

Cases for the Separation of the Spouses
According to the New Code
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Causes (cases) for the Separation of the Spouses
According to the New Code

1. Overview
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I
OVERVIEW

In the scheme of the new Code of Canon Law, the reasons for the separation of the spouses are regulated in Chapter III of the Title I, which is dedicated to matrimonial processes, in Part III of Book VII, *De Processibus*. (Processes). Part III delineates *De quibusdam processibus specialibus*¹.

¹ *De quibusdam processibus specialibus* means certain special processes [translator's note]

Before beginning into the study of the diverse reasons for the separation of the spouses, their nature, and their peculiar norms of activity, decision, and recourses, we intend to pause on three concrete precepts. Taking into consideration these precepts with certain amplitude could deviate us from our present objective.

The first and second of these precepts tend to obtain the same practical result: that the reason (cause) for the separation of the spouses and its peculiar effects, as well as the effects which are merely civil must originate from the Decree of the diocesan Bishop or from the judicial sentence; if these procedures are followed, they must also produce their efficacy in the civil sphere². The Church is situated in a field which is under the sovereignty of the states, which are frequently ignorant if not hostile to any other juridical system that does not proceed

² [Mary's Advocates Note] Can. 1059 Even if only one party is Catholic, the marriage of Catholics is governed not only by divine law but also by canon law, without prejudice to the competence of civil authority concerning the merely civil effects of the same marriage (from www.vatican.va) Annotations: This canon reproduces c. 1017 of the *CIC/17*, with some slight variations. It reaffirms the exclusive jurisdiction of the Church over canonical marriage, except for those effects of a merely civil nature, which are the competence of the civil authority. According to proper legal principles, the State should recognize canonical marriage as a *marriage system* with its own legal value, and not merely as a *method of contracting*. The system called "compulsory civil marriage" fails to recognize the jurisdiction of the Church; therefore it fails to recognize a primary juridical system - the canonical system - which is an unacceptable tenet from a legal point of view. Failure to recognize the canonical system is not a necessary result of the non-confessionality of the State, but a corollary to the agnosticism of the State - a form of confessionality, the secular confessionality. The non-confessional State must acknowledge the fact of religious, with all its consequences, which include - in the case of the Catholic Church - the existence of the canonical system, since it entails acceptance of a social reality, endowed with its own juridical identity. (from Hervada Dr. Javier, Holder of the Chair of Canon Law. Emeritus professor of philosophy of law, of natural law and of fundamental theory of canon law. Faculties of the Law and Canon Law, University of Navarra, Pamplona. Annotations on can. 1059 in Code of Canon Law Annotated Second edition revised and updated of the 6th Spanish language edition. Prepared under Instituto Martin de Azpilcueta. Woodridge, IL: Midwest Theological Forum, 2004)

from their own sovereignty³. This is explained by the precepts of Can. 1692⁴ §§ 2 y 3. And therefore, the Church renounces any jurisdiction over juridical matrimonial matters when these do not affect the sacred matrimonial bond (cfr. also 1672)⁵.

However, Can. 1692 §2 seems to require the previous permission of the Bishop of the diocese of the residence of the spouses – *perpensis peculiaribus adiunctis*⁶ – so that the spouses can approach the civil forum. In relation to its antecedent, in the project of Book VII⁷, the

³ [Mary's Advocates Note] Marriages that involve children, contract and covenant are nevertheless treated legally in the same manner as the Las Vegas marriage. Because the law treats marriage as no-fault, but because people recognize that marriage involves covenant, contract and may involve children, rational people are discouraged from marrying. ... One of the most important and beneficial ways marriage reform can occur is to allow individuals to choose their own private marriage contract – along with the means, outside of the State, to mediate and enforce that contract. One such movement could take place within Catholic and Jewish churches. Both of these institutions have established courts and procedures to deal with marriage issues. The TrueMarriage project is currently encouraging Catholics and others to establish clear agreements and procedures to adjudicate marriage issues. (from Safranek, Stephen. "Free Forty Million Americans: Privatize Marriage Or When Premises Collide." LewRockwell.com 31 March 2006 <<http://archive.lewrockwell.com/orig7/safranek1.html>> Safranek graduated Cum Laude from University of Notre Dame Law School and has been a law professor at three Michigan law schools: the University of Detroit Mercy, Ave Maria School of Law, and Wayne State University. Member of Board of Scholars for The Mackinac Center for Public Policy)

⁴ Can. 1692 §1. Unless other provision is legitimately made in particular places, a decree of the diocesan bishop or a judicial sentence can decide the personal separation of baptized spouses according to the norm of the following canons. §2. Where an ecclesiastical decision has no civil effects or if a civil sentence is not contrary to divine law, the bishop of the diocese of the residence of the spouses, after having weighed the special circumstances, can grant permission to approach the civil forum. §3. If a case concerns only the merely civil effects of marriage, the judge, after having observed the prescript of §2, is to try to defer the case to the civil forum from the start. (from www.vatican.va)

⁵ Can. 1672 Cases concerning the merely civil effects of marriage belong to the civil magistrate unless particular law establishes that an ecclesiastical judge can investigate and decide these cases if they are done in an incidental or accessory manner. (from www.vatican.va)

⁶ *perpensis peculiaribus adiunctis* means their particular circumstances (translator's note)

⁷ (Mary's Advocates footnote) Before the 1983 Code of Canon Law was promulgated, the Holy See entrusted teams of expert consultants to study sections and consider possible revisions. Book VII of The Code of Canon Law, Processes, contains canon 1692, which requires the bishop's permission before a party can petition in the civil forum for separation or divorce. Proceedings of the consultants meetings were recorded and published. Somebody amongst the consultants (though not necessarily on the team that was working on canons regarding separation of spouses) thought this canon should be omitted, and that each local bishop or country's conference of bishops can decide how to deal with separation of spouses. In other

following was said: “I appreciate that this license ‘*ad casum*’⁸ in the event that the final revision of the scheme is upheld, is only a bureaucratic step, without any practical efficaciousness and its suppression would be more prudent. This problem would be different if there would exist a service in the pastoral organization of the diocese for the faithful who find themselves in this conflictive matrimonial situation which would operate with efficaciousness.”⁹ (1)¹⁰.

On the contrary, we estimate, by contrast, that if this service of assistance does not exist, it must be created if the ecclesiastical judges and ministers in charge of pastoral ministry at the diocesan level are incapable or have great difficulties in attending these problems, which emerge between the spouses. Precisely, such a desire to offer a pastoral solution to the differences and conjugal conflicts makes it necessary to impose upon the Judge a specific obligation, not

words, separation of spouses could be handled by “particular law.” All the consultors thought this canon must stay, and not allow each bishop or county to decide whether or not to intervene when spouses separate. Quote from minutes: “Concerning the opinion of a certain organ of consultation, namely that hit title about cases of separation should be suppressed, because the spouses never bring cases of separation to the ecclesiastical tribunal, or the whole question should be referred to particular law. However, all the consultors considered that this title is not able to be absent from the general law, considering the competence of the Church in cases of separation of spouses.” Source: PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Opera consultorum in recognoscendis schematibus, Coetus studiorum de processibus, De causis separationis coniugum*, in *Communicationes*, 11 (1979), pp. 272-274. Cited by St. Louis Sanchez. St. Louis Sanchez. *The Canonical Obligation of Spouses to Approach the Ecclesiastical Authority for a Separation*. San Francisco, CA: Academia.edu, 2014
<http://www.academia.edu/6096431/The_Canonical_Obligation_of_Spouses_to_Approach_the_Ecclesiastical_Authority_for_a_Separation>

⁸ *ad casum*’ means case by case or to chance (translator’s note)

⁹ Writer being quoted, Goni, suggests that the requirement to have the Bishop’s permission is a bureaucratic step and Goni thinks it would be imprudent to keep requirement as part of canon law. Diago-Lora appears to disagree with Goni. (translator’s note)

¹⁰ Original Footnote (1). M. Arsa Goni, *Las causas de separacion conyugal en Espana, en el momento actual y en el futuro*, en *VV.AA., Curso de Dereco matrimonial y procesal cononico para profesionales del Foro*, IV, Salamanca 1980, p. 61.

proceeding from a juridical nature, but pastoral; this, according to Can. 1695¹¹, which is the third of the precepts that we have mentioned. Similarly, Cann. 1152¹² and 1155¹³

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indicate and recommend to the innocent spouse affected by the separation to renounce to the *actio separationis*¹⁴, and even in the precepts his/her conduct is praised if it is a conduct of reconciliation and reestablishment of the conjugal life. In these hypotheses, there are not enough canons, such as 1713¹⁵, which tend to avoid a trial. It is about enabling an efficacious pastoral stance of the Church prior to the beginning of the process. (2).

