitatem* for “a just and reasonable cause” with

74 (1982), 449-454, in W.H. Woestman, (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, 172; *coram* Verginelli, 16 March 2007, in *Studia canonica*, 43 (2009), 552-553.

⁵ *Coram* Pompedda, 11 April 1988, 80 (1988), 202, in J. Renken, “Matrimonial Jurisprudence,” Class Notes, Ottawa, Faculty of Canon Law, Saint Paul University, 2012-2013, 97-98 where he argues that “the *bonum coniugum* - the only one treated in the new code, which no longer makes mention of the right to communion of life, ought to be understood and brought about as the right (and correlative obligation) to the communion of life: understood in its broad significance, ideally inspired toward conjugal love as the Second Vatican Council placed it, expressed juridically by the rights and obligations associated with a unique or specific way of acting in interpersonal relationships proper to spouses, determined by what is essentially required and adequate from the nature of marriage and having juridical importance” (hereafter J. Renken, “Matrimonial Jurisprudence”); GS no. 48, in Flannery 1, 835. Some rotal decisions have been given on *bonum coniugum* as an autonomous ground of nullity. See for example *coram* Burke, 26 November, 1992, in *Studia canonica*, 27 (1993), 500-502.; *coram* Pinto, 9 June 2000 in *Studia canonica*, 39 (2005), 271-308; *coram* Turnaturi, 13 May 2004, in *Studies in Church Law*, 2 (2006), 297-322, original Latin in *Periodica* 96 (2007), 65-92; *coram* Serrano, 23 January 2004, in *Philippine Canonical Forum*, 10 (2008), 321-338.

⁶ See Benedict XVI, Allocution to the Roman Rota, 26 January, 2013, no. 2, English translation in *Origins*, 42 (2013), 597 which states: “[...] there is no intention to affirm that fidelity and likewise the other properties are not possible in natural marriage, contracted between people who have not been baptized.”

⁷ Second Vatican Council II, Declaration on the Relation of the Church to Non-Christian Religions *Nostra aetate*, 7 October, 1965, no. 3, in AAS, 58 (1966), 740-744, English translation in Flannery 1, 654. See also F.A. Fau, *Mixed Marriage. The Historical Evolution of the Impediment of Disparity of Cult and Prohibition of Mixed Religion up to the Legislation of the 1983 Code*, JCD Thesis, Rome, Pontifical Gregorian University, 1993, 15-41.

⁸ See Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Erga migrantes caritas Christi*, 1 May, 2004, no. 67, in AAS, 96 (2004), 762-822, English translation in *People on the Move*, 36 (2004), 810 which states: “During the marriage preparation the two fiancés will be helped to know and consciously “assume” the profound cultural and religious differences they will have to face, both between themselves and in relation to their respective families and the Muslim’s original environment” (hereafter *EMCC*).

a dispensation from the impediment of the disparity of cult by the local ordinary (c. 1086 §§1, 2; CCEO, c. 803 §§1, 2). In juridical terms, *iusta de causa* as an indeterminate juridical concept is not an empty notion. This is because the local ordinary is bound to verify the fulfillment of the conditions stipulated by law *ad liceitatem* in cc. 1125-1126 (CCEO, cc. 814-815), prior to issuing the rescript. This implies that the local ordinary who grants (*concessio*) the favour needs to demonstrate that there is a “real cause, a good reason, [which has been] objectively weighed and deemed to be sufficiently motivating for determining the *right* course of action.”⁹ It also implies that the local ordinary would never want to do something which is not just, even in cases when the sufficiency of the motivating reasons may be doubtful (c. 90 §2).¹⁰ This is why the granting or not granting of a dispensation from the impediment of the disparity of cult is based on the local political and cultural conditions. In addition, due to cultic, cultural, and social differences, the local ordinary can also grant the couple a dispensation from the canonical form while demanding a public exchange of consent (c. 1127 §2) in a suitable place (c. 1118 §2). From a canonical viewpoint the local ordinary is to ensure that:

- i. the Muslim man is made aware of the faith obligations of his Catholic fiancée, which includes her sincere promise to do ‘all (*omnia*) in her power,’ to have ‘all’ (*universa*) the children baptized and educated in the Catholic Church; and
- ii. both parties are instructed on the essential ends and properties of marriage, which neither are to exclude.

With this background, the paper seeks as its sole objective to indicate and highlight the relevant canonical issues at stake in a marriage between a Muslim man and a Catholic woman. Chapter One seeks to place in perspective the essential element and properties of marriage according to the Islamic law. Chapter Two will indicate, emphasize, and raise some salient canonical issues which emerge from a conflict of laws, matters that would necessarily have to be raised and discussed at the pre-marital level.

⁹ W.L. Daniel, “The Principle of Legality in Canon Law,” in *The Jurist*, 70 (2010), 45 (hereafter W.L. Daniel, “The Principle of Legality in Canon Law”); C.J. Scicluna, “Recourse against Singular or Particular Administrative Acts of the Diocesan Bishop: Request for Revocation or Amendment, Hierarchical Recourse to the Holy See. Procedure before the Apostolic Signatura,” in *Forum*, 16 (2005), 91-97.

¹⁰ J.F. Castano, *Il sacramento del matrimonio*, Rome, Ancora, 1992, 466 states: “[...] il termine ragionevole non aggiunge niente di sostantivo all’espressione causa giusta, ma risponde all’uso tradizionale della medesima che è stato consacrato dalla prassi giuridica.”

Marriage in Islamic Law

Pointing out the essential and constitutive elements of Muslim marriage brings out the canonical issues that need to be addressed before allowing the Catholic woman to marry a Muslim man. The issues are not just for the information of both parties, but for the (re)formation of a common understanding of the conjugal life that they have to share. More than the common understanding is the mutual respect to each one's expectations, rights and obligations, in a manner that protects marriage as for the good of the spouses and the procreation and upbringing of children.

Islam is essentially a society with its own legislation and traditions. Islamic law, known as the *Shari'a* in Arabic, is rooted in the Qu'ran,¹¹ the sayings of the prophet Mohammed and Islamic tradition.¹² The *Shari'a* forms the backbone of all aspects of Muslim life from personal affairs and family relations to the social, economic and political organization of the community.¹³ The Muslims are divided into Sunni Muslims and the Shia Muslims.¹⁴ The Sunni Muslims adhere to the jurisprudence of

¹¹ *The Qu'ran*, translated by M.M. Pickthall, Beirut, Dar al-Kitab Allubnani, 1981. This translation is used for all subsequent citations of the Qu'ran.

¹² For a detailed understanding of Islamic Jurisprudence, see M.K. Kamali, *Principles of Islamic Jurisprudence*, Cambridge, England, Islamic Texts Society, 2008, 16-75 (hereafter M.K. Kamali, *Principles of Islamic Jurisprudence*); L. Bakhtiar, art. "Social Issues," in *Encyclopedia of Islamic Law. A Compendium of the Major Schools*, Chicago, IL, ABC International Group, 1996, 395-546 (hereafter Bakhtiar, art. "Social Issues").

¹³ General Secretariat Of The Synod Of Bishops. Special Assembly For The Middle East, *The Catholic Church in the Middle East: Communion and Witness, Lineamenta*, Vatican City, 2009, no. 84, in http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20091208_lineamenta_mo_en.html (10 July 2013); L. Pruvost, "Islamic Identity and Divine Law. Notes on the Concept of *Shari'a*," in *Encounter*, 236 (1997), 4: "*Shari'a* is the product of the intellectual, social, and political processes of Muslim history and contains general ethical principles and guidelines rather than strict instructions. Consequently, tradition refers to the oral teachings, customary laws and the behavior of the Prophet Muhammad and early Muslim communitarian life."

¹⁴ L. Hazleton, *After the Prophet. The Epic Story of the Shia-Sunni Split in Islam*, New York, Anchor Books, 2010, 4: "The differences between the Shias and the Sunnis originate from the question of who would succeed the Prophet Mohammad after his death [...]. Sunni means 'one who follows the Sunnah (what the Prophet said, did or condemned). Shi'a is a contraction of the phrase 'Shiat Ali', meaning 'partisans of Ali.'" See also "Open Letter to His Holiness Pope Benedict XVI," 2006, <http://www.thinkingfaith.org/articles/ACommonWordLetter.pdf> (20 June, 2013). There are thirty-eight Muslim signatories from different Islamic nations, of different religious and political ranks in their respective communities, but none with jurisdiction or authority over the other in religious matters and legal jurisprudence; L.A. Nichols, G.A. Mather and A.J. Schmidt (eds.), art. "Islam," in *Encyclopedic Dictionary of Cults, Sects and World Religions*, revised and updated edition, Grand Rapids, Michigan, 2006, 145-146; "Religious Diversity in Canada," in *Horizons*, 10 (2009), 19-20: "The Environics study included a survey of an oversample of Muslims (in Canada's case, the sample included 500 Muslims) as well as a survey of the population at large designed to measure the general public's attitudes toward the Muslim minority [...]. About half of Canadian Muslims (53%) believed *Sharia* law should be recognized by the Canadian government as a legal basis for Muslims to settle family disputes." *Religions in Canada*, Ottawa, Directorate of Human Rights and Diversity, 2008, 55-59 (hereafter L.A. Nichols, G.A. Mather and A.J. Schmidt [eds.], art. "Islam").

four principal schools of law, namely, the Shafite, the Malikite, the Hanifite and the Hanibalite schools of interpretation; while the Shia Muslims have their own school of law or jurisprudence.¹⁵ Consequently, the interpretation of the legal precepts of Islamic law - which are divided into the duties to God and the duties of the people - vary in interpretation and observance among the two denominations. The duties to God concern individual spiritual regulations such as prescribed prayers and rules for fasting and charitable works.¹⁶ The duties of the people are of three kinds. These are: duties dealing with matters of marriage, divorce, and inheritance; duties dealing with business transactions; and finally, duties dealing with civil law.

There is no single, legal, independent authoritative body in Islam to interpret the *Shari'a*. Most of the present-day marriage practices and rituals are derived from traditional customs which in canonical terms can be explained as centenary or immemorial. These include the exchange of consent, the practice of polygamy and the manner a marriage could be dissolved.

