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THE CANONICAL PROCEDURE IN SEPARATION CASES

A HISTORICAL SYNOPSIS AND A COMMENTARY

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A DISSERTATION

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In general, their argument was resolved into disproving the alleged intrinsic malice of divorce. They pointed out that no decree of the Holy See made this statement and that the authoritative answers in these responses in stating that a civil divorce was not licit even for very grave reasons, did not necessarily mean that such action was evil in itself. They further alleged that the replies of the Holy See were answers to particular cases and that as a consequence it would be quite bold to resolve them into a general prohibitory rule for all occasions.[32] They found further support for their view in the contention that the civil law did not intend to interfere with conscience in the matter of dissolving a marriage which is valid before God. The law was impersonal in this regard and considered only the civil effects of the marriage, abstracting from any decision on what is valid before God and the Church.[33]

It is noteworthy that this opinion, although quite benign in comparison with the rigid view of the day, was not an all-embracing endorsement of a permission for Catholics to plead for a divocre in the secular courts; rather, it allowed such action only in those cases in which it was necessary to establish civil effects for an ecclesiastically granted separation. Moreover, it insisted on a very grave and proportionate cause and the permission of the ordinary in every instance.

In resolving the question of preferring a legal separation to an absolute divorce, the proponents of this view were naturally in favor of an action for separation. In a separation, they saw that the improbability of a reconciliation and the normal evils following upon the cessation of the common life were less pronounced, inasmuch as the damage to marital integrity was not so complete as in a divorce.[34]

vols., Mechliniae-Baltimorae, 1866), II, n. 112; Konings, *Theologia Moralis* (Boston, 1874), n. 1053; Waffelaert, "Question du Divorce," *NRT*, XVII (1885), 231; Smith, *Marriage Process in the United States*, nn. 47, 48; De Becker, *De Sponsalibus et Matrimonio*, p. 435; Lehmkuhl, *Theologia Moralis* (12. ed., 2 vols., Friburgi, 1914), II, 530; Sabetti, *Compendium Theologiae Moralis* (concinnatum a Timotheo Barrett, 19. ed., Ratisbonae, 1906), n. 559; Genicot, *Institutiones Theologiae Moralis* (6. ed., 2 vols., Bruxellis, 1909), II, 582; De Smet, *De Sponsalibus et Matrimonio* (Brugis, 1909), p. 254.

[32] De Becker, *op. cit.*, p. 433; De Smet, *loc. cit.*

[33] Smith, *loc. cit.*

[34] Feije, *De Impedimentis*, p. 470; Kenrick, *Theologia Moralis*, II, n. 112;

When the petition of the party was limited to a separation suit, there was little difficulty in reaching a practical solution. The Holy Office in its reply to the Bishop of Southwark had presented the norms to be observed in such a case (cf. *supra*, p. 145) and authors used it as a guiding norm. If any further doubts should arise, no matter, pastors, confessors and bishops were always advised to have recourse to the Holy See.

Article 3. Suggested Norms of Action Today

Since the extent of ecclesiastical directives on the subject of petitions of Catholics for separation and divorce in civil tribunals was limited in the period before the Code to the aforementioned responses of the Holy Office and the Sacred Penitentiary, it is difficult to state with certainty just what the Church's policy was on this matter or to conclude from them any absolute norms of action for the present. The reticence of the Holy See in not establishing common rules of procedure, evidenced in the absence of any provisions in the Code of Canon Law, seems to be demonstrative of the relative nature of the question. The Church legislates for the whole world and it seems to have preferred silence to the providing of norms that might be acceptable in one country and, perhaps, be almost impossible to observe in others.

Authors today, as their predecessors before the Code, in considering the question of civil action, treat the obligations of Catholic judges, attorneys and spouses. The consideration presented here, however, as in the foregoing historical review, will be confined to the particular problems of the ordinary or his delegate in ascertaining the conditions necessary for permitting an action in the civil courts to a party engaged in an ecclesiastical suit of separation.

The least objectionable civil action is that which seeks a separate maintenance or alimony without divorce. Since it is not an action concerned with dissolving the bond or even concerned with the integrity of marriage, as would be an action for separation, it is the preferable course to follow when legal action is found to be necessary.