2. DIVERSE NATURE OF THE VARIOUS CAUSES FOR SEPARATION

According the discipline of the new code, the causes of the separation of the spouses are the object of a specific regulation of the process, which is contained in cann. 1692-1696. On the contrary, the Pius-Benedictine Code was lacking this very specific attention for the causes regarding conjugal separation. In dealing with marriage, in Book III, *De rebus*, and under the rubrics of *Pars Prima, De Sacramentis*, in the old canon 1130¹⁶, it was described that the innocent spouse could have separated not only legitimately in instances of adultery, but also by

¹¹ Can. 1695 Before accepting the case and whenever there is hope of a favorable outcome, the judge is to use pastoral means to reconcile the spouses and persuade them to restore conjugal living. (from www.vatican.va)

¹² Can. 1152 §1. Although it is earnestly recommended that a spouse, moved by Christian charity and concerned for the good of the family, not refuse forgiveness to an adulterous partner and not disrupt conjugal life, nevertheless, if the spouse did not condone the fault of the other expressly or tacitly, the spouse has the right to sever conjugal living unless the spouse consented to the adultery, gave cause for it, or also committed adultery. (from www.vatican.va)

¹³ Can. 1155 The innocent spouse laudably can readmit the other spouse to conjugal life; in this case the innocent spouse renounces the right to separate. (from www.vatican.va)

¹⁴ *actio separationis* means The action of separation (translator's note)

¹⁵ Can. 1713 In order to avoid judicial contentions an agreement or reconciliation is employed usefully, or the controversy can be committed to the judgment of one or more arbitrators. (from www.vatican.va)

¹⁶ Can 1130. Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitae consortium; potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit. (1917 CIC, from www.vatican.va)

one's own authority according to the *iudicis sententia*¹⁷. This is an affirmation made by accident, which identifies the type of process that could be present in the separation of the spouses; the canonical precept, however, did not have, as a direct end, the ability to mitigate the nature of the process of the separation of the spouses in the canonical system.

On the other hand, the old can. 1131¹⁸ mentioned, for the temporary separation, the concepts *autoritate Ordinarii loci*¹⁹ in its §1, while under §2 the Ordinary Decree was only mentioned, either for the conjugal separation or for the restoration of the communion of life of the spouses. This problem was of special relevance in Spain because the canonical matrimonial system ruled fully in its internal system.²⁰

Like Fuenmayor has stated, “after the *Codex* the constant practice of the diocesan curia in Spain has been that of treating these causes through the judicial venue.” (3)²¹ It has been affirmed by some authors that “it could be sustained that the causes of separation should be inexcusably processed judicially.” (4)²² Precisely, Fuenmayor, exposed the situation that came to light as a result of the application of the Concordat of 27 August 1953 between the Holy See and Spain (5)²³, as well as the doctrinal opinions that were manifested in favor of the judicial solution, in which a Circular of the Apostolic Nunciature in Spain had a great influence, 2 August 1958, which was directed to the Ordinaries, and which expressed the following: “in light

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of the special circumstances, and paying attention to the practice that is generally applied in Spain, it is the intention of the Holy See that, in the mentioned cases, it should proceed through

¹⁷ *iudicis sententia* means the judgment (translator's note)

¹⁸ Can 1131 §1. Si alter coniux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam crimosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora.

§2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore. (1917 CIC, from www.vatican.va)

¹⁹ *autoritate Ordinarii loci* means authority of the local Bishop (translator's note)

²⁰ (translator's note) In Spain, as in Italy, the judicial sentences emanated by the ecclesiastical tribunals had the same effect both in the ecclesiastical and civil spheres. This was the case because Spain and the Holy See had a concordat in place.

²¹ Original Footnote (3). Fuenmayor, *El matrimonio y el concordato Espanol*, en *Ius Canonicum*, III (1963) 368.

²² Original Footnote (4). H. Y. B. Alonso, *La separacion natrimonial*, Madrid 1958, pp. 200-201.

²³ Original Footnote (5). Fue publicado, adquiriendo vigencia legal en Espana, en el *Boletin Oficial del Estado*, de 19 de Noviembre de 1953.

the judicial venue before the competent Ecclesiastical Tribunal.” (6)²⁴. However, there was not a lack of authors, such as Msgr. Del Amo, who, although he appeared to favor the judicial venue, he recognized that the administrative process, “because of its characteristics of celerity, easiness, and low costs, cannot be ignored for it is secure enough and competent to resolve, in justice, the cases of temporary separation of the spouses, as long as the process includes listening to the Parties, pondering the proofs, giving place to the due defense and arguing the gubernatorial Decree. To proceed administratively is not to proceed arbitrarily without judicial elements.” (7)²⁵

After some time, and after abrogating the Spanish Concordat of 1953, all the problems that were experienced in this aspect could be seen as a mere historical anecdote; but on the other hand, it does not cease to gravitate, in some way, to the present and new can. 1692 §1.²⁶ In fact, this canonical precept regulates two juridical forms used to decide about the separation of the baptized spouses: either by decree of the diocesan Bishop or by sentence of the judge.²⁷ **This is analogous to the following:** all the separations of the baptized spouses are to be decided either through the administrative process that culminates with the decree of the diocesan Bishop, or through the judicial process, which culminates with a constitutive sentence pronounced by the competent judicial body. (8)²⁸ From this procedural canonical precept it is not fit anymore to deduce that which could be understood of the reading of the old canons—already abrogated—1130 y 1131, that the judicial sentence was the formal and adequate decision for the separation

²⁴ Original Footnote (6). Para el estudio de estos problemas, en su conjunto, dfr. A. de Fuenmayor, *ob. y ed. ctds.*, pp. 369-378.

²⁵ Original Footnote (7). L. Del Amo, Procedimiento en las causas de separacion, en *Revista de Derecho Privado*, XLIII (1959) 560.

²⁶ Can. 1692 §1. Unless other provision is legitimately made in particular places, a decree of the diocesan bishop or a judicial sentence can decide the personal separation of baptized spouses according to the norm of the following canons. (from www.vatican.va)

²⁷ (translator's note) This canon gives the option to the Bishop to decide which process to follow depending on the complexity of each case, some cases are more suitable for the administrative process while others must follow the ecclesiastical judicial process to establish the proofs and issue a decision.

