

The Catholic Church on Separation and Civil Divorce

Eric F. MacKenzie, S.T.D., J.C.D.

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Civil Law Commons](#), and the [Religion Law Commons](#)

This Reprint is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

This address was delivered to a group of Catholic lawyers in Fall River, Massachusetts on June 29, 1953, at the invitation of the Most Reverend James L. Connolly, D.D., Dr. Sc. Hist., Bishop of Fall River.

While the address spans the entire subject of marriage and divorce, the individual topics will be treated in greater detail by lawyers and canonists in forthcoming issues of THE CATHOLIC LAWYER.

THE CATHOLIC CHURCH on SEPARATION and CIVIL DIVORCE

MOST REVEREND ERIC F. MacKENZIE, S.T.D., J.C.D.*

HIS EXCELLENCY, the Bishop of Fall River, has asked me to present to you tonight the Catholic doctrine concerning separations and divorces. He informed me that he had invited the Catholic civil lawyers of the community, along with others who might be interested in this subject. Naturally, I am happy indeed to have this unusual opportunity.

As you know, I am not a civil lawyer. Rather, by training and experience, I am a canon lawyer. This leads to a preliminary remark. I have some slight acquaintance with Chapters 207 and 208 of the General Laws of Massachusetts, and with monographs such as Lombard's Marriage and Divorce Laws of Massachusetts. Yet if I were to address you on the civil law in this matter, it would be all too obvious that my knowledge is incomplete, inaccurate and entirely amateurish. May I suggest a parallel? I am sure that everyone here tonight knows the general teaching of the Catholic Church about the sacred character of marriage, and about the permanence of the marriage tie. You know the Church's condemnation of divorce and remarriage, and no doubt recall Our Lord's words "Whom God hath joined together, let no man put asunder." But a talk based merely on these general principles, presented to canon lawyers, would of necessity be incomplete and amateurish. For nineteen hundred years the Church has dealt with the endless problems presented by the faithful. Of necessity she has evolved precise laws and procedures to handle such cases. A knowledge of these is essential for the determination of actual cases.

This leads to a second preliminary remark. It seems strange, but it is true, that many good people, including good Catholics, are surprised at the statement that the Church has laws, in the strictest meaning of that term. They think of the Church as a loose, voluntary association of people who find in our worship and our Sacraments something of inspiration and consolation. They listen to the Church's teachings, and are somewhat familiar with them; but they think of them as being some sort

*Auxiliary Bishop of Boston; Officialis of the Archdiocesan Tribunal; member, Interprofessional Commission on Marriage and Divorce Laws under the sponsorship of the Special Committee on Divorce and Marriage Laws and Family Courts of the American Bar Association.

of abstract theory, some sort of generality which has no practical application. In the matter of marriage, they accept the usual doctrine up to the time when it is applied to themselves or to a son or daughter or friend; but then they are shocked and outraged by the statement that, in their own individual case, no man may put asunder those whom God hath joined together. They are shocked and outraged by the statement that the Church insists on formal trials and the producing of competent evidence. They are shocked and outraged by the possibility that a Church court may issue a decision contrary to their wishes. I would not even suggest that any such Catholics are in this audience. I do suggest that, as lawyers, you will meet and deal with many such, and that it will be useful to you to know something of the Church's legislation on marriage and divorce.

This said, I turn to the Church's Code of Canon Law. This is a compilation of all the Church's general laws, which bind all Catholics of the Roman rite, here and everywhere across the world. The authentic text of the Code is in Latin. I offer you my own translation. This is, of course, in no wise authentic; but I hope it will be sufficiently accurate in setting forth the contents of the law.

In Canon 1012, we read:

Christ Our Lord has raised the marriage contract of baptized persons to the dignity of a Sacrament; hence no valid contract can exist between baptized persons without the Sacrament being present *ipso facto*.

