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3 October 2018

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Your Excellency,

Questioning Writings - Ed Peters' Fellowship of Catholic Scholars Quarterly

1. As the Bishop of the diocese in which the publisher has its address, I seek from you a judgment on the position held and published by Dr. Edward Peters.¹ See his article, "Do Catholics Need Ecclesiastical Permission to Divorce?" published in *Fellowship of Catholic Scholars Quarterly* (40, no. 1/2 Spring/Summer 2017: pp 61-64). In Dr. Edward Peter's article, he disputes with me when he refers to "intelligent (but not canonically trained) persons, interested in promoting Church teaching on marriage."
2. Dr. Peters teaches canon law and sacramental law at Sacred Heart Major Seminary that prepares candidates for the Roman Catholic priesthood for the Archdiocese of Detroit and for dioceses nationally and internationally. As a teacher of theology in seminary or teacher in university who teaches disciplines pertaining to faith and morals, he is bound to the *Profession Faith and Oath of Fidelity* promulgated by the Holy See (pursuant to canon 833, 6° - 7°).²

¹ Can. 823 §1. In order to preserve the integrity of the truths of faith and morals, the pastors of the Church have the duty and right to be watchful so that no harm is done to the faith or morals of the Christian faithful through writings or the use of instruments of social communication. They also have the duty and right to demand that writings to be published by the Christian faithful which touch upon faith or morals be submitted to their judgment and have the duty and right to condemn writings which harm correct faith or good morals. Can. 824 §2. Those things established regarding books in the canons of this title must be applied to any writings whatsoever which are destined for public distribution, unless it is otherwise evident.

² Congregation For The Doctrine Of The Faith, *Profession of Faith and Oath of Fidelity*, (9 January 1989): AAS 81 (1989), 105. "believe everything contained in the word of God, whether written or handed down in Tradition, which the Church, either by a solemn judgment or by the ordinary and universal Magisterium, sets forth to be believed as divinely revealed" [...] "accept and hold each and everything definitively proposed by the Church regarding teaching on faith and morals." [...] "adhere

3. With the non-profit organization Mary's Advocates, I work to reduce unilateral no-fault divorce and support those who are unjustly abandoned. The pastoral practice and interpretation of canon law described by Dr. Peters illustrates inconsistencies in Church leadership. The introduction to our *Catholic Order of Celebrating Matrimony* discusses *The Importance and Dignity of the Sacrament of Matrimony*; parties “persevere in good times and in bad, faithful in body and mind, remaining complete strangers to any adultery and divorce.”³ On the contrary, at the time of marriage crisis, when one spouse, or party to a putative marriage, seeks a civil divorce, legal separation, or legal annulment, diocesan authorities are silent and only offer option of nullity investigation after the civil forum’s decision has purportedly gone into effect.
4. Because of the civil forum's no-fault divorce laws, a party who has committed no offenses justifying temporary or permanent separation is routinely forced to lose everyday interaction with parties’ children, forced to forfeit party’s right to the material contributions of the other spouse, and forced to financially support the other spouse who is renegeing on obligations of marriage. The civil forum has no respect for marriage promises, no expectation for the one renegeing on his promises to repair damage as much as humanly possible, and makes no distinction between grounds for temporary separation, permanent separation, and the absence of grounds. In the civil forum, the determination of obligations of parties is routinely opposed to common decency, natural law, divine law, and canon law.
5. For those who said the Catholic marriage promises, obligations include maintaining the common conjugal life unless a legitimate reason for separation exists, the Catholic upbringing of children, and providing one’s share of material help. Promising to be oriented toward the good of the spouses includes material help (1917 *CIC* c. 1013 “*mutuum adiutorium*” mutual help).

with religious submission of will and intellect to the teachings which either the Roman Pontiff or the College of Bishops enunciate when they exercise their authentic Magisterium,” [...] “foster the common discipline” [...] “maintain the observance of all ecclesiastical laws, especially those contained in the Code of Canon Law.” [...] “follow what the Bishops, as authentic doctors and teachers of the faith, declare, or what they, as those who govern the Church, establish”

³ USCCB. The Order of Celebrating Matrimony, English Translation According to the Second Typical Edition. 2016. Introduction, par. 9, citing *Gaudium et spes*, no. 49.

Judgement Sought

6. I bring to Your Excellency the issues below and ask for your judgement:
- a. Is the Church's exclusive jurisdiction in cases of separation of spouses the following:
 - i. a matter of doctrine, such that whoever obstinately places said doctrine in doubt or denies it falls under the censure of heresy (*cf* cc. 750 §1, 751, 1364 §1);⁴ or
 - ii. a matter definitively proposed by the magisterium of the Church to safeguard and expound the deposit of the faith, such that a person who obstinately rejects said matter, and who does not retract after having been admonished by an ordinary, is to be punished with a just penalty (*cf* cc. 750 §2, 1371 §1)?⁵
 - b. Is a spouse, or party to a putative marriage, who, based on the judgment of one's own conscience, petitions in the civil forum for civil divorce, civil separation, or civil annulment while cut off from the Church's mediation (that also includes binding canonical laws) doing the following:

⁴ Can. 750 §1. A person must believe with divine and Catholic faith all those things contained in the word of God, written or handed on, that is, in the one deposit of faith entrusted to the Church, and at the same time proposed as divinely revealed either by the solemn magisterium of the Church or by its ordinary and universal magisterium which is manifested by the common adherence of the Christian faithful under the leadership of the sacred magisterium; therefore all are bound to avoid any doctrines whatsoever contrary to them.

Can. 751 Heresy is the obstinate denial or obstinate doubt after the reception of baptism of some truth which is to be believed by divine and Catholic faith; apostasy is the total repudiation of the Christian faith; schism is the refusal of submission to the Supreme Pontiff or of communion with the members of the Church subject to him.

Can. 1364 §1. Without prejudice to the prescript of can. 194, §1, n. 2, an apostate from the faith, a heretic, or a schismatic incurs a *latae sententiae* excommunication; in addition, a cleric can be punished with the penalties mentioned in can. 1336, §1, nn. 1, 2, and 3.

