Do Catholics Need Ecclesiastical Permission to Divorce?

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Canons 1151-1155 of the Code of Canon Law state that Roman Catholics wishing to separate from their spouses must obtain ecclesiastical permission for the cessation of conjugal life. Canons 1692-1696 set forth the procedure for obtaining that authorization. Yet, of the tens of thousands of Catholics who separate or divorce each year in the United States, virtually none of them makes any effort to comply with these norms. "As a matter of fact, cases of separation are rarely brought before ecclesiastical authorities. Many couples sue for a civil divorce only."[1] In more than a decade of diocesan work, I never saw or heard of a spouse seeking ecclesiastical permission for separation or divorce.

This stark contrast between what appear to be plain provisions of law and this apparent widespread disregard for those norms prompts some to wonder whether a multitude of lay Catholics are in violation of several canons intended to direct their behavior toward the good; whether bishops are being negligent by not urging lay Catholics to comply with requirements set forth by a wise and loving Church; or whether noncompliance with these canons is weakening the Church's witness to the permanence of marriage. Indeed some intelligent (but not canonically trained) persons, interested in promoting Church teaching on marriage, have come across these canons and—notwithstanding the heavy logistical demands that adopting their proposals would place on bishops and their staff—assert that observance of these norms must forthwith be urged by bishops and pastors upon pain of pastoral dereliction. I think, however, that such calls, at least insofar as they claim to rest on canonical imperatives, are ill-founded. I will offer here several observations toward either abandoning such proposals or reformulating them in light of canonical arguments that could be raised against them.

Some preliminary points may be set out. Our focus is on Western canon law,[2] but even so, I would observe that, over time and across various ecclesiastical genres, terms such as "separation" and "divorce" have been used with significantly different shades of meaning by approved authors. Thus apparent similarities in usage do not always signify the same things, while differences in phrasing do not necessarily denote disagreement. Next, Canons 1151-1155 (stating the conditions under which spouses may separate or divorce) are almost identical to Canons 1128-1132 of the 1917 Code. This continuity allows us to invoke commentators on the old law for insights into the new.[3] In contrast, Canons 1692-1696 (outlining the procedure for seeking Church permission to discontinue conjugal life) are new and thus lack

significant roots in canonical tradition. Finally, all translations herein are mine.

At the risk of beginning this analysis in the middle of the matter, I first observe that during the post-Conciliar canonical revision process, as the Church transitioned from the 1917 Code to the 1983 Code, there was opposition to retaining the older norms on spousal separation in the projected law and to introducing new norms for hearing such cases therein.

For example in 1978 advisors to the Coetus on Marriage "suggested that all the materials on separation while the bond endures [the future Canons 1151-1155] not be retained in the Code but rather should be left to episcopal conferences which, if they felt it necessary, could enact local norms in accord with the practices of their peoples."[4] The coetus replied that, because adultery (the traditional factor triggering separation) was discussed in Scripture, these proposed canons should be retained in the law. Of course, many things are discussed in Scripture that are not found in canon law, and canon law provides for many matters not found in Scripture, so the reasoning here is less than persuasive.

Likewise in 1979 advisors to the Coetus on Procedural Law argued that "this title on separation cases [the future Canons 1692-1696] should be suppressed because spouses never bring separation cases to ecclesiastical tribunals, or the whole matter should be left to local law."[5] The coetus replied, however, that these canons "cannot not be in the general law" and retained them despite concerns that they would remain essentially unused.

Some might look at the dates of these objections (the late 1970s) and attribute them to a wider post-Conciliar malaise regarding the defense of marriage or see in the apparent disregard of current spousal separation norms just one more example of the modern failure to respect canon law. Against such a view, though, stands the fact that the nonuse of spousal separation canons, which, as noted above, were present in the 1917 Code in terms nearly identical to the current law, was well known before Vatican II.

