

PONTIFICIA UNIVERSITAS LATERANENSI
INSTITUTUM UTRIUSQUE IURIS

Separation and Divorce

A Comparative Study of the Canon Law of the
Catholic Church and the Civil Law of the State
of Michigan Looking Toward a Solution to the
Problem of Family Break-up.

A DISSERTATION PRESENTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE
DEGREE OF DOCTOR OF CANON LAW

By

Rev. THOMAS J. GUMBLETON, B.A., J.C.L.

Priest of the Archdiocese of Detroit

Director :

Rt. Rev. MONSIGNOR JOSEPH DAMIZIA

ROME

1964

od of separation. And the trial was conducted with the formalities of the Roman Law procedure. Gratian evidently was not aware of the possibility of separation on the private authority of the injured spouse. However, he did include in the decree one canon from which later canonists argued in behalf of separation on private authority. The Decretals are vague and somewhat contradictory on this point. Some chapters can be alleged in favor of it, and other chapters against it.

The question of the custody of children was determined in the *Corpus Iuris* by the general rule that they would be awarded to the innocent spouse, to be raised at the expense of the guilty party.²⁹

It can be readily seen that the laws of the Church as they had developed up to this point already contain many of the elements that later passed over to the civil laws and are still in use in modern states. As the development of Church law on separation and divorce continued into the modern period, it maintained and further developed those elements that passed from ecclesiastical legislation into modern civil law.

4. — *From the Corpus Iuris Canonici to the code of canon law*

After the time of the *Corpus Iuris* canonists and theologians up to the Council of Trent in the sixteenth century did not bring about much further development in the law of the Church concerning separation and divorce. For the most part their teaching consisted mainly in repeating what had been set forth in the Decree of Gratian and the Decretals of Gregory IX.

The Council of Trent was prompted to treat somewhat extensively of separation and divorce because of the teachings of the Protestants concerning marriage and divorce and also because of the abuses of Church discipline in the East under the influence of the Roman Civil Law. The evidence available shows that the Greek Church did not commit itself formally to any error in this matter but there was abuse in practice in so far as divorce with the permission to remarry took place often on the grounds of

²⁹ Forbes, *op. cit.*, pp. 78-102. This brief summary of conclusions is based on careful research which he made into the original sources and which he has carefully documented.

adultery. The Protestants openly contradicted the traditional doctrine since they allowed divorce with remarriage for several causes. In response to these teachings and practices the Council promulgated two canons concerning the separation of spouses. One is a condemnation of the teaching that the marriage bond could be dissolved because of adultery; the other was a declaration that spouses could separate on many grounds for either a definite or an indefinite time.

After Trent there was not much further elaboration of the Church law. Several Popes had to issue statements urging the implementing of the Council's legislation. As various questions arose concerning separations the Sacred Congregations settled them for the Bishops who had transmitted them to Rome. Also the beginning of a change from exclusively judicial procedure to the use, at least some of the time, to an administrative procedure did take place during this period. These changes were contained in the rules established by the Congregation for the Propagation of the Faith for the use of missionary tribunals in conducting trials of separation.

Finally, when the Code of Canon Law, which is the law in force at the present time, was published in 1917, it contained in general merely an editing of the Church's pre-code teaching and discipline on the separation of married people. Substantially the legislation under the Code is the same today as it was under the immediate pre-Code dispensation.³⁰ &

ARTICLE 2

THE PRESENT LAW

When we come to examine the law of the Catholic Church today concerning separation and divorce, we will see that it is at once sublime and yet realistic and practical. Christian marriage is looked upon as a very noble vocation, demanding a constant spiritual growth on the part of the spouses if they are to achieve the personal enrichment and life-long happiness which marriage

³⁰ Ibid., pp. 124-126. These conclusions, which we have summarized rather briefly, are all carefully documented by this author, pp. 103-126.

promises. However, the law also recognizes that in many cases this ideal is not reached, and the result is a horrible multitude of impossible situations. Canons 1128 to 1132 of the present Code of Canon Law reflect the Church's long experience in trying to maintain the ideal of marriage as a Christian vocation, sanctified by an indissoluble sacramental bond, and at the same time sympathetically provide for those who fail, tragically, to approach the ideal.³¹

A) THE NATURE OF SEPARATION

The Code of Canon Law recognizes the traditional triple division of the community of married life into the areas of bed, board and home.³² The habitual sharing of these by a husband and wife establishes the community of conjugal or married life.³³ And it is recognized that there is an obligation on the part of both spouses to maintain this community of life in an habitual fashion. Without it the full attainment of the primary and secondary ends of marriage would not be possible.³⁴

Since the community of married life consists of these three areas of mutual sharing, it is obvious that separation will consist in a breaking off of one or more of these relationships. However, at the outset it should be noted that even if all three of these relationships are severed, it does not mean that the bond of marriage will necessarily be severed. Cohabitation under this threefold aspect is not so essential to marriage that a true marriage could not exist without it. As we shall see, occasions can arise when further cohabitation becomes inadvisable or even morally impossible. Under such circumstances separation would be permissible and sometimes really necessary. Of course, since cohabitation is the norm in so far as circumstances permit, very

³¹ Mackenzie, Eric, Auxiliary Bishop of Boston, "The Catholic Church on Separation and Divorce," *Catholic Lawyer*, Vol. I, (January, 1955), p. 40.

³² C.I.C., Title VIII, Chap. X, Article II.

³³ Bouscaren, op. cit., p. 13; Arrinhac, H. A. - Lydon, P. J., *Marriage Legislation in the New Code of Canon Law*, 2nd. rev. ed., (New York: Benziger Brother Inc., 1952), pp. 328-329; Cappello, Felix, S. J., *Tractatus Canonico-Moralis De Sacramentis*, editio septima, (Romae: Marietti, 1961), Vol. V, p. 757; Gasparri, Petrus, Card. *Tractatus Canonicus De Matrimonio*, Ed. Nova ad Mentem C.I.C., (Romae: Typis Polyglottis Vaticanis, 1932), Vol. II, pp. 188-190.