The Essential Element of Muslim Marriage

Marriage for every Muslim is an obligation. Celibacy does not exist in Islam for those men who are 'capable.'¹⁷ According to tradition, the primary and essential element of an Islamic marriage is the procreation and the education of the child in the faith of the father.¹⁸ In other words, Islam teaches that marriage is a sexual license

¹⁵ M. Amira, "Islamic Law and Gender Equality: Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt," in *Human Rights Quarterly*, 27, (2005), 567-568: "Soon after the end of the divine revelation with the Prophet's death, interpretation was needed to answer new questions resulting from the expansion of Islam into new societies and cultures. This exercise of interpretation during the eighth and ninth centuries led to the development of four schools of jurisprudence followed today by the vast majority of Sunni Muslims: Hanafi, Maliki, Shafi, and Hanbali." A. Al-Rahman Al-Jaziri, *Islamic Jurisprudence according to the Four Sunni Schools*, Louisville, KY, Fons Vitae, 2009, 5-31.

¹⁶ The five fundamental obligations of every Muslim are: the profession of faith in God and his messenger, daily prayer, fasting during Ramadan, the pilgrimage to Mecca, and almsgiving to the poor (Qu'ran, 2, 177).

¹⁷ Bakhtiar, art. "Social Issues," 398: "Capable is considered as sane, not impotent, and concerns the one who has the means to earn a living and take care of his spouse minimally." B. Immenkamp, *Marriage and Celibacy in Medieval Islam. A Study of Ghazali's Kitab Arab al-Nikah*, Cambridge, University of Cambridge, 1994, 28-61.

¹⁸ See The Islamic Council of Europe, "Universal Declaration of Human Rights in Islam," in *Encounter* 116 (1985), 15: "The father [is responsible for] the physical, moral and religious education of his children in accordance with his faith and his *Shari'a*, and he is responsible for his choice of the direction in which he will guide them: 'Each of you is a shepherd, and each is responsible for his flock;' A.A. Ibn Umar Al-Baydawi, *Anwar al-Tanzil wa Asrar al-Ta'wil*, Damascus, Dar al-Rashid, 2000, 243. The author explains that the precondition for procreation is validated as the natural consequence of the mutual longing for completeness, but subordinated to the affective cooperation between the spouses; M.M. Sharawi, *Ahkam al-Usrah fi al-Bayt al-Muslim*, Cairo, Makataba al-Turath, 1998, 17. Sharawi places primary emphasis on woman as the means for comfort, which he defines as the abode

to control concupiscence and a legitimate channel for procreation. This is necessary to satisfy the prophet Mohammed on the Day of Judgment, so that he can boast of the size of his community in front of the other prophets.¹⁹ Subsequently, *the element of the good of the spouses is oriented and subordinate to the procreation and education of the child.*

With the birth of a child, the parents immediately pronounce the Islamic profession of faith into the ears of the newborn so that these become the first human words the infant hears. For this reason, the birth of a child involves both the nomination of a Muslim name and the responsibility of the father to cater to the religious upbringing and formation of the child. Moreover, the father is obliged to provide sustenance to the children until they reach puberty. This principle is based on the Qu'ran which teaches: "Mothers shall suckle their offspring for two years [...] and the father shall be responsible for paying the cost of their food and clothing on equitable terms" (2, 233). Finally, in case of divorce, the pre-pubescent children continue to live with their mother until the age of puberty or earlier, based on the wishes of the father.

Muslims must marry only Muslims and never idolaters or polytheists.²⁰ No Muslim woman is permitted to marry outside the faith and can marry no more than one husband. Muslim men are allowed to marry women of the 'People of the Book' and the children adopt the faith of the father (Qu'ran, 5, 5).²¹ The pre-pubescent in which man's sexual thirst is stilled (hereafter A.A. Ibn Umar Al-Baydawi, *Anwar al-Tanzil wa Asrar al-Ta'wil*).

¹⁹ See I. Al-Faruqi, "Marriage in Islam," in *Journal of Ecumenical Studies*, 22 (1985), 57: "The Arabic word for marriage is *zawaj* or a pair, and the ceremony is called *nikaah* which means coitus for a sexual relationship" Rotal jurisprudence reformulates conjugal love as a remedy for concupiscence. See also *coram* Ferreira Pena, 9 June, 2006, in *Studia canonica*, 42 (2006), 510; Bakhtiar, art. "Social Issues", 397; M.A. Rauf, *The Islamic View of Women and the Family*, New York, Robert Speller and Sons, 1977, 39.

²⁰ See Qu'ran, 2, 221: "Do not get married with a *musyrik* (idolator) woman except when she converts. Do not get married with a *musyrik* man except when he converts. The *musyrik* will bring you to condemnation, but God will bring you to goodness and pardon;" Qu'ran, 4, 25: "And who so is not able to afford to marry believing women, let them marry from the believing maids whom your right hands possess. Allah knoweth best your faith." See also Al-Ghazali, *Le livre des bons usages en matière de mariage*, translated by L. Bercher and G.H. Bousquet, Paris, Maisonneuve, 1953, 40. If a Muslim woman married a non-Muslim man, the marriage is null. If the couple knew of this impediment and they still married, the man would be punished with forty lashes (hereafter Al-Ghazali, *Le livre des bons usages en matière de mariage*).

²¹ See R.A. Brandwein, C.A. Brown and E.M. Fox, "Women and Children Last. The Social Situation of Muslim Divorced Mothers and their Families," in *Journal of Marriage and Family*, 36 (1974), 498-514. On 1 January 1958 the Moroccan government brought into effect a new law on personal status. Article 108 of the law introduced a reform concerning custody of children, whereby a Christian ex-wife can obtain custody over her children for a longer period than is allowed in the *Shari'a*. Moreover this article allows the transfer of custody to the female non-Muslim relatives of the wife, though only until the children are five years old. The same stipulations were accepted in Algeria on 9 June 1984. The same is effective in Turkey and in Tunisia.

children are also able to marry as long as they have legal representation, though they are required to reach puberty to co-habit and to indulge in sexual relations.²² In the case of non-Muslim wives, the wife is entitled to legal guardianship of the children, only until they reach the age of ‘religious discernment,’ which is between four and seven years of age and not until puberty. However, in the case of divorced Muslim wives, the age limit can rise to seven for girls and ten for boys. The non-Muslim wife is also forbidden by law, after a divorce, to hand the children to the care and custody of her family or relatives, due to the disparity of cult, much unlike the privilege for divorced Muslim women.

The Constitutive Elements of Marriage

A valid Islamic marriage consists of four constitutive elements. These are:

- a. the contract;
- b. the consent;
- c. the form; and
- d. the impediments.

a. *The Contract*

Marriage in Islamic law is a contractual agreement between a capable male and a capable female to legitimize procreation.²³ The contract is a private, bilateral

²² Al-Ghazali, *Le livre des bons usages en matière de mariage*, 50-51. Jews and Christians are considered by Muslims as the ‘People of the Book.’ From Mohammed’s biography we know that among his wives, the prophet had a Coptic wife whose name was Mary who gave birth to Ibrahim, Mohammed’s son who died during his lifetime. The prophet also had a Jewish wife, Sofia. Today, the Sunni law schools hold different opinions concerning the religious affiliation of the parents of a non-Muslim wife. The Hanbalis for example claim that both parents ought to be ‘People of the Book.’ For the Hanafis, it is sufficient if one of the parents, preferably the father, is from among ‘the People of the Book.’ When a Christian woman becomes Jewish, or a Jewish woman becomes Christian, she too can be legally wed, according to the Maliki law school. The Shafi’is reject such a possibility. The *Shia* law school does not follow the Sunni interpretation. In its view, marriage to a non-Muslim is always to be considered as a temporary marriage, unless the woman converts to Islam; S. Haeri, *Law of Desire: Temporary Marriage in Iran*, London, I.B. Tauris Publishers, 1989, 256; K. Cragg, “Islam and Other Faiths,” in *Studia Missionalia*, 42 (1993), 260-265 (hereafter Cragg, “Islam and Other Faiths”). See also A.E. Francis, “Status of Women in Islam and their Right to Choose Spouses,” in *Hamdard Islamicus*, 18 (1995), 115-117 (hereafter Francis, “Status of Women in Islam and their Right to Choose Spouses”).

²³ See Conferenza Episcopale Italiana, *I matrimoni tra cattolici e musulmani in Italia, Le indicazioni della Presidenza della CEI*, Rome, 2005, no. 44, 156: “In modo più scarno, invece, il diritto islamico vede nel matrimonio un contratto che rende leciti i rapporti sessuali fra gli sposi. Si tratta di un contratto bilaterale privato, per la cui validità non è necessaria una celebrazione pubblica” (hereafter Conferenza Episcopale Italiana, *I matrimoni tra cattolici e musulmani in Italia*); A. Komadina, *Il matrimonio musulmano*, JCD Thesis, Rome, Pontifical Lateran University, 1983, 4; M. Borrmans, “Alle fonti del diritto e della morale in Islam,” in *Vita e pensiero*, 75 (1992), 192-194; A.Y. Al-Abri,

legal agreement. Only after the contract is agreed, is consent given in the presence of two witnesses, and the couple is recognized as husband and wife.²⁴ Evidently, the contract is a *sine qua non* for the exchange of consent.

Secondly, the dowry is an integral element of the contract (Qu’ran, 4, 4). This is a unique feature in Islamic law and it distinguishes itself from the customs of non-Islamic cultures, wherein the family of the bride pays a dowry to the groom. In Islam, the dowry is given by the husband to his wife. The dowry serves to assist the wife economically, if she is divorced. The material amount in the dowry is dependent on the economic status of the groom, and stipulated after due consultation with the family of the woman. However, if the dowry is waived by the woman, this fact must be mentioned in the contract. Finally, the wife loses the right to the dowry:

- if she is divorced prior to the consummation of the marriage;
- if the union is declared invalid because of apostasy on her part;
- if there exists a permanent impediment between them; and
- a (proven or unproven) adulterous act by her.²⁵

b. *The Consent*

Contract and consent are the principal and primary co-elements which make marriage in Islamic law, even if consent is subordinate to and dependent on the terms of the contract. Subsequently, if the dowry, which guarantees security after the divorce, was not included into the contract agreement, or the amount was not agreeable to either of the parties, consent is not exchanged.