Konings, *Theologia Moralis*, n. 1053; Genicot, *Institutiones Theologiae Moralis*, II, 582; De Smet, *De Sponsalibus et Matrimonio*, p. 256.

This is especially applicable in cases of temporary separation. Moreover, since it relates exclusively to the canonically termed "civil effects" of the marriage, there seems to be no real objection to its employment.[35] In actual practice, however, it may not be sufficient or, because of the circumstances depending on the force given it in the particular states, it may be impractical. It is for this reason that this action, although most often recommended in curial practices, is rejected by the party seeking legal protection in favor of the more secure guarantees of legal separation or even divorce. It remains for the individual ordinary to determine the value of this legal remedy in his jurisdiction and to adopt that norm which, in his prudent judgment, is the most appropriate according to the circumstances of the case presented.

Although many of the earlier authors held that the Church could never permit Catholic consorts to plead a suit of separation before the civil tribunals, the basis for this reasoning being the contention that such action was essentially evil because of the implied usurpation of ecclesiastical jurisdiction, today it is the common opinion of canonists and theologians that a petition of this kind may be presented for a grave reason.[36]

The principal basis for this opinion is the reply of the Holy Office to the Bishop of Southwark in 1860. (Cf. *supra*, p. 145). If this type of separation were intrinsically evil, the Holy See would never have permitted it even in a particular instance. This legal remedy, although in no wise implying any recognition of ecclesiastical jurisdiction by the civil power, nevertheless does retain and protect, at least implicitly, the exalted doctrine of the Church on the indissolubility of marriage. This statement is not meant to imply that a general permission has been given Catholics to plead this action, but it does mean that, provided the conditions indicated by the Holy

[35] S. C. C., *Basileen.*, 31 iul. 1869—*Fontes*, n. 4215; Wernz-Vidal, *Ius Canonicum*, V, n. 647; Cappello, *De Sacramentis*, V, n. 830.

[36] De Smet, *De Sponsalibus et Matrimonio* (4. ed.), n. 401; Prümmer, *Manuale Theologiae Moralis* (3 vols., 4. et 5. ed., Friburgi Brisgoviae, 1928), III, n. 892; Genicot, *Institutiones Theologiae Moralis* (10. ed., 2 vols., quam recognovit I. Salsmans, Bruxellis, 1922), II, 528; Vlaming, *Praelectiones Iuris Matrimonii* (2 vols., Vol. II, 3. ed., Bussum, 1921), n. 697.

Office are observed, it seems to be an acceptable action and may be tolerated by the ordinary.

The Holy Office enumerated the following conditions as essential for the toleration of this legal remedy. These stated conditions in view of their clarity, necessitate no further comment. (1) Just causes must be present in the judgment of the ordinary; (2) the Catholic party must lack any other tribunal to which he could go to obtain a separation recognized in civil law; and (3) the sentence of the tribunal must have no other effect than that of separation of bed, board and cohabitation.

In view of the fact that the same Congregation, in reply to a petition from France, used the very same words, the use of these norms as practical rules of action gains special merit.[37] To the contrary, however, there are some authors who hold that the use of this norm in countries other than England and France would be illicit. They point out that these responses were given in answer to petitions from these two nations, and as special permission conceded in particular cases by the Holy See they pertained only to the countries to which they were directed. Gasparri among others accepted this position; he held that Catholics in nations other than England and France explicitly had to petition and obtain the same favor of tolerance from the Holy See, since what has been conceded *gratiose* to one person cannot be extended to others even in the same circumstances.[38] Today, most of the authors do not accept Gasparri's view. They base their stand on what might be called an opposition to the Cardinal's unproved assertions that these responses were granted *gratiose*. They also demonstrate the absence of any good reason for limiting the tolerance of this practice to two nations when this very same tolerance, since it is founded in the prescription of the divine law to avoid greater evils when possible, should be applicable anywhere under the same circumstances. They concur in permitting this action in other nations when the above outlined

[37] S. C. S. Off., *S. Galli*, 3 apr. 1878—*Collectanea*, II, n. 1491.