³⁴ Bouscaren, loc. cit.; Gasparri, loc. cit.; Regatillo; Eduardus, S.J., *Ius Sacramentarium*, ed. tertia, (Santander: Sal Terrae, 1960), p. 865.

grave reasons are required to permit separation to take place.³⁵

Separation, in the sense of the breaking off of physical marriage relations, is an area of married community life that pertains to the private rather than the public order. For this reason the Church in making its laws as a public society does not concern itself with obligations and rights that are connected with conjugal intercourse in the strict sense. These matters properly belong to the field of moral theology. We will only note in passing that such separation can take place by mutual consent for a just cause, but it should not take place if there is danger of incontinence on the part of either spouse.³⁶ St. Paul mentions this type of separation from religious motives.³⁷ Complete and perpetual separation of this kind would scarcely ever be licit since the difficulties and stresses attendant upon it would almost always be far too great to justify the attempt to do it. There would also be seriously grave dangers to chastity for both spouses and few causes could be serious enough to justify the attempt to live in this fashion.³⁸

If married persons stopped sharing the same table this would constitute separation since it would be a disruption of part of the community of married life which they have vowed themselves to observe. Obviously this part of the common life is not so important as the other two, and there will be far more occasions when, even if there were no other reason, necessity and circumstances will make it impossible for spouses to share a common table.³⁹ Separation in this sense of the word is also discussed in moral theology rather than canon law since it pertains to the private order and does not affect the public order except, perhaps, in rare instances.

The breaking up of a home by the separation of a husband

³⁵ Ayrinhac-Lydon, op. cit., pp. 328-329; Bouscaren, op. cit., pp. 613-615; Gasparri, op. cit., pp. 242-248; Genuario, William A., "Rotal Criteria for Granting Separations," *The Jurist*, Vol. XXII, (July, 1962), pp. 33-334. On the basis of his examination of the Rotal decisions in cases of separation, this writer indicates that the Sacred Roman Rota is strict in determining the presence of a cause that will justify marital separation.

³⁶ Bouscaren, op. cit., p. 613; Wernz, Franciscus X., S.J., - Vidal, Petrus, S.J., *Ius Canonicum ad Codicis Norman Exactum*, ed. tertia, (Romae: Apud Aedes Universitatis Gregoriana, 1946), Vol. V, p. 849, n. 648.

³⁷ I Cor., VII: 5.

³⁸ Bouscaren, loc. cit.; Regatillo, op. cit., p. 866; Gasparri, op. cit., p. 248, n. 1178.

³⁹ Cappello, op. cit., Vol. V, p. 758, n. 824.

and wife is a far more serious thing than abstaining from marital relations for a time or a separation from the common table. Separation in this sense ordinarily would include discontinuation of the other two aspects of community life at the same time. It is something that is a matter of the public order since marriage is a social institution. The Church is a visible society and its members are subject to the rule of the public authority placed within the Church by God. And this public authority is justifiably concerned whether married people do or do not live together. Under this aspect, separation is subject to the law of the Church.⁴⁰

It should be clear why the breaking up of a home is a matter of the public order. When married people refuse to live together their separation by its very nature is a public affair, and the public good is always involved. In most cases separation will cause scandal in society. And since homes are set up in order to guarantee the continuation of society by providing new members, the public authority is concerned that these homes be stable and permanent. It is also much concerned that children be protected from the painful experience of having separated parents, or at least be hurt by the separation as little as possible.

By way of summing up this discussion of the nature of separation, we have indicated that separation involves the breaking up of the community of married life under one or more of its three aspects. However, it is only when there is separation from common home life that the separation becomes a matter of the public order and thus subject to the laws established by public authority. For this reason in the Code of Canon Law when the term "separation" is used it must be understood as involving the discontinuation of common home life. Also, it is very important to note that separation from the community of married life, either partial or complete, in no way implies a breaking of the marriage bond. The Council of Trent maintained the discipline of the Church very clearly on this point.⁴¹

In the light of this discussion of the nature of separation the first canon of the code that deals with this matter can be read with a clear understanding of the obligation that is being im-

⁴⁰ Bender, L., O.P., *Praelectiones Iuris Matrimonii*, ed. quarta, (Hollandia: Paulus Brand, 1950), p. 511: "Codex nonnisi totalem coniugum separationem suis canonibus moderatur." Cf. also Ayrinhac-Lydon, op. cit., pp. 328-329.

⁴¹ Trent, Sees. xxiv, can. 7; can. 8. These are cited by all the various authors. See, for example, Ayrinhac-Lydon, p. 6; p. 328.

posed. Canon 1128 provides :

"Married persons are obliged to live together, unless they have a just cause for separation."⁴²

In the next article we will discuss the causes or grounds that would excuse from this obligation. Before we take up this question, however, we will briefly indicate the various kinds of separation.

B) KINDS OF SEPARATION

Separation, under the aspect of breaking up a home by discontinuing cohabitation, can be most conveniently divided under three headings. One would relate to the authority by which the separation was granted; another would be the length of time for which it was granted; and the third would be on the basis of the freedom which the parties had to accept the separation or not.

1. - *Authority for separation*

The authority by which a separation is granted may be either private or public. Generally, since the public order is involved when married people break up their homes, it will be necessary for the public authority of the Church to intervene with its permission for the separation. This public authority is exercised by the Bishop who rules the diocese in the name of the Church. He may exercise this authority either by an administrative decree or by acting through a judge in a judicial process.⁴³

However, separation on the private authority of the parties is also possible. This may be with or without mutual consent. On the basis of the consent of both spouses a perpetual separation is sometimes possible in order to permit them to lead a more perfect life; that is, in order to receive the sacrament of holy orders or to enter the religious life. Such a separation would

⁴² C.I.C., canon 1128: "Conjuges servare debent vitae conjugalis communionem, nisi iusta causa eos excuset." The translation is taken from Ayrinhac-Lydon, p. 328. In Bouscaren, op. cit., p. 613, it is translated: "Husband and wife are obliged to observe community of conjugal life unless a just reason excuses them."