This is why, the intermediate phase of the engagement is essential. During this period of time, deliberations take place concerning the terms of the contract and the amount for the dowry. The engagement also provides the couple with the opportunity to become better acquainted or otherwise part ways. During this interval, it is forbidden for the woman to see another suitor. The man could see other suitors for he can simultaneously prepare himself for a polygamous union.

Once the terms of the contract are agreed, the exchange of consent takes place.²⁶ This exchange is devoid of any specific oral or written formula. The process

“The Nature of Islamic Marriage: Sacramental, Covenantal or Contractual?” in J. Witte Jr., and E. Ellison (eds.), *Covenant Marriages in Comparative Perspectives*, Grand Rapids, Michigan, Eerdmans Publishing, 182-216.

²⁴ I. Al-Faruqi, “Marriage in Islam,” 56; R.W. Maqsood, *The Muslim Marriage Guide*, 2nd edition, New Delhi, Goodword Books, 2013, 7-9.

²⁵ A woman could not accuse her husband for adultery unless four male witnesses were brought forward by the woman. See Al-Tahir al-Haddad, “Les thèses d’al-Tahir al-Haddad sur la promotion féminine et leurs multiples réfutation en Tunisie,” in *Oriente Moderno*, 59 (1979), 31-33.

²⁶ Francisce, “Status of Women in Islam and their Right to Choose Spouses,” 117. “In certain

is that the man declares his offer to marry the woman to the legal guardian of the bride. This is done in the presence of the bride and the witnesses. Her guardian is her father, her older brother, or one of the male members of her father's relatives. Their eligibility depends on their maturity, sanity, honesty, and adherence to Islam. Muslim legal scholars also concur that, if the woman does not have a legal guardian, she may authorize a Muslim male of reliable character to handle her marriage contract and give her consent. The woman gives her acceptance through her legal representative. For the sake of validity, the proposal of the groom and the acceptance of marriage take place at the same time and at the same ceremony.²⁷

c. *The Form*

The involvement of any religious leader at the exchange of consent is optional.²⁸ This is because the exchange of consent primarily requires that it occurs before two witnesses. The witnesses are to be male Muslims who have reached puberty, are to be mentally sound and not deaf. Only one of the male witnesses could be replaced by two women. The witnesses are also the signatories for the marriage license. In brief, a typical Islamic marriage takes place in the following way:

- the Qu'ran is recited by a male leader of the community or by the local religious leader;
- the groom proposes through the legal guardian of the bride;
- the offer is accepted by the bride through her legal guardian in the presence of two witnesses;
- the marriage contract is then signed by the couple and the witnesses; and
- the exchange of rings takes place, if this is customary.

d. *The Impediments*

The impediments to marriage in Islamic law are few and precise. However, Islamic law presumes that if the parties are later aware of the impediment but had conditions, a male spouse could give the right to a mandated representative to propose marriage on his behalf. This happened when the male spouse had a great difficulty in being physically present."

²⁷ M. Borrmans, "Rites et culte en Islam," in *Studia Missionalia*, 23 (1974), 161-189; Francisce, "Status of Women in Islam and their Right to Choose Spouses," 119.

²⁸ I. Al-Faruqi, "Marriage in Islam," 55: "Marriage, like so many other aspects of Islamic culture, is neither wholly sacred nor wholly secular, neither religious nor non-religious;" J. D. Datang, *Intermarriage between Catholics and Muslims in Indonesia: Pastoral Care in a Complex Situation*, JCD, Rome, Pontifical Lateran University, 1993, 33. "In Indonesia, a Muslim marriage is performed in front of an official authorized by the Department of Religious Affairs. His function is only to supervise that the performance is according to the religious prescriptions." See also M. Borrmans, "Osservazioni e suggerimenti a proposito dei matrimoni misti," in *Quaderni di Diritto Ecclesiale*, 5 (1992), 325, "nel diritto dei paesi di radizione islamica il matrimonio è un semplice contratto bilaterale, senza rito speciale nella moschea."

already consummated the marriage, then the marriage is considered valid but illicit. The legal effect would be that, if the woman was divorced, she would have no right to the dowry amount stipulated in the contract, and their children would be attributed to the father for the sake of legitimacy, such that she would have no rights over them.²⁹

Permanent Impediments

a. Consanguinity

The Qu'ran forbids marriages of consanguinity in the direct line.³⁰ The impediment continues after the death of the husband and even after a divorce.

b. Affinity

The Qu'ran prohibits marriage in the first degree in the collateral line. However, marriage between first cousins and between half-brothers and half-sisters is allowed.³¹ The impediment of affinity is linked to the consummation of the marriage, that is, if the marriage was consummated, the union is illicit but valid. Consequently, if she was divorced, the wife is entitled to the dowry, or in the event of his death, to the property and assets of the husband.

c. Breast Feeding

The breast feeding of a child by the mid-wife entails that she and her husband are considered to be the foster parents of the child, for "milk is like blood."³² It is only the child who is bound by these impediments,

²⁹ I. Al-Faruqi, "Marriage in Islam," 50; Al-Ghazali, *Le livre des bons usages en matière de mariage*, 46.

³⁰ "Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sisters, and your mother's sisters, and your brother's daughters and your sister's daughters, and your foster-mothers, and your foster-sisters, and your mothers-in-law, and your step-daughters who are under your protection (born) of your women unto whom ye have gone in, but if ye have not gone in unto them, then it is no sin for you to marry their daughters, and the wives of your sons who spring from your own loins" (4, 23).

³¹ Al-Ghazali, *Le livre des bons usages en matière de mariage*, 43.

³² I. Al-Faruqi, "Marriage in Islam," 53. The CCEO in c. 811 §1 has the impediment of spiritual relationship between a godparent and the baptized person and latter's widowed parent as well. Here the impediment is logically applicable to Catholics only (c. 1; CIC c. 1) since the Code permits non-Catholics to be godparents in the danger of death (c. 685, §3). See also *Nuntia*, 15 (1982), 73: "The canon corresponds to genuine oriental tradition which still has importance for some oriental churches." V. Gorbatykh, *L'impedimento della parentela spirituale nella Chiesa latina e nelle Chiese orientali. Studio storico-canonico*, Tesi Gregorianum 81, Serie Diritto Canonico, Rome, Editrice Pontificia Università Gregoriana, 2008, 288-302.

not his or her brothers and sisters, nor his or her biological parents.³³ On her side, the mid-wife, her husband and their biological children are bound by the impediment of consanguinity and affinity to the breast-fed child.

Temporary Impediments

The temporary impediments which lapse with time or remarriage can be listed as:

a. *For the man:*

- marriage to a polytheist woman, unless she converts to Islam;
- remarriage to his own wife whom he has divorced;
- an adulterous woman, unless she is proven innocent or her innocence is accepted by the man;
- marriage to a fifth wife, unless one of the previous four have been divorced;
- marriage to two sisters at the same ceremony.

b. *For the woman:*

- after her husband's death, for a period of four lunar months and ten days, to ensure legitimacy for children if she is pregnant, as well as respect for the deceased;³⁴

c. *For the man and the woman:*

- during his or her preparations for a holy pilgrimage to Mecca and the annual period of fasting.

The Properties of Marriage

The properties of marriage in the Islamic tradition are basically two. These are polygamy and dissolubility.

³³ S.S. Shah, "Surrogate Parenting. Its Legal and Moral Implications in Islamic Law," in *Hamdard Islamicus*, 18 (1995), 110-111: "The Sunni school of law, namely the Shafi'ite and the Hanbalite schools retain that the impediment comes into action if there were five sessions of breast-feeding; while the Hanifite and Malikite schools hold that it comes into force even after a single session. The Shafi'ite, the Malikite and the Hanbalite schools accept breast-feeding up to two years of the age of the child, while the Hanifite school accepts it up to two and half years."

³⁴ I. Al-Faruqi, "Marriage in Islam," 52-53. The waiting period consists of a period of sexual abstinence imposed on the widowed wife to avoid any confusion as regards the legitimacy of a child who may be born. In addition to this, for the widow it is also a sign of respect for the dead husband. This period is obligatory for the widowed wife even if she has not consummated the marriage.

a. *Polygamy*

Polygamy was widely predominant in pre-Islamic societies and therefore formed part of the primitive Islamic community.³⁵ Polygamy is mentioned only once in the Qu'ran:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three, or four; But if ye fear that ye shall not be able to deal justly, then only one, or a captive that your right hand possesses. That will be more suitable, to prevent you from doing injustice (33,50).

This is why Islamic law permits polygamy but limits a Muslim man to marry four wives. Muslim tradition rationalizes polygamy as the best solution for diverse reasons. These range from the infertility of the wife to the fulfillment of the sexual needs of the man.³⁶ The only conditions are that the husband should respect their feelings, show them kindness and consideration, and have the capacity to treat them equally and justly concerning both material affairs and the time he devotes to each one of them (Qu'ran, 2, 228).³⁷ This also implies that he has to provide separate quarters for each of the wives and divide his nights equally among them. He is obliged to pay compensation to the wife whose turn it was, if he fails to keep this obligation. It is incumbent on the husband to provide the financial support for all his wives. This responsibility is inherent in a man's role as being superior to the woman and the leader of the family household. This is on account of his "strength, wisdom, ability to provide maintenance, inheritance, dowry and *jihad*" (Quran, 2, 228).

The main duty of a wife is to be attentive to the physical comforts and psychological needs of her husband as stated in the Qu'ran: "O Lord,

³⁵ J. Prader, *Il matrimonio in oriente e occidente*, Kanonika 1, Rome, Pontifical Oriental Institute, 1992, 97: "La poligamia è tutto'ora ammessi nei seguenti Stati: Indonesia, Pakistan, Afghanistan, Iran, Iraq, Siria, Giordania, Egitto, Arabia Saudita, Kuwait e negli Emirati, nello Yemen, negli Stati Africani, Marocco, Sudan, Somalia, Nigeria, Algeria ecc. [...]. La poligamia è abolita solo in Turchia, Tunisia e Mali" (hereafter J. Prader, *Il matrimonio in oriente e occidente*).