[38] "Hae declarationes ad alias nationes, quae in iisdem circumstantiis reperiuntur, extendi per se non possunt, quia 'quod alicui gratiose conceditur trahi non debet aliis in exemplum'; Reg. 74, R. J., in VI°; proinde necesse est eiusdem tolerantiae gratiam petere et obtinere."—*De Matrimonio*, II, n. 1237.

conditions are present on the ground that, despite the particular nature of the replies, it can be considered to have at least the tacit tolerance of the Holy See, until express provisions are made to the contrary.[39]

The direct statements of the Holy See on legal separation are most helpful for practical solutions in the case of requests of this nature today, and it would be indeed gratifying if the problems connected with petitions to initiate an action of civil divorce were as easily resolved. The division of opinions among authors dealing with the latter subject in the period before the Code has been shown, and it must be admitted that there is very little change today. Although no new source of information has been issued since 1918, Gasparri has helped the situation somewhat by including in his latest work (1932), a response to the Holy Office, a document hitherto unknown to canonical writers. This rescript was given in reply to a question on divorce. According to Gasparri, the Holy Office was asked whether a Catholic woman could be permitted to petition for a civil divorce *"ob gravissimas causas."* The reply was the following:

> Attentis peculiaribus circumstantiis in casu concurrentibus, permitti posse, dummodo mulier oratrix coram Ordinario vel eius delegato ac duobus testibus etiam iureiurando declaret se matrimoniale vinculum nullatenus abrumpere, sed tantummodo a civilis ritus oneribus exsolvi velle; remoto scandalo quo meliori modi iudicio Episcopi fieri poterit.[40]

The nature of the *"causae gravissimae"* for which the permission was granted is not contained in Gasparri's treatment. Hines, however, received privately a decree from the Holy Office permitting him to publish the explicit reasons and they have become public for the first time in his work. The causes for this concession are there described as:

> Mulier in casu, iam a duodeviginti annis nupta, volebat divortium civile ob rationes, quae sequuntur:

[39] Cappello, *De Sacramentis,* V, n. 831; Wernz-Vidal, *Ius Canonicum,* V, n. 711, ftn. 11; De Smet, De Sponsalibus et Matrimonio (4. ed.), n. 398; Noldin-Schmidt, *Summa Theologiae Moralis,* III, n. 671; Merkelbach, *Summa Theologiae Moralis,* III, n. 978.

[40] S. C. S. Off., 6 aug. 1906—Gasparri, *op. cit.,* II, n. 1324.

> 1.—ut bona a parentibus sibi suisque relicta melius et in proprium commodum servaret; dum maritus, quod nisi ita esset, statim ac plene ea perderet;
>
> 2.—ut filios liberaret a patria potestate, quae eisdem fieret perniciosa. Ad quem necesse erat ut mulier, cui data esset curatio suorum filiorum, divortium obtineret ob viri culpam;
>
> 3.—ut satisfacere valeat continuis iurgiis, vexationibus et repetitis nimis patris matrisque seu amborum parentum, qui, quantocumque pretio ac summa ope, sedulo optant civile divortium pro filia.[41]

According to Gasparri, this reply of the Holy Office has been adopted as a general practical norm by the Sacred Penitentiary when questions of this nature arise.[42] Kelly lends further credence to this statement by professing knowledge of a similar petition in 1945, which was answered by the Holy Office in the self-same words.[43]

From the replies of the Roman Curia, most of the authors today are of the opinion that the petitioning and obtaining of a civil divorce cannot be proved to be intrinsically evil.[44] If this action were intrinsically evil, then, even when there is no intention of remarriage, the Holy See could not have permitted it even in a single case. Moreover, even if one argue from the nature of the Catholic party's petition to initiate action for a divorce, granted that the necessary conditions are fulfilled, the rigid view is not tenable. In the case under consideration here it does not seem merely pragmatic to assert that the very object of the act is not evil. In seeking a divorce the petitioner is concerned merely with a dissolution of the civil rights and duties arising from the marriage contract, and not with a dissolution of the sacramental bond.[45] Similarly, the argument that would presume a general intention on the part of Catholic spouses to dissolve the marriage and thereby to enjoy freedom to enter an-

[41] *De Coniugum Separatione,* pp. 72, 73.

[42] *Loc. cit.*

[43] "Separation and Civil Divorce,"—*The Jurist,* VI (1946), 222.

