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Malicious Abandonment
A Jurisprudence Study

The strategy applied for this study has led us to come up with a number of partial conclusions; this being at the end of each chapter or regarding concrete assumptions in some of them.

Such conclusions take on the form of very specific achievements as a result of the analysis done over some aspects of a given case object of our study.

In spite of everything and after applying lawful logic, upon reaching the finish line of the study process, summarizing global results obtained throughout some of the conclusions of a general character became vital.

I

The concept of malicious abandonment as a sufficient cause for separation is not expressly provided by current legislation. Its autonomous treatment and character regarding the other concepts of separation is the result of a work of jurisprudence and doctrine with the intent of specifically protecting compliance with every conjugal and family duty, and penalizing any omission.

Malicious abandonment constitutes a cause for separation since it is the only one that destroys by principle the cohabitation by acting directly against the essence of the sacrament which is common life and love.

II

It has become impossible to integrate this concept within the other causes presented in Canon 1.153.

Malicious abandonment is differentiated from other causes of separation in that, while causes expressly defined in the CIC contemplate positive conduct - "occasions grave danger of soul or body to the other or to the children, or otherwise makes the common life unduly difficult" - malicious abandonment contemplates noncompliance with every conjugal duty.

With the concept of malicious abandonment, one is not seeking separation, because in fact it already exists; nor is there danger to the spirit or body of the other spouse, which can be involved in cohabitation, in that there is no longer cohabitation. Neither is one looking to assume that 'abandonment' generates great difficulty in the common life. Rather the absence of such since all life in common has been terminated precisely by it.

It becomes rather evident, then, that this is a matter of grave and radical causes more so than the ones contemplated in Canon 1.153.

III

The codicil system becomes incorrect to the point of incongruence when it does not take into consideration the 'gravest and most obvious' causes for separation '*manente vinculo*'. Therefore resulting in a legal blockage.

Reasons for such blockage being many and varied in nature. It might be helpful to point out, in a hypothetical manner, that a legislator might have looked to avoid causes of boundaries, which in itself could have been in accord with the appropriate causes for dissolution of the marriage.

IV

This lack of codicil statements regarding malicious abandonment, gravely affected by the disappearance of an analogical clause contained in the old canon 1.131, makes it necessary to appeal to an integration via any of the possible ways offered in canon 19 and, more concretely, through the general principles for marriage decrees and rights.

V

Malicious abandonment judicially fits within the break up of common habitation already configured as the essential element for community life.

However, not all break up of such nature constitutes malicious abandonment. A few criteria to be considered here. Malicious abandonment must be unilateral. This assuming the action was taken without knowledge nor agreement of the other spouse. It must also be illicitly objective and subjective. This meaning not only the lack of justified cause regarding one's conduct, but also the clear knowledge of the lack of it by the person executing such action. Intention to dissolve one's marriage must exist in the one displaying such action.

Bilateral break up of common habitation does not necessarily state in principle malicious abandonment. This being said in light of the lawful principle '*scienti et consentienti non fit inuria neque dolus*'. However, given the judicial inefficacy for this kind of separation within Canon Law, rejecting the agreement or consent could lead to malicious abandonment. Bilateral break up, then, turns into an illicit unilateral one.

VI

Judicial stipulation of malicious abandonment in the canonical jurisprudence is a unanimous consideration of autonomous causes for conjugal separation with a personal touch.

VII

The specificity of the 'abandoning one's conjugal duties' that occasionally appeared diffuse in the doctrinal terrain becomes crystal clear in the jurisprudence level.

The differentiated element between both images precisely becomes the matter element for malicious abandonment. That is the actual break up of cohabitation. Such break up is

essential for the actual existence of malicious abandonment but not necessary for the abandoning of one's conjugal duties. Both being common elements.

VIII

The judicial stipulation of one's abandoning conjugal duties does not entail, however, a single jurisprudence's action. It is worth talking about two tendencies regarding its judicial nature. The one stating that abandoning one's conjugal duties is autonomous cause for separation. It has its own entity. The other stating that all that is not a typical malicious abandonment such as the case of abandoning one's duties boils down to 'sevicias' (cruelty and malicious attitudes) causes.

Either tendency, however, agree to consider that abandoning one's duties will lack autonomy if one of the required elements is absent. In such case, we will find ourselves before assumptions of 'sevicias' (cruelty and malicious attitudes).

IX

A sound judicial analysis of the content for malicious abandonment requires that both subjects of the conjugal community be considered. It is never enough to observe the abandoning spouse's conduct since it could, directly or indirectly, be a side effect determined by the abandoned spouse.

Taking this as a starting point, it is possible to come up with a more agreeable systematizing of the elements present here. In order to do this, it becomes necessary to begin with the existence of two different elements: the doctrinal and the judicial process.