³⁶ See Yasmeen and S. Ahmad, "A Sociological Study of Marriage and Divorce in Islamic Law," in *Islam and the Modern Age*, 20 (1989), 355: "According to Imam Mohammad Abdou, a nineteenth century Egyptian theologian and reformer, polygamy, although permitted in the Qu'ran, is a concession to necessary social conditions that was given with great reluctance, inasmuch as it is permissible only when the husband is able to take equal care of all of his wives and to give to each her rights with impartiality and justice. From this it is clear that the recommendation of the Qu'ran is to monogamy." D. Latifi, "Rationalism and Muslim Law," in *Islam and the Modern Age*, 4 (1973), 65-66.

³⁷ M.H. Kamali, "Muslim Interpretations of S. 2:228," in *the Muslim World*, 74 (1984), 89; J.L. Esposito, *Women in Muslim Family Law*, Syracuse, NY, Syracuse University Press, 1982, 17-18.

grant us wives and offspring who will bring comfort to our eyes” (25, 74).³⁸ The wife must be faithful, trustworthy, and honest. Without her husband’s knowledge and permission, a wife is not allowed to receive or entertain unrelated males in the domicile, found alone with an unrelated male, or move outside the house alone for any reason. She is to be accompanied always by another woman or an approved male relative if the husband is away.

Non-Muslim wife

For the Sunni Muslims, the husband cannot demand his non-Muslim wife to refrain from eating pork or drinking wine, though she is to show prudence, respect, and tolerance to her surroundings and his faith sensitivities. It is also not lawful for him to forbid her to attend her religious festivals. Further, the husband cannot oblige his non-Muslim wife to observe the Islamic rules of purification after her menstrual periods, namely, by isolating her for the stipulated period of time. On the other hand, the Shia school of law prescribes only a temporary marriage with a non-Muslim wife, that is, she can be divorced with no legal reason. Moreover, the Shia denomination compels her to follow the same rules and regulations as any Muslim wife, and her attendance at her religious ceremonies and festivals is dependent on the permission of her husband.³⁹ A non-Muslim wife is incapable of inheriting the property of her husband after his death, unless stated in his will. This is based on Islamic tradition where difference of religion excluded inheritance on both sides.⁴⁰ Her husband is not prevented by law from providing for her economic security indirectly, in the form of a donation, after his death. If she converts to Islam after the death of her husband, she possesses the right to his inheritance, provided that her conversion takes place before the estate is divided. She can bequeath

³⁸ For an expanded study on the faith based assumptions demeaning to women, see K.A. El-Fadl, *Speaking in God’s Name. Islamic Law, Authority and Women*, Oxford, England, One World Publications, 2008, 209-220.

³⁹ See A.R. Doi, *Non-Muslims under the Shariah*, London, Taha Publishers, 1983, 5-15; A.A. Al-Mawdudi, “The Rights of Minorities in an Islamic State,” in *Encounter*, 64 (1980), 15-16; M.W. Hoffmann, “Marriages between Christians and Muslims. Some Comments,” in *Encounter*, 5 (1999), 106-107; D. Assad, G. Harpigny, and J. Nielsen, *Christian-Muslim Marriages*, Series Research Papers, Muslims in Europe, no. 20, Birmingham, England, Centre for the Study of Islam and Christian Relations, 1983, 5-19; J. Prader, “Il diritto matrimoniale islamico e il problema del matrimonio fra donna cattolica e musulmano,” in *Migrazione e diritto ecclesiale*, Pontifical Council for the Pastoral Care of Migrants and Itinerants (ed.), Padua, 1992, 150-153.

⁴⁰ Cragg, “Islam and Other Faiths,” 261; Al-Ghazali, *Le livre des bons usages en matière de mariage*, 46.

her personal assets to anyone, including her non-Muslim children, if any. According to the Shias, the non-Muslim wife can provide only for her Muslim children in her will, not for her non-Muslim children.

b. *Dissolubility*

Given the dowry factor which is pivotal for a marriage to take place, the possibility of divorce in a marriage between a Muslim man and a Catholic woman is real and actual. However, the *Shari'a* teachings on divorce are mixed. On one side, it teaches that, "Of all the permitted things, divorce is the most abominable in the sight of God [...]. Marry and do not divorce; I have no doubt that due to divorce, the throne of the beneficent Lord shakes" (Qu'ran 2, 229-231); on the other side, the historic experience of the Muslim faith community proposes that the dissolution of a broken marriage is a necessary evil, for if the spouses can no longer live in harmony, and have irremediably lost respect for one another, they ought to divorce.⁴¹ According to the Qu'ran, "If they separate, Allah will provide whatever is needed for each one from His bounty, for Allah, the One who cares for all, is wise" (4, 130).

Islamic law grants only the male married members the right to divorce their wives. However, the law does allow the first wife to ask for divorce, if her husband proceeds to a second marriage, even though he is not bound to grant her the request. This is because a married woman can never separate from her husband or even live alone against his wishes while she is still married. Furthermore, her own family too would never accept her. In this context, the dissolution of the marital bond would be only by death; or by the decree of a judicial court.

In order to divorce, the man is to be an adult, of sound mind, not under fear or force, and logically in a legal relationship with the concerned party. In brief, though the reasons a husband could divorce his wife are non-exhaustive, yet they can be illustrated as being on account of

- a. the adulterous activities of his wife;⁴²
- b. her neglect of domestic duties;

⁴¹ M.K. Kamali, *Principles of Islamic Jurisprudence*, 60-62.

⁴² A.M.J., Mughniyyah, "Divorce according to five schools of Islamic Law," in *Tawhid*, 4 (1986), 52-54. If the husband accuses his wife of adultery, he can refuse the child of his wife if she gets pregnant within one cycle. This act attains juridic status by five oaths of repudiation. A woman can never renounce her husband's declaration. This interpretation of the Qu'ran is common to all schools and the Sunni and Shia sects too.

- c. any reason that infringes his conjugal rights;
- d. apostasy.

Types of Divorce

a. Irrevocable

Divorce in Islam is either irrevocable or revocable. An irrevocable divorce can occur in three ways:

- i. the triple utterance of the formula of dismissal stated at one and the same time with the words, "I divorce you;"
- ii. an agreement reached directly between the two spouses or through their representatives at the judicial court; and
- iii. the repudiation of the wife with whom the union has not been consummated.⁴³

b. Revocable

A revocable dismissal implies that the triple formula of divorce, namely "I divorce you" by the husband to the wife, is pronounced at least one time but not the third time. Immediately after the divorce statement had been pronounced, the period of waiting for the wife begins. In other words, the husband and wife are prevented from any physical intimacy until the end of the waiting period, which lasts three menstrual cycles or three months. This is to permit the husband some reflective time to discern whether to take her back (Qu'ran, 4, 228).⁴⁴ During the waiting period, the wife does not lose her marital legal status nor her right to lodging and maintenance. At the same time, towards the very end of her waiting period, the husband is not permitted by law from taking back his divorce pronouncement and then pronouncing it again. A revocable divorce entails that the marriage has been consummated; if not, the wife is not held to observe the legal waiting period. However, if it turns out that the woman is pregnant during the waiting period, she is prohibited to remarry another man until after the birth

⁴³ If the pronouncement was made prior to the consummation of the marriage and if the dowry was already established, the repudiated woman had the right to at least half of that amount (Qu'ran 2, 237). See M. Borrmans, "Les droits de l'homme en milieu musulman," in *Studia Missionalia*, 39 (1990), 256-258; M. Simone, "L'Islam e i diritti umani," in *La Civiltà Cattolica*, 152 (2001), 400-403; M. Wasel, "The Dynamic Equilibrium in Marriage and Divorce in Islam," in *Hamdard Islamicus*, 7 (1984), 41-45; D.S. El-Alamai and D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World*, London, Cimel-Soas, 1996, 199-205.

⁴⁴ "Either take them back on equitable terms, or release them in an honorable way."

of the child. Islamic law permits the concerned divorced woman to remarry her husband again but not until she marries another man, consummates this marriage, is divorced by him and the subsequent legal waiting period is over (Qu'ran, 2, 230).

Islamic law does not grant the wife the right to divorce her husband. However, the wife can petition her husband to dismiss her, if he marries a second wife (Qu'ran, 2, 229). Consequently, the permission of the husband to the wife is conditioned by her willingness to forfeit part or all of her dowry. However, Islamic law does permit a wife to request a divorce from her husband, without any loss to the dowry, for reasons of fear, cruelty, and suspicion of desertion or disappearance.⁴⁵ Finally, Islamic law also permits divorce on the initiative of either the man or the woman, through a court decision, if the marriage was contracted at a prepubescent age or in the case of a marriage to a second woman, proven apostasy, genital irregularities, mental health issues, leprosy and impotency.

Canonical Issues of Concern

The conflict of laws in the Catholic Church and Islam raises multiple canonical issues concerning the institution of marriage. Logically, these differences “require even greater circumspection.”⁴⁶ This is because, while it is necessary that the couple is aware of the purposes and essential properties of marriage as outlined by the Code, at the same time, for the sake of an informative, value based and substantial marriage preparation course, it is incumbent that the pastors of souls also inform the couple of the relevant and pertinent canonical issues that such a marriage entails in the spirit of cc. 1063-1064 and CCEO, c. 783 §§ 1, 3. The *ius connubii* or the divine right to marry is also a logical argument that needs to be addressed in this context, since the divine right “refers only to the right to celebrate a nuptial ceremony.”⁴⁷ In fact, the right to contract a marriage presupposes a capacity and intention to celebrate it. Subsequently, if the mental capacity or intention to divorce were present in any

⁴⁵ F. Khan, “Tafwid al-Talaq: Transferring the Right to Divorce to the Wife,” in *The Muslim World*, 99 (2009), 502-520; A.N. Islam, “La donna nell’Islam,” in *La donna. Memoria e attualità*, IV, L. Boriello (ed.), Vatican City, Libreria Editrice Vaticana, 2001, 31. One of the worst experiences for a wife was to lose her husband by disappearance. It was not uncommon for husbands to disappear, to get a long detention in prison, or to leave for a long sojourn in a foreign country and leave the wife begging in the streets.