[44] Gasparri, *op. cit.,* II, n. 1324; Cappello, *op. cit.,* V, n. 837; De Smet, *loc. cit.*; Vermeersch-Creusen, *Epitome Iuris Canonici,* III, n. 278; Prümer, *Manuale Theologiae Moralis,* III, n. 892; Genicot, *Institutiones Theologiae Moralis* (10. ed.), II, 528; Merkelbach, *op. cit.,* III, n. 977; Iorio, *Theologia Moralis,* III, 998; Noldin-Schmitt, *loc. cit.*; Wernz-Vidal, *loc. cit.*

[45] Cappello, *loc. cit.*; Iorio, *op. cit.,* III, 996; Merkelbach, *loc. cit.*

other invalid union is hardly acceptable. For the circumstance of such a position, inasmuch as the party has demonstrated his good faith by observing the ecclesiastical law on separation, gives rise, rather to the opposite presumption namely that of the absence of any such evil intent toward a later bigamous union.[46]

Any arguments in opposition to the very strict opinion on this matter need not necessarily signify that these Roman documents afford arguments from authority and therefore include general permissions to be used as a matter of course. These replies were answers to specific cases and they do not present a general norm of action; rather, since no universal prescription has been promulgated by the Holy See, these responses, although helpful directives for an ordinary faced with such problems, are not to be made general rules of practice.[47] However, in the absence of a general decree of the Holy See forbidding any divorce action by a Catholic, it seems to be a reasonable conclusion that such action may be tolerated exclusively under certain important conditions. In the United States, especially, the civil law is not directly concerned with impugning or denying the rights and the laws of the Church,[48] therefore, the replies of the Holy See in forbidding this action in certain countries because of the grave harm caused by laws aimed intentionally at the rights and authority of the Church are hardly applicable,[49] and since the action cannot be certainly rejected on the grounds of intrinsic evil, it is tolerable.

If this action is allowed, however, it must under careful guard be permitted only under the following conditions, which seem appropriate for forestalling the many evils which any abuses in this matter would create and, at the same time, for preserving as much as possible the exalted attitude of the Church on the indissolubility of marriage.

Of paramount importance is the observation that there is absolutely no necessity to permit a Catholic to petition for an absolute divorce when the civil legislation in that particular region accords

[46] Hines, *De Coniugum Separatione*, p. 75.
[47] Gasparri, *De Matrimonio*, II, n. 1323; Cappello, *loc. cit.*
[48] Forbes, *The Canonical Separation of Consorts*, p. 218.
[49] Cappello, *loc. cit.*

equal effects to a separation action. The fact that this latter remedy is so much less objectionable than a divorce action warrants its preference in every instance. The same norm should be applied to other legal institutes by which similar legal guarantees and safeguards may be attained. The actions for separate maintenance and alimony without a separation or divorce would be embraced in this category, since they usually afford sufficient civil protection.[50]

Lest there be any mistake in interpretation, special emphasis should be placed on the fact that a Catholic can never licitly seek a divorce to dissolve a valid marriage and to enter a new union, even if this is merely a civil attempt at marriage. This is clear from the penalty stated in Canon 2356. There the Church's law inflicts the *ipso facto* incurred penalty of infamy of law on such a person and also provides that, if the parties refuse to discontinue their illicit concubinage after being admonished by the ordinary, they should be punished with excommunication or personal interdict.[51] Moreover, the penalty of the *ipso facto* incurred excommunication as stated in the III Plenary Council of Baltimore (1884) for the same delict is, according to accepted principle still in force in this country, since it supplements the Code rather than contravenes the law as therein enacted.[52]

Although there is no penalty in the Code or in the particular conciliar law for this country against those who seek a civil divorce, nevertheless the same decree of the Council of Baltimore calls attention to the grave sin involved in seeking such action.[53] Therefore, the permission of the local ordinary is a necessary requisite for licit