²⁸ Original Footnote (8) Nos parece fundamental ahondar en la distinción de lo que la moderna ciencia procesal distingue: entre proceso y procedimiento. Como ha hecho notar J. I. ARRIETA, *Proceso y procedimiento, en Ius Canonicum*, XVIII (1978), nn. 35 y 36, pp. 347-404, la distinción de lo judicial y lo administrativo, en el aspecto formal, no es un tema sólo de procedimientos lentos o procedimientos rápidos, sino que su diferenciación radica en la misma estructura de los actos jurídicos que constituyen la trama de la actividad jurisdiccional.

because of adultery while the Decree of the Ordinary, after the precedent administrative process, was the formal instrument of the decision reserved for the temporary separation. (9)²⁹

To our judgment, now, whoever pretends, under the Church's authority, that a decision must be rendered about the separation of the spouses, will be able to opt—independently that it may be the result of adultery (Can 1152) or because of some of the causes enumerated in Can 1153—in favor of following the administrative venue, so that the diocesan Bishop can decide by decree, or in favor of following the judicial process, in such a way that the issue of separation will be resolved by a sentence of the body of justice. This canonical possibility to choose the venue became common to all the spouses once the Agreements

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of 3 January 1979 of the Spanish State with the Holy See have ended³⁰ with the peculiar canonical regime that, with respect to the separation, was in vigor in Spain. (10)³¹

Following the judicial process in the new Code does not mean, however, that the conjugal separation must be processed and decided through only one type of process. Can. 1693 §1³² remits itself to the oral contentious process introduced in the new Code, which is regulated with general character in cann. 1656-1670. This type of process [the oral contentious process] is the one to be followed if one of the parties or the Promoter of Justice does not request that the proper ordinary contentious process be followed. Such a possibility of choosing the process of greater assurance, only through the request of the interested party, leads us to conclude—following a line of coherent reasoning—that if the interested party would request that the administrative process be followed for the separation ; it would only be enough, by the same token, the request

²⁹ Original Footnote (9) Cfr. en este sentido, L. MIGUELEZ, *Las causas matrimoniales de separación temporal, en Revista Española de Derecho Canónico*, 9 (1954) 317-318; y R. LE PICARD, *La communauté de la vie coniugale. Obligations des époux*, Paris 1930, p. 186.

³⁰ (translator's note) Although the Agreements between the Holy See and Spain have ended, the ecclesiastical process for the separation of the spouses is still applicable nowadays; however, its effects are confined to the ecclesiastical realm. This is the case in the U.S. as well. Although the bishop might issue a sentence concerning the separation of the spouses, its effects are merely ecclesiastical. The Parties would be morally bound by the sentence; however, any civil effects would depend upon their good predisposition as morally responsible citizens to abide by the precepts of the sentence. For instance, the Church might state that one of the parents is obliged to provide for child support; however, it would be the responsibility of the spouse to fulfill this requirement.

³¹ Original Footnote (10) Tras la ratificación parlamentaria, con fecha 4 de diciembre de 1979, se incorporaron al ordenamiento jurídico positivo del Estado Español por su publicación en el *Boletín Oficial del Estado*, de 15 de Diciembre de 1979.

³² Can. 1693 §1. Unless a party or the promoter of justice requests the ordinary contentious process, the oral contentious process is to be used. (from www.vatican.va)

of the other spouse or the Promoter of Justice to follow the judicial venue. Therefore, in abandoning the administrative process, the oral contentious process would be instituted immediately. Except in the case, surely, that some of the aforementioned subjects would expressly request that the ordinary contentious process be followed.

The advantages of the simplicity of the administrative process, the simplicity of its procedure, the greater economy of expenses, the easiness for the posterior restitution of the conjugal life thereafter, etc., proper to the administrative process, yields before the function of assurance³³ that the course proper to the contradictory process provides to the Party—private or public—who would want to protect oneself under the assurances of the contentious process, whether the oral process or the one with the greater characteristics of assurances, which is the ordinary contentious process. For this reason, can. 1693 §1 is an echo of the general precept, and first of all, of the canons that regulate the oral contentious process, can. 1656 §1³⁴, which asserts that this process, which is complete as the ordinary process, must be prompt (11)³⁵. However, it loses its ability to treat the same causes which are reserved to it by prescription of the law, as soon as one of the parties requests that the ordinary contentious process be followed.

These causes of the separation of spouses rightly deserves to be qualified as a cause, even if one of the ways to proceed is the administrative process, because with general character, the *Codex* utilizes the voice *de causis* to refer to the jurisdictional activity inasmuch as it contemplates not the activity but the juridical matters submitted to these means of investigation and decision proper to Book VII.³⁶ And by contemplating the judicial matters submitted to investigation, the causes relative to spiritual matters and those linked with the spiritual are mentioned

³³ (translator's note) The function of assurance contained in the contentious process is more important than the advantages of the administrative process; the contentious process seems to be more thorough, the administrative process is more easily used when the facts and proofs of the case are very clear and leave no doubt as to the outcome of the case.

³⁴ Can. 1656 §1. All cases not excluded by law can be treated in the oral contentious process mentioned in this section unless a party requests the ordinary contentious process. (from www.vatican.va)

³⁵ Original Footnote (11) Sobre precisiones acerca de los diversos modos de proceder, que producen distintos tipos de procesos con alcance o efectos procesales y configuración diversa, ha trabajado en España, con atinado y profundo acierto, V. FAIREN GUILLEN. Pueden consultarse su obras *El juicio ordiuario y los plenarios rápidos*, Barcelona 1953; *Estudios de Derecho Procesal*, 1955, pp. 374 y ss.; *Sugerencias sobre el Anteproyecto de Bases para el Código procesal de 1966*, Valencia 1966; *Temas del ordenamiento procesal, II*, Madrid 1968, pp. 825 y ss.

³⁶ Book VII is "Processes." It includes five parts: 1) Trials in General, 1) The Contentious Trial (distinguishing Ordinary Contentious Trial from Oral Contentious Trial), 3) Certain Special Processes, 4) The Penal Process, and 5) The Method of Proceeding in Administrative Recourse and in the Removal or Transfer of Pastors. (from www.Vatican.va)

(cf. Can. 1401, n. 1)³⁷, just as in the same way that we call causes those that are proper to the canonization of the Servants of God (Can. 1403)³⁸. In the same sense, the formal juridical treatment of investigation and decision of the legitimate separation of the spouses, adopts the accurate canonical categorization of causes of separation of the spouses. At the same time, these causes are submitted to a broader rubric which is designated *De quibusdam processibus specialibus*,³⁹ because the peculiarity of the juridical matter, which submitted to processing and decision in these processes, influences with requirements of special modifications, singularizing them in diverse manners of what is commonly called contentious process, whether this be designed as the ordinary contentious process (cann. 1501-1655) or as the oral contentious trial (cann. 1656-1670).

3. SPECIALTIES OF THESE CAUSES OF SEPARATION OF SPOUSES

There must be a distinction whether this is about the simple processes of separation, submitted to the decision by decree of the diocesan Bishop, or about the contentious processes, oral or ordinary, submitted to the decision of the competent judicial body.

In either case, the singularities that the new Code identifies make reference to:

a) Norms of competency:

Can. 1694⁴⁰ expressly refers back to the general norms of competency established by can. 1673.⁴¹ A forum of territorial character of concurrent nature is established. We won't stop to

³⁷ Can. 1401 By proper and exclusive right the Church adjudicates: 1/ cases which regard spiritual matters or those connected to spiritual matters (from www.vatican.va). [(Mary's Advocates' note) Book VII "Processes" begins with Part-I "Trials in General," that opens with three introductory canons 1400 – 1403, before starting Title 1 of that Part]

³⁸ Can. 1403 §1. Special pontifical law governs the causes of canonization of the servants of God. (from www.vatican.va)

³⁹ *De quibusdam processibus specialibus* Certain Special Processes is Part III in Book VII (from www.vatican.va)

⁴⁰ Can. 1694 The prescripts of ⇒ can. 1673 are to be observed in what pertains to the competence of the tribunal. (from www.vatican.va)

⁴¹ Can. 1673 In cases concerning the nullity of marriage which are not reserved to the Apostolic See, the following are competent: 1/ the tribunal of the place in which the marriage was celebrated; 2/ the tribunal of the place in which the respondent has a domicile or quasi-domicile; 3/ the tribunal of the place in which the petitioner has a domicile, provided that both parties live in the

study the canonical precept because the singularity of the precept ceases as soon as this is remitted to a norm of concurrent forum, which is common in the process for the nullity of marriage.