⁵ Can. 750 §2. Each and every thing which is proposed definitively by the magisterium of the Church concerning the doctrine of faith and morals, that is, each and every thing which is required to safeguard reverently and to expound faithfully the same deposit of faith, is also to be firmly embraced and retained; therefore, one who rejects those propositions which are to be held definitively is opposed to the doctrine of the Catholic Church.

Can. 1371 The following are to be punished with a just penalty: 1° in addition to the case mentioned in can. 1364, §1, a person who teaches a doctrine condemned by the Roman Pontiff or an ecumenical council or who obstinately rejects the doctrine mentioned in can. 750, §2 or in can. 752 and who does not retract after having been admonished by the Apostolic See or an ordinary;

- i. denying that marriage is a reality of the Church and thereby denying doctrine, such that whoever obstinately places said doctrine in doubt or denies it falls under the censure of heresy (c. 1364 §1); or
 - ii. denying a matter definitively proposed by the magisterium of the Church to safeguard and expound the deposit of the faith, such that a person who obstinately rejects said matter, and who does not retract after having been admonished by an ordinary, is to be punished with a just penalty (c. 1371§1)?
- c. Does the Church's exclusive jurisdiction in cases of separation include competence to decide any, and which, of the following for a spouse or a party to a putative marriage:
 - i. whether a legitimate basis for separation exists;
 - ii. what the parties are to do, or omit doing, especially in order to observe the law;
 - iii. what obligations have arisen for the parties from the ecclesiastic proceeding or process and how they must be fulfilled;
 - iv. whether one may petition in the civil forum for civil divorce, civil separation, or civil annulment?
- d. Do cases of separation of spouses pertain to ecclesiastic judges (administrative or judicial venue), who alone are competent to render a decision on the obligations of parties, unless--with the bishop's permission--the competence is transferred to the civil forum with the voluntary willingness of both parties?
- e. According to the common code of canon law, is a spouse (or party to a putative marriage) required to have the bishop's permission to petition in the civil forum for civil divorce, civil separation, or civil annulment, unless said requirement for permission is waived by particular law?
- f. Absent a particular law waiving said requirement, is someone who denies that a spouse (or a party to a putative marriage) is required to obtain the bishop's permission prior to petitioning in the civil forum for civil divorce, civil separation, or civil annulment, thereby doing the following:
 - i. denying that marriage is a reality of the Church and thereby denying doctrine, such that whoever obstinately places said doctrine in doubt or denies it falls under the censure of heresy (c. 1364 §1); or

- ii. denying a matter definitively proposed by the magisterium of the Church, such that the person who obstinately rejects said matter, and who does not retract after having been admonished by an ordinary, is to be punished with a just penalty (*cf* c. 1371§1)?
- iii. denying the duty the person owes the Church according to the prescripts of the law (*cf* c. 209 §1)⁶
- g. In territories in the United States, does our particular ecclesiastical law require that no spouse (or party to a putative marriage) may petition in the civil forum for civil divorce, civil separation, or civil annulment without first having obtained the bishop's permission?
- h. In territories in the United States, does any spouse (or party to a putative marriage) who petitions in the civil forum for civil divorce, civil separation, or civil annulment, without first having obtained the bishop's permission, incur grave guilt?
- i. In territories in the United States, is any spouse (or party to a putative marriage) who petitions in the civil forum for civil divorce, civil separation, or civil annulment, without first having obtained the bishop's permission, to be punished through the judgment of the bishop.
- j. Is separating from one's spouse (or the other party in a putative marriage) without a legitimate reason as delimited in Canon Law and jurisprudence an object of grave manifest sin?

Dr. Peters Opinion Unfounded, Seek that He be Corrected

7. Herein, I will show excerpts from Dr. Peter's article, followed by sources contradicting his statements. From Your Excellency, I seek that you issue a precept to the publisher of the *Fellowship of Catholic Scholars Quarterly*, and that you issue a precept to Dr. Edward Peters, enjoining him to fulfil his oath of fidelity and maintain the observance of laws contained in the Code of Canon Law, and follow what the Bishops, as those who govern the Church have declared and established.

⁶ Can. 209 §1. The Christian faithful, even in their own manner of acting, are always obliged to maintain communion with the Church. §2. With great diligence they are to fulfill the duties which they owe to the universal Church and the particular church to which they belong according to the prescripts of the law.

Lack Significant Roots in Canonical Tradition

8. Dr. Peters says, “Canons 1692-1696 (outlining the procedure for seeking Church permission to discontinue conjugal life) are new and thus lack significant roots in canonical tradition.” Canon 1692 describes three authorities who could decide obligations of parties in cases of separation of spouses and the limits of each authority’s competence: 1) bishop’s administrative decree, 2) tribunal’s judicial sentence, or 3) civil forum’s decree. Multiple sources in canonical tradition from fourth century to 1917 were collected by Petri Cardinal Gasparri, in *Codicis Iuris Canonici Fontes* (Sources Code of Canon Law).
9. After the protestant reformation, the Council of Trent in 1563 restated that the Church had exclusive jurisdiction over marriage cases. Even the Canon Law Society of America recognizes that marriage cases include, among others, cases of separation of spouses and cases challenging the validity of marriage. The *New Commentary on the Code of Canon Law*, published in 2000, in the title on *Marriage Processes* (cc. 1671-1707), shows, “This title contains the norms governing marriage nullity cases” [and ...] “cases of the separation of spouses.” An early source for canon 1692 in the Code promulgated in 1983 is found in the Council of Trent. In the twenty-fourth session of the Ecumenical Council of Trent, in 1563, the Church pointed out heretical positions, for which someone would be anathema (excommunicated). The Council’s Canons showed the Church’s jurisdiction over cases of separation of spouses.⁷

Whereas therefore matrimony, in the evangelical law, excels in grace, through Christ, the ancient marriages; with reason have our holy Fathers, the Councils, and the tradition of the universal Church, always taught, that it is to be numbered amongst the sacraments of the new law; against which, impious men of this age raging, have not only had false notions touching this venerable sacrament, but, introducing according to their wont, under the pretext of the Gospel, a carnal liberty, they have by word and writing asserted, not without great injury to the faithful of Christ, many things alien from the sentiment of the Catholic Church, and from the usage approved of since the times of the apostles; the holy and universal Synod wishing to meet the rashness of these men, has thought it proper, lest their pernicious contagion may draw more after it, that the more remarkable

⁷ The Council of Trent, the Twenty-Fourth Session, The canons and decrees of the sacred and Ecumenical Council of Trent, Ed. and trans. J. Waterworth (London: Dolman, 1848), 192-232. Online; available from: http://www.documentacatholicaomnia.eu/03d/1545-1545,_Concilium_Tridentinum,_Canons_And_Decrees,_EN.pdf [accessed 1 October 2018]

heresies and errors of the above-named schismatics be exterminated, by decreeing against the said heretics and their errors the following anathemas. [...]