⁴³ Canon 1130, no. 1 mentions the possibility of a judge's decision in a case of separation for adultery; canon 1131, no. 1 provides for the intervention of the ordinary of the place in separations for other causes. Cf. also Ayrinhac-Lydon, op. cit., p. 333, Doheny, William J., C.S.C., *Canonical Procedure in Matrimonial Cases*, (Milwaukee: Bruce Publishing Co., 1944), Vol. II, p. 638; Bouscaren, op. cit., p. 615.

be permissible as long as it did not lead to a violation of the moral law because of the danger of incontinency or scandal. In such cases the Church demands that when one of the spouses receives Orders or enters the religious life, the other spouse must also enter a religious community or at least take a vow of chastity, though remaining in the world. Also, of course, careful provision must be made for the children if there are any. Clearly such separations would be extremely rare.⁴⁴

If the parties separate by mutual consent for a short period and with good reason, the public authority of the Church does not become concerned. Such absence of one of the spouses could be for reasons of study, business, health or something similar. But even in these cases there must be no proximate danger of incontinency or scandal.

However, it will be easily recognized that absence under certain conditions will amount to real separation. An obvious example would be if one of the spouses went to a distant place without any intention of returning and the other spouse refused to follow. In a case of this kind there must be recourse to the public authority of the Bishop to get permission for the separation since a home is being broken up, and this involves the public good.

In a case where the home is not being finally broken up but there will be a rather extended absence of one of the spouses, a proportionately more serious reason will be necessary to permit it. Other factors that might enter into such a case would be whether or not there were still children at home who needed the care and presence of both parents; the ages of the parties concerned; and the danger of scandal that could arise from the absence. Just as in the case of shorter absences, the public good is not involved in these cases and the parties concerned could make the decision without recourse to the Bishop. But it must be emphasized that the law does not accord married people the right to separate permanently or even temporarily on account of slight reasons, such as a mere incompatibility of temperament or mere dislike of one another. Separation is always to be by way of exception.⁴⁵

⁴⁴ C.I.C., canon 542; canon 987; Bouscaren-Ellis, *op. cit.*, p. 613; Cappello, *op. cit.*, Vol. V., p. 759; Ayrinhac-Lydon, *op. cit.*, pp. 328-329.

⁴⁵ Cappello, *op. cit.*, Vol. V, p. 759; Gasparri, *op. cit.*, Vol. II, p. 248.

Even without mutual consent either party may be entitled to separate from the other on his own authority for grave reasons. The norms for the exercise of this authority are set out in canon 1129 and canon 1131. When the cause for separation is adultery, canon 1129 provides that the innocent party may terminate the community of life. The canon does not demand the intervention of the public authority. But commentators are agreed that the innocent party could separate on his own authority only if the crime of adultery is *certain* and *public* in the sense that it is commonly known or was committed in such circumstances that it must easily become common knowledge.⁴⁶

In canon 1131 other causes for separation are listed in addition to adultery. But this canon does provide that ordinarily in these cases the separation must be pronounced by the Bishop. Private authority to separate for the reasons listed or for others as grave can be invoked only by way of exception. The canon makes it clear that if there is danger in delay and the legal cause is certain, the innocent party may separate.⁴⁷

2. - Duration of separation

On the basis of the length of time for which separations are granted, we may divide them into permanent and temporary separations. A permanent separation would give the innocent party the right to live apart from the guilty spouse with no obligation ever to take him back. The Code makes this very clear and explicit:

"After a legitimate separation, whether effected by private authority or by sentence of the judge, the innocent spouse is never obliged to admit to married life the party guilty of adultery; he may, however, admit or recall her, unless, with the consent of the innocent spouse, the guilty one has embraced a state incompatible with matrimony."⁴⁸

Adultery is the only cause for perpetual separation; all other causes are the basis for a temporary separation only. And in such cases, if the injured party had departed on his own authority, he is

⁴⁶ Bouscaren - Ellis, op. cit., pp. 614-615; Gasparri, op. cit., Vol. II, p. 246; Regatillo, op. cit., p. 869.

⁴⁷ Ayrinhac - Lydon, op. cit., p. 333; Bouscaren - Ellis, op. cit., p. 615; Doheny, op. cit., Vol. II, pp. 637-638.

⁴⁸ C.I.C., canon 1130.

bound to return and restore the common life as soon as it is certain that the legal reason has entirely ceased to exist.⁴⁹ If the separation was granted by the authority of the Bishop for a definite period of time, the common life must be restored when that time has expired. This is provided in canon 1131. This canon also provides that if the Bishop pronounced the separation for an indefinite period of time, the innocent party is not bound to return until ordered to do so by a new decree of the Bishop.⁵⁰

3. - *Freedom or coercion to separate*

The third division of separations is made on the basis of the freedom that the parties had to accept the separation or not. Under this heading separations may be either voluntary or forced. A voluntary separation would be one which takes place with the mutual and free consent of the spouses, as described above. A forced separation is one in which the guilty party is coerced against his will to be separated from his innocent spouse.

C) GROUNDS FOR SEPARATION

The principal grounds for separation according to the law of the Catholic Church are listed in the Code of Canon Law. But it is important to note immediately that the list of causes that is given in the Code is not exclusive. Bishops, therefore, may allow married people to separate for other reasons besides those explicitly listed. This is made clear in the Code itself, and all commentators are agreed on this point.⁵¹ In canon 1131 after certain causes for temporary separation are listed, it is stated:

These and other things of the kind are so many lawful reasons for the other party to depart, on the authority of the Ordinary of the place, and even on his own authority if the grievances are grave and there is danger in delay.

In their commentaries on the Code modern authors follow the list of causes as enumerated but hasten to add that other causes are possible and usually add a few by way of example. Some that are suggested by various authors are: malicious deser-

⁴⁹ C.I.C., canon 1131, no. 2; Bouscaren - Ellis, op. cit., p. 615.

⁵⁰ C.I.C., canon 1131, no. 2; Bouscaren - Ellis, op. cit., p. 616.