The singular problem is posed not in relation to the contentious process, either oral or ordinary, but for the hypothesis that it would be instituted and processed as a procedure, subjected to a decision by decree of the diocesan Bishop, according to the wording of Can. 1692 §1. Can. 1694 mentions the tribunal, and can. 1673, to whose precepts the previous canon is remitted, always makes reference—in its four numbers—to a determined tribunal; that is to say, to a judicial body with collegial nature constituted according to that which is stated by can. 1425 §1, no. 1st, b).⁴²

We find ourselves, then, according to the provision of can. 1694, before a norm of judicial competence, which does not necessarily coincide with the proper norm of territorial competence that governs in the pastoral and administrative activity, in which case, we must follow the rule of competence that is determined, according to can. 107⁴³, by reason of domicile or quasi domicile. By its virtue, such a description is that which is determined by the proper Ordinary of each person. Consequently, it must be established that when can. 1692 §1 mentions that the decision must be made by a decree of the diocesan Bishop, we understand that it is attributed to the same, and that it is determined by the domicile or quasi domicile of the spouses.

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Another problem that is posed by can. 1692 §1 is that, since it expressly makes reference to the decree of the diocesan Bishop, it must be understood that only the diocesan Bishop can decide about the conjugal separation through the administrative venue. There would not have been a problem if the diocesan Ordinary would have been mentioned, but when the term Bishop is mentioned, it must be considered whether this is an administrative act, especially attributed *ex*

territory of the same conference of bishops and the judicial vicar of the domicile of the respondent gives consent after he has heard the respondent; 4/ the tribunal of the place in which in fact most of the proofs must be collected, provided that consent is given by the judicial vicar of the domicile of the respondent, who is first to ask if the respondent has any exception to make. (from www.vatican.va)

⁴² Can. 1425 §1. With every contrary custom reprobated, the following cases are reserved to a collegiate tribunal of three judges: 1/ contentious cases: " [...] "b) concerning the bond of marriage, without prejudice to the prescripts of cann. ⇒ 1686 and ⇒ 1688 (from www.vatican.va)

⁴³ Can. 107 §1. Through both domicile and quasi-domicile, each person acquires his or her pastor and ordinary. (from www.vatican.va)

iure (cfr. can. 479 §1⁴⁴) to the Bishop and only exercised by someone else in the name of the Bishop as in the case of a special mandate. (12)⁴⁵

In order to obtain, under this topic, an adequate solution, we cannot forget the following criteria: when in these cases can. 1692 §1 does not contain any reference to the necessity of a special mandate⁴⁶ to substitute the activity of the diocesan Bishop, we understand, in general that, every act of the power of the Bishop, whether executive or judicial, could be fulfilled either personally by the Bishop or through the General or Episcopal Vicars or through the Judicial Vicar respectively (cfr. can. 391 § 2).⁴⁷ According to our judgment, the Decree of conjugal separation reserved to the diocesan Bishop, according to can. 1694, is not a judicial activity, but one of pastoral and administrative character. Therefore, it must be considered within that which can. 391 §2 designates as an exercise of the executive power that, in principle, with general character, is attributed, by this precept and by can. 479 §1, to the Vicar General; and also to the Episcopal Vicars (cfr. that which is proposed in this topic by can. 479 §§ 2 and 3).⁴⁸

⁴⁴ Can. 479 §1. By virtue of office, the vicar general has the executive power over [over] the whole diocese which belongs to the diocesan bishop by law, namely, the power to place all administrative acts except those, however, which the bishop has reserved to himself or which require a special mandate of the bishop by law. (from www.vatican.va)

⁴⁵ Original Footnote (12) La necesidad del mandato especial del Ordinario, en hipótesis de hallarse éste ausente o impedido, fue el criterio que se siguió por el art. 228 de la Instrucción de la Sagrada Congregación de Sacramentos de 15 de Agosto de 1936 (AAS, 28 [1936] 313 y ss.), para que pudiera dictar sentencia de nulidad, en el proceso rápido para los casos exceptuados, el Oficial o Provisor. Este precepto no quedó modificado por el Motu Proprio de PAULO VI, *Causas matrimoniales*, de 28 de Marzo de 1971 (AAS, 63 [1971] 441 y ss.), a pesar de las modificaciones, que el designado, por el nuevo Código, bajo la rúbrica *De processu documentalibus* (Cfr. Cann. 1686-1685), recibiera por obra de las normas X y XI del *Motu proprio*.

⁴⁶ (translator's note) Special mandate means that the Bishop can delegate his power to a special person, such as the Judicial Vicar, to issue the decree. The Judicial Vicar would have a special mandate to act in the name of the Bishop.

⁴⁷ Can. 391 §1. It is for the diocesan bishop to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law. §2. The bishop exercises legislative power himself. He exercises executive power either personally or through vicars general or episcopal vicars according to the norm of law. He exercises judicial power either personally or through the judicial vicar and judges according to the norm of law. (from www.vatican.va)

⁴⁸ Can. 479 §1. By virtue of office, the vicar general has the executive power over the whole diocese which belongs to the diocesan bishop by law, namely, the power to place all administrative acts except those, however, which the bishop has reserved to himself or which require a special mandate of the bishop by law. §2. By the law itself an episcopal vicar has the same power mentioned in §1 but only over the specific part of the territory or the type of affairs or the faithful of a specific rite or group for which he was appointed, except those cases which the bishop has

Nonetheless, in this case there is a precept that sheds some light on this topic: can. 134 § 3.⁴⁹ Since can. 1692 §1 contains a nominal attribution to the diocesan Bishop giving him the authority to dictate the Decree of separation, this competence belongs to the diocesan Bishop alone; therefore, the General and Episcopal Vicars are excluded unless they have a special mandate.

b) Necessary Participation of the Promoter of Justice.

The new can. 1696⁵⁰ does not offer any doubt in its redaction. It is about an imperative precept in the mandate that it contains, and it explains besides the justifiable reason of this necessary participation: *causae de coniugum separation ad publicum quoque bonum spectant.*⁵¹ And from here the consequential remittal to can. 1433⁵² which sanctions with nullity the procedural acts of those causes which, requiring the presence of the public ministry, whether the Promoter of Justice or the Defender of the Bond, were not, nonetheless, cited; or that, at least, because of this lack of citation, they were not present by fact in the cause or did not fulfill the mission of examining the acts before arriving to the pronouncement of the sentence. (13)⁵³

reserved to himself or to a vicar general or which require a special mandate of the bishop by law. §3. Within the limit of their competence, the habitual faculties granted by the Apostolic See to the bishop and the execution of rescripts also pertain to a vicar general and an episcopal vicar, unless it has been expressly provided otherwise or the personal qualifications of the diocesan bishop were chosen. (from www.vatican.va)

⁴⁹ Can. 134 §3. Within the context of executive power, those things which in the canons are attributed by name to the diocesan bishop are understood to belong only to a diocesan bishop and to the others made equivalent to him in ⇒ can. 381, §2, excluding the vicar general and episcopal vicar except by special mandate.

⁵⁰ Can. 1696 Cases concerning the separation of spouses also pertain to the public good; therefore the promoter of justice must always take part in them according to the norm of can. 1433 (from www.vatican.va).