Canon VIII. If anyone saith, that the Church errs, in that she declares that, for many causes, a separation may take place between husband and wife, in regard of bed, or in regard of cohabitation, for a determinate or for an indeterminate period; let him be anathema. [...]

Canon XII. If anyone saith, that matrimonial causes do not belong to ecclesiastical judges; let him be anathema.

10. Another source for canon 1692 pertinent to the procedural law on marriage is shown in *Codicis Iuris Canonici Fontes* by Cardinal Gasparri: the 22 August 1840 instruction from The Sacred Congregation of the Council with competence to execute and interpret the decrees of the Council of Trent.⁸ The conditions under which it was tolerable for a party to petition in the civil forum in cases of separation of spouses were set down by the *Sacra Congregatio Sancti Officii* (*S.C.S. Off.*) in 1860 while answering a question from Southwark England.⁹

1) there must be present just causes for the separation in the judgment of the bishop;

2) there must be no other tribunal to which the Catholic can go to obtain a separation which would be recognized by the civil law;

3) the sentence of the civil tribunal must have no other effect than that of separation. [Translation, Forbes]¹⁰

Cardinal Gasparri also presented clearly multiple sources (*fontes*) for canonical tradition with respect to Catholics approaching the civil forum in his Latin work *Tractatus Canonicus de Matrimonio* that has an article and appendix about divorce.¹¹ More decrees implementing the

⁸ *Codicis Iuris Canonici Fontes*. Vol. VI – by Gasparri, published by *Typis Polyglottis Vaticanis*, MCMXXXII (1932). *Fontes* n. 4069. Page 345-350. Online available from http://marysadvocates.org/wp-content/uploads/2018/09/1840_Aug.22_fonte_4069_.pdf

⁹ *Collectanea Sancti Congregationis de propaganda fide seu decreta instructiones rescripta pro apostolicis missionibus*. Vol. 2 Ann. 1867-1906. Rome: Publisher Polyglotta (1907). n. 2272. 22 Maii et 19 Dec. 1860. *S.C.S. Off.* Southwark. Online available from http://marysadvocates.org/wp-content/uploads/2017/07/18601219_S.C.S.Off_.Southwark.pdf

¹⁰ Forbes, Rev. Eugene A, A.B., S.T.L., J.C.L., Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128-2232. Ottawa: The University of Ottawa Press, 1948. pg. 204)

¹¹ *Tractatus canonicus de matrimonio. Editio Tertia, Volumen Secundum*. Petro Gasparri. Paris: Libreria Delhomme Et Brigueuet. (1904). Chapter II, Article II, *De Divortii* (no. 1318-1382); Appendix. *De Matrimonio, Ut Aiunt, Civili, II, De civili divortio* (no. 1534-1557).

Council of Trent for cases of separation of spouses can be found in Latin from the authority *Sacrae Congregationis Cardinalium Sacri Concilii Interpretum* (Congregation with competence to execute and interpret the decrees of the Council of Trent).¹² Multiple historical sources (*fontes*) showing the Church exclusive jurisdiction in separation cases were described in the dissertation of Rev. James P. King, proving that canon 1692 does, in fact, have canonical roots:¹³

Not only the Council of Trent but the Holy See through several papal letters and through Instructions of the Congregations insisted upon the right of the Church to hear marriage cases. These suits, it was pointed out, were not a matter of the mixed forum, but belonged to the exclusive jurisdiction of the Church. The reason for this declaration, was based on the nature of such cases as ‘*causae spirituales*;’” [spiritual cases] “thus the Church alone was competent. The same applied to separation cases. These cases, since they affected the very status of persons, were considered ‘*res gravissimae*’” [grave matter] “and were to be judged solely by an ecclesiastical tribunal (note 10).

[Note 10] “*Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos: anathema sit.*”—Conc. Trident., sess. XXIV, de matrimonio, canon 12; Pius VI, const. *Auctorem fidei*, 28 aug. 1794, Prop. 58, 59, 60—*Fontes*, n. 475; Pius IX, *Syllabus Errorum* (a. 1864), Prop. 74—*Fontes*, n. 543; idem., litt. ap. *Ad apostolicae* 22 aug. 1852, n. 2—*Fontes*, n. 511; Idem., ailocut. “*Acerbissimum*,” 27 sept. 1852, n. 3—*Fontes*, n. 515; instr. *S. C. De Prop. Fide* (a. 1883), n. 1—*Collectanea*, II, n. 1587. The authors of this period clearly confined separation cases to the ecclesiastical forum—Schmalzgrueber, *Ius Ecclesiasticum Universum* (5 vols. in 12, Romae, 1843-1845), II, tit. 1, n. 53 (hereafter cited as Schmalzgrueber); Gasparri, *Tractatus Canonicus de Matrimonio*, 3. ed., II, nn. 1457, 1458; Wernz, *Ius Decretalium*, IV, n. 731.