⁵¹ C.I.C., canon 1131, no. 1; Bouscaren - Ellis, op. cit., p. 615; Ayrinhac - Lydon, op. cit., pp. 332-333.

tion; ⁵² intolerable hardships imposed on one spouse by the other, joined with hardened aversion or hatred; ⁵³ very grave loss of temporal goods; ⁵⁴ danger threatening the wife's fortune, if the only means of removing the danger is separation; ⁵⁵ an extremely avaricious and niggardly character which makes life unbearable; an excessively extravagant tendency to squander money to the detriment of the fortune of the other.⁵⁶

There would be no particular advantage gained from further speculation as to possible causes. No complete listing would even be possible. But it is clear from the canon and from the examples given by the commentators that all grounds for separation must be in the category of either spiritual or material danger to one of the spouses. And the enumeration given in the canon does establish a standard of seriousness to guide ecclesiastical authorities in their consideration of other causes. As it was stated in a decision of the Sacred Roman Rota:

It is not right that separation take place for light inconveniences, even though these are repeated, for example, incompatibility of temperament; for even more serious quarrels, arising from unusual anger and unexpected perturbation, do not exclude hope of early reconciliation... all these do not bring with them serious injury or grave fear to a steadfast soul.⁵⁷

After this brief discussion of the grounds for separation in general, we can now consider the specific grounds that are listed in the Code. In Church law adultery is the most important and gravest cause of all the possible causes for separation. The reason for this is that it is directly contrary to conjugal fidelity, and it is the only cause that is really special and intrinsic to marriage.⁵⁸ Also as we have seen, it is the only one mentioned in the Gospel. Its importance in Church law can be judged also from the fact that it is the only cause for *permanent* separation without mutual consent.

⁵² Regatillo, op. cit., pp. 869-870.

⁵³ Bouaert, Claeys, F. - Simenon, G., *Manuale Iuris Canonici*, ed. secunda, (Gandae et Leodii: Seminarium Gandavense et Leodense, 1935), Vol. II, p. 350.

⁵⁴ Vermeersch, A.-Creusen, G., *Epitome Iuris Canonici*, editio sexta, (Mechliniae-Romae: H. Dessain, 1940), vol. II, p. 307.

⁵⁵ Cappello, op. cit., pp. 763-764.

⁵⁶ Doheny, op. cit., pp. 635-636.

⁵⁷ *S. R. Rotae Dec.*, XXII (1930), Dec. XLVII, n. 4, p. 525. This is cited and quoted in Forbes, op. cit., p. 151. This case is also quoted and discussed in Doheny, op. cit., Vol. II, pp. 670-673.

⁵⁸ Ayrihac-Lydon, op. cit., p. 330.

The law establishing adultery as a grounds for separation is found in canon 1129:

Either party to the marriage, by reason of adultery on the part of the other, has the right, though the marriage bond remains intact, to terminate the community of life even permanently, unless he consented to the crime, or was the cause of it, or condoned it expressly or tacitly, or himself committed the same crime.⁵⁹

Contrary to what some older authors held, previous to the publication of the Code, this canon makes it certain that the right of separation on the grounds of adultery is granted to the innocent husband or wife respectively. Both sexes have equal standing before the law in this matter. It should be noticed also that the canon gives the innocent party the *right* to separate but it does not insist that he necessarily use his right. But, as Cappello mentions, there might be a case where there would be an obligation to separate because of adultery. As an example he suggests that the possibility of fraternal correction or the avoidance of scandal might demand that the innocent party leave the guilty one.⁶⁰

Since the guilty party will be deprived of his *right* to marital intercourse because of his crime, the adultery, which the canon specifies as grounds, must be adultery in the strict sense. As the commentators generally express it, the adultery must be complete (perfect) and consummated.⁶¹ Hence, the mere intention to commit the sin does not suffice. Acts which remotely prepare the way for it, such as immodest embraces, kisses, touches and the like, though gravely sinful, could not be considered adultery in the sense demanded by this canon.⁶²

A difficulty arises when a spouse has adulterous relations with another but does not complete the marital act. Most canonists in theory would refuse to accept such "copula inchoata," as it is called, as grounds for separation. And in the internal forum of the sacrament of penance the confessor can rely on the word of the penitent that the act was not complete. However,

⁵⁹ C.I.C., canon 1129, no. 1.

⁶⁰ Cappello, *op. cit.*, pp. 753-764.

⁶¹ Bouscaren-Ellis, *op. cit.*, p. 614; Ayrinhac-Lydon, *op. cit.*, p. 330; Cappello, *op. cit.*, pp. 759-761; Gasparri, *op. cit.*, pp. 243-244.

⁶² *Ibid.*

in the external forum once a married person has adulterous relations with another, the presumption is that the act was completed, and therefore, in practice, canonists agree that "copula inchoata" is sufficient grounds for permanent separation. The presumption, of course, would yield to contrary proof.⁶³

Besides being in agreement that the adultery must be complete, canonists are also unanimous in demanding that it be *formal* adultery. This term indicates that it must be a culpable action. Hence, there must be internal consent. Adultery that was committed as a result of ignorance, deceit, error or force would not be grounds for separation.⁶⁴ Examples of adultery that would be material only and not formal could be any of the following: a spouse who believed that his wife was dead and married another, unless he persisted in the union after learning of his mistake; a person who had relations with another whom at the time he thought to be his spouse; a wife who was violated against her will by force.

The commentators also agree that the crime of adultery must be morally certain. This means that mere suspicions, accusations or even compromising situations will not constitute proof of adultery. On the other hand, since the crime by its nature is generally occult, no one demands that eye-witnesses be brought in as proof. Indirect proofs, indications and presumptions of the sin can give the other spouse or the ecclesiastical judge moral certitude that the crime was committed.⁶⁵

However, even if the crime of adultery is complete, consummated, formal, and morally certain the innocent spouse can lose his right to a separation. The canon itself makes this very clear. As set forth in the canon quoted above, the right to separation on the grounds of adultery is lost:

- (1) If the other party consented to the crime;
- (2) If the other party was the cause of it;
- (3) If the innocent party condoned it expressly or tacitly;
- (4) Or if the other party himself committed the same crime.

⁶³ Cappello, *op. cit.*, p. 760.

⁶⁴ Bouscaren-Ellis, *op. cit.*, *op. cit.*, p. 614; Ayrihac-Lydon, *op. cit.*, p. 330; Cappello, *op. cit.*, p. 760. If the adultery was committed out of grave fear, it is controverted among the commentators whether a separation is justified. Cf. Gasparri, *op. cit.*, p. 243.