⁴⁶ *Catechismus Catholicae Ecclesiae*, Vatican City, Libreria Editrice Vaticana, 1997, no. 1633, cf. 1643, English translation from *Catechism of the Catholic Church*, New Delhi, Theological Publications in India, 1994, 312-313 (*hereafter CCC*).

⁴⁷ Benedict XVI, Allocation to the Roman Rota, 22 January, 2011, in W.H. Woestman, [ed.], *Papal Allocutions to the Roman Rota 1939-2011*, 311.

one of the parties “the *ius connubii* would not, therefore, be denied.”⁴⁸ In the context of the paper, the local ordinary needs to make a sound moral judgment in response to the petition for such a marriage to be celebrated. This is also a moment for the Catholic woman to seriously face the truth about herself and her own Christian vocation for marriage.

Dissolubility

In Islamic law, the contract is a legal and bilateral element for the exchange of consent. The contract can however be broken. In Church teaching, the exchange of consent is understood as a ‘covenant’ (*foedus*) with biblical roots and a more personal connotation or as a ‘contract’ (*contractus*).⁴⁹ There are no canonical or doctrinal differences in the meaning of the two terms. However, the issue at stake is that the Muslim man may comprehend the ecclesial interpretation of marriage as a contract to imply the Islamic legal exercise of the same term. Consequently, prior to the granting of the dispensation from the disparity of cult, this issue must be addressed and clarified at the marriage preparation encounters. This clarity of concept is essential in order to eliminate an error or a mistaken judgment of the true essence and nature of marriage in its creative purity. This is because the Islamic contract necessarily includes the terms of the dowry, even if this is waived by the Catholic woman. This itself is a visible and perceptible datum of the dissolubility of a union (c. 1101 §1; CCEO, c. 824 §1) making superfluous any presumption of law (c. 1060; CCEO, c. 779) to the contrary.⁵⁰ As an alternative, a document could be made to demonstrate

⁴⁸ *Ibid.* Coram Pompedda, 23 January, 1971, in J.H. Provost, “Simulated Consent. A New Way of Looking at an Old Way of Thinking, Part III,” in *The Jurist*, 55 (1995), 741; Gasparri, *Tractatus canonicus de matrimonio*, 3rd revised edition, Vatican City, Typis polyglottis vaticanis, 1932, section 807, in *ibid.*: “[...] if the laws or customs of the region admit divorce to the bond, or polygamy, there would seem to be the presumption that those marrying will to enter a marriage conformable to the laws or customs of the nation; hence it would follow that all marriages celebrated in that region must be held to be invalid, unless in particular cases it is proved that those marrying had a different will in the act of marriage. But it can easily be shown that this doctrine cannot be admitted.”

⁴⁹ *Communicationes*, 15 (1983), 222 states that *contractus* is to be taken in the same sense as *foedus*, a term used in *Gaudium et spes*. See *Communicationes*, 9 (1977), 121: “iam vero matrimonium ut institutum naturae est contractus.” See also Paul VI, Allocution to the Roman Rota, 9 February, 1976, in W.H. Woestman, (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, 135: “In virtue of this well-known principle, a marriage exists at the moment when the spouses express a juridically valid matrimonial consent. This consent is an act of the will by nature of a pact (or a conjugal covenant, to use the word preferred today to contract). In an indivisible moment of time it produces a juridical effect [...].” GS, no. 48; in Flannery I, 835-836; D. Salachas, *Il sacramento del matrimonio nel nuovo diritto canonico delle Chiese orientali*, Bologna, Edizioni Dehoniane, 1994, 24-30; Connolly, “Contrasts in the Western and Eastern Approaches to Marriage,” in *Studia canonica*, 35 (2001), 363-369.

⁵⁰ Bianchi, “L’esame dei fidanzati: disciplina e problemi,” in *Quaderni di Diritto Ecclesiale*, 15 (2002), 362; M. Flood, “Presumption in Canon Law and its Application to Marriage Legislation,” in *Studia canonica*, 41 (2007), 412 : “Presumption provides a stable framework for people to live. While it does not eliminate doubt that may still linger in their minds, people are assured of the intent

the ecclesial reality of what marriage truly is, namely, a lifelong partnership between one man and one woman, which is perpetual, exclusive, and open to children. More precisely, the elements to be emphasized for inclusion in the document are:

- i. a commitment by both partners to respect their individual beliefs and duties of each to worship according to their religious traditions;
- ii. clauses which clarify the faith and religious education of the children;
- iii. an explicit mention of monogamy and marital fidelity by both partners;
- iv. the renunciation of the option to divorce;
- v. an agreement regarding the ownership of goods and property and their distribution;
- vi. the right to inheritance as a widow; and
- vii. the custody of the children, in the case of the death of the husband, or the separation of the couple for reasons of adultery and abuse (cc. 1152 §1, 1153 §1; CCEO, cc. 863 §1, 864 §1).

Secondly, even if Church teaching admits the separation of the spouses while maintaining the marriage bond (*manente vinculo*),⁵¹ there is also the possibility that the Muslim man may misinterpret the moral tolerance of the Church for civil divorce, to imply that the Church supports the very idea of divorce. This is because, according to Church teaching, even if divorce is a “grave offense against the natural law”⁵² yet, at the same time, “if it is the only possible way of ensuring certain legal rights, the care of the children, or the protection of inheritance [...] it does not constitute a moral offence.”⁵³ This is another issue that must be clarified at the pre-marital enquiry level.

Thirdly, related to the topic of the indissolubility of the bond is the issue of a pre-nuptial agreement, that is:

- i. could a couple sign a pre-nuptial agreement that proposes a plan to provide for distribution of assets in the unforeseen case of a civil divorce and even of a dissolution of the bond, in favour of the faith?

of their actions.” (hereafter M. Flood, “Presumption in Canon Law and its Application to Marriage Legislation”).

⁵¹ *Communicationes*, 5 (1973), 86: “The separation here is not just moral, but also juridical.” See also *idem*, 5 (1973), 86-87.

⁵² CCC, no. 2384.

⁵³ CCC, no. 2383.

- ii. Would this initiative affect the canonical validity of a marriage between the Muslim man and his catholic fiancée?

A response to this issue is clear in the Code: “Marriage based on a condition concerning the future cannot be contracted validly” (c. 1102 §1).⁵⁴ In other words, such consent would be null or juridically inefficacious. However, the Muslim man could argue that despite the canonical obstacles, yet “a pre-nuptial agreement can be viewed as a civilly acceptable means by which parties and their families are accorded necessary protection in civil law, which they deem necessary.”⁵⁵ This is obvious in the case of a permanent separation of any sort, including the dissolution of the bond, in favour of the faith.

A response to this argument would be the moral responsibility of the local ordinary who has the authority to permit or deny a future condition, and therefore a prenuptial agreement (c. 1102 §3). He would also have to weigh certain circumstances such as the civil obligation to provide for children of a previous union, or children born from this marriage. He would also need to be aware that the Catholic woman could be deprived of necessary and equitable decent support in case of divorce from the Muslim man, whereby his wealth could be retained in favour of his future spouse(s).

Fourthly, the dowry factor in an Islamic marriage contract also needs to be addressed by the local ordinary, since it is logical to opine that the Muslim man despite his love for his spouse and openness to children, may hope for a dissoluble marriage even if he wishes for a perpetual bond. In juridical terms, by virtue of the dowry, the Muslim man demonstrates in “words and signs” an *indicum* that the bond of marriage can be dissolved at any time, including when the marriage definitively breaks down, or in the case of a probable breakdown. Consequently, this implies not an absence of matrimonial will but rather the presence of a positive will to exclude indissolubility and unity, which also “[harms] the ordination toward the good of the spouses.”⁵⁶ The moral *onus* rests on the Catholic woman, the local ordinary and concerned pastors of souls who would have to make a human, optimistic conjecture concerning the sincerity of the Muslim man.

⁵⁴ The CCEO even eliminates the mention of any condition whatsoever: “Marriage based on condition cannot be validly celebrated” (c. 826).

⁵⁵ G. Ingels, “Canon 1066: Pre-Nuptial Agreements,” in *Roman Replies and CLSA Advisory Opinions*, W. Schumacher and L. Jarrell (eds.), Washington DC, Canon Law Society of America, 1990, 106. Provost advises that “the only way to determine what the effect of a particular agreement might be is to examine each case in itself.” J. H. Provost, “Canon 1066,” in *Roman Replies and CLSA Advisory Opinions*, W. Schumacher and R. Hill (eds.), Washington DC, Canon Law Society of America, 1984, 55.

⁵⁶ Benedict XVI, Allocution to the Roman Rota, 22 January, 2011, in W.H. Woestman, [ed.], *Papal Allocutions to the Roman Rota 1939-2011*, 314.

The canonical issue at stake can be summed up as: *can a person, whose mind is saturated with convictions concerning the dissolubility of marriage derived from his own faith, law and society, be capable, by a few pre-marital encounters, intend an indissoluble marriage?*⁵⁷

Consent

Consent is the fundamental principle and basis of the canonical discipline for marriage and matrimonial jurisprudence. It “makes love conjugal and never loses this character moving from ‘a spontaneous feeling of affection to a binding obligation.’”⁵⁸ Now, the essential end of an Islamic contract and exchange of consent is to merely legitimize conjugal love for the sake of procreation, while in canonical terms the good of the spouses and all that it entails is primary, being the source of the essential rights and obligations of marriage.⁵⁹ Logically, one may presume that in an Islamic marriage, if conjugal love in marriage is lacking, the marriage would automatically “open the door to divorce [since, when] love ceases, with it goes the validity of the irrevocable conjugal covenant [...].”⁶⁰

In jurisprudential terms, the fundamental rights of the woman are at stake, since the giving and receiving factor among the spouses which needs to be mutual, integral, total, indivisible, and characterized by respect, would be missing.⁶¹ This is

⁵⁷ See M. Flood, “Presumption in Canon Law and its Application to Marriage Legislation,” 413: “In referring to a ‘conjecture’ rather than a ‘conclusion’ the CIC definition of presumption immediately excludes absolute certitude. Reiffensteuel call presumption a ‘belief.’” See also F. Morissey, “Canon Law meets Civil Law,” in *Studia canonica*, 32 (1998), 186-187.