¹² *Collectio S.C.C – Collectio declarationum Sacrae Congregationis Cardinalium Sacri Concilii Tridentini interpretum*,. Tomus II. Atrebatii Apud Rousseau-Leroy 1861. *Matrimonium § XXVII Matrimonium quoad obsequie matrimonialia, separationem thori, ac divortium* (pp. 459-461); *Collectio S.C.C - Tomus IV*. 1868. *Matrimonium § XXII Matrimonium quoad separationem thori*. (pp. 388-389)

¹³ King, Reverend James Patrick, J.C.L., *The Canonical Procedure in Separation Cases, a Historical Synopsis and a Commentary*. Washington, D.C.: Catholic University of America, 1952. (p. 42)

11. In 1883, two sources (*fontes*) addressed marriage cases: 22 June 1883 addressed to the Oriental bishops from the *Sacred Congregation of the Holy Office*,¹⁴ and the decree from the *Sacred Congregation for the Propagation of the Faith* sent to the Bishops of the United States.¹⁵

12. On 6 January 1885, the US Bishops Conference, with the promulgation of the decrees of the Third Plenary Council of Baltimore, established particular law *de matrimonii sacramento* (for marriage cases).¹⁶ They cited the twenty-fourth session of the Council of Trent as the authority in their first decree of the marriage chapter, such that one is excommunicated who suggests that marriage cases (*not limited in kind*) belong to any authority other than the Church.

123. *Cum Matrimonii contractus sit unum ex septem legis evangelicae sacramentis, ad solam Ecclesiam, cui tota de sacramentis cura a Christo concredita fuit, pertinet de validitate matrimonii, et de juribus ac de obligationibus ex eodem derivantibus iudicium ferre . Quam ob rem Concilium Tridentinum, (Sess. xxiv., can. 12.) definivit: "Si quis dixerit causas matrimoniales non spectare adjudices ecclesiasticos, anathema sit."*

[Translation Mary's Advocates] The matrimonial causes pertain to the ecclesiastical judge and it belongs only to the Church to make judgments about the validity of marriage, and of the rights and duties derived from the same. As such, the Council of Trent (Sess. XXIV., Can. 12.) determines that: "If anyone saith, that matrimonial causes do not belong to ecclesiastical judges; let him be anathema."

The US Bishops, in decree 124 of Third Plenary Council of Baltimore, cited Pope Leo XIII encyclical *Arcanum*, and they described two types of criminals: those who obtained a civil dissolution of marriage, and those who attempted a so-called second marriage. In the 1970's the US bishops asked the Pope to abrogate the automatic excommunication for those who enter a second so-called civil marriage, but the Pope did not abrogate the entire decree no. 124.

124. *Quoniam constat per matrimonium duos "unam veluti carnem fieri; et nuptiale vinculum sic esse, Dei voluntate, intime vehementerque nexum, ut a*

¹⁴ S. C. S. Off., instr. (ad Ep. Rituum Orient.), a. 1883. Codicis Iuris Canonici. *Fontes*. Vol. IV by Gasparri, *Typis Polyglottis Vaticanis*, MCMLI (1951). *Fontes*, n. 1076. pp. 395-410.

¹⁵ *Codicis Iuris Canonici. Fontes. Vol. VII* – by Gasparri, *Typis Polyglottis Vaticanis*, MCMXXXV (1935). *Fontes*, n. 4901. pp. 479-491. Online available from http://marysadvocates.org/wp-content/uploads/2018/09/Fontes_Gasparri_V.vii_n4901_June22_1883.pdf

¹⁶ *Acta et Decreta Concilii Plenarii Baltimorensis Tertii*. Baltimore: *Summi Pontificis Atque Archiepiscopi Baltimorensis Typographorum*. 1886. n. 123-134. pp. 63-68

quopiam inter homines dissolvi aut distrahi nequeat" (Leonis XIII. Lit. Ap. Arcanum, 10 Febr. 1880.); manifeste apparet gravissimae culpa illos esse reos, qui a magistratu civili matrimonium dissolvi postulant, vel, quod gravius est, divortio civili obtento, novum matrimonium inire attentant legitimo vinculo posthabito, quod coram Deo et Ecclesia adhuc manet. Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, ipso facto incurrendam ab eis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare.

Dr. Peters said there were no roots for canon 1692 and he seems unaware of the canon law in effect for U.S. Catholics. Decree 126 of Third Plenary Council of Baltimore contained three elements: reiterating the common (worldwide) law requirement for bishop's permission prior to filing in the civil tribunals; stating the moral ramifications; and establishing the territorial penal precept of incurring punishment by the bishop:

126. Praeterea, quo magis magisque dignitati matrimonii consulatur, quod magnum in Ecclesia. Sacramentum est, a quo innamora bona profluent pro animarum salute, pro pace familiarum, pro ipsius civilis reipublicae incolumitate ac prosperitate; iis omnibus, qui matrimonio conjuncti sunt, praecipimus, ne inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi iudicio puniendum esse

[Translation Bernard, 1948]¹⁷ We lay down the precept to all those, who are married, that they not enter civil tribunals for obtaining separation from bed and table, without consulting ecclesiastical authority. But if anyone should have attempted it, let him know that he incurs grave guilt and is to be punished through the judgment of the bishop.

13. It is notable that the U.S. Bishops Plenary Council cited the encyclical of Pope Leo XIII *Arcanum*. The Holy Father said it was unacceptable to relegate to the civil forum judgements about contractual elements of marriage. In 1880, there were people who thought it was fine for the civil forum to judge cases of separation (*a.k.a.*, divorce) while leaving only for the Church the judgement about the validity of the marriage:

¹⁷ Alford, Rev. Culvar B. Cohabitation and Separation of Married Persons. A Paper read at the Conference of Priests of the Diocese of Albany. November 3, 1948 (Online Available from <http://marysadvocates.org/cohabitation-and-separation-of-married-persons>)

[*Arcanum* 23] Let no one, then, be deceived by the distinction which some civil jurists have so strongly insisted upon - the distinction, namely, by virtue of which they sever the matrimonial contract from the sacrament, with intent to hand over the contract to the power and will of the rulers of the State, while reserving questions concerning the sacrament of the Church. A distinction, or rather severance, of this kind cannot be approved; for certain it is that in Christian marriage the contract is inseparable from the sacrament, and that, for this reason, the contract cannot be true and legitimate without being a sacrament as well. For Christ our Lord added to marriage the dignity of a sacrament; but marriage is the contract itself, whenever that contract is lawfully concluded.¹⁸

14. The U.S. Bishops Third Plenary Council published a memorial volume of their council, containing the homily given by The Right Rev. Michael O'Farrell, Bishop of Trenton, N.J., titled "Christian Marriage," wherein he said that marriage can only be governed by the Church.¹⁹

[M]arriage is of divine institution and can exist only on the conditions fixed by God Himself. Christian marriage, in its essence, can be governed only by the laws of the divine legislator of the Christian Church.