⁶⁵ Gasparri, *op. cit.*, pp. 243-244; Bouscaren-Ellis, *loc. cit.*; Ayrihac-Lydon, *loc. cit.*

Bouscaren, in his commentary, adds also that adultery cannot be used as a grounds for separation if the crime was committed *only before baptism*. He reasons that even though this is not mentioned in the canon, it is in accord with the very firm doctrine of the Church that baptism entirely obliterates crimes committed in the past.⁶⁶

In the case of an innocent spouse who has consented to the crime of adultery on the part of the other spouse, the right to separation is lost precisely because no injury has been inflicted. In spite of her abhorrence of the breaking up of a home the Church concedes the right to do so on the grounds of adultery because of the very grave injury that is inflicted on an innocent spouse by this crime. However, it is a very ancient and well established principle of law that "there is no injury done to one who knows and consents to the action."

X As the authors point out, the consent to the crime can be either explicit or tacit. Explicit consent is given by clear words or signs of acquiescence. The consent is tacit if the innocent party knows of it or could easily know of it, and yet does not prevent it, even though he could do so without grave hardship or difficulty.⁶⁷ Consent could not be claimed because the innocent party knows of the crime but pretends not to, in order in the meantime to find witnesses who could help convict the other of the crime.⁶⁸

In order to lose the right to separation because he is the cause of the adultery, the innocent party must have caused it directly and proximately.⁶⁹ A person who directly and proximately causes another to sin becomes a cooperator in that sin and thus also shares the guilt of it. A man, for example, could be guilty of this kind of cooperation in the adultery of his wife if he commanded, forced, or urged her to commit it. A man could also be the cause of his wife's crime if he knew her weakness and yet allowed other men of bad reputation to come readily into his house and left her alone with them. And of course, a wife could be the cooperator in the crime of her husband in these same ways.

It also seems to be the opinion of the commentators that a spouse could be the direct cause of the other spouse's adultery

⁶⁶ Bouscaren-Ellis, loc. cit.

⁶⁷ Cappello, op. cit., pp. 760-761.

⁶⁸ Gasparri, loc. cit.

⁶⁹ Bouscaren-Ellis, loc. cit.; Cappello, loc. cit.

by frequently and unjustly refusing intercourse, or by not supplying necessary support, or by unjustly expelling the other from the home; also by deserting the home himself. In all of these cases the right of separation on the grounds of adultery would be lost because the spouse guilty of these actions would be deemed to have been the direct and proximate cause of the adultery on the part of the other.⁷⁰

Condonation of the crime of adultery will also take away the right to separate. The innocent party may condone the crime either explicitly or tacitly. The basis for this is the fact that separation is granted as a favor to the innocent party, but he may give up his right if he is so inclined. However, it is obvious that such condonation must be a true forgiveness, free and spontaneous, not extorted by force or fear. Otherwise, it could hardly be called condonation in the sense that the canon uses this term.⁷¹

The condonation is explicit if the innocent party uses clear words or signs to indicate that he has forgiven the adulterer. If the innocent party acquires certainty that his spouse has committed adultery but nevertheless continues married life as before, his action implies condonation of the crime. If he continues this married life under these circumstances for a period of six months, the law presumes that condonation has taken place. This is spelled out clearly in the second part of canon 1129:

There is a tacit condonation if the innocent party, after learning of the adultery, of his own accord receives the other with conjugal affection; condonation is presumed, unless the injured party within six months expels or deserts the adulterer, or brings a legal accusation against him.⁷²

The six month period mentioned in the canon begins from the day that the adultery becomes known to the innocent party, not from the day when the sin was committed, nor from the day when the innocent party was first able to use his right of separation. After the six month period the law presumes that the innocent party has condoned the crime so that he now loses his

⁷⁰ Gasparri, *loc. cit.*; Vermeersch-Cruesen, *op. cit.*, p. 306; Bouscaren-Ellis, *loc. cit.*

⁷¹ Bouscaren-Ellis, *loc. cit.*

⁷² C.I.C., canon 1129, no. 2.

right to depart merely by saying that he did not have intercourse during that period or that he remained only from force or fear, or because he was ignorant of his right. However, this presumption against the innocent party will give way to contrary proof.⁷³

Finally, as clearly stated in the canon, the right to separate from an adulterous party is lost by a spouse who is himself guilty of the same crime. In this case the crime of one partner is compensated by the crime of the other. This provision of the code is an application of the principle that "equal crimes are taken away by mutual compensation."⁷⁴ In applying this principle it would make no difference if one of the partners were guilty of the crime only once or at most a few times while the other had committed it many times. The determining factor is that the crimes of both are certain and by their nature sufficient for perpetual separation, not the number of crimes.

If the separation takes place and later the innocent party commits adultery, this is not judged to be compensation of the crime. The canon is concerned with the situation when both are guilty of the crime *before* separation. The innocent spouse who commits adultery after the separation is not violating the right of the other to separate since he already lost this right when he committed the sin.⁷⁵

A final point that we should note about the grounds of adultery is that many authors hold that all sexual intercourse outside of married life on the part of married people is assimilated to adultery. Thus an innocent spouse would have grounds for permanent separation from his partner who is guilty of the sin of homosexual relations or bestiality.⁷⁶ y

⁷³ Bouscaren, loc. cit.; Regatillo, op. cit., p. 868; Cappello, op. cit., p. 76.

⁷⁴ This principle is clearly spelled out in the fifth book of the Code, "Crimes and Penalties". See canon 2218, no. 3 which says: "When mutual injuries have been inflicted they offset each other, unless one of the parties, because the injury done by him was greater, ought to suffer some penalty, mitigated according to the requirements of the case. (Translation found in Bouscaren-Ellis, op. cit., p. 848).

⁷⁵ Regatillo, op. cit., p. 868. However, there seems to be some disagreement among the authors on this point. If there has been no judicial sentence of separation, then according to Gasparri, the formerly innocent spouse must take the other back, if he falls into the same sin. But if the separation was the result of a judicial sentence, the community of life would not have to be restored until a subsequent judicial sentence was pronounced. See, Gasparri, op. cit., p. 245; Doheny, op. cit., Vol. II, p. 651.

⁷⁶ Ayrinhac-Lydon, loc. cit.; Wernz-Vidal, op. cit., pp. 843-844. Cappello, op. cit., p. 759, admits that many hold this as the common opinion, although he himself says that such sins are not adultery, "proprie dictum," and thus not grounds for separation.