⁵⁸ Paul VI, Allocution to the Roman Rota, 9 February, 1976, in AAS, 68 (1976), 207, quoted by John Paul II, Allocution to the Roman Rota, 21 January, 1999, in W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, 250; *idem*, Allocution to the Roman Rota, 9 February, 1976, in AAS, 68 (1976), 204-208, in W.H. Woestman [ed.], *Papal Allocutions to the Roman Rota 1939-2011*, 136.

⁵⁹ *Coram* Burke, 26 November, 1992, in *Studia canonica*, 27 (1993), 500-502. Some rotal decisions have been given on *bonum coniugum* as an autonomous ground of nullity. See for example *coram* Pinto, 9 June 2000 in *Studia canonica*, 39 (2005), 271-308; *coram* Turnaturi, 13 May 2004, in *Studies in Church Law*, 2 (2006), 297-322, original Latin in *Periodica* 96 (2007), 65-92; *coram* Serrano, 23 January 2004, in *Philippine Canonical Forum*, 10 (2008), 321-338.

⁶⁰ *Ibid.*, 134-136; A. Mendonca, “Exclusion of the Essential Elements of Marriage, in W.H. Woestman (ed.), *Simulation of Marriage Consent: Doctrine, Jurisprudence, Questionnaires*, Ottawa, Faculty of Canon Law, Saint Paul University, 2000, 53. “Rotal judges frequently refer to conjugal love in their sentences but deliberately refrain from discussing its juridical value” (hereafter W.H. Woestman, [ed.], *Simulation of Marriage Consent*).

⁶¹ See GS, no. 48, English translation in Flannery I, 835-836; John Paul II, Allocution to the Roman Rota, 21 January, 1999 in AAS, 91 (1999), 622-627, in W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, 251: “Consent is none other than the conscious and responsible assumption of an obligation by means of juridic act through which on their reciprocal giving, the spouses promise total and definite love to each other [...] at the moment they posit this act, they establish a personal state in which love becomes a kind of duty that is also endowed with a juridic character.”

why in the light of procreation as the Islamic aim of marriage – and the place and role of a woman in the Islamic society and more particularly in the household – can the rapport between husband and wife ever be equal; or would it be dependent on her ability to conceive based on health and age. In the event of sterility or age or any untoward handicap to the wife, the perpetuity of the conjugal love would be at stake. It is therefore essential that at the pre-marital phase the canonical “purpose” of marriage includes this factor as well.

Secondly, given that marriage is a divine institution and that consent makes marriage, it is logical to deduce that consent is based on divine law, which no human power can supply (c. 1057 §1; CCEO, c. 817 §2); and the primary essential element of every juridic act is the intention of the subject that is manifested externally, explicitly, and legitimately. Now, in the context of an Islamic exchange of consent, the Catholic bride is a mere passive subject vis-à-vis- her fiancé who is the active subject. Here, the intention of the bride is manifested indirectly to the groom, through the legal guardian. In other words, the bride conveys her willingness to marry the groom to the legal guardian, who in turn informs the groom of the bride’s consent. Islamic law presumes that such an act is licit and valid, since the subject is capable and competent and the *external elements* of the law are observed.⁶² However from a canonical perspective:

- Is this form of an exchange of consent - despite the dispensation from canonical form - licit, irrespective of its legal efficacy in the public forum?
- Does the dispensation from canonical form - which implies that one is now subject to the manner of exchange of consent recognized by the cult of the other party - imply ecclesial approval of the Islamic way of the exchange of consent?
- Is the canonical emphasis on *merely informing* the local ordinary and the pastor “of the place of the celebration and the public form observed” (c.

⁶² L. Orsy, “Matrimonial Commitment in the New Code. *Glossae* on Canons 1057, 1095-1103, 1107,” in *The Jurist*, 43 (1983), 59: “[...] once a legal transaction is completed, we stand for its validity unless the contrary is proved. However, once the invalidity of the transaction is proved, we may still continue to stand for the existence of the internal commitment that is consent.” See also John Paul II, Allocution to the Roman Rota, 29 January 2004, in AAS, 96 (2005), 348-352, in W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, Ottawa, Faculty of Canon Law, St. Paul University, Law, 2011, 278: “human acts licit in themselves and having juridical support are presumed valid while proof of their invalidity must clearly be established. The presumption cannot be interpreted as a mere protection of appearances of the status quo as such, since the possibility of contesting the act is also provided for, within reasonable limits” (hereafter L. Orsy, “Matrimonial Commitment in the New Code. *Glossa*”)

1121 §3; CCEO, c. 841 §3) sufficient to legitimate this unique *multilateral nature* of an Islamic exchange of consent, despite its juridic effects?

Thirdly, given the sensitivity of the Muslims to enter a Church for the sake of marriage, the dispensation from canonical form would be a just and reasonable cause. However, from a canonical viewpoint, there is no canonical norm for an ecclesial passive presence at the ceremony, even if the local ordinary of the place of celebration is informed of the celebration. Ironically, canon law also demands that the woman is to be the protagonist to ensure that suitable notifications of the ceremony are made to her parish (c. 1121 §3; CCEO, c. 841 §3). In pastoral terms once the Catholic woman has received the dispensation from canonical form, she is on her own or better isolated. This fact misrepresents and belittles the maternal and caring nature of the very Body who has given spiritual birth to her (c. 849, CCEO, c. 675 §1).⁶³

Unity

In a marriage between a Muslim man and a Catholic woman, the former has the legal option, sanctioned by the *Shari'a* to have more than one spouse. In other words, the Muslim man may not be unfaithful to his spouse, for this would be adultery; rather, faithful to the Islamic law he has the option:

- i. of the direct exclusion of the right of unity itself;
- ii. to legally concede the right to conjugal acts to a third party, by polygamy; and
- iii. to be polygamous due to weakness of his carnal desires.

This mentality is not in accord with the moral law because “conjugal communion is radically contradicted by polygamy which] directly negates the plan of God [...] it is contrary to the equal personal dignity of men and women who in matrimony give themselves with a love that is total and therefore unique and exclusive.”⁶⁴ There can be no marriage when unity is excluded. Consequently, when

⁶³ cc. 96; 204. This situation is all the more glaring in the context of c. 1116. See also Francis, Address to the Pontifical Council of the Laity, in *L'Osservatore romano*, 42 (2013), 20: “I also like to think of the Church not as an ‘it’ but as a ‘she’. The Church is a woman, she is mother and this is beautiful.” Coronelli, R., “Appartenenza alla Chiesa e abbandono: aspetti fondamentali e questioni terminologiche,” in *Quaderni di Diritto Ecclesiale*, 20 (2007), 8-34.

⁶⁴ CCC, no. 2387. See John Paul II, Allocution of 28 January 1991, in AAS, 83 (1991), 947-953, in W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, 217: “As you know, in the world there are still peoples, among whom the practice of polygamy has not disappeared. In my apostolic visits I have not failed to point out the Church’s teaching on monogamous marriage and the equality of rights of man and woman. Indeed, we cannot ignore the fact that such cultures still have a long way to go in the field of the full recognition of the equal dignity of man and woman.”

unity is excluded, fidelity too, which is at the very heart of conjugal life, can no longer exist, as *bonum fidei* excludes both polygamy and adultery.⁶⁵

With this in view, the canonical issue can be processed thus: given the valuable informative input of the marriage preparation course (c. 1125 §3; CCEO, c. 814 §3) which eliminates the possibility of an error of the intellect, the Muslim man begins a phase of (re)formation.⁶⁶ Subsequently, he begins the struggle to understand and harmonize the essential properties of the purpose of marriage. However, given the brevity of time at the pre-marital encounters and his Islamic environment:

i. Would he in this period of time be able to radically and willfully personalize the canonical essential properties of marriage while continuing to live in a family and society that surround him with a contrary experience?

ii. Can he rightly intend the unicity of the bond as opposed to polygamy?

iii. Can one not convincingly presume that, despite the pre-nuptial enquiry (c. 1067; CCEO, c. 784), it is likely that his Islamic convictions and upbringing will continue to be operative at the time of consent, resulting in explicit or implicit (*in plico verborum*) simulation (c. 1101 §2; CCEO, c. 824 §1)?⁶⁷

Faith of the Catholic Party

The Church always seeks to strike a balance concerning the “theological dialectic, perennially current, between the indicative of salvation and the imperative of moral commitment.”⁶⁸ This fact is evident when a Catholic woman declares her promise to remove “dangers of defecting from the faith” (c.1125 §1; CCEO, c. 814 §1). However, the Muslim man is not bound by Church law to guarantee the declaration of his fiancée (c. 1125 §1; CCEO, c. 814 §1); but is only urged to be informed

Idem, Post-Synodal Apostolic Exhortation on the Christian Family in the Modern World, *Familiaris Consortio*, 22 November 1981, no. 19, in *AAS*, 74 (1982), 81-191, English translation in Flannery II, 856: “polygamy directly negates the plan of God which was revealed from the beginning, because it is contrary to the equal personal dignity of men and women [...]” (= John Paul II, *Familiaris Consortio*).

⁶⁵ CCC, no. 1645. See S. Villeggiante, “L’esclusione del ‘Bonum Sacramenti,’” in *Monitor Ecclesiasticus*, 115 (1990), 344-345: “Il discorso è semplice: la Chiesa non obbliga nessuno al matrimonio, anzi garantisce al massimo la libertà di scelta della persona. Ma, libera nella scelta la persona è assolutamente vincolata dall’oggetto: o la sua volontà intende un oggetto nella sua essenza diverso per ciò stesso sua volontà non è matrimoniale.”

⁶⁶ Bianchi, “Il pastore d’anime e la nullità del matrimonio,” in *Quaderni di Diritto Ecclesiale*, 2 (1993), 200.

⁶⁷ Deepa “The Importance of Pre-Nuptial Enquiry in the Kerala context,” in *Iustitia*, 4 (2013), 121-142.