X

The **doctrinal** element situates the abandoning elements in **three different levels**. A negative element previous to the actual abandonment is the absence of just cause; two simultaneous and positive elements to this would be the actual leaving and the sorrowful intention; lastly, another negative – active element that could also be simultaneous or a posteriori is the absence of consent by the abandoned party.

The judicial element alters the order of the elements in place already mentioned. The judicial action always comes into place after the fact. It verifies the existence of a given case and gives it judicial efficacy.

A possible systematizing of the elements for malicious abandonment would present the following: matter (*break up of common habitation*), absence of just cause and the existence of sorrowful intention.

It is not necessary to prove opposition to abandonment. The one appealing to the judge obviously does not consent to the action taken by the spouse and rather looks to execute one's right to lawful separation.

XI

In reference to a concrete analysis of each of the elements for abandonment, and utilizing the doctrinal element as a more didactic tool, it is worth pointing out the absence of just cause becomes separate from the intentional element to which it traditionally was linked. Two facts corroborate to this hypothesis. First, the absence of just cause normally appears previously to the actual act and independent of knowledge by the spouse executing it. Secondly, it is something totally unknown to the will of the one abandoning. It could probably depend on a single objective fact or the will of the spouse being abandoned, but never dependent on the will of the one abandoning.

If a just cause is crystal clear, something rather unusually frequent in the day to day practice, malicious abandonment could turn into licit abandonment.

Lastly, the wrong belief in the existence of a just cause, while this good faith lasts, impedes considering abandonment as malicious.

XII

Break up of common habitation as element of matter and simultaneous at the moment the abandoning takes place presents two different models: the break up taking place in the already established home and refusal to living in a future home.

The first takes place when one of the spouses abandons the home or the expulsion of the other from this same home.

A character of permanence or reiteration is required to have such an action as a crystal clear intention to assume one's duties related to cohabitation, extremely required for malicious abandonment, by the one executing the abandonment. This reveals the connection between the break up of cohabitation and the spirit with which it is executed. It is never enough to have the matter element alone but also necessary to have a specified intention.

XIII

Refusal to living in a future home contemplates the following:

1. Negativity to continue with the husband's address.
Once gone the male principle, this negativity suffers modifications regarding its status quo.
The common home must be agreed upon equally by both spouses since canon law does not give the right to do so to either spouse separately. Any unilateral or arbitrary affirmation will not be valid.
The obligation for either spouse to follow the other when changes of homes take place will be reciprocal and limited to the assumption that just cause is absent for acquiring one's own new home.
2. Negativity to a common home because of break up of common habitation in a specific place could possibly originate the existence of malicious abandonment.

However, the one responsible for it could change his/her mind according to the efficacy offered to such agreement. Something the jurisprudence does not favor much.

If judicial efficacy is given to this type of agreements, the one responsible for the abandonment would also be the one not executing such stipulations. If, however, efficacy is denied, the one responsible for abandonment would also be the one reticent to go to a new home with the one responsible for the break up of the agreement.

3. Negativity to restore conjugal living ordered by lawful authorities as a result of the absence of cause for separation makes up for malicious abandonment if such negativity is not justified.

However, a new jurisprudence trend has surfaced in the last few years. A trend which aware of the problems presented at the moment common habitation was reinstated to two persons after having requested separation would never have a peaceful and cordial life in common. A trend still looking to apply the generic type of '*grave difficulty in common life*' without any formal faults easily attachable to either spouse in order to legitimize the request for separation.

XIV

The '*animus*' or sorrowful intention is number two of the simultaneous elements to the act of abandonment. This goes closely attached to the matter element as its qualifier.

The content is the intention to dissolve the conjugal consortium. Such intention, however, must have a series of requisites given its efficacy. This could be concretized in three. It must be a conscious intention; deliberate and with a sense of permanency. It is never enough when it is an on and off intention.

The intention not to comply to other conjugal duties different from the common habitation constitutes accessory of the '*animus*'. This would only be considered to stipulate actions if such intention goes closely attached to the lack of intention to assume one's duties for common habitation.

XV

The absence of consent to the abandonment is not only a negative element but also of a flexible nature. Study of it requires clear distinction of three different situations intimately connected to it: knowledge, consent, and opposition to abandonment.

Knowledge could be before, simultaneous to or after the abandonment. Knowledge is still previous to one's consent or opposition and never a determining factor, but indeed necessary.

Consent to abandonment can be simultaneous or after the fact. There is no place for previous consent since this would entail common agreement and not an illicit unilateral decision.

Simultaneous or after the fact consent can be explicit or implied requiring after the fact 'passive' attitude.

Revocation to consent can be simultaneous or after the fact; it should be specific and translated always into an after the fact active attitude: serving the other spouse and starting the judicial process.

Lastly, opposition to abandonment depends exclusively upon the will of the abandoned spouse. This could be explicit or understood, simultaneous or after the fact, but in order to achieve judicial efficacy it must be always translated into a dynamic after the fact conduct against the abandonment executed: serving the other spouse and starting the judicial process.