[50] Cappello, *op. cit.*, V, n. 838; Merkelbach, *loc. cit.*; Genicot, *op. cit.*, II, n. 562; Hines, *op. cit.*, p. 74.
[51] Bigami, idest qui, obstante coniugali vinculo, aliud matrimonium, etsi tantum civile, ut aiunt, attentaverint, sunt ipso facto infames; et si, spreta Ordinarii monitione, in illicito contubernio persistant, pro diversa reatus gravitate excommunicentur vel personali interdicto plectantur.
[52] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A. D. MDCCCLXXXIV*, n. 124; Barrett, *A Comparative Study of the Plenary Councils of Baltimore and the Code of Canon Law*, The Catholic University of America Canon Law Studies, n. 83 (Washington, D. C.: The Catholic University of America, 1932), p. 134; Hannan, "Marriage after Civil Divorce," *The Jurist*, VII (1947), 311.
[53] Cf. *supra*, p. 144, ftn. 21.

action in every instance. It is his office to judge the gravity of the reasons for seeking this legal remedy, and it is but reasonable, as a means of preventing the abuses arising from private judgment in this matter, that he, the guardian of faith and morals in his territory, thoroughly familiar with the local civil statutes, should be the authority to issue this permission in worthy cases.[54]

The causes alleged for seeking the divorce must be very grave and proportionate to the evils which result from such actions. There can be no doubt that divorce does leave the party free to marry again in the civil forum if he should be of the mind to do so. There are many other bad effects which such action may have in influencing others. As a consequence, whereas a grave reason was recommended as sufficient for the action of legal separation, most grave reasons would be necessary for the more absolute remedy of divorce.[55]

That the Church may have some guarantee of good faith and cooperation from the petitioner, the Catholic seeking this legal remedy of divorce should declare, under oath, his right intention in the matter. He should, therefore, swear before the ordinary or his delegate and two witnesses that he does not intend to dissolve his marriage which he believes to be valid before God and therefore indissoluble, but that he is seeking this civil action simply to procure the protection of the civil law which will follow upon it.[56]

There is an added obligation for the ordinary in these matters as in all such cases wherein there is danger of misunderstanding. It is the office of the ordinary to make every endeavor to remove whatever scandal might arise from this action of a Catholic,[57] for there is no doubt that people, aware of the Church's centuries old and

[54] S. C. S. Off., 6 aug. 1906—Gasparri, *op. cit.*, II, n. 1324; Cappello, *loc. cit.*; Noldin-Schmitt, *Summa Theologiae Moralis*, III, n. 671.

[55] Cappello, *loc. cit.* Kelly demands a cause to be one of the public order as well as the private order before he is ready to deem it proportionate to the evils involved.—"Separation and Civil Divorce," *The Jurist*, VI (1946), 232; Forbes agrees with this view.—*op. cit.*, p. 219; but Hines dissents in this fashion: "Difficile tamen est intelligere quid sit causa gravissima ordinis publici, quae sollicitationem divortii iustificet. Quapropter mihi videtur, praesertim post considerationem responsorum S. Sedis, quod sufficit causa gravissima etiam ordinis privati."—*De Coniugum Separatione*, p. 76.

[56] S. C. S. Off., 6 aug. 1906—Gasparri, *op. cit.*, II, n. 1324.

[57] *Loc. cit.*

adamant stand against this spreading evil, would be scandalized at the knowledge of such action when the details of the situation are not fully explained. However, in the case envisaged here, the scandal that might be attendant upon ecclesiastical permission for a Catholic to plead a civil divorce action, may be considered as being somewhat less in the light of the extant circumstances than many would claim. Since the party has shown good faith in securing a canonical separation and has sought previous permission before initiating any civil action, it seems safe to presume that those associates and intimates who are aware of the civil divorce are also cognizant of the facts of the case and of the party's intention to procure only the civil effects. Since only very grave reasons are acceptable for such a permission, those who know of the conditions for which the permission has been granted are less likely scandalized than someone who has no other knowledge than the fact that a Catholic is a plaintiff in a divorce suit.[58]

Although, as a general rule, permission for civil divorce should be granted only after an ecclesiastical decree of permanent separation, this is by no means an ironclad rule. Adultery is the sole cause for permanent separations, yet decrees of temporary separation which are granted for an indeterminate period of time very often approximate a permanent separation in their actual duration. It should be left to the prudent discretion of the ordinary, therefore, to determine whether a temporary separation wherein future reconciliation can hardly be termed probable, e. g. in cases involving apostasy, moral depravity, etc., would sufficiently warrant the issuance of this permission. The grave causes necessary to permit any divorce action would of course be necessary in this instance also.[59]

[58] The probability or, in some cases, certainty that the other consort will attempt a bigamous union after the plaintiff has succeeded in winning a divorce is not a determining factor here. Authors agree that the innocent consort is not responsible for the possible or probable sins of his errant spouse.—Noldin-Schmitt, *op. cit.*, III, n. 670; Kelly, "Separation and Civil Divorce," *The Jurist*, VI (1946), 229; Hines, *op. cit.*, p. 77.