The Church holds that among Christians, marriage is a Sacrament, and hence directly of religious nature and standing. This is in manifest opposition to the civil law doctrine. As a typical statement of civil law, I quote from the *Corpus Juris*, volume thirty-eight, in which marriage is defined as

. . . the civil status of one man and one woman capable of contracting, united by contract and for life, for the discharge to each other and to the community of the duties legally incumbent upon those whose association is founded on the distinction

of sex. . . . It is now the commonly accepted doctrine that marriage is a civil contract. . . . While marriage is a contract and purely civil, it is also and specially a status or personal relation, in which the state is deeply concerned and over which the state exercises a jealous and exclusive dominion.

A comparison of this civil law doctrine with Canon 1012 brings out forcibly the fact that Catholics as Catholics, are bound in conscience to a higher and stricter concept of marriage than is known in civil law and in the *mores* of the American community. For us this is fundamental, unchangeable and all important; and no matter what be the decisions of legislators and civil courts, no matter what the ordinary thinking and practice of other citizens, the Catholic Church will hold and teach that marriage is religious and that its nature and obligations are determined by God and by God's law. No one can reject this teaching and remain a faithful Catholic in good standing.

The Church does not do this in a merely arbitrary way, just to be different from civil law. The Church relies on the teaching of Christ Our Lord. We find this in the nineteenth chapter of St. Matthew. Let me remind you of the text. A group of Pharisees, well versed in the law of the Old Testament, asked Our Lord's opinion of divorce as sanctioned by Moses. Our Lord replied by referring to the very first chapter of the Old Testament, the opening chapter of the Book of Genesis, and quoted the words:

What therefore God hath joined together, let no man put asunder.

Explaining that Moses' decision was occasioned by the hardness of his people's hearts, Our Lord went on:

I say to you, that whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and he that shall marry her that is put away, committeth adultery.

Adultery is, in ordinary conversation, not a polite word. We avoid using it. But Our Lord was frank and exact. His teaching is per-

fectly plain: that divorce and remarriages result in nothing but adulterous relationships.

Nor is this all. Some might think this was a hasty phrase, which need not be taken too precisely, and which should not be considered as applying to real people and actual cases. But the Gospel makes plain Our Lord's seriousness. In the next verse, He was addressed, not by the Pharisees, but by His own friends and disciples. They raised the very practical objection:

If the case of a man with his wife be so, it is not expedient to marry.

In other words, "Who will marry if he is bound to stay with a wife who is unworthy, — who drinks, or is lazy and incompetent, or is a common scold or is in any way incompatible? What about the cases we all know, in which common life is impossible for a husband or a wife. Won't You, Lord, make some exceptions? Won't you admit that some people ought to be allowed to get rid of an unworthy partner and then marry a decent person and have a happy home and family?"

The text shows that Our Lord did not make any exceptions. He stood by the law He had proclaimed, despite its rigorous and difficult demands. He answered the problem His friends proposed by a talk on vocations. Those who have a vocation will find that God gives them grace and strength to live up to it. Our Lord did not say, but it is implied: those who have a vocation and the grace to live up to it, but thereafter fail to fulfill their duty, must be judged failures, deserving of exclusion from His Kingdom.

So, on the authority of Christ Our Lord, the Catholic Church teaches that marriage is a Sacrament; that the outward ceremony of making a contract has behind it the fact that God Himself intervenes, that God makes the man and woman one flesh, so completely one that any other marriage, in the lifetime of the partners, is a criminal adultery; and that, finally, God makes marriage a vocation and gives the partners grace and assistance to fulfill the vocation. This is what the Church

means by saying that marriage is a Sacrament.

On this is based the doctrines of the following canon, Canon 1013:

The essential properties of marriage are its unity and indissolubility; which in a Christian marriage, take on a special permanence by reason of the Sacrament which is present.