15. The 1917 Code did not derogate any aspects of decree 126 of the Third Plenary Council of Baltimore. Number 126 has three substantive aspects: 1) the procedural part that requires a party to have the bishop's permission before petitioning in the civil forum, 2) the incurring guilt part, and 3) the penalty part. All were still binding after the 1917 Code. Penal laws from territory's bishops are still in effect, unless on a case-by-case, topic-by-topic basis, they were abrogated by either the common (worldwide) canon law applicable to the universal Church, a ruling from the Pope, or by a subsequent act of a Plenary Council (*cf* 1917 *CIC* c. 6, 1-6°).

16. The 1983 Code, furthermore, did not derogate any aspects of article 126 of Third Plenary Council of Baltimore. The requirement for the bishop's permission is in canon 1692 §2. The penalty aspect is not abrogated by canon 6, 3° because only particular penal laws issued by the Apostolic See are abrogated, and the penalty precept was issued by the U.S. Bishops. Moreover, canon 20 states "A universal law, however, in no way derogates from a particular or special law

¹⁸ Pope Leo XIII. *Arcanum*. 10 February 1880. Online available from http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_10021880_arcanum.html [accessed 1 October 2018]

¹⁹ O'Farrel, Michael, J, Bishop of Trenton NJ. "Christian Marriage." *The Memorial Volume: a history of the Third Plenary Council of Baltimore, November 9 – December 7, 1884*. Baltimore: The Baltimore Publishing Company, 1885. 18. Nov. 1884. pp. 120-132 (p. 121). Online available from <https://archive.org/details/thememorialvolum00unknuoft/page/120> [accessed 1 October 2018]

unless the law expressly provides otherwise.” When cases of separation of spouses are managed by the administrative procedure, the bishop (not the civil forum) is competent to issue a singular precept, that “is a decree which directly and legitimately enjoins a specific person or persons to do or omit something, especially in order to urge the observance of law” (c. 49). When cases of separation of spouses are managed on the judicial venue, the Tribunal (not the civil forum) must “determine what obligations have arisen for the parties from the trial and how they must be fulfilled” (c. 1611, 2°). When the validity of the marriage is challenged, in lieu of, or addition to, a petition for separation, the Tribunal sentence must decide “the moral and even civil obligations binding them toward one another and toward their children to furnish support and education” (*Motu Proprio Mitis Iudex* c. 1691 §1).

17. The twenty-fourth session of the Council of Trent, the 1860 instruction of the *S.C.S. Off.*, the 1883 decree from *Sacred Congregation for the Propagation of the Faith*, the encyclical *Arcanum*, and the US Bishops’ Third Plenary Council of Baltimore, show that Dr. Edward Peter’s assertion is unfounded wherein he says that canons 1692 to 1696 lack significant roots in canonical tradition.

Other Authors Instruct Priests to Not Insist on Enforcing Obligations

18. Dr. Edward Peters’ article in the *Fellowship of Catholic Scholars Quarterly* cites authors from 1946 and 1963 who downplay the competence of the Church to decide cases of separation of spouses and the obligation of obtaining the bishop’s permission prior to petitioning in the civil forum:

[Peters quoting Bouscaren & Ellis, *Canon Law: A Text and Commentary* (1946), 572.] A party seeking separation should normally be referred to the Ordinary. However, since people usually hesitate to enter into direct communication with diocesan officials in these matters, it will usually be well not to insist on this obligation if the parties are unaware of it, especially if the separation is already in effect and there is no great scandal connected with it. (6)

[Peters quoting Halligan, *Administration of the Sacraments* (1963), 516] If the parties have already separated...without ecclesiastical authorization, the obligation [to seek such authorization] need not be insisted upon nor the parties disturbed. (7)

19. However, multiple other authors uphold clearly the lawful requirement to obtain one’s bishop’s permission prior to petitioning in the civil forum. They show that petitioning in the civil

forum without bishop's permission incurs grave guilt and deserves penalty from one's bishop.²⁰ For example, Rev. Culvar Alford, with the imprimatur from his Bishop in Albany taught the following:²¹

Seeing Catholics in this country becoming infected with the errors of the modern philosophy of private judgment, separating from their husbands or wives for all sorts of reasons, going to the civil courts for “legal” separations, falling into the heresy of denying the authority of the Church in matrimonial cases,[Conc. Trid., Sessio XXIV, Can. 12: “*Si quis dixit rit, causas matrimoniales non spectare ad iudices ecclesiasticos, A.S.*”] it is evident that it is our duty as priests having the care of souls to enforce the law of the Church and to teach our people so that they will realize and accept the exclusive authority of the Church to pass judgment on matters of the separation of baptized married persons. And what has been said of civil separations applies with all the more force to the greater evil of civil divorce.

Rev. James Kelly, J.C.D., with the imprimatur of the Archbishop of New York, delivered a lecture to the Canon Law Society of America in 1945 lamenting the spread of the evil of divorce:²²

One would indeed be the proverbial ostrich if one did not admit that many—indeed too many—Catholics are infected with the virus of this modern disease. But we would not be true to ourselves if we did not admit also that we priests are in some measure responsible for the spread of this evil among our Catholic people, for too frequently, I fear, we have been loath to interfere in the thankless job of refereeing a family squabble, or seeking to effect a reconciliation. Sometimes, I fear, we have even been swayed by sentiment toward one of the parties, or on occasion, perhaps, have even given the impression to married people that their lives are their own business and that they can separate on their own authority for only trivial reasons if they so wish. I have even heard married

²⁰ Doheny, Msgr. William J., C.S.C., J.U.D, (advocate and procurator for the Supreme Tribunal of the Roman Rota, with imprimatur from Archbishop of Milwaukee). Canonical Procedure in Matrimonial Cases, Volume II, Informal Procedure. Milwaukee: The Bruce Publishing Company, Copyright 1944. Second Edition 1948. pg. 650; Albert L. Schlitzer. “Catholic Lawyer and Divorce Cases.” Notre Dame Law Review V 29 (October 1, 1953): 37-48. pg. 43; Kelly, Rev. George (with imprimatur from Archbishop of New York). The Catholic Marriage Manual. New York and Toronto: Random House, 1958. pg. 166; Miller, Fr. Donald (with imprimatur from Archbishop of St. Louis), C.Ss.R. Program for Divorced Catholics. Liguorian Pamphlet, 1962.