⁵¹ (Translator's Note) *causae de coniugum separation ad publicum quoque bonum spectant* means Cases concerning the separation of spouses also pertain to the public good;

⁵² Can. 1433 If the promoter of justice or defender of the bond was not cited in cases which require their presence, the acts are invalid unless they actually took part even if not cited or, after they have inspected the acts, at least were able to fulfill their function before the sentence.(from www.vatican.va)

⁵³ Original Footnote (13) Utilizamos los términos *participación necesaria*, de mayor fidelidad — a nuestro entender — a1 texto de estos Cann. 1696 y 1433, para distinguir esta participación *necesaria* del Pro motor de Justicia en causas relativas al bien público, de la designada por 1a doctrina procesal como intervención forzosa de tercero, acogida por el nuevo Can. 1597. Con el calificativo *necesaria*, sobre el tema de la intervención forzosa de tercero, se han escrito recientemente páginas muy iluminadoras por L. MADERO, *La intervención de tercero en el*

If the Promoter of justice is not invoked by the actor in his/her petition, the jurisdictional body, by office, must be cited according to can. 1696, whose precept understands that every cause of separation of spouses affects the public good. And when the Code mentions the causes of separation, it must be counted, including among them, those cases which follow the process and are resolved by sentence, just as when the process initiated is merely procedural and the decision is pronounced through a decree by the Bishop. The legal importance of the participation of the Promoter of justice in the process is, besides, equally necessary when the cause of separation was because of adultery (can. 1152) just as when it is founded under another legitimate motive (cfr. can. 1153).

With this new canonical precept, a legal void which had been manifested in the Code of 1917 is undoubtedly covered. Although nothing was said about the Promoter of justice in the causes of separation of the spouses, Le Picard (14)⁵⁴, taking as foundation can. 1586⁵⁵, which limited its application to the cases in which, according to the judgment of the Ordinary, the public good was compromised, argued that if the Promoter of Justice could intervene in order to reclaim the separation when the nullity of the marriage prohibited cohabitation, there was also the right and the obligation of opposing the separation when there was danger of the law about cohabitation being violated because there was no excusable just cause for separation.

Msgr. Del Amo expressed himself in an analogous manner when he indicated the various aspects of the public good that would be affected by separation: civil state, the paternal-filial relations, and the economic and patrimonial relations of the family. Because of these reasons, he argued that the intervention of the Promoter of Justice must be required in the separation of the spouses, because “when the marriage is valid,⁵⁶ the separation is a *grave and public* cause, which is contrary to a natural obligation, highly harmful to the same spouses who, because of their separation, run the risk of incontinence and frustrate the ends of marriage, and besides it destroys

proceso canónico. Pamplona 1982, pp. 191-229. En la hipótesis que consideramos, el Promotor de Justicia es parte propiamente dicha, y parte necesaria, independientemente de que la parte autora lo invoque o no en su escrito de demanda. Para el estudio del Promotor de Justicia sigue teniendo plena validez la obra de F. ROBERTI, *De processibus*, I, in *Civitate Vaticana* 1956, pp. 291-294 y 296-311.

⁵⁴ Original Footnot (14) Cfr. R. LE PICARD, *ob. y ed, cds.*, pp. 222-224.

⁵⁵ Can. 1586 (1917 *Codex Iuris Canonici*) *Constituatur in dioecesi promotor iustitiae et defensor vinculi; ille pro causis, tum contentiosis in quibus bonum publicum, Ordinarii iudicio, in discrimen vocari potest, tum criminalibus; iste pro causis, in quibus agitur de vinculo sacrae ordinationis aut matrimonii.* (from www.intratext.com)

⁵⁶ [Mary’s Advocates’s Note] All marriage must be presumed valid until proven otherwise. From www.vatican.va , Can. 1060 Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven.

the family and harms the common good because of the damage and the scandal that it causes” (15)⁵⁷

c) *Procedural Transactions*

When we talk about the procedural processes, we need to distinguish according to these juridical acts that pursue and investigate the truth, ending in the demonstration of the legitimate cause of separation, whether they are carried out through the administrative or procedural venue, depending on whether they are decided by decree of the Bishop or by a judicial sentence respectively.

1) If the transactions are developed in the administrative ambit, under the direct competence of the diocesan Bishop or through a special mandate, these juridical acts must be developed with the utmost simplicity.

We must not forget that, since 1932, the doubt that posed the novelty represented in the words *auctoritate Ordinarii loci*⁵⁸ of can. 1131⁵⁹ of the Code of 1917 was resolved. The answer of the Pontifical Commission for the authentic Interpretation of the Code of Canon Law, of 25 June 1932, (16)⁶⁰ expelled any doubt when it affirmed that, either in first or in second instance, the temporary separation would be decreed through the administrative form *nisi ab Ordinario aliter statuatur ex officio vel ad instantia partium*. “With the norm of can. 1131—as Miguez teaches—a radical innovation of not little importance was introduced into the Church’s discipline; because until the promulgation of the Code, all the causes of separation—perpetual or temporal—were processed contentiously. (17)⁶¹

⁵⁷ 15 L. DEL AMO, *Reflexión acerca de las causas matrimoniales en España*, en *Ius Canonicum*, XIV (1974), fasc. 1, p. 181. M. PALOMAR, *Intervención del Fiscal en las causas de nulidad y separación*, en *VV.AA.*, *Curso de Derecho Matrimonial y Procesal Canónico para profesionales del foro*, II, Salamanca 1977, pp. 289-290, enumeraba, con base a cánones del antiguo *Codex*, diez intervenciones imperativas del Ministerio Fiscal en causas de separación y diez facultativa.

58 (Translator's Note) *auctoritate Ordinarii loci* means the authority of the Local Ordinary

⁵⁹ Can. 1131. (1917 *Codex Iuris Canonici*) § 1. Si alter coniux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora. § 2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore. (from www.intratext.com)

⁶⁰ Original Footnote (16) AAS, 24 (1932) 284.

⁶¹ Original Footnote (17) L. MIGUELEZ, *Las causas matrimoniales...*, ob. y ed. ctds., p. 316.

The administrative process for the temporary separation of the spouses, then, already has a long tradition. In Spain, the initiation and transaction of these processes has been very slow due to the aforementioned reasons. (18)⁶² Now, in virtue of the new can. 1692 §1, it could be said that the administrative process is always the ideal process for the decision by decree of the diocesan Bishop for all conjugal separations, as long as the judicial process has not been requested by either of the parties or by the Promoter of justice.

To summarize, this process—since specific norms are lacking—could consist in the petition for separation which is presented by one of the spouses, directed to the diocesan Bishop, specifying the legitimate cause of separation that excuses the conjugal life (cfr. can. 1151), which must conform to one or more of the hypotheses that are respectively contemplated in can 1152 and 1153.(19)⁶³ Together with the petition, the spouse who presents it must accompany the alleged proof

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of the legitimate cause or causes of separation. As long as it contains such a proof, this petition can be handled through the documentary⁶⁴ process.; the proofs that do not fulfill these qualities must be, at least, invoked before the Bishop⁶⁵, and if he judges them to be correct, he may put it⁶⁶ into practice.

Next, the competent ecclesiastical authority will cite the spouses with the finality of implementing the pastoral means of agreement and conciliation, in order for the conjugal life to be reestablished peacefully, according to the prescript of can. 1695⁶⁷. If this wished for outcome is not achieved, we must proceed to a new citation of the spouses, and of the Promoter of Justice,

⁶² Original Footnote (18) Cfr. lo que indicarnos en el apartado 2. de este trabajo. La primera vez que tuvimos noticias de la efectiva introducción en España, de este procedimiento administrativo para le separeción de cónyuges, fue por un Decreto del Cardenal Arzobispo de Barcelona, publicado en el Boletín Oficial de este Arzobispado, de 15 de Enero de 1977, pp. 5-7.

