

make such a request. This is possible also because according to the Latin canonical doctrine the priest is not the celebrant of marriage, but only the official qualified witness of the Church who asks the celebrating parties to manifest their consent and in the name of the Church receives it (cf. c. 1108 § 2). In the aforementioned urgent cases the Catholic minister accomplishes an act of charity in view of the spiritual good and eternal salvation of souls, preventing the non-Catholic Christian faithful from falling into a state of sinful life and eternal death.

Conclusion

The recognition of the Churches and ecclesial communities outside the Catholic Church is the first step towards mutual collaboration between the various Churches and participation in spiritual resources. Between the Catholic Church and Eastern Orthodox Churches there exists almost full doctrinal, ontological and sacramental communion, which renders sacramental sharing theologically feasible and spiritually beneficial. According to Catholic theology, the ecclesial communities of Reformation have not maintained valid sacraments, with the exception of baptism (and marriage), and hence it is difficult to find a sound theological ground for reciprocal communication in sacraments. The canonical norms for sacramental sharing vary according to the grades of communion existing between the Catholic Church and other Churches and ecclesial communities. The observation of such norms is necessary to avoid indifferentism, doctrinal errors, scandal among the Christian faithful and false accusations of proselytism, which are detrimental to Christian unity and full communion of all the Christian Churches.

Legal Separation: A Pastoral Alternative

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I. Introduction

Marriage, according to canon 1055 of the 1983 Code of Canon Law is a covenant, by which a man and a woman establish between themselves a partnership of the whole of life, ordered by its nature to the well-being of the spouses and the procreation and upbringing of children.¹ Although the 1917 Code spoke of procreation and the education of children as the primary end of marriage, with "mutual help and the remedying of concupiscence" as secondary ends,² the 1983 Code (adopting the language of *Gaudium et spes*, n. 48) no longer speaks of "mutual help" as the primary end of marriage

¹*Codex Iuris Canonici auctoritatis Joannis Pauli PP. II promulgatus*, Vatican City, Libreria Editrice Vaticana, 1983. Canon 1055: "Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium consituunt, indole sua naturali ad bonum coniugum atque ad proli generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est." (Subsequent references to the 1983 Code are taken from this source relying on the author's English translations; English translations will be referred to in the text and notes, unless special problems of translation warrant reproduction of the Latin text.)

²*Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Rome, Typis Polyglottis Vaticanis, 1917. Canon 1013, §1: "Matrimonii finis primarius est procreation atque educati proli; secundarius mutuuum adiutorium et remedium consupiscentiae." (Subsequent references to the 1983 Code are taken from this source relying on the author's English translations; English translations will be referred to in the text and notes, unless special problems of translation warrant reproduction of the Latin text.)

viduals work through such issues, particularly if it appears that separation is indicated and that the separation might have to be permanent. If a decision is not made to separate, a period of assessment can be helpful for determining whether remaining together offers greater hope for preserving the marriage and an intact family. If separation does seem necessary, at least temporarily, an assessment can be made of what will be necessary for cohabitation and family life to be restored. Whether the need for immediate separation is indicated or not, once separation has occurred there is no reason why both the conditions necessary for the resumption of cohabitation or the advisability of going forward to a permanent separation, divorce and the seeking of a decree of nullity should not be explored pastorally. When all is said and done, the point is for ministers to engage in pastoral ministry to this particular person in this particular situation, and to assure that such ministry will continue on an ongoing basis as long as it is needed to guide the individual through this difficult life circumstance within a context of religious faith, the teachings of the Church, and considerate and caring pastoral ministry.

d) *Canonical procedures*

The procedures for requesting approbation of a legal separation are outlined in canons 1692-1696 of the Code. The procedural canons anticipate that a case of this nature may be able to be relegated to a civil tribunal,³⁶ and also provide that particular law can incorporate special procedures for dealing with such cases that may be at variance in one way or another with universal law.³⁷