This Canon suggests, and it is important to remember, that there are two kinds of marriages. One kind is Christian marriage, in which both the man and woman have been baptized and therein have been made children of God, brothers of Christ, and partakers of the supernatural life which Christ gives his followers. For them, marriage is a Sacrament and the indissolubility of the bond is founded on the Sacrament present. But there are millions of other marriages; the marriages of those who lived before Christ was born, and the millions of others who, since Christ's death, never knew Him; never were baptized, never were raised to the supernatural order. These latter marriages are not Sacraments, in a technical sense; but they have the essential qualities mentioned in the first chapter of Genesis. In these marriages, God makes the husband and wife one flesh. For these marriages too, there is the prohibition, "What God hath joined together, let no man put asunder." For these marriages too, the Church has reverence. The Church will uphold the validity and the indissolubility (with few exceptions) of the marriage of two unbaptized people, be they uncivilized primitives in Africa or Australia, or unbaptized citizens of our own country and city. I assure you that it is not Catholic doctrine, but rather a denial of Catholic principles, to say that non-Catholic marriages have no status and may be disregarded and treated as non-existent.

Let me go on. Canon 1016 provides:

The marriage of baptized persons is regulated not only by Divine Law, but also by canon law; due recognition is hereby

given to the competency of civil law in regard to the purely civil effects of any marriage.

This Canon again repeats the spiritual and religious essence of Christian marriage; but it turns to the fact that there are many difficult and important problems arising on another plane. Along with the spiritual union of a husband and wife, there are problems of property, of inheritance, of responsibility for debts, of support of children and the like. These problems have been met in various ways. In ancient Rome, there was the family system, with all rights and responsibilities vested in the *paterfamilias*. Skipping many other solutions, we have our own system, which still occasions complicated problems of dower and courtesy rights, joint income tax returns, foundations holding family property, and a thousand more. I assure you that the Church very gladly, and with a sigh of relief, passes these problems to civil lawyers and civil courts. All she wishes to do is to uphold the sanctity, the unity and the permanence of marriage. Temporalities, she gladly relinquishes to civil law.

I turn now, following the Code of Canon Law, from the canons that define the nature of marriage to those which regulate the separation of spouses. In this as always, the Church is realistic and practical. Whatever may be the intrinsic spiritual nature of marriage, the fact is that men and women meet and marry, all too often, on another basis; all too often moved by passion or greed or ambition or other forms of ignoble selfishness; and, despite the spirituality and nobility of marriage *in se*, the result is a horrible and often impossible situation. With long experience the Church has had to provide for these cases. Canon 1128 restates the basic teaching of the Church: Spouses have the duty to live a common life, unless a just cause of separation excuses them. Husband and wife belong together, for mutual love and devotion and assistance and to fulfil their duty to their children. Despite all the horrible statistics of separation and divorce in the United States I think Canon 1128 still states

the belief and the wish of Americans and, even more, states the ordinary and usual situation. I'm not a pessimist. I still think that good people live well; and even if they have problems, they solve them in favor of common life. They live, if not for each other, at least for their children.

But the very practical and realistic Catholic Church goes further. Canon 1029 states that if one spouse commits adultery, the other spouse has a right to live separately on a permanent basis. This right to separation is restricted in ways that are more familiar to you lawyers than to the general public. Following the experience of nineteen hundred years, the Church has recognized the defenses of condonation, causation and recrimination.

I have served on an Interprofessional Committee which reports to an American Bar Association Committee considering a new type of Family Court to have jurisdiction over marriage, divorce, custody of children and all other problems of marriage and divorce. I'm revealing no secret when I say that the members of the Interprofessional Committee, representing the fields of civil law, psychiatry, psychology, social work, marriage counselling and others, is almost unanimous in condemning the present civil law practice of requiring contentious trials, and allowing defenses of condonation, recrimination and the like. I do not intend to enter into any controversy. I wish simply to advise you civil lawyers that the Church still holds a traditional attitude. It still holds that a permanent separation can be decreed only after a trial, after proof of the one essential crime against the sanctity of marriage, and after the elimination of even the technical defenses of condonation and recrimination and the rest. In other words, Canon 1129 makes a permanent separation purposely difficult; and the reason, once again, is the Church's unvarying insistence on the words of Christ Our Lord: "What God hath joined together, let no man put asunder."