⁶³ Original footnote (19) El nuevo Can. 1152 §2 se cuida de evitar toda referencia a órgano o trámites judiciales: sólo menciona los términos *causam separationis*, que acoge tanto lo administrativo como lo judicial, y, cuando invoca a la autoridad que ha de decidir, se limita a remitirse: *ad competentem auctoritatem ecclesiasticam*.

⁶⁴ (translator's note) Documetary process means that all the proofs are readily available, evident, and proven to be true; thus, there is no need of indagation (inquiry or investigation) since the rights of both Parties are protected).

⁶⁵ (translator's note) Proofs can be verbally presented before the Bishop, but they need to be recorded by a notary.

⁶⁶ (translator's note) The petition (it) can be submitted to the process.

⁶⁷ Can. 1695 Before accepting the case and whenever there is hope of a favorable outcome, the judge is to use pastoral means to reconcile the spouses and persuade them to restore conjugal living. (from www.vatican.va)

in order to formulate the arguments, to propose them, and to put into practice⁶⁸—within the shortest possible time—the suitable proofs that lend credibility and legitimacy to the alleged causes, or the reasons to support the opposition of the same. If some of those who are cited would solicit the judicial venue, the diocesan Bishop must decree the closing of the process that has been initiated so that the petitioner can approach the judicial process.

A problem is posed in relation to the way of carrying out to conclusion the own actions of the procedure and, above all, the exercise (exercising) off the proofs that are proposed. In the *Schema*,⁶⁹ notified with date of 3 November 1976, by Cardinal⁷⁰ Msgr. Pericles Felici, (20)⁷¹ there was in existence can. 361⁷² (*novus*) that contained a precept of remission in the way of proceeding which was proper to judgments in general and to the contentious judgment; this canon is identical in its redaction to can. 1691⁷³ of the new Code. Can. 1691, in actuality, does not constitute more than a general norm proper to the causes for the declaration of matrimonial nullity. That canon that belonged to the Project was eliminated by the *Consultors*, because they

⁶⁸ (translator's note) "to put into practice" means that the ecclesiastical authority, in his juridical mind, is putting the process of the petition in motion and applying proofs to the investigation of the case

⁶⁹ (Mary's Advocates' Note) Earlier versions of proposed canons that would become the 1983 Code were developed by drafting committee charged with the formulation of the new law: *Pontificia Commissio Codici Iuris Canonici Recognoscendo*, which means "Pontifical Commission for the Revision of the Code of Canon Law." The part of Canon Law which became Book VII, Processes, was released for external commentary in 1976: *Schema Canonum de modo procedendi pro tutela iurium seu de processibus* (which roughly translated means "Draft Canons of only Procedures for Protection rights or of Processes")

⁷⁰ (Mary's Advocates' Note) Cardinal Msgr. Pericles Felici was Prefect of the Apostolic Signatura (15 Aug 1977 Appointed - 22 Mar 1982 Died) (from www.catholic-hierarchy.org)

⁷¹ Original Footnote (20) *Schema Canonum de modo procedendi pro tutela iurium seu de processibus*, Typis Poliglottis Vaticanis MCMLXXVI, p. 82.

⁷² (Mary's Advocate's Note) Can. 361 (*novus*). *In ceteris quae ad rationem procedenti attinent, applicandi sunt, nisi rei natura obstet, canones de iudiciis in genere et de iudicio contentioso in genere, servatis specialibus normis circa causas de stata personarum et causas ad bonum publicum spectantes* (from *Schema* pg 82). [(Translator's Note) In all other matters that are related to the nature of the proceedings, the canons on trials in general and on the contentious trial in general are to be applied with due observance of the special norms concerning cases dealing with the status of persons and cases pertaining to the public good is to be observed; except when precluded by its very nature.]

⁷³ Can. 1691 In other procedural matters, the canons on trials in general and on the ordinary contentious trial must be applied unless the nature of the matter precludes it; the special norms for cases concerning the status of persons and cases pertaining to the public good are to be observed. (from www.vatican.va)

understood that the then can. 357⁷⁴ supported well enough that which ought to be applied in the causes of separation, that is, those norms that made reference to the manner in which to proceed. (21)⁷⁵ But this can. 357 of that *Schema*, even if it does not greatly differ from can. 1693 §1, it substantially coincides with it. With this, it is clear that when the procedural venue is chosen, whether oral or contentious, the *modus procedendi* proper to the process governs, but that which was to be applied when the administrative process is followed in its procedure was not resolved; even more so, given the reservation that can. 1692 §1 establishes in favor of the particular right.

As an effect of the elimination in the *Codex* of the precept aforementioned, it results that the procedure to be followed by the diocesan Bishop, from the introduction of the petition until the dictation of his decree, cannot be subjected to any pre-established procedural norm. The procedure, however, must be endowed with the freedom of organization inherent to each case that is followed by the competent authority. However, in order to receive determined proofs, such as those provided by the prudence advises that the proofs must be regulated through whatsoever possible means to that which the *Codex* has established for them. But this convenient prudence cannot restrict, however, the organizational freedom of the process of the ecclesiastical authority that pronounces the decree.

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Lastly, if the process continues, the diocesan Bishop, or the special representative, will decide on the conjugal separation by a decree. This decree must be well founded and it will

⁷⁴ (Mary's Advocates' Note) Can. 357 (*novas*). *Nisi Qua pars vel promotor iustitiae processum contentious ordinaries pedant, processes contentious summaries adhibeatur* (from *Schema*)
[(Translator's Note) Unless a party or the promoter of justice requests the ordinary contentious process, the summaries of the contentious process is to be used]

⁷⁵ Original Footnote (21) Cfr. *Communicationes*, XI (1979), 274.

identify the legitimate motive or motives for the separation according to can. 1152⁷⁶ and 1153⁷⁷ respectively; it will also include, at the same time, these opportune measures that require the due sustenance and education of the children (cfr. can. 1154⁷⁸).

The Code does not mention, on the other hand, whether it is possible to approve a conventional separation by a decree of the diocesan Bishop. (22)⁷⁹ It has been noted that this conventional separation, “homologated⁸⁰ by the competent authority, has become more widely accepted in the canonical field before the many favorable aspects that it encases in comparison with the contentious separation” (23)⁸¹ From our perspective, we leaned toward this theme beforehand demanding that the legitimate cause of separation be mediated, and that the

⁷⁶ Can. 1152 §1. Although it is earnestly recommended that a spouse, moved by Christian charity and concerned for the good of the family, not refuse forgiveness to an adulterous partner and not disrupt conjugal life, nevertheless, if the spouse did not condone the fault of the other expressly or tacitly, the spouse has the right to sever conjugal living unless the spouse consented to the adultery, gave cause for it, or also committed adultery. §2. Tacit condonation exists if the innocent spouse has had marital relations voluntarily with the other spouse after having become certain of the adultery. It is presumed, moreover, if the spouse observed conjugal living for six months and did not make recourse to the ecclesiastical or civil authority. §3. If the innocent spouse has severed conjugal living voluntarily, the spouse is to introduce a cause for separation within six months to the competent ecclesiastical authority which, after having investigated all the circumstances, is to consider carefully whether the innocent spouse can be moved to forgive the fault and not to prolong the separation permanently. (from www.vatican.va)

⁷⁷ Can. 1153 §1. If either of the spouses causes grave mental or physical danger to the other spouse or to the offspring or otherwise renders common life too difficult, that spouse gives the other a legitimate cause for leaving, either by decree of the local ordinary or even on his or her own authority if there is danger in delay. §2. In all cases, when the cause for the separation ceases, conjugal living must be restored unless ecclesiastical authority has established otherwise. (from www.vatican.va)

⁷⁸ Can. 1154 After the separation of the spouses has taken place, the adequate support and education of the children must always be suitably provided.