The circumstances in which the parties may be given permission to approach a civil court are: 1) Where it is foreseen that the ecclesiastical decision will not result civil effects, and 2) if it is foreseen that a civil judgment in the matter will not contravene divine law. The competent authority for giving this permission is the Bishop of the diocese where the parties are living. The canon does not specifically address the question of parties who have already separated on their own authority and are living in different ecclesiastical jurisdictions, but presumably it is referring to the Bishop of the place where the common household was being maintained prior to separation. However, in cases of longstanding separation it may be presumed that the Bishop of the place where the party seeking official recognition of the separation is

³⁶Canon 1692 §§2 & 3.

³⁷Canon 1692 §1.

living would be the appropriate ecclesiastical authority whose permission is required. In fact, the language of the canon (*perpensis peculiaribus adiunctis*) may anticipate precisely this kind of situation. Furthermore, if the case will necessarily concern the merely civil effects of the marriage (most often one may presume that this means the distribution of the property of the parties and spousal and child financial support), the competent authority is directed to attempt to have the case brought before a competent civil court from the very beginning, provided the stipulations of §2 of the canon against any civil judgment that would contravene divine law are complied with.³⁸ Thus, a primary concern of canon law is that the case not be relegated to a civil court if the civil court judgment might result in declaring the dissolution of a valid marriage bond or some other effect contrary to divine law.

A canonical determination regarding separation can be made either by a decree of the competent diocesan Bishop or through a judicial sentence. If there is a question regarding the competence of a tribunal to which the case has been referred, it is to be resolved in accordance with the provisions of canon 1673 pertaining to marriage nullity cases.³⁹ Thus, unless the case is reserved to the Apostolic See for some reason, cases regarding the legal separation of spouses can be decided by the tribunal of the place where the marriage was celebrated, the tribunal of the place where the respondent has a domicile or quasi-domicile, the tribunal of the place where the plaintiff has a domicile provided both parties live in the territory of the same Bishops' Conference and the Judicial Vicar of the respondent's domicile consents after being consulted, or the tribunal of the place where most of the proofs are to be collected if the Judicial Vicar of the respondent's place of domicile consents after asking the respondent if he or she has any objection.⁴⁰

Cases for the separation of spouses are to be determined according to the oral contentious process, unless either party or the promoter of justice requests that the ordinary contentious process be used. Therefore the matter can be heard by a single judge (c. 1657) according to the norm of canon 1424 (that is, the judge may utilize two assessors as advisors, who can be either clerics or laypersons, if he so chooses). The petitioner must submit a petition that complies with canon 1504 (identifying the judge before whom

³⁸Canon 1692 §3.

³⁹Canon 1694.

⁴⁰Canon 1673.

the case is brought, what is being requested and from whom, the legal basis of the petitioner's claim and at least in general the facts and proofs in support thereof; it must be signed by the plaintiff or her or his procurator indicating the day, month and year and the address of the plaintiff or procurator; and it must indicate the respondent's domicile or quasi-domicile). Furthermore, the petition must summarize the facts involved and identify any proofs that cannot be submitted with the petition itself in a way that will permit them to be gathered immediately by the judge.⁴¹ Furthermore, any relevant documents (or at least authentic copies) must be attached to the petition.⁴²

Canon 1695 requires the judge to use pastoral means to attempt to bring about a reconciliation of the parties and persuade them to restore conjugal living before the case is accepted whenever there is hope a favorable result. Similarly, canon 1659 §1 impliedly requires the judge to attempt mediation according to the norm of canon 1456 before notifying the respondent of the petition and calling forth a response.⁴³ Thus, the judge is to exhort the parties to seek an equitable solution to their differences by discussing the matter with them, even employing reputable persons to mediate between the parties.⁴⁴ If such efforts seem pointless or are attempted but prove fruitless, the judge is then to notify the respondent of the petition allowing for a written reply within fifteen days, which has the effect of a judicial summons in accordance with canon 1512. The canons are careful to preserve the respondent's right of defense, and require the judge to set a time limit for the petitioner to reply to any exception raised by the respondent within the allowed time for responding to the petition.⁴⁵ After the time limit for the pleadings has expired the judge is to examine the acts and determine the point in issue, and then summon the parties and any others whose attendance may be required to be present for a hearing within thirty days, identifying for the parties the point in issue.⁴⁶ The parties are to be notified in the summons that they may submit a short written statement in support of their