We now turn to a consideration of the grounds that can be the basis of temporary separation. As noted above, these grounds that are listed in the Code are by no means exclusive. They merely make clear that the basis for separation must be some grave spiritual or material harm to the innocent spouse. The list as given also sets up a standard of seriousness which can be used as a criterion in the judgment of other causes that are alleged as the basis of the right to separate.

The causes which the Code cites as sufficient for temporary separation are enumerated in canon 1131:

If one of the parties has joined a non-Catholic sect; or educated the children as non-Catholics; or is living a criminal and ignominious life; or is causing grave spiritual or corporal danger to the other; or makes the common life too hard by cruelty — these and other things of the kind are so many lawful reasons for the other party to depart, on the authority of the Ordinary of the place, and even on his own authority if the grievances are certain and there is danger in delay.⁷⁷

Heresy has traditionally been labeled by Catholic writers as spiritual adultery since it involves failure to live up to the commitment a man has made of himself to God when he first received God's life into his soul. Hence, it is not surprising to see heresy given as the first cause for temporary separation. Authors without exception assimilate apostasy and schism to the crime of heresy also.⁷⁸ However, it must be noted that together with the heresy, apostasy or schism there must be added, according to the present law, actual affiliation with a non-Catholic sect, either Christian, Jew, or Pagan. Thus, if a spouse were a heretic, schismatic, apostate or atheist without becoming affiliated with any non-Catholic sect, there would be no right of separation on this grounds.⁷⁹ However, personal heresy, or apostasy by indifference, or statements contrary to the Faith could, of course, be grounds for separation on the basis of grave spiritual danger to the innocent spouse or the children. In fact, it is not just canon law that would indicate these as grounds for separation. The very law of nature would justify separation because of the proxi-

⁷⁷ C.I.C., canon 1131, no. 1.

⁷⁸ Ayrinhac-Lydon, *op. cit.*, p. 333.

⁷⁹ *Ibid.*

mate danger of perversion of the other party, unless this danger could be made remote. And as Gasparri declares, there might even be an *obligation* to separate, if the danger was proximate and could not by any remedies be made remote. On the other hand, as he also notes, if the dangers can be made remote by the use of necessary precautions, then the innocent party might be obliged out of charity to remain with the other in order to effect his conversion.⁸⁰

Parents have a grave obligation to raise their children in the true faith. To fail to fulfill this obligation is to violate both the natural and the divine law. And it is deemed such a grave failing that canon law permits the breaking up of a home rather than permitting this to happen.

The non-Catholic education that is spoken of in the canon refers not just to religious education in a non-Catholic religion but also to any such education that was against Catholic faith or morals. Thus it would include raising the children in indifference or in no religion at all.⁸¹

In most cases where this ground is present, the innocent party should not bring about separation on the basis of it alone, unless he had very great hope that he could better assure the Catholic education of the children by separation. In practice it seems likely that it would be very rare when separation would be the only means of successfully providing a Catholic education for the children. However, if this were the case, then there would be an obligation to separate in order to protect the children.⁸²

The next grounds for temporary separation listed in the Code is the living of a criminal and ignominious life. A criminal life would be one dedicated habitually to crime, not one or another criminal or disgraceful act. Such a life would be ignominious if it were publicly known, for it would then entail shame and disgrace for the criminal and his family.⁸³

The sin of adultery, of course, is excluded from this category

⁸⁰ Gasparri, *op. cit.*, p. 246.

⁸¹ Neglect of the religious education of the children in this way would be directly against the *bonum prolis*, and for this reason the authors cite it as one of the reasons for separation. Cf. Wernz-Vidal, *op. cit.*, p. 847; Cappello, *op. cit.*, p. 763.

⁸² Doheny, *op. cit.*, Vol. II, p. 633.

⁸³ Coronata, *op. cit.*, pp. 922-923.

since it is a cause for separation by itself. Also a criminal and ignominious life that would be at the same time a grave danger to the faith or morals of the other spouse or the children would be excluded from this category. The danger to the spiritual welfare of the wife or children could itself justify separation. What the canon is indicating by this grounds is that the crimes of one of the spouses, even if they are not a grave danger to the faith or morals of the other, or of the children, can be a basis for separation.

The innocent spouse might use this as a grounds to separate temporarily from the guilty partner in order to effect repentance and a reformation of life. And certainly this ground could be used to justify separation if the innocent spouse has good reason to fear serious penalties from the civil law because of association with the guilty party. Finally, the innocent party might allege the criminal life of the other as a reason for separating because of his justifiable fear of grave infamy or public disgrace to his honor, good name, or family. However, the fact that the civil authorities have condemned a spouse to punishment for his crimes does not in itself warrant his partner's seeking a separation from him.⁸⁴

In actual practice this cause would not often be alleged by itself. In most cases it would be linked with the grave danger of spiritual or physical harm to the innocent party.

When there is a serious menace to the spiritual welfare of one of the spouses because of the conduct of the other, or danger of death or grave physical harm from his conduct, then not just canon law but also the divine, natural law gives the right to separate.

The commentators cite various examples of grave spiritual dangers which can be the basis for separation. Such danger would be present in a case in which one of the spouses or his relatives frequently and continually urges the other to commit serious sin, and this person finds it extremely difficult to refuse.⁸⁵ Another example would be the case where one of the spouses abuses the marriage act and thus attempts to involve the other in serious sin.⁸⁶ Other crimes also, such as thefts, doubts against

⁸⁴ Wernz-Vidal, *op. cit.*, p. 848, footnote 136.

⁸⁵ Coronata, *op. cit.*, p. 923; Cappello, *op. cit.*, p. 763.