Then comes Canon 1131. This Canon makes provision for the cases in which neither party has been guilty of adultery, the basic

crime against marriage itself; but one or other has been guilty of other serious crimes. For example, a husband or wife fails to practice a good Christian way of life; or causes children to be brought up outside the Church; or causes peril to the soul or body of the spouse or makes common life too difficult by some form of cruelty. In these cases, in which adultery is absent, but in which any other serious situation exists, the Church provides for a temporary separation, which may be for a week, a month, a year or on an indefinite basis, but always short of a permanent separation. Two points need emphasis. The first is that there must be a serious crime or fault, which must be investigated and proved. The second is that, with the crime proved, the resulting decree is of its nature temporary. This is explicitly stated in the second section of this Canon, which states that common life must be resumed as soon as the verified cause of separation has been removed and atoned for.

This procedure, under Canon 1131, is not too unlike the civil law procedure for separation in Massachusetts. Both have the element in common that the court's decree is temporary. Both anticipate that the cause for separation may be removed, and that husband and wife may go back together. In neither civil law nor in the Church procedure, is there any provision for a new marriage. Hence, as is obvious, the Church will steadfastly oppose divorce, which connotes remarriage; but will more readily tolerate a civil separation which implies no remarriage, but rather reconciliation and a restoration of common life.

Let me add one or two other items from the Code of Canon Law. Canon 1960 states that trials and judgments concerning the marriages of baptized persons belong to ecclesiastical courts by a competency which is strictly and exclusively their own. We have already seen that the Church gladly gives to civil courts the determination of questions of property and money and inheritance and the rest. The point is that the Church holds that it has the right to determine the basic ques-

tion as to the existence and the validity of a marriage, while money questions belong elsewhere.

It may seem to many — and I know it does seem to many good people — that the Catholic insistence on the spiritual essence of marriage is foolish; and that the problem can be brought down to other more practical issues. These people hold that a man and woman, after a marriage ceremony, may live together until they wish to separate. When they separate, no police power, no Church teaching can bring them together. All anyone can do is to settle property rights and custody of children and all the rest.

I submit that I can understand this viewpoint. But I submit that this viewpoint omits the one thing I have emphasized in this talk. The “liberal” viewpoint takes for granted — it does not say, but implies, — that marriage is a mere agreement of a man and woman to live together, that the agreement is essentially private, subject to change and terminable by mutual consent or even by the determined obstinacy of one spouse. I can understand that many people, not knowing or forgetting the words of Our Lord, hold that marriage does not make a man and woman one, does not create a unity which, established by God, no man can put asunder. What I cannot understand is how people insist on divorce and remarriage, and at the same time profess to be believers in and followers of Jesus of Nazareth. Even more, I cannot understand how proponents of good social order and civil virtue can support unrestricted divorce and remarriage, in face of the scandals and the horrible statistics of the last ten years and more.

To complete my talk, I call your attention to two decrees of the Third Plenary Council of Baltimore. In 1884, all the Bishops of the United States met in Baltimore to consider the needs of the Catholic Church in the United States. They drew up legislation, and then forwarded it to Rome for approval. In January 1886, the Pope gave his approval, and the decrees became law. They apply only

to the United States, and hence differ from the Canons of the Code which are not territorially restricted. Two of the Baltimore decrees regulate divorces and separations.

Section 124 reads:

Since it is established by law that by marriage two spouses become one flesh; and by God's will the marriage bond is so intimately and strongly forged that it cannot be broken or removed by any human power: it clearly appears that a most serious guilt attaches to those who seek to dissolve their marriages by appeal to the civil authorities, or, what is worse, obtain a civil divorce and attempt a new marriage, in spite of the lawful bond which still exists in the sight of God and His Church. To punish these crimes, we decree that an excommunication be automatically incurred by those who attempt a new marriage after divorce; this excommunication being reserved to the local Bishop.

Two points should be noted. This law penalizes those who marry after divorce with excommunication. It does not so penalize those who get a divorce but do not remarry. Yet it would be wrong to conclude that Catholics are free to get divorces, provided they do not remarry. The law states just the opposite; it says, "a most serious guilt attaches to those who seek to dissolve their marriages by appeal to the civil authorities". The words "most serious guilt" express with complete clarity the Church's judgment that the appeal for a civil divorce is completely wrong and prohibited.