positions at least three days before the hearing,⁴⁷ and at the hearing the judge is to consider first all of the matters referred to in canons 1459-1464 (exceptions based on defects that might render the judgment invalid, requests for delay, objections to the competence of the tribunal or the judge, assertions that the matter is a *res judicata*, other peremptory exceptions, counterclaims and questions regarding the allocation of judicial expenses or the grant of free legal aid).

The acts of the case are to be assembled during the hearing (without prejudice to the judge's right to call upon other tribunals for assistance in instructing the case or communicating the acts as noted in canon 1418),⁴⁸ and the parties may be allowed to assist in the examination of the other party or witnesses or any experts.⁴⁹ A record of the pleadings, acts and testimony to the extent they bear on the substance of the matter is to be kept by a notary and signed by the persons testifying,⁵⁰ and proofs not previously submitted or requested may only be admitted in accordance with canon 1452 (although the judge does have considerable leeway in admitting new proofs in accordance with both canon 1452 and canon 1600, specifically mentioned in canon 1665).⁵¹ Nevertheless, if all of the proofs cannot be collected during the hearing, the matter is to be delayed and a further hearing scheduled (canon 1666, which is clearly designed to safeguard the right of the parties to have adequate notice of proofs and an opportunity to respond to all relevant matters brought before the tribunal). After the proofs have been collected the judge is to conduct an oral discussion of the case and proceed to make a decision privately, the dispositive portions of which are to be immediately announced in the presence of the parties.⁵² Judgment can be deferred for up to five "useful" days in particularly difficult matters, but the full text of the judgment, including the reasons for it, is to be notified to the parties as soon as possible, normally within fifteen days.⁵³

⁴⁷Canon 1661 §2.

⁴⁸Canon 1663 §1.

⁴⁹Canons 1663 §2, 1561, 1670.

⁵⁰Canon 1664.

⁵¹Canon 1665.

⁵²Canon 1668 §1.

⁵³Canon 1668 §§2 & 3.

⁴¹Canon 1658.

⁴²Ibid.

⁴³Canon 1659.

⁴⁴Canon 1446 §2.

⁴⁵Canon 1660.

⁴⁶Canon 1661 §1.

Given the nature of any request for legal separation, it is hard to imagine cases in which one of the parties would prefer an ordinary contentious process, and it can be presumed that if and when someone would actually request formal ecclesiastical approval of a legal separation the oral contentious process will ordinarily suffice. Nevertheless, it must be born in mind that the canons do provide for the possibility of an action for legal separation being litigated according to the ordinary contentious process. Given the unlikelihood of this actually occurring, however, no effort will be made to summarize the provisions of that process in connection with actions for legal separation. If the ordinary contentious process were utilized, however, canon 1693 §2 provides that in the event of an appeal the tribunal of second instance is to proceed in accordance with canon 1692 §2 (that is, following the same processes outline above for cases in the first instance), observing whatever the court determines to be necessary or appropriate.

Finally, canon 1696 provides that since cases regarding the separation of spouses concern the public good no less than cases involving the validity of the marriage itself, the promoter of justice must always intervene in accordance with the norm of canon 1433, which requires his or her presence, and also that the acts are invalid if he or she was not summoned. However, the canon goes on to stipulate that the acts will not be considered invalid if the promoter was actually present or was at least able to fulfill her or his role after studying the acts.

IV. Conclusion