[59] Hines, *op. cit.*, p. 76; Forbes, *op. cit.*, p. 220; This against Kelly, who considers an ecclesiastical decree of permanent separation a *conditio sine qua non* for the granting of permission to plead a divorce action.—*op. cit.*, p. 231 and Hannan, "Marriage after Civil Divorce," *The Jurist*, VII (1947), 311.

A recommended condition in this case is an additional sworn statement, on the side of the party seeking the permission, to resume cohabitation if a reconciliation should become possible at a later date. There is little difficulty from the civil law in arranging such a reconciliation, since remarriage is quite a common occurrence in this country. However, in witnessing a renewal of consent by the parties to fulfill the prescriptions of the civil law, the priest in question should take pains to advise the parties of the nature of this action. Since the matter and form of the sacrament consist in the exchange of consent,[60] there is no danger of a *simulatio sacramenti,* for in reality the exchange of consent stands as something permanent and perpetual and therefore cannot be repeated except materially. Accordingly the parties should be informed that they are married and that the ceremony now being held is no more than an endeavor to satisfy the requirements of the civil law, which before God has no significance as far as their marriage is concerned.

It is only reasonable to mention in passing that persons involved in cases of temporary separation wherein a definite period of time is specified could never use the remedy of civil divorce. It is difficult to conceive of a case involving a temporary separation in which it would ever be necessary, since the decree is made binding for but a brief and definite period of time, and always is issued with a well-founded hope of an early reconciliation.

The fulfillment of the above outlined conditions, then, seems to be necessary as a prerequisite for any civil divorce action by a Catholic. Even with these safeguards the matter is one to be treated with grave caution and deliberation. Especially is this so today with the number of permanent marriages so fast diminishing as to be scarcely equal to the number of marriages dissolved. These are cases to be admitted as a last resort, and the practice of diocesan curias demonstrates a recognition of this fact. Therein it is the usual practice, so far as the writer has been able to ascertain, to utilize the lesser legal remedies whenever possible. Legal separations are the usual last resort, and divorces are permitted only when the circumstances, relative both to the needs of the parties and to the difficulties in the civil law, force this extreme remedy as the sole solution.

[60] Canon 1081, §§ 1, 2.

CONCLUSIONS

1. The proper canonical procedure for separation cases in the pre-Code period was the formal judicial process. Although there are indications that a shorter process was utilized in practice as early as the fourteenth century, such procedure was not clearly evident until the post-Tridentine era. Even at that time there was not always a clear distinction between the summary judicial process and the administrative method, as it is known today. Since these briefer processes arose more by common usage, in consequence of the need that was felt for a shorter process in mission territories, inasmuch as they were never legally prescribed methods, they were at the least tolerated by the ecclesiastical authority.

2. Although separation suits are, as a general rule, subject to a hearing before the Church to be legitimate, the institute of separation undertaken *propria auctoritate* as stated in Canons 1130-1131 must be given consideration. Not all canonists are in agreement in their interpretations of this matter, but it is the opinion of the writer that an innocent consort, if he has separated because of a certain and manifest sin of adultery, is legitimately separated. One who leaves in view of the grounds given as sufficient for a temporary separation in Canon 1131, provided there is a danger in delay, could indeed be considered as having legitimately departed, but would need a decree of the ordinary before the separation can be considered legitimate. (Pp. 66-73.)

3. Under the present discipline the ordinary procedure for cases of permanent separation because of adultery is the formal judicial process. The cases of temporary separation as stated in Canon 1131, have as their ordinary process the administrative method. The two processes are not so mutually exclusive, however, that they cannot be used for either type of separation case provided that certain conditions are present. (Pp. 73-78.)

4. The ordinary may, at the instance of the parties or even *ex officio,* employ the judicial process for temporary separations and, so it seems, even hear a case of permanent separation in the admin-