Consider this advice from the standard pre-Conciliar canon law textbook used in American seminaries during the twenty years leading up to Vatican II:

> A party seeking separation should normally be referred to the Ordinary. However, since people usually hesitate to enter into direct communication with diocesan officials in these matters, it will usually be well not to insist on this obligation if the parties are unaware of it, especially if the separation is already in effect and there is no great scandal connected with it.[6]

Or again, "If the parties have already separated…without ecclesiastical authorization, the obligation [to seek such authorization] need not be insisted upon nor the parties disturbed."[7] This relaxed view toward observing canons on spousal separation was not limited to our side of the herring pond: "No spouse may bring a separation case before the civil court without the permission of the Ordinary; but in practice, he does not usually require this formality."[8]

Clearly, then, even during a period of high regard for canon law, one free of the pastoral timidities experienced in later years, solid canonists, reading spousal separation canons nearly identical to ours, concluded that they were *not* to be enforced according to their plain terms. To understand how such a seemingly anomalous situation arose, I suggest turning now to the renowned Roman canonist Felix Cappello who, in his *Tractatus Canonico-Moralis de Sacramentis*,[9] addresses this matter with respect for canonical principles and a sense for pastoral practicality.

Cappello, like Bouscaren and Ellis, Halligan, and Naz, advised priests against requiring Catholics unaware of the canonical separation requirements (which would have been most Catholics, then as now) to undertake a formal canonical process in regard to discontinuing conjugal life, but Cappello offered more analysis than did the others and his insights are illuminative for us.

Cappello began by noting that the Holy See had signed a concordat (treaty) with Italy recognizing, among other things, wide state authority over marriage and generally permitting Italian Catholics the option of approaching civil tribunals in these cases. In addition, Cappello noted that some nations, on their own, recognized marriage-related decrees from religious tribunals—in which situation Cappello expected Catholics to approach Church tribunals before turning to civil courts. But in either case, the idea that a state, by treaty with the Holy See or otherwise, might accept an ecclesiastical separation ruling (as opposed to, say, the state simply granting civil recognition to religious weddings) scarcely enters the mind of American Catholics, yet it is crucial, I shall suggest below, to understanding why canon law might contain norms on spousal separation and divorce issues (and not just on, say, wedding rites or sacramental validity).

In any event, Cappello considered, finally, the difficulties faced by Catholics living in countries without special, usually diplomatically achieved, provisions for separation and divorce matters (that is, the situation faced by, among others, American Catholics), and he identified three opinions:

> Some say that the Church in no way allows spouses to approach civil courts and that any sentence issued by a civil court would be illicit and would not protect one's conscience.
>
> Others hold that spouses have the right to approach civil courts if there is a statement to that effect from the Holy See (such as was made for England in 1860 or France in 1885) but not in other nations.
>
> Still others hold that in light of circumstances—such as pressing grave cause, while respecting Church doctrine about the exclusive authority of the Church over marriage cases, and with due regard for divine and canon law—the Church explicitly or at least implicitly tolerates spouses going directly to civil courts to seek separation.
>
> This view is the more well-founded, is practically safe, and should be preferred. For, on the one hand, [direct recourse to civil courts] is not intrinsically evil, else the Holy See would not have, indeed could not have, issued permissions for it; on the other hand, Catholic doctrine [for example, on the ultimate authority of the Church over the marriages of the baptized, discussed below] stands, as do divine and canon law, and grave cause could exist, indeed most serious cause could exist, for turning to civil courts especially in regard to preserving property rights.

In short, notwithstanding spousal separation canons that, in terms virtually identical to those used in the 1983 Code, required all Catholics to obtain ecclesiastical permission to discontinue conjugal life, canonists of the prestige of Cappello held that Catholics who did not live in "concordat nations" could directly approach civil tribunals in most such cases, provided only that they did not regard a civil decree of divorce as settling *canonical* issues such as the validity of their marriage. Doubtless some impressive canonists could, as suggested by Cappello himself, be cited in disagreement with his view (I find Halligan, for example, uncharacteristically ambivalent in this area), but such disagreements among experts only reinforce my main point, namely, that canonists see, and have long seen, more than one appropriate way to read legal texts that amateurs might think are unequivocal.