The second point to be noted is that section 124 is stated absolutely, covering all cases and allowing no exception. In this it differs from section 126, which I now read to you.

Moreover, to establish even more firmly the dignity of marriage, a great Sacrament in the Church, from which derive innumerable benefits for souls, for the peace of families and for the safety and prosperity of the state, we order those who

are joined in wedlock not to approach the civil courts for a separation *a mensa et thoro*, unless they first consult the proper Church authority. But if anyone makes such an attempt, let him realize that he has incurred grave guilt and that he is subject to penalties in accordance with the prudent judgment of the Bishop.

Thus, even a separation by civil courts is forbidden by the Church, unless permission be granted.

This then is the Catholic teaching concerning marriage and separation and divorce. As was said to Our Lord in another connotation, "This saying is hard and who can hear it?" (John VI/61). Hard saying or not, it is a teaching which must be accepted by all Catholics, accepted in its generalized principles, accepted also in its individual applications.

Perhaps this talk is not just what you, my audience, expected. I am well aware that you have come with many practical problems. Some of these will be covered in the question and answer period. Basically, they will have one common element, that you are approached by clients who demand a separation and a divorce, who have, in civil law, a right to such legal action, and who have therein the approval of a vast majority of the citizens of the United States and even of our local communities. You will ask: what can be done in such cases? How far may I, a Catholic lawyer, go in accepting and prosecuting such civil actions?

I have thus far not answered these questions directly. Rather I have concentrated on the basic sanctity and permanence of marriage, on the Church's native right to judge all marriage cases, and on the Church's prohibition of civil divorce and separation. I submit that this background is too little known, too rarely remembered and stated. It needs emphasis, and it must be kept in mind in any discussion of individual cases. I trust that, as such, my talk has been useful and satisfactory.

Among the dioceses which have recently enacted legislation governing the institution of civil suits for separation or divorce was the Diocese of Lafayette (Louisiana) whose Diocesan Synod on January 1, 1954 enacted the following articles:

Article 176

No person may lawfully abandon the communal residence of his marriage without the permission of the Ordinary, except in the cases provided for in Canon 1129 and the emergency case provided for in the last part of Canon 1131. Even in these latter cases, no civil suit of separation or divorce shall be initiated, under pain of excommunication, without the permission of the Ordinary.

Article 354

Institution of a civil separation or divorce suit by a Catholic party affecting a valid marriage without permission of the Ordinary, or acceptance and prose-

cution of such a case by a Catholic lawyer against the provisions of Article 176 results in his or her ipso facto excommunication reserved to the Ordinary.

In the Bulletin publishing the above synodal decrees, the following note was set forth:

N.B. In emergency cases, when the financial position or other civil effects in favor of the petitioner cannot be otherwise safeguarded, it has been the practice, which may still prevail, for the lawyer to file the separation case immediately, and pending the prosecution, have the Catholic petitioner submit his case to his or her pastor, who shall submit the case immediately to the Bishop according to the procedure adopted in the Diocese. This procedure of the lawyer presumes that the case has real merits, as far as he can judge at the time, and that in the event that the approval of the Bishop is not given because of lack of merit of the case, the case will be abandoned.

The Catholic attorney is never so truly a *counsellor* as when his client's case involves the marital or parental relationships. These are the cases which most closely touch the conscience of the man of law who is "God's good servant first." Nor can he guide himself and others in these matters by mere common sense. Future issues of THE CATHOLIC LAWYER will contain practical and detailed studies of the canonical and theological principles applicable to the Catholic attorney's participation in marital conciliation, divorce, separation, custody and adoption matters. The client's rights and the law's remedies will be considered in the light of Catholic morals and ecclesiastical discipline. In ordering the content and sequence of the articles, the Editors will be guided largely by the interest of our readers. Suggestions will be appreciated.