²¹ Alford, Rev. Culvar B. (with imprimatur from Bishop of Albany). Cohabitation and Separation of Married Persons 1948.

²² Kelly, James P., J.C.D., “Separation and Civil Divorce,” The Jurist vol. VI, No.2, April 1946: 187-238. pg.193.

people say that priests have told them that it was permissible for them to separate on their own authority provided they did not seek a civil divorce, or, what is worse, that it was permissible to seek a civil divorce on their own authority provided they did not attempt to remarry. This is a far cry from the doctrinal and juridical position of the Church.

With the imprimatur of the Archdiocese of Detroit, in 1963, The Catholic Lawyers Society showed that the lawyer for a Catholic who has no bishop's permission also incurs sin:²³

A lawyer who takes the case of a Catholic desiring a civil separation or a civil divorce from a valid marriage, when the Catholic does not have ecclesiastical permission for such action is putting himself in a state of sin. It would seem that any good Catholic lawyer would be happy to let the Church make such a difficult decision and not assume to himself something which he is definitely forbidden in conscience to do.

Peters selectively chose to quote authors in his article who appear to want to hide canon law on party's obligations about separation. However, other authors see these obligations as the antidote to the modernist disease and infection, and see the need for priests to bring Christ's reconciliation to families and prevent scandal.

Renowned Canonist Capello, Out of Context and Confusing "Canonical Issues"

20. In Dr. Edward Peters article, he translated to English four Latin paragraphs from *Tractatus Canonico-Moralis de Sacramentis, Vol V. De Matrimonio* by Felix M. Cappello, S.I., a professor of canon law at the Pontifical University Gregorian published in 1947. Cappello describes three various opinions held by experts as to whether it is ever licit for a spouse to petition in the civil magistrate in territories where the decision from the Church would not have civil effects (sec. 831). Dr. Peters asserts Church separation judgements do not have civil effects in the USA, though Mary's Advocate proposes otherwise.²⁴ The first opinion Cappello describes is that the Church may never permit a spouse to approach the civil magistrate; the second is that the Church may only permit a spouse to approach the civil forum for territories in which the Holy See has made specific declarations instructing under which conditions a spouse could do so (such as the

²³ Catholic Lawyers Guide. Catholic Lawyers Society Archdiocese of Detroit, March 21, 1963. pg. 106.

²⁴ Mary's Advocates asserts that a Church separation judgement could have civil effect in the states of the USA because of the U.S. Constitution, contract rights, due process rights, religious freedom, and fundamental liberties

diocese of Southwark (19 dec. 1860); and the third is that the Church tolerates spouses approaching the civil magistrate for grave cause, keeping intact the Church's exclusive competence regarding marriage cases.

[Peter's translation, third opinion] Still others hold that in light of circumstances—such as pressing grave cause, while respecting Church doctrine about the exclusive authority of the Church over marriage cases, and with due regard for divine and canon law—the Church explicitly or at least implicitly tolerates spouses going directly to civil courts to seek separation.

[Peter's translation, Capello's afterthought] This view is the more well-founded, is practically safe, and should be preferred. For, on the one hand, [direct recourse to civil courts] is not intrinsically evil, else the Holy See would not have, indeed could not have, issued permissions for it; on the other hand, Catholic doctrine [for example, on the ultimate authority of the Church over the marriages of the baptized, discussed below] stands, as do divine and canon law, and grave cause could exist, indeed most serious cause could exist, for turning to civil courts especially in regard to preserving property rights.

21. When Cappello refers to the “ultimate authority of the Church over the marriages,” he appears to be referring to all kinds of marriage cases (including separation and nullity). None-the-less, Dr. Peters adds his own analysis of Cappello's opinion:

In short, notwithstanding spousal separation canons that, in terms virtually identical to those used in the 1983 Code, required all Catholics to obtain ecclesiastical permission to discontinue conjugal life, canonists of the prestige of Cappello held that Catholics who did not live in “concordat nations” could directly approach civil tribunals in most such cases, provided only that they did not regard a civil decree of divorce as settling *canonical* issues such as the validity of their marriage.

When Peter's showed *canonical* issues, he only mentioned the validity of marriage, which leads readers to conclude that all other marriage issues are not *canonical*.

22. Readers think that the right of material help and support from one's spouse is not a *canonical* issue; or, the right to live with one's spouse, and to raise one's children (including living with them) are not *canonical* issues. However, the drafting committee for the 1983 Code of Canon Law knew the *canonical* issues threatened by the judgments of the civil magistrate: “matrimonial cases of the baptized belong by proper right to the ecclesiastical judge” [...] “If the church would renounce its own duty and right, it would follow that a separation against the

divine law would frequently be imposed or denied” (19 April 1971).²⁵ The drafting committee also knew risks experienced when the merely civil effects of marriage are not simultaneously resolved by an ecclesiastic judgement. For example, an ecclesiastic judgement deciding obligations of spouses could leave the innocent party to be found guilty of a civil crime of abandonment. If a woman’s husband was making it impossible for her and parties’ children to practice the faith, the woman would have a morally legitimate basis for separation of spouses. In the ecclesiastic forum, the husband would have the obligation to contribute his share of mutual help. But the drafting committee noted that in the civil forum, she could be found guilty of abandonment (see 19 April 1971, *executio sententiae canonicae potest haberi ut delictum in foro civili*). Perhaps in some parts of the world, abandonment is a crime, but the states’ divorce laws reward abandoners with no-fault divorce decrees in which the innocent party’s rights are forfeited. Furthermore, in a putative marriage, the rights of the party not causing invalidity are routinely harmed in civil no-fault divorce, because the civil forum does not require the party causing the breakup and invalidity to repair harm.