⁸⁶ Ayrinhac-Lydon, *op. cit.*, p. 333; Cappello, *op. cit.*, p. 763.

faith, temptations against morals, etc., are given as examples, wherever the guilty party brings serious danger to the other by trying to involve him in the same sin.⁸⁷

If the danger of the innocent party's sinning is not grave and proximate, there is not a cause for separation except, perhaps, for a short time as an attempt to get the other to reform his life. On the other hand, if the danger is truly proximate, and there is no other way to make it remote other than by separation, there is a serious obligation on the part of the innocent party to separate. This is merely an application of the principle that one is obliged to make proximate occasions of sin remote, or to remove himself from them if they cannot be made remote.⁸⁸

The serious corporal danger that the canon speaks of would be present when there was actual danger of death, danger to health, including, of course, mental health, or danger of serious mutilation. The source of the danger might be the spouse himself or his companions or relatives.⁸⁹ To justify separation it is not necessary that the danger be due to the fault of the other, but it is necessary that there be no other means available to remove it. Examples cited by authors of such dangers include the following: insanity; contagious disease, e.g., venereal disease, advanced tuberculosis; serious and constant quarreling; loss of material goods through irresponsible spending or gambling; or plots against one's life.⁹⁰

Diseases that are particularly burdensome, though not contagious, would not be grounds for separation since it is one of the obligations of married life for the healthy spouse to care for the sick one. This is a factor that must be considered, for example, in the case of drunkenness. Furthermore, the healthy spouse's obligation to the other continues even though they are separated, e.g., when an insane spouse or one who is an habitual drunkard is placed in an institution.⁹¹

The last cause enumerated in the canon is cruelty which makes the common life too hard. The word used in the canon for cruelty is "saevitia", which means a degree of cruelty that is unbearable. And the Code is concerned with cruelties that

⁸⁷ Ibid. Also, Gasparri, *op. cit.*, pp. 246-247.

⁸⁸ Wernz-Vidal, *op. cit.*, p. 847.

⁸⁹ Doheny, *op. cit.*, Vol. II, p. 633.

⁹⁰ Gasparri, *op. cit.*, pp. 246-248; Cappello, *op. cit.*, pp. 763-764; Wernz-Vidal, *op. cit.*, pp. 847-848; Ayrinhac-Lydon, *op. cit.*, p. 333.

⁹¹ Coronata, *op. cit.*, p. 923.

are bodily in nature, although serious threats of them are sufficient reason for separation if there is good reason to believe that they will be carried out.⁹² Commentators generally would include the following in the classification of cruelty: frequent and almost continual quarreling; implacable hatred; quarrels arising from mutual and long-standing hatred; avarice of a husband who denies his wife the necessities of life; wasting of family goods and fortune to the detriment of the rest of the family; malicious absence for a long time.⁹³

There is also a relative norm to be considered in separation cases based on the cruelty of one spouse toward the other. The cultural background and the educational achievements of the injured party must be taken into account in any estimate of the "unbearableness" of the cruelty. What would be light treatment for a woman of common background and robust health could easily constitute serious and intolerable cruelty to a woman of noble birth, of good education, of sickly health or a timid disposition.⁹⁴ J

D) THE EFFECTS OF SEPARATION

At the outset of a discussion of the effects of separation perhaps it should be emphasized again that any separation between husband and wife does not dissolve the marriage bond. That bond which was created when they validly exchanged mutual consent continues to exist no matter what was the cause of their separation. Separation in canon law does no more than dissolve the community of married life which they were bound to. After separation they are no longer bound to the obligations of bed, board, and home.

The canonical consequences of separation will vary to a certain extent depending on the grounds for the separation. If there has been a legitimate separation because of the adultery of one of the spouses, the innocent spouse has the right to refuse perpetually to take the other back in order to resume the common married life. This effect of a separation because of adultery is spelled out very clearly in canon 1130:

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Cappello, loc. cit.; Gasparri, op. cit., p. 247.

The innocent party who has departed legally, whether in pursuance of a judicial decree or on his own authority, is never bound to admit the adulterous partner again to conjugal life; but he may either receive or recall the party, unless the latter has in the meantime with his consent embraced a state of life inconsistent with marriage.⁹⁵

From this canon it is clear that there is no way that the guilty party can ever again demand the restoration of community life. Once he has committed the crime of adultery he has simply lost his right to it, and he can never claim that he is being *unjustly* treated by the refusal of his spouse to take him back. This is true even if he should sincerely repent his crime and effectively reform his life. However, it is possible that in some cases *charity* might demand that after amendment the contrite spouse be taken back. And perhaps in some exceptional cases reasons of the common good might impose the same obligation on the innocent spouse.⁹⁶

Commentators used to teach that if the innocent party later committed the same crime he would then be bound to take back the other one, either immediately if the separation had been on private authority, or after the intervention of the judge if the separation had been by judicial decree. But this canon seems to make clear that the innocent party is free *forever*, at least as far as any rights in justice are involved. And the common opinion of canonists now is that this is the case.⁹⁷

The canon also makes clear that the separation for adultery affects only the right of the guilty party to community of life. The innocent party continues to retain his right to bed, board, and home. For this reason he is free to receive the guilty party back at any time or even put him under obligation to come back. The separation was a favor granted to the innocent party, and it cannot be used to penalize him by being turned to his disadvantage or harm when he wishes to restore the community of married life with his spouse. There is one exception to this right of the innocent spouse to recall the guilty

⁹⁵ C.I.C., canon 1130.

⁹⁶ Ayrinhac-Lydon, *op. cit.*, p. 331; Vermeersch-Cruesen, *op. cit.*, p. 306; Doheny, *op. cit.*, Vol. II, p. 651.

⁹⁷ Ayrinhac-Lydon, *op. cit.*, p. 331; Bouscaren-Ellis, *op. cit.*, p. 615; Vermeersch-Cruesen, *op. cit.*, p. 306.

one. As the canon makes clear, this cannot be done if the innocent spouse has conceded to the other the right to enter into a new state of life, which would be incompatible with the married state, and the other has taken advantage of this permission. This would be the case if the guilty spouse had entered the religious life or received Sacred Orders.

When the separation has taken place because of any of the reasons mentioned in canon 1131, n. 1, the effect of the separation is not the same as it is when adultery is involved. In this case the separation is only temporary and lasts as long as the cause lasts. It may, of course, become perpetual in fact if the cause persists for the lifetime of the parties.⁹⁸ This is made clear in the canon which reads:

In all these cases, when the cause of the separation has ceased to exist, the common life is to be restored; but if the separation was decreed by the Ordinary for a definite or indefinite time, the innocent party is not bound to the common life unless by decree of the Ordinary or upon expiration of the time.⁹⁹

The reason that the effect of separation is different in these instances from the effect produced when adultery is the cause is the fact that in these cases the grounds for separation are extrinsic to the nature of marriage. They do not directly contradict its nature as adultery does, and there is less evil in them for this reason. Their effect on the marriage is only temporary. Thus the result is that when the cause ceases, the right of separation ceases also.¹⁰⁰

But even after the right of separation no longer exists, there will not in every case be an obligation to begin community of married life immediately. This will depend on the manner in which the separation came about. If the innocent party departed on his own authority, then he is obliged to restore community of life as soon as the cause for the break has ceased. If the Bishop has intervened in the case and issued a decree of separation, then the obligation to take up a common life again will

⁹⁸ Ayrinhac-Lydon, *op. cit.*, p. 334; Bouscaren-Ellis, *op. cit.*, pp. 615-616.