⁶⁸ Benedict XVI, 7 March 2007, in *L’Osservatore Romano*, English edition, 11 (2007), 15.

about it.⁶⁹ This is a factor that has become a canonical issue of concern for episcopal conferences such as those in the Middle East, Indonesia, the United States, Canada, and Italy.⁷⁰ This concern is justified if the couple intends to migrate to an Islamic country. This is because such a marriage would have to be registered at the Islamic consulate of the Muslim party. Consequently, “If the marriage is registered with an Islamic national consulate, the Catholic party may be asked to recite the *shahada* or sign a document containing the *shahada* [...],”⁷¹ which is the rite of conversion to Islam. Logically, this is a matter of canonical, moral and pastoral concern for the local ordinary to “keep before his eyes” (c. 1752; CCEO, c. 1400).

Secondly, the common element in Islam and Catholicism concerning the reverence of the person of Jesus and Mary is also worthy of consideration. Muslims are known to pay tribute to Mary and even hail her as the “chosen above the women of the world” (Qu’ran, 3, 42).⁷² In fact, in certain parts of the world, Marian shrines and grottoes attract many Muslims.⁷³ Despite this religious fact, it is known that Muslims forbid the use of the adoration and veneration of any image, both in private or in public. The canonical issue in question here concerns the practice of Catholic popular

⁶⁹ *Communicationes*, 9 (1977), 356: “normam de ‘promissionibus’ non afficere validitatem dispensationis.”

⁷⁰ J.D. Datang, *The Intermarriage between Catholics and Muslims in Indonesia. Pastoral Care in a Complex Situation*, 62-63; Conferenza Episcopale Italiana, 156: “A tutela della moglie cattolica si potrebbe tuttavia tollerare la celebrazione del matrimonio civil in Italia, anche nei casi in cui esso non venga riconosciuto dallo Stato del coniuge e non possa tutelare adeguatamente la posizione della donna, essendo colà ammessa la poligamia. In tali Paesi i figli non potranno che essere musulmani e, qualora la coppia vi si trasferisse dopo aver trascorso alcuni anni in Italia, essi, se battezzati, dovrebbero apostatare la fede cristiana.” Conferencia Episcopal Española, Comisión Episcopal de Relaciones Interconfesionales, “Orientaciones para la *celebración* de los matrimonios entre católicos y musulmanes en España,” in *Boletín Oficial de la Conferencia Episcopal Española*, 18 (1988), 58-66; <http://en.lpj.org/2010/05/13/conferencia-de-mgr-shomali-sur-le-synode-pour-le-moyen-orient/> (19 June, 2013): “Many times, the conversion of Christians results not from religious conviction but personal interests or under pressure from Muslim proselytism, particularly to be relieved from obligations related to family difficulties;” W. Shemali, “The Middle Eastern Synod in its Geopolitical and Pastoral Context Conference, May 13, 2008,” Jerusalem, Israel. “In Egypt, it is estimated that up to 15,000 young Christian girls become Muslim for reason related to marriage. Each year, similar cases occur in Palestine and Jordan. Each time it’s a tragedy for the family, which looks upon this conversion as a betrayal in front her religion and herself. In the majority of cases, the girl is considered lost because the girl completely loses touch with her family.”

⁷¹ EMCC, no. 67.

⁷² G. Parrinder, *Jesus in the Qu’ran*, Oxford, One World Publications, 1996, 16: “The Qu’ran gives two accounts of the annunciation and birth of Jesus, and refers to his teachings, healings, and his death and exaltation” (hereafter Parrinder, *Jesus in the Qu’ran*).

⁷³ Ibid. Parrinder, *Jesus in the Qu’ran*, 60: “Mary is the only woman to be called by her proper name in the Qu’ran. The Qu’ran uses the name ‘Mary’ more times than does the New Testament, thirty-four times in the former, nineteen times in the latter.” John Paul II, Angelus, Damascus, 6 May, 2001, in *L’Osservatore Romano*, English edition, 19 (2001), 17; Benedict XVI, General Audience, 6 December, 2006, in *L’Osservatore Romano*, English edition, 50 (2006), 11.

piety. This includes the adoration of “the Person of the Incarnate Word [...] which has nothing in common with idolatry.”⁷⁴ This also includes the probable presence of the Bible in the home or among personal belongings of the Catholic woman, and the Rosary, as a possible minimum.⁷⁵ This issue must not be neglected at the pre-marital phase, since the discussions that could ensue would enable the Muslim man to be “truly aware of the promise and obligation of the Catholic party” (c. 1125 §2; *CCEO*, c. 814 §2), and subsequently prepare both of them to adequately understand the religious requirements of each other in the spirit of mutual respect and religious tolerance. Consequently, the canonical issue at stake calls for the Catholic woman and the local ordinary to be attentive to the elements of

- i. the faith and spirituality of the Catholic woman vis-à-vis the challenges she will face if the domicile is in an Islamic country; and
- ii. her capacity to be faithful to her beliefs while seeking to live in conjugal harmony with the cultural, religious, and social differences in her Muslim environment.

Thirdly, and importantly, in the context of the Church’s teaching on the sacred character of life, the issue of abortion must be raised. This is because Islamic culture permits the abortion of a malformed fetus in the womb within a time period of four months from conception after the pre-natal diagnosis.⁷⁶ On her part, the Church holds that prenatal diagnosis is morally licit, and teaches that “it is gravely opposed to the moral law when this is done with the thought of possibly inducing an abortion.”⁷⁷ Further, there is the possibility of penalties “subject to the conditions provided by canon law.”⁷⁸ In this context, outside of fear (1324 §1, 5^o) that is coercion, the formal

⁷⁴ John Paul II, 29 October, 1997, in *L’Osservatore Romano*, English edition, 45 (1997), 7.

⁷⁵ John Paul II, *Familiaris Consortio*, no. 61, English translation in Flannery II, 892: “Such as reading and meditating of the Word of God, preparation for the reception of the sacraments, devotion and consecration to the Sacred Heart of Jesus, the various forms of veneration of the Blessed Virgin Mary, [...] and popular devotions.”

⁷⁶ Conferenza Episcopale Italiana, 161. “L’aborto è condannato, a meno che non si renda necessario per salvare la vita della madre; viene comunque considerato una forma minore di infanticidio. I giuristi, pertanto, vietano l’aborto dopo il quarto mese o sempre, eccetto il caso di pericolo per la salute della madre. È però ammesso l’aborto del “feto malformato.” L. Hessini, “Abortion and Islam. Policies and Practice,” in *Reproductive Health Matters*, in 15 (2007), 76-77: “Most Muslim scholars agree that abortions are allowed if pregnancies ended before ensoulment of the fetus, described as occurring between 40, 90 or 120 days after conception, depending on the school of thought [...].”; K.F. Akbar, “Family Planning and Islam. A Review,” in *Hamdard Islamicus*, 17 (1974), 34-51.

⁷⁷ CCC, no. 2274. The Code does not provide a definition of abortion considering it unnecessary. “Non vident rationem huius definitionis cum doctrina catholica sit clara hac in re,” in *Communicationes*, 9 (1977), 317. See also *Communicationes*, 20 (1988), 77: “eiusdem fetus ocisione quocumque modo et tempore a momento conceptionis procuretur.”

⁷⁸ CCC, no. 2272; c. 1398. S.J. Renken, “Penal Law,” Class Notes for the Private Use of Students, Ottawa, Faculty of Canon Law, St. Paul University, 2013, 103: “If the attempt to abort is not successful,

co-operation of the Catholic woman in the abortion would constitute a grave offense and is a delict (c. 1398), with the penalty of *latae sententiae* excommunication which can be remitted inside or outside of confession. This also does not imply that the concerned Muslim persons are not bound by divine and positive law to uphold the right of the woman, as well as of those who seek to save the life of the unborn, even if civil legislation deprives them of this innate right. This is because “No circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church.”⁷⁹

With this in perspective, the question that must be asked is: *what can the Catholic mother do in such a situation - when the killing of life in her womb is supported by her Muslim household, including the spouse - given that she is caught up between her sincere love for her husband and his convictions for the death of the child?*⁸⁰ This is another moral and juridical concern that must also be discussed at the pre-marital phase since “marriage and motherhood represent essential realities which must never be denigrated.”⁸¹ Associated to this issue is the canonical urgency of baptizing the child “in danger of death even against the will of the parents”⁸² (c. 868; CCEO c. 681 §4). Here the Catholic party would have to use extreme caution and prudence with due regard to the religious sentiments and convictions of the Muslim household. However, according to canon law, baptism of a living fetus, is still possible (cc. 869, 871; CCEO, c. 680).⁸³ To this end, *it is imperative that this moral and juridical concern be raised at*

the delict is not committed, although the attempt itself is gravely sinful [...]. The delict of canon 1398 involves the killing of a living immature fetus, whether inside or outside of the mother’s womb and by whatever means;” Pontifical Council for the Interpretation of Legislative Texts, *Responsiones ad proposita dubia*, 19 January 1988, approved by Pope John Paul II, 23 May 1988, in AAS, 80 (1988), 1818; J. Sanchis, “L’aborto procurato. Aspetti canonici,” in *Ius Ecclesiae*, 1 (1989), 668.

⁷⁹ John Paul II, Encyclical Letter, *Evangelium vitae*, 25 March 1995, no. 62, in AAS, 87 (1995), 401-522, English translation in *L’Osservatore Romano*, 14 (1995), 12. See *ibid.* no. 73, English translation, 14: “There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection.” See also CDF, “Clarification on Procured Abortion,” in *L’Osservatore Romano*, 26 (2009), 7.

⁸⁰ M. Borrmans, “L’Islam e le sue implicazioni morali e giuridiche,” in *Sette Religioni*, 10 (1993), 44-46.

⁸¹ Benedict XVI, Post-Synodal Exhortation on the Eucharist as the Source and Summit of the Church’s Life and Mission, *Sacramentum Caritatis*, 22 February, 2007, no. 27, in AAS, 99 (2007), 105-180, English translation *The Sacrament of Charity*, Washington, DC, USCCB, 2007, 24.

⁸² The CCEO omits the expression “against the will of the parents.”