²⁵ *Communicationes* Vol. XL • N. 1 (2008) *Ex Actis Pont. Comm. CIC Recognoscendo, Coetus Studii « De Processibus » Sessio XI* (pages 144-152) [page 144] *Adunatio I. die 19 aprilis 1971 mane habita*” [...] “*Rev. mus Secretarius exponit ordinem laborum, pro hac Sessione statutum, de examinandis scilicet schematibus canonum: a) de causis separationis coniugum; b) de processu dispensationis super matrimonio rato et non consummato; c) de procedura administrative*”.;

[page 147] *De competentia ad huiusmodi causas iudicandas*

Rev. mus Rektor dicit Consultores parvi Coetus censuisse non expedire quod causae separationis demandentur semper civili magistratui quia:

- *in can. 1960 (iam recognito) edictum est: «causae matrimoniales baptizatorum iure proprio ad iudicem ecclesiasticum pertinent »;*
- *plura matrimonia sunt aliquando tantummodo canonica;*
- *in iure civili haud considerantur quaedam motiva separationis, apud Ecclesiam bene valida;*
- *si contrarium statueretur, Ecclesia officium et ius suum abdicaret; simulque consequeretur quod separatio contra legem divinam frequenter imponeretur vel denegaretur;*
- *separatio, in foro civili statuta, esset saepe basis supra quam, elapso statuto tempore, ipso iure inscriberetur divortio.*

Attamen nec parva sunt incommoda duplicis iurisdictionis, quia, ad habendos civiles effectus circa pensionem et iura oeconomica, circa custodiam filiorum etc., pars cuius interest debet quoque adire forum laicum. Consequenter adest periculum fastidii et iacturae temporis et pecuniae pro partibus et possibilitas duarum decisionum quae sint sibi invicem contrariae et praeterea executio sententiae canonicae potest haberi ut delictum in foro civili, v.g. ob desertionem domicilii coniugalibus et ita porro. Ideo parvus Coetus proponit formulam, quae, salvo iure particulari (ut sunt concordata), ex una parte non abdicat ius et officium Ecclesiae et, ex alia parte, ita sit flexibilis ut magna ex parte supradicta incommoda vitentur.

23. In Cappello's volume *De Matrimonio* quoted by Peters, eleven pages after describing the three opinions, Cappello shows a response from the *Sacrae Poenitentiarie* of 30 June 1892, that says no spouse is allowed to seek a civil divorce without first having obtained "*canonicam licentiam se separandi obtinuerint*."²⁶ In other words, the Church requires a spouse, in a case of separation, to undergo some kind of canonical proceeding before the spouse has license/permission to approach the civil magistrate. Peters says that the canonical issue about which Cappello is concerned is the issue of validity of marriage, but Capello elsewhere describes the canonical issue of separation of spouses.

24. The third opinion described by Capello, in which the Church tolerates a spouse approaching the civil magistrate only while maintaining the exclusive ecclesial competency regarding matrimonial suits (including separation cases and nullity cases), is contained in common law in canon 1692, and in the particular decrees of the Third Plenary Council of Baltimore for the United States (123, 124 & 126). Other authors writing for an international readership also show that a party is required to obtain the bishop's permission prior to petitioning to the civil forum in marriage cases:

²⁶ Sec. 838. "Quoad coniuges, haec in praxi tenenda sunt:[1] Si ipsi non intendunt petere divortium, ut ad alias nuptias transire possint, sed solum ut matrimonium effectibus civilibus privetur et ipsi hac ratione a gravi malo et incommodo liberentur, a quo alia via liberari non possunt, praesertim causa reconventionis, possunt illud petere (cfr. resp. S. Poenitentiarie, 30 iun. 1892; n 835.4). [2] Si finem intentum etiam per meram separationem quoad habitationem et bona obtinere possunt, non licet eis petere sententiam divortii: nulla enim est ratio eam petendi. [3] Si coniuges petunt ipsam vinculi solutionem, ut ad alias nuptias transire possint, divortium petere non licet, quia petunt rem malam et iuri divino repugnantem.[4] Cum causae matrimoniales ad Ecclesiam pertineant, non licet coniugibus petere divortium civile, nisi antea ob causam canonicam licentiam se separandi obtinuerint (15) [note 15] Noldin l. c. n. 675; Leitner, L.C.; De Becker, l.c. p. 410]

[Mary's Advocates' Translation] 838. As it pertains to spouses, these things must be cared for in practice: [1] If they themselves do not intend to seek a divorce in order that they may cross into another marriage but only that the marriage be deprived of its civil effects and they on this account be freed from a grave evil and inconvenience, from which by another way they could not be freed, especially by a cause of return, they are able to see it. (cfr. resp. S. Poenitentiarie, 30 iun. 1892; n. 835, 4). [2] If they can obtain the intended end even by a mere separation in respect to their habitation and goods, it is not permissible for them to seek a sentence of divorce {this is the language here, it does not say 'a declaration of nullity', but 'sentence of divorce'}. [3] If the spouses seek the dissolution of the bond itself in order that they cross into another marriages (or marriages), it is not permissible for them to seek a divorce, because they seek a bad thing which is repugnant to divine law. [4] Since matrimonial cases pertain to the Church, it is not permissible for spouses to seek a civil divorce, unless they have obtained a canonical license of separation first.