⁷⁹ Original Footnote (22) Para este tema cfr la. obra de F. VARELA DE LIMIA, *La separación convencional de los cónyuges en el Derecho español*, Pamplona 1972, que recoge una abundante bibliografía al respecto. Cfr. también, a este respecto, X. BASTIDA, *A propósito de las llamadas <<separaciones consensuales>>*, en *Revista Jurídica de Cataluña*, 75 (1976- 125-140

⁸⁰ Definition of HOMOLOGATE: sanction, allow; especially: to approve or confirm officially. Examples of HOMOLOGATE <to be effectual, a judge must homologate the plea bargain between the district attorney and the defense> (from www.merriam-webster.com)

⁸¹ Original Footnote (23) J. L. ACEBAL, *El problema de la posible remisión de las causas de separación a la Jurisdicción civil*; en VV.AA., *Curso de Derecho Matrimonial y Procesal Canónico para profesionales del foro*, II, Salamanca 1977, p. 105.

agreement by Decree of the Ordinary of the competent judicial ecclesiastical authority be endorsed; such a decree would serve to homologate the agreement of the spouses, sanctioning in this way that the established pacts in the agreement would be conformed to both natural and canonical law, and at the same time they would be respectful of the public ecclesiastical order. (24)⁸²

Before the new Code, we take into consideration the freedom contained in the existent process for the diocesan Bishop to dictate the decree for the separation of the spouses; thus, we do not see any obstacle in order for the Bishop to dictate his decree, after the spouses have reached an agreement, if it can be proved that the motive for the separation is legitimate according to can. 1152 or 1153, and its truth is simultaneously demonstrated; and at the same time, just measures are provided for the effects of the sustenance and the education of the children (can. 1154). In addition, the validity of this decree requires for the ecclesiastical authority to have exhausted the intention of conciliation of can. 1695⁸³; furthermore, it also requires the intervention of the Promoter of Justice before the pronouncement of the decree according to can. 1696. These would be the conditions, moreover, of any particular law that might exist in a determined place (cfr. Can. 1692 §1).

2) The procedural transactions, if the contentious process is followed (can. 1693 §1), will be those proper to the ordinary contentious process, that is to say, those regulated in cann. 1501-1655⁸⁴, or these that are proper to the oral judgment, according to cann. 1656-1670⁸⁵. (25)⁸⁶ We should not add anything to this topic because its study corresponds to a

⁸² Original Footnote (24) Cfr. C. DE DIEGO-LORA, *Función pastoral...*, ob. y ed. ctds., pp. 266-269.

⁸³ Can. 1695 Before accepting the case and whenever there is hope of a favorable outcome, the judge is to use pastoral means to reconcile the spouses and persuade them to restore conjugal living. (from www.vatican.va)

⁸⁴ (Mary's Advocates' note) Canons 1501 through 1655 are Section I "The Ordinary Contentious Trial," in Part II "The Contentious Trial," in Book VII "Processes."

⁸⁵ (Mary's Advocates' note) Canons 1656 through 1670 are Section II "The Oral Contentious Trial," in Part II "The Contentious Trial," in Book VII "Processes."

⁸⁶ Original Footnote (25) La configuración formal del proceso contencioso oral no aparece hasta el *Schema Codicis Iuris Canonici*, Librería Edítrice Vaticana 1980, pp.. 355-357. Se cambia entonces la nomenclatura e incluso sistemática, sustituyéndose el anterior proceso sumario, incluido entre los juicios especiales, por este proceso contencioso oral que, con carácter general, se regula junto al proceso contencioso ordinario. Esta innovación legislativa no ha dejado de contar con ciertos precedentes doctrinales, por entenderse que el sistema procesal canónico carecía de un proceso plenario rápido, regido por la oralidad e informado por los principios de inmediación y concentración, que repercutirían de modo decisivo en un mejor servicio a la verdad, consiguiendo además una mayor economía procesal. En este sentido merece destacarse la obra de A. NICORA, *Il principio di orfaltà nel Diritto processuale civile italiano e nel Diritto*

procedural field of greater scope and generality, to which one must continually be making reference, in studying in detail the causes of conjugal separation, when they are debated and decided in this ambit of that which is designated by the Code under the rubric *De iudicio contentioso*.⁸⁷

We only need to note, then, the following particularities: *in first place*, that in any of these processes it is needed—as a requisite for validity—the presence of the Promoter of Justice is needed (can. 1696); *and, in second place*, that in principle, if the contentious venue is chosen, the contentious oral process will be followed, except if one of the Parties or the Promoter of Justice request that the contentious ordinary process be followed (can. 1693 §2)⁸⁸. It is enough that only one Party requests the ordinary process so that the legal process that offers better procedural guarantees is followed.

The problem resides in whether this possibility to choose the ordinary contentious process is a subjective procedural right submitted to a given preclusion, or whether, on the contrary it could be exercised at any moment. According to our point of view, we must keep in mind that can. 1459 §2⁸⁹, which requires that every exception that does not effect the nullity of the sentence, and concretely those which make reference to the *modum iudicii*,⁹⁰ must be exercised before the contestation of the lawsuit, unless they would surface after having taken place. Only in the case in which the Promoter of Justice has not been cited before the contestation of the lawsuit, or

processuale canonico, Roma, 1977. A esta obra le hicimos una observaciones criticas: cfr. C. DE DIEGO-LORA, *El principio de oralidad en el proceso, Ius Canonicum*, XVII (1977), n. 34, pp. 373-387. Los nuevos cánones que regulan el proceso contencioso oral proporcionan una conveniente síntesis de escritura y oralidad, en el mismo proceso, que, a nuestro juicio, puede alcanzar en el futuro mayores expansiones para el tratamiento procesal de muchas materias jurídicas merecedoras de decisión pronta y al mismo tiempo rodeada de las debidas garantías. Es de suponer que la doctrina 'canónica procesal se interese en adelante de especial modo por este proceso de nueva implantación codicial.

⁸⁷ *De iudicio contentioso* means the contentious judicial trial (translator's note)

⁸⁸ Can. 1693 §2. If the ordinary contentious process has been used and an appeal is proposed, the tribunal of second grade, observing what is required, is to proceed according to the norm of can. 1682, §2 (from www.vatican.va).

⁸⁹ Can. 1459 §1. Defects which can render the sentence null can be introduced as exceptions at any stage or grade of the trial; the judge can likewise declare them *ex officio*. §2. In addition to the cases mentioned in §1, dilatory exceptions, especially those which regard the persons and the manner of the trial, must be proposed before the joinder of the issue unless they emerged after the issue was already joined; they must be decided as soon as possible (from www.vatican.va).

⁹⁰ (Translator's Note) *modum iudicii* means manner of trial

either of the spouses was not cited (cfr. can. 1592⁹¹ and 1593⁹²), can it be justified that, after having produced the contestation of the lawsuit, one can opt —once the presence of the Party previously absent has been dully admitted t—for the contentious ordinary process.

d) *Recourses against the decision of the separation of the spouses:*

1) If it was decided by a Decree, the new Code does not say anything in relation to its possible recourses. Can. 1693 §2 contains a precept that is only applicable to the ordinary contentious process. Consequently, against the decree, the hierarchical recourse regulated in cann. 1737-1739⁹³ is applicable, without prejudice that the interested Party has previously exhausted the one that we now designate as previous recourse of the reposition, directed, according to can. 1734⁹⁴, to the proper author of the decree.

⁹¹ Can. 1592 §1. If the cited respondent has neither appeared nor given a suitable excuse for being absent or has not responded according to the norm of can. 1507, §1, the judge, having observed what is required, is to declare the respondent absent from the trial and decree that the case is to proceed to the definitive sentence and its execution. §2. Before issuing the decree mentioned in §1, the judge must be certain that a legitimately executed citation has reached the respondent within the useful time, even by issuing a new citation if necessary (from www.vatican.va).