⁸³ Canon 822 of the 1980 *schema* stated that it would be lawful to baptize an infant in danger of death, even if the parents were unwilling, *except when there was a danger of causing religious hatred* (emphasis added). See *Codex iuris canonici. Schema Patribus Commissionis reservatum*, Vatican City, Libreria editrice Vaticana, 1980 382 which states: “nisi exinde periculum exurgat odii in religionem;” B. Daly, “Canonical Requirements of Parents in Cases of Infant Baptism according to the 1983 Code,” in *Studia canonica*, 20 (1986), 427; Pavanello, “Rilevanza del principio della libertà religiosa all’interno dell’ordinamento canonico,” in *Quaderni di Diritto Ecclesiale*, 11 (1998), 271-274. See also

*the pre-marital phase not only among the couples themselves but more importantly to the concerned pastors of souls given that “the true evaluation and full meaning [of life] can only be understood in reference to man’s eternal destiny.”*⁸⁴

Faith and Guardianship of the Child

The Code is clear in its demand concerning the “grave obligation and right” of the Catholic woman to educate her child according to the doctrine handed on by the Church (c. 226 §2; CCEO, cc. 407; 627 §1). This obligation extends to admitting the child to a Catholic school as far as possible, or else to provide them with Catholic education outside the school (cc. 797-798; CCEO, cc. 627 §3; 633 §3). However, in a marriage between a Catholic woman and Muslim man, the principle of guardianship and custody of children is controlled by Islamic law. Here, custody is the duty of both parents, while guardianship in matters of maintenance is the right of the father or his male relatives. It is also a fact that - with due regard for c. 1125 §§ 1, 2, and c. 1136 (CCEO, c. 627 §1), in Islamic law, the children follow the faith of the father.⁸⁵ In this context, it is the worth and value of the declaration and promise of the Catholic party is questionable since “[the family has] the right to decide in accordance with their own religious beliefs the form of religious upbringing which is to be given to the children.”⁸⁶

However, in practical terms given the disparity of cult of the parents, any simultaneous doctrinal information to a child by a Muslim and a Catholic, is bound to create conflict and confusion in the child as well as in the family. Consequently, one asks: *is there a possibility for the Catholic woman in an Islamic ambient, aggravated by the gender inequality and her limited influence in the household, to be ‘really’ capable of educating the child in the Catholic faith, without endangering family peace and unity.*

J.H. Provost, “Canon 869. Baptism in *Utero*,” in *CLSA Advisory Opinions*, (1994-2000), 255; J.H. Huels, “Canon 871. The Baptism of Fetuses,” in *CLSA Advisory Opinions*, (1984-1993), 260-261.

⁸⁴ “Omnibus vero compertum sit vitam hominum et munus eam transmittendi non ad hoc saeculum tantum restringi neque eo tantum commensurari et intelligi posse, sed ad aeternam hominum destinationem semper respicere.” GS, no. 51, English translation in Flannery 1, 840.

⁸⁵ K. Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States*, Studies in Religion, Secular Beliefs and Human Rights, Boston, Martinus Nijhoff Publishers, 2008, 215-258.

⁸⁶ Second Vatican Council, Declaration on Religious Liberty, *Dignitatis Humane*, 7 December, 1965, AAS,58 (1966), 929-941, English translation in Flannery 1, 706; *Charter of the Rights of the Family*, presented by the Holy See, 22 October, 1983, in *L’Osservatore Romano*, English edition, 48 (1983), 3-4. SCDF, Instruction on Mixed Marriages *Matrimonii sacramentum*, 18 March 1966, in AAS, 58 (1966), 235-239, English translation in Flannery I, 429: “It does happen in some places that the Catholic education of the children is impeded [...] by the people’s laws and customs, which those intending to marry have to obey.”

Separation of the Spouses

Spouses have the duty and right to preserve conjugal life unless a legitimate cause allows them to separate in accord with c. 1153 §1.⁸⁷ Islamic law permits the woman to divorce her husband if he intends to marry a second wife. Consequently, from the viewpoint of the privilege of the faith, this is a legitimate occasion for the Catholic woman to petition the Supreme Pontiff for the dissolution of the bond.⁸⁸ In addition, in the case of adultery, the Catholic woman has the canonical right to sever conjugal living while still maintaining the bond, unless she

- i. consented to adultery, explicitly, or tacitly; or
- ii. gave cause for adultery; or
- iii. likewise committed adultery too (c. 1152 §1; *CCEO*, c. 863 §1).

In such a situation, the Catholic wife would have a dual option to either return to her Muslim husband if he is not in a polygamous marriage by tacit condonation (c. 1152 §2; *CCEO*, c. 863 §2); or she could petition the Supreme Pontiff, as the non-culpable party, for the dissolution of the bond as a favour to preserve her faith, by virtue of the power of the keys.⁸⁹ The objective of the Church for the salvation of souls is clearly indicative here (c. 1752; *CCEO*, c. 1400).

In the context of a pre-marital preparation, it would be therefore pertinent that *both parties* be made aware of this favor and its conditions prior to the marriage, even if it would raise the following questions:

- i. Is it prudent that the parties be informed of this favour prior to the marriage?

⁸⁷ Conferenza Episcopale Italiana, *Nota pastorale sulla pastorale dei divorziati e di quanti vivono in situazioni matrimoniali irregolari o difficili*, Rome, 1979, no. 42 which states: “ma la vita concreta della coppia può registrare situazioni tali di incomprensioni reciproche, di incapacità o insufficienza a un rapporto interpersonale con ripercussioni negative sia sull’equilibrio coniugale sia sull’ educazione dei figli, che possono rendere legittima la ‘separazione.’”

⁸⁸ CDF, *Normae de conficiendo processu pro solutio vincula matrimonialis in favorem fidei Potestas Ecclesiae*, 30 April 2001, E civitate Vaticana, 2001, English translation with a commentary in W. Kowal and W.H. Woestman (eds.), *Special Marriage Cases and Procedures*, 4th edition, Ottawa, Faculty of Canon Law, Saint Paul University, 2008, 81-130.

⁸⁹ Related to the topic of dissolution, is the topic of non-consummation of the marriage (c. 1142; *CCEO*, c. 862). The Code is silent concerning the procedures for the dissolution of a non-ratified, non-consummated marriage. Also, it must be noted that the verb “dissolve” is the operative verb in the papal process, even if the verb is not employed in canons 1148 and 1149 where a second marriage is authorized by the canons themselves, subject to the provision of canon 1085, §2 (*CCEO*, c. 1426, §1). The dissolution of a non-sacramental marriage is also not a privilege - which is either *praeter legem* or *contra legem*, that is, of the ecclesiastical law - but is rather an exercise of the divine law, the power given by Christ to the Church.

- ii. Would such information not give the Muslim party a warped and false opinion of the permanence of marriage and encourage him to intend a dissoluble marriage, aware of the conditions in article 4?

Secret Celebration

In a pluralistic environment with a strong Islamic influence, the canonical norm for celebrating a secret marriage can become an issue if the local ordinary is petitioned (cc. 1130-1133; CCEO, c. 840).⁹⁰ This is due to the precarious status of the Catholic Church in many Islamic countries, where her existence is dependent on the goodwill and relationship with the government to serve the faithful.⁹¹ The grave and urgent reasons for a secret marriage between a Muslim man and a Catholic woman could be multiple, though the relevant of these could be motives of inability to travel to another territory, or opposition of either one of the families etc. The discretion of the local ordinary is paramount at these moments, as it does involve moral, spiritual and probably physical harm to all concerned. Nevertheless, in the light of c. 1116 §2 (CCEO, c. 832 §2), as long as nothing stands in the way of a valid and licit celebration (c. 1066; CCEO, c. 785), and based on the judgment of the local ordinary concerning the probable harmful civil effects on the Church and the couple, one could celebrate the marriage in the extraordinary form.

Conclusion

Marriage is a covenant, an irrevocable sacred bond which establishes the totality of conjugal love. No one can be prevented from their divine right (*ius connubii*) to marry - as long as they qualify by law and have no divine impediments - though one could still postpone the marriage for grave reasons and as long as the gravity of the cause persists. The discretionary exercise of powers by the local ordinary based on objective fulfillment of canonical requisites to grant the requisite dispensations for a marriage to take place is also to be considered. In a marriage between a Muslim man and a Catholic woman, the differences of faith, the conflict of laws and the spiritual education of children are canonical issues and sources of tension which could ultimately disrupt the totality of conjugal living. The pre-marital phase - including the betrothal period - is significant because a promise to marry, does not give rise to

⁹⁰ *Communicationes*, 5 (1973), 73 which states: “non est oculus, sed publicum in sensu canonico.”

⁹¹ Hinder, “Leading a Church in Muslim Lands,” in *Islam Christiana*, 38 (2012), 213; L. Sandri, “To the Latin Bishops of the Arabic region at their ad limina visit,” [http:// www.vatican.va/ roman_ curia/congregations/orientchurch/interventi/rc|_con_corient_doc_20080115_celra_it.html](http://www.vatican.va/roman_curia/congregations/orientchurch/interventi/rc|_con_corient_doc_20080115_celra_it.html) (19 July 2013): “vivete nel mare della presenza islamica e conoscete la realtà non facile di quel contesto religioso, culturale e sociale. Mentre esercitate la cura pastorale, tra mille prove, avete la responsabilità di offrire alla Chiesa elementi indispensabili di conoscenza per aiutare l’occidente all’incontro con l’Islam.”

an action to seek the celebration of marriage. The pre-marital period for the Muslim man and the Catholic woman offers them precious time to seek counsel from pastors of souls and those concerned, to introspect, evaluate, and discern their marital decision, as well as their own respective human and Christian vocation for marriage. It is also a significant phase to clarify the multiple canonical areas that have been raised in this paper, issues that demonstrate the seriousness of such a marital union from the aspects of unity and indissolubility, and matters concerning the spiritual and moral life of the Catholic party and the children. In this context, and with due regard to the 'just and reasonable cause' for granting a dispensation it must also be noted that from an Islamic legal perspective *when a Muslim man marries a Catholic woman, no tenet of Islamic law is dispensed with, not one*. One can reasonably conclude that the natural and ecclesial order of marriage as an exclusive and perpetual bond of conjugal life and the multiple canonical issues involved in a marriage between a Muslim man and a Catholic woman is indeed a matter of concern.**PS**

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