⁹⁹ C.I.C., canon 1131, no. 2.

¹⁰⁰ Wernz-Vidal, *op. cit.*, p. 849; Ayrinhac-Lydon, *loc. cit.*; Bouscaren-Ellis, *loc. cit.*

depend upon the terms of the decree.

It is possible that the separation was granted for a definite, limited time. If this is the case, then there is an obligation on the part of both spouses to begin living together as soon as the time has elapsed. If the innocent spouse contends that the cause for separation is still present, he must submit the case to the judgment of the Bishop again and abide by whatever the new decision states. A refusal, either to begin married life again or to re-submit the case to the judgement of the bishop, would make the innocent party guilty of injustice to his spouse and he would have the right to seek the intervention of the Bishop.¹⁰¹

In a case in which the separation was granted for an indefinite time, the innocent spouse is under no obligation to begin common life again with the guilty partner until there is a new decree from the Ordinary stipulating that the cause has ceased and that the parties must reconcile. The canon makes this provision in order to assure that the innocent party will not be compelled to restore the community of life unless there are sure signs of amendment on the part of the guilty spouse, and sufficient guarantees from him that his spouse will not simply be subjected to the same abuses as before the break-up of the marriage.¹⁰²

A further point that should be noted regarding the effects of separation is that, when a separation takes place on the private authority of the innocent spouse, its effect is not always final without the ratification of the Bishop. In the case of certain and public adultery, the effect is final immediately without ratification. The reason for this is that in this case the innocent party has a right to separate based on the words of Christ Himself. Any ratification of the Bishop would be purely declarative. But if there is any doubt concerning the crime of adultery, then the offended party must go to the Bishop for ratification of the separation if it has already taken place.¹⁰³

In actual practice, as Cappello notes, every case of permanent separation on the grounds of adultery should be submitted to the judgement of the Bishop in order to prevent abuses and evils that could easily arise from hasty and ill-advised sep-

¹⁰¹ C.I.C., canon 1131, no. 2; Wernz-Vidal, *op. cit.*, p. 849.

¹⁰² *Ibid.*

¹⁰³ Gasparri, *op. cit.*, p. 246. See also Doheny, *op. cit.*, Vol. II, pp. 637-638.

arations. It is very easy to foresee that mistakes in judgment and exaggerations on the part of the innocent spouse could lead to real injustice for the other.¹⁰⁴

In those cases where the innocent party separates because of the danger in delay, the effect of the separation should be ratified by the Bishop also. Even though the canon does not explicitly demand this, and the canonists do not mention it, it is obvious that the same abuses and evils could arise in these cases as could arise in the case of separation on private authority because of adultery.

The final point that we must take up in a consideration of the effects of a separation concerns the custody and education of the children, if there are any that have been born of the marriage that is being broken up. In the Code of Canon Law this is provided for in canon 1132:

When a separation has been effected, the children are to be educated under the care of the innocent party, or if one of the parties is a non-Catholic, under the care of the Catholic party, unless in either case the Ordinary decrees otherwise for the good of the children themselves, always without prejudice to their Catholic education.¹⁰⁵

It is clear from the wording of the canon that the primary consideration in the provisions for the children must be their own welfare. And the most important element of their interest to be considered is the safeguarding of their faith. The canon merely states what would be obvious general norms for the judge to follow in order to achieve this end. If both of the spouses are Catholic, it is most likely that the innocent spouse would see to the Catholic education of the children most effectively. If one of the spouses is not Catholic, it will be difficult for him to see that the children are raised in the Catholic faith as he promised they would be at the time of the marriage. In that case the judge could very well entrust the children to the Catholic spouse even though he is the one guilty for the breaking up of the home. But in every case, it must be emphasized, the Code leaves the way open to the judge to make the best provision possible after taking all the circumstances into considera-

¹⁰⁴ Cappello, *op. cit.*, p. 762.

¹⁰⁵ C.I.C., canon 1132.

tion.¹⁰⁶ And in making this best possible provision for the children, one of the circumstances that the ecclesiastical judge should bear in mind is the civil law of the country.¹⁰⁷

Perhaps it should also be added that canon 1132 does not refer to any children other than those that have been born of the marriage that is breaking up. Thus no provision is made by this canon for children that were born to either spouse by a former marriage, or children born to either from an adulterous union.

ARTICLE 3

CATHOLIC TEACHING ON CIVIL DIVORCE

The Code of Canon Law has no explicit law about civil separation and divorce. However, there are ecclesiastical laws dealing with these matters. These are derived from various sources. Some are necessary conclusions drawn from the matrimonial laws and procedures that are contained in the Code; others derive from statements of the Popes; yet others come from regional councils or diocesan synods; and approved authors are the sources for others. Although all of these sources do not have the same authority, they are all helpful in providing some positive ecclesiastical law regarding civil divorce and separation. Also these sources provide clear exposition of the moral law, which does not have to be legislated in a positive fashion in order to be binding.¹⁰⁸

Catholic teaching on civil divorce is based necessarily on Catholic teaching regarding marriage. And this has been summarized as follows:

Marriage was instituted by God as a permanent contract be-

¹⁰⁶ Ayrinhac-Lydon, op. cit., pp. 334-335; Bouscaren-Ellis, op. cit., p. 617.

¹⁰⁷ Vermeersch-Cruesen, op. cit., p. 308. The determination of what has to be provided for the support of the children, as well as for the support of the wife, is also left to the civil courts. This is in accord with canon 1016 which states: "The marriage of baptized persons is governed not only by divine law but also by canon law, without prejudice to the competency of the civil power as regards the merely civil effects of such marriage."

¹⁰⁸ Dailey, Robert H., S.J., "The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case," *University of Detroit Law Journal*, Vol. 38, (February, 1961), p. 257.