This variety of options for Catholics seeking separation or divorce is reflected in the modern Canon 1692, which restates the priority of diocesan bishops or judges in hearing separation cases among Catholics but also underscores the authority of bishops to send separation cases to civil courts, and even encourages such deferral in certain cases. Once again, though, canonists from English-speaking lands underscore the rarity of such petitions being made to our Church officials. "In practice (except perhaps in countries operating under a concordat with the Holy See), requests to have the matter dealt with by the civil courts are about as rare as canonical judicial separation cases, in effect almost non-existent."[10]

Finally—and stepping away from purely canonical considerations for a moment—the basic moral liceity of Catholics turning directly to civil courts for separation and divorce issues seems reflected in the fact that, even among the most ardent hierarchical defenders of the permanence of marriage, Catholics who are merely civilly separated or divorced are eligible for holy Communion regardless of whether they utilized a canonical process for the cessation of conjugal life.[11] Is it plausible that prelates such as then-Cardinal Ratzinger or Archbishop Chaput would *not* have cautioned simply separated or divorced Catholics against approaching for holy Communion if their failure to seek ecclesiastical authorization for the cessation of conjugal life had itself been gravely at odds with Church doctrine or discipline?

One may yet ask why Canons 1151-1155 and 1692-1696 are in the 1983 Code. Two possible reasons suggest themselves.

First, as noted above, various countries have concordats with the Holy See whereby some canonical marriage decisions are given civil weight. In some other nations, including Islamic ones, civil law itself sometimes recognizes religious tribunal rulings.[12] For both scenarios, *canonical* norms for separation and divorce cases would be needed to guide parties and ecclesiastical officials whose actions and decisions could carry *civil* consequences. The Code might be considered a convenient place to locate such norms.

But again, to my knowledge no such marriage concordats or social observances exist in common law countries, leaving the canons on spousal separation with "no practical application in English-speaking countries as couples who wish to obtain a legal separation have recourse to the civil courts."[13] The drafters of the 1983 Code would have done better, in my view, not to include in universal law norms that are needed only in certain regions; but included they were, with the result that today, some people coming across these canons understandably, but wrongly, conclude that, like most other canons in the Code,

these norms must be applicable everywhere.

Second, the Church has, to be sure, fundamental jurisdiction over the marriages of all the baptized,[14] even though she chooses not to exercise that jurisdiction over marriages involving only baptized non-Catholics or, as a rule, even to involve herself in the civil consequences of marriages between Catholics.[15] Still, the retention of norms such as Canons 1151-1155 and 1692-1696 in universal law might help to preserve, at least in some "symbolic" way, the Church's assertion of her radical baptismal jurisdiction over marriage. I find the cost of retaining in law "symbolic" norms, if that is what these canons amount to in many places, to be high (if only in terms of their potential to cause confusion among the faithful), but the Legislator apparently concluded otherwise. Nevertheless, even "symbolic" canons must be read in accord with their text *and context*,[16] and the context of the canons on spousal separation strongly suggests that they are not to be applied in all countries the way they might be applied in some.

In conclusion, most Catholics today, and certainly most Catholics living in countries such as the United States, have no idea that any canons seem to require them to obtain ecclesiastical permission to cease conjugal life prior to filing for a civil separation or divorce; Bouscaren and Ellis would have advised against calling attention to the separation norms in such cases—assuming that such canons even apply in nonconcordat nations, which is itself, as we have seen, highly questionable. At the same time, most Catholics also recognize, if not always in technically accurate terms, that the Church has something more to say about the permanence of their marriage than can be gleaned from a civil divorce decree, and specifically, that such a decree is not sufficient to allow them to enter a subsequent "marriage in the Church"; Cappello would have found that degree of awareness and acceptance of Catholic teaching on marriage to be a pastorally acceptable starting place for further catechesis.

And so, I suggest, may we. ✠

ENDNOTES

1 Örsy, *Marriage in Canon Law* (1986), 237.
2 Eastern law treats the same issues in CCEO 863-866 and 1378-1382.
3 1983 CIC 6, 17.
4 *Communicationes* 10:118.
5 *Communicationes* 11:272.
6 Bouscaren & Ellis, *Canon Law: A Text and Commentary* (1946), 572.
7 Halligan, *Administration of the Sacraments* (1963), 516.
8 Naz, *Traité de Droit Canonique* II (1954): 407.
9 V (1947), 828-29.
10 Kelly, in *Letter & Spirit* (1985), 944.
11 See, for example, Congregation for the Doctrine of the Faith, *Letter to Bishops* (1994), *passim*, and Archdiocese of Philadelphia, *Pastoral Guidelines* (2016), 3.
12 Pospishil, *Eastern Catholic Church Law* (1993), 520.
13 McAreavey, *Canon Law of Marriage* (1997), 202.
14 1983 CIC 1671.
15 1983 CIC 1, 22, 1059.
16 1983 CIC 17.

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