⁹² Can. 1593 §1. If the respondent appears at the trial later or responds before a decision in the case, the respondent can offer conclusions and proofs, without prejudice to the prescript of can. 1600; the judge, however, is to take care that the trial is not prolonged intentionally through longer and unnecessary delays (from www.vatican.va).

⁹³ Can. 1737 §1. A person who claims to have been aggrieved by a decree can make recourse for any just reason to the hierarchical superior of the one who issued the decree. The recourse can be proposed before the author of the decree who must transmit it immediately to the competent hierarchical superior. §2. Recourse must be proposed within the peremptory time limit of fifteen useful days which in the cases mentioned in can. 1734, §3 run from the day on which the decree was communicated; in other cases, however, they run according to the norm of can. 1735. §3. Nevertheless, even in cases in which recourse does not suspend the execution of the decree by the law itself and suspension has not been decreed according to the norm of can. 1736, §2, the superior can order the execution to be suspended for a grave cause, yet cautiously so that the salvation of souls suffers no harm. Can. 1738 The person making recourse always has the right to use an advocate or procurator, but useless delays are to be avoided; indeed, a legal representative is to be appointed ex officio if the person making recourse lacks one and the superior thinks it necessary. Nevertheless, the superior always can order the person making recourse to be present in order to be questioned. Can. 1739 The superior who deals with the recourse, as the case warrants, is permitted not only to confirm the decree or declare it invalid but also to rescind or revoke it or, if it seems more expedient to the superior, to emend, replace, or modify it (from www.vatican.va)

⁹⁴ Can. 1734 §1. Before proposing recourse a person must seek the revocation or emendation of the decree in writing from its author. When this petition is proposed, by that very fact suspension of

2) If the separation was decided by a judicial sentence, we must distinguish whether the proper canonical norms of the ordinary contentious process were followed, or, on the contrary, those pertaining to the oral contentious.

If the first instance was processed as an ordinary contentious process, can. 1693 §2 remits itself to can. 1682 §2⁹⁵, so that in this case, it is applied *servatis servandis*.⁹⁶ This modalized remission means, *in first place*, that this special process of appeal is applied when—by analogy with the sentence of nullity—the sentence is about separation and not, on the contrary, when the petition was rejected; *in second place*, that the appellation *ex officio* of can. 1682 §1 does not proceed;⁹⁷ therefore, the voluntary appellation of the prejudiced Party, whether public or private, will always be required and it must interpose within the time limit of can. 1630⁹⁸; *and third*, that the process must be handled with celerity and must be decided by decree according can. 1682 §2, substituting the *animadversionibus defensoris vinculis*⁹⁹, for those of the Promoter of Justice in any case.

If, on the contrary, the procedure of the oral process was used in first instance, the norms of the common appeal must be followed—as it has already been indicated—. In effect, when there is not a peculiar norm with this respect in the canons that regulate the causes for the separation of

the execution of the decree is also understood to be requested. §2. The petition must be made within the peremptory period of ten useful days from the legitimate notification of the decree. §3. The norms of §§1 and 2 are not valid: 1/ for recourse proposed to a bishop against decrees issued by authorities subject to him; 2/ for recourse proposed against a decree which decides a hierarchical recourse unless the bishop gave the decision; 3/ for recourse proposed according to the norm of cann. 57 and 1735 (from www.vatican.va).

⁹⁵ Can. 1682 §2. If a sentence in favor of the nullity of a marriage was given in the first grade of a trial, the appellate tribunal is either to confirm the decision at once by decree or to admit the case to an ordinary examination in a new grade, after having weighed carefully the observations of the defender of the bond and those of the parties if there are any (from www.vatican.va).

⁹⁶ (Translator's Note) *servatis servandis* means with the things that must be preserved

⁹⁷ (Mary's Advocates Note) In nullity cases, if the first instance tribunal decided in favor of nullity, there is to be an automatic appeal to a tribunal of second instance (cf c. 1682 §1). In cases of separation, if the ordinary contentious process is used, only if there is an appeal will the case be forwarded to the tribunal of second instance. An appeal could be lodged by the parties or the promoter of justice.

⁹⁸ Can. 1630 §1. An appeal must be introduced before the judge who rendered the sentence within the peremptory period of fifteen useful days from the notice of the publication of the sentence. §2. If an appeal is made orally, the notary is to put it in writing in the presence of the appellant (from www.vatican.va).

⁹⁹ (Translator's Note) *animadversionibus defensoris vinculis* means observations of the defender of the bond

the spouses, the appellation of the sentence which was dictated in the oral process will follow the general norm of remission to the ordinary contentious which is established in can. 1670, that is to say, that which is prescribed in can. 1628¹⁰⁰ and ff. With this, “it seems to forewarn—according to the opinion of Madero—a given jealousy with respect to the oral contentious, that in this type of causes lends sufficient guarantees of justice” (26)¹⁰¹

By all means, it must be concluded, *in the end*—even if the new Code does not gather anything expressly in spite of the peculiarities with which the causes of separation are regulated—that the sentences that are emanated, either in the oral contentious process or in the ordinary contentious, will never produce the effect of a adjudicated matter. The principle *numquam transeunt in rem iudicatam causae de statu personarum* is now proclaimed by can. 1643¹⁰² of the Code promulgated by His Holiness John Paul II, albeit with the clarification of *haud exceptis causis de coniugum separatione*¹⁰³. With these terms the juridical reassurance has been introduced in the new precept to know with certitude that, it will always be possible to recur to the tribunal of appeals on the basis of *novis iisque gravibus probationibus vel argumentis*, following the prescriptions of can. 1644¹⁰⁴.

¹⁰⁰ Can. 1628 A party who considers himself or herself aggrieved by any sentence as well as the promoter of justice and the defender of the bond in cases which require their presence have the right to appeal the sentence to a higher judge, without prejudice to the prescript of can. 1629 (from www.vatican.va).

¹⁰¹ (Original Footnote 26) Cfr. L. MADERO en *Nuevo Código de Derecho Canónico comentado*, a. cargo del Instituto Martín de Azpilcueta de 1a Universidad de Navaxra, Pamplona 1983, comentario al Can. 1693, P. 1014.

¹⁰² Can. 1643 Cases concerning the status of persons, including cases concerning the separation of spouses, never become *res iudicata* (from www.vatican.va) [(Translator's Note *res iudicata* means an adjudicated matter)]

¹⁰³ (Translator's Note) *haud exceptis causis de coniugum separatione* means including cases concerning the separation of spouses

¹⁰⁴ Can. 1644 §1. If a second concordant sentence has been rendered in a case concerning the status of persons, recourse can be made at any time to the appellate tribunal if new and grave proofs or arguments are brought forward within the peremptory time limit of thirty days from the proposed challenge. Within a month from when the new proofs and arguments are brought forward, however, the appellate tribunal must establish by decree whether a new presentation of the case must be admitted or not. §2. Recourse to a higher tribunal in order to obtain a new presentation of the case does not suspend the execution of the sentence unless either the law provides otherwise or the appellate tribunal orders its suspension according to the norm of can. 1650, §3 (from www.vatican.va).

SUMMARIUM

In the new published code, a cause of separation can be decided in the ordinary process, or in the oral process, or it can be decided by Episcopal decree.. The decree of the diocesan Bishop is a pastoral or administrative act, or executive, whereby the General or Episcopal Vicar

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does not have any competence without a special mandate. The Promoter of Justice must assist whether in the judicial or administrative process. The procedural process proposes to follow the administrative venue. Consensual separation is admitted with the consent of the Bishop, with the proper juridical causes admitted. Recourse against the decree of the Bishop is made first by decree of the Petitioner (can. 1734). In the judicial venue the oral process must be requested by either of the Parties or the Promoter of Justice before the contestation of the lawsuit of the ordinary process is followed.