Can. 1692 §2 seems to require the previous permission of the Bishop of the diocese of the residence of the spouses – *perpensis peculiaribus adiunctis* – so that the spouses can approach the civil forum (page 391, Diego-Lora, 1984).²⁷

These reasons justify the separation, which, however, in itself, is authorized by the ordinary of the place (the Diocesan Bishop: can 1692 para 2) through decree, since it, even if motivated, does not be reduced to a simple private fact of spouses (c. 1153 Chiappetta, Italian, 1996).²⁸

[Canon 1152 §2] does not state that for such an action [filing in civil court] the innocent spouse needs the prior permission of the competent ecclesiastical authority. However, the requirement becomes clear from Canon 1692 §2” [...] “This canon speaks about the granting of permission as a particular administrative act issued by a competent executive authority. It means that such a permission is needed for each case. That diocesan bishop has no power to grant a general permission that all separation cases in his diocese will be decided in the civil court. This would be contrary to the provision laid down and Canon 87 §1 which states that the Diocesan Bishop cannot dispense from procedural laws, that is, laws ‘established to safeguard Justice and protect the rights of the faithful.’” [...] “However there is no need for granting permission in those countries where the supreme authority of the church has decided to by the way of Concordat that cases of separation will be handled by civil court” (Page 258-259, Kamus, 1997).²⁹

Since divorce laws have proliferated in many countries, the need to request the diocesan bishop’s authorization is a necessary precaution, which prevents the fostering of trials whose judgments violate precepts of divine law, to the

²⁷ Diego-Lora, Carmelo De. “*Las Causas de Separación de Cónyuges Según el Nuevo Código.*” *Dilexit iustitiam : Studia in Honorem Aurelii Card. Sabattani*. Libreria Editrice Vaticana: Città del Vaticano (1984) 389-403. (English Translation, Mary’s Advocates. Online Available <http://marysadvocates.org/cases-for-the-separation-of-the-spouses-by-diego-lora/>)

²⁸ Chiappetta, Luigi. *Il Codice di diritto canonico : commento giuridico-pastorale* (Seconda edizione). Roma: Dehoniane, imp. 1996. Original Italian: *Questi motivi giustificano la separazione, che tuttavia, per se, dev’essere autorizzata dall’ordinario del luogo il Vescovo Diocesano: can. 1692 para 2) mediante decreto, poiche essa, anche se motivate, non si reduce a un semplice fatto private dei coniugi.* (Online available from http://marysadvocates.org/chiappetta_diritto_canonico_commento_italian/)

²⁹ Kamas, Juraj. *The Separation of the Spouses with the Bond Remaining: Historical and Canonical Study with Pastoral Applications*. Dissertation for Doctorate in Canon Law. Roma: Pontificia Università Gregoriana. 1997.

detriment of the spouses and with the risk of scandal to others (c. 1692, Navarra Canon Law Annotated, 2004).³⁰

[T]he Bishop of the place where the party seeking official recognition of the separation is living would be the appropriate ecclesiastical authority whose permission is required” [...] “A primary concern of canon law is that the case not be relegated to a civil court if the civil court might result in declaring the dissolution of a valid marriage bond or some other effect contrary to divine law. (p. 247, Brown, 2008).³¹

[T]he law has placed an obligation on all spouses to obtain the permission of the diocesan bishop before approaching the civil forum. The process of drafting canon 1692 highlights the fact that it is the diocesan bishop alone who can allow the spouses to approach the civil forum [from section 2.3.1 — The Norms of the 1983 *Codex Iuris Canonici* in Light of the Revision Process] (p. 39, St. Louis-Sanchez, 2014).³²

25. Peters’ statement “that Catholics who did not live in ‘concordat nations’ could directly approach civil tribunals in most such cases, provided only that they did not regard a civil decree of divorce as settling *canonical* issues such as the validity of their marriage” is unfounded. Peters says that for Catholics in the USA, where we are a non-concordat nation, it is “highly questionable” that the canon law would “require them to obtain ecclesiastical permission to cease conjugal life prior to filing for a civil separation or divorce.”

26. The opposite is, in fact, true. Catholics who do not live in concordat nations may not directly approach the civil tribunals without express permission from the bishop. Only if there is a particular law for their territory, is the requirement be waived. If the bishops had a concordat treaty with the civil forum in which the bishops agreed to relegate all cases of separation to the civil forum, a spouse would not need the bishop’s permission.

³⁰ Instituto Martin de Azpilcueta. Code of Canon Law Annotated Second edition revised and updated of the 6th Spanish language edition. Woodridge, IL: Midwest Theological Forum, 2004.

³¹ Brown, Rev. Phillip J. JCD. “Legal Separation: A Pastoral Alternative.” Studies in Church Law IV. Bangalore, India: St. Peter’s Pontifical Institute, 2008. 215-252.

³² St. Louis-Sanchez, Anthony. The Canonical Obligation of Spouses to Approach the Ecclesiastical Authority for a Separation. St Paul University, Ottawa. www.Academia.edu. 2014.

Conclusion

27. While the particular rules for judging cases of separation of spouse are not of divine law, the necessity of the Church to have some kind of just process for managing cases of separation of spouses is arguably of divine law. This topic merits clear teaching because those who obstinately doubt truths that are to be believed by divine and Catholic faith are heretics.

28. Those who participate in Catholic marriage ceremonies should be advised how authorities in the civil forum and the Church are going to respond in a marriage crisis. Is the Church going to remain silent when one spouse, or party to a putative marriage, reneges on the marriage promises? Do those in ecclesiastic executive and judicial power tacitly condone all Catholics petitioning in the civil forum for divorce, legal separation, or civil annulment? Are Church leaders giving government legislators, judges, and civil lawyers unlimited authority to impair on obligations of parties in a Catholic marriage ceremony? Children are being forcibly taken from the spouse who properly consented to marriage and did nothing grave justifying separation of spouses. These spouses, who are counting on the marriage promises to be upheld, are being forced out of their own homes, forced routinely to pay money to an abandoner who lives with parties' children, and denied due support from the other spouse that was promised in marriage.

29. Mary's Advocates seeks from Your Excellency judgments so that parties to a Catholic marriage ceremony and their children can know whether they alone facing the evil of divorce. For your consideration, I am including a copy of the paper by Dr. Donald Asci (professor of Theology at Franciscan University of America): *The Evil of Divorce and the Dignity of the Human Person – Understanding the Immorality of Divorce through St. John Paul II's Theology of the Body*.³³

Respectfully Yours in Christ,

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³³ Asci, Donald. "The Evil of Divorce and the Dignity of the Human Person – Understanding the Immorality of Divorce through St. John Paul II's Theology of the Body." Mary's Advocates 6 Nov. 2017. (Online Available from http://marysadvocates.org/wp-content/uploads/2017/11/the_evil_of_divorce_donald_asci.pdf)