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JURISPRUDENCE

THE CATHOLIC JURIST AND DIVORCE

On November 7, 1949, His Holiness, Pope Pius XII addressed a convention of the Union of Italian Catholic Jurists. In that address he laid down four general principles of morality which must govern Catholic judges in the exercise of their duties. As a particular application of these principles, the Holy Father said:

"In particular a Catholic judge cannot pronounce, except for reasons of great weight, a sentence of civil divorce—where this is in force—for a marriage valid before God and the Church. He must not forget that such a sentence, in practice, does not come to touch only the civil effects but in reality conduces to the erroneous consideration of the actual bond being broken and of the new one as valid and binding."

The secular newspapers seized upon this statement of the Pope, and a storm broke over America. One divorce judge on the west coast was moved to remark that, "I am an American before I am a Catholic." His remark pointed up only one thing, viz., that he is neither a good Catholic, nor a good American, nor a good lawyer. For a good Catholic is ever solicitous of his actions that they be moral in the sight of God; a good American knows that there can be no true patriotism where there is no true morality; and a good lawyer knows never to draw a conclusion from a statement until he has examined that statement, and until he has consulted authorities for a true interpretation of that statement.

In order to secure the legal profession from amateur newspaper theologians, it is occasionally profitable for a law publication to review those principles of Moral Theology that govern the actions of lawyers and judges in divorce cases. For there is an immutable norm of morality to which man must conform for the good of the community and for the sake of his own salvation. The President of the United States understood this when he said, only four days after the Holy Father's address to the Italian judges, that "above all these works of man there is the eternal standard of God by which we shall all be judged." The Catholic lawyer recognizes this all important truth, and sincerely desires to fulfill his office in compliance with this norm. Yet, he is no theologian, nor does he have ready access to those reference works that will solve the ethical dilemmas which his work often presents. In the hope of being of service to such attorneys, the *MARQUETTE LAW REVIEW* is restating the Catholic doctrine in regard to the permissibility of their handling divorce cases.

Divorce is not an intrinsic evil, per se. It is often an indifferent act, and, at times, even a good act. As, for example, when a Catholic woman

has been granted a separation *a thoro et mensa* from her husband by the ecclesiastical courts. In such a case, a civil divorce, instituted to obtain a subsistence allowance under the sanctions imposed by the civil law, would be a good act. However, the usual type of divorce in this country is obtained for the purpose of contracting another marriage. But the sin lies not in the divorce, but in the second marriage.¹ Divorce, in such cases, is a means of sinning. The question then becomes this: when may a Catholic lawyer assist a client to obtain a divorce when that divorce will be used to consummate a second and sinful marriage? And when may a Catholic judge hand down a decree granting such a divorce?

Since the procuring of a divorce for such a client is obviously cooperating with him in a sinful act (since remarriage in the United States is impossible without a civil divorce), we must inquire as to whether such cooperation is ever permissible. Now, cooperation is defined as concurrence with another in a sinful act, and it may be either formal or material. Formal cooperation is that concurrence in the sin of another in which the cooperator consents to, and shares in, the evil intention of the other party. Such cooperation is always sinful. Material cooperation is the concurrence in the external act of the other party, but not in his sinful intent. This may be accomplished in one of two ways, either by assisting in the act which produces the evil effect directly, or by assisting in an action which is only preparatory to the sinful act itself. The first type of material cooperation, assisting in the deed itself, is always sinful, and not even a grave reason will excuse it, except in certain cases involving property where the only alternative to the cooperator is grave harm to himself. However, no guilt attaches to the second type of material cooperation, i.e., assisting in an action which is only preparatory to the sin, if two conditions are concurrently met: 1. that the act which the cooperator places is not in itself sinful; and 2. that there is a sufficient reason for permitting the other to sin.

Applying these principles to our present question, it becomes clear that the Catholic lawyer may never act in a divorce suit if his intention is to free his validly married client to undertake a second marriage. This is formal cooperation, and is never justifiable. But if his intention is merely to free his client of the civil effects of the marriage, and not to free him from the bond itself (though the State so declares in its judgment), then he may take the case if the two conditions given above are fulfilled. Divorce, as we have stated, is not of itself evil. If it is accompanied by no evil intention, then it is at worst an indifferent act. Thus the first condition is verified.

¹ Cf. H. Noldin, S.J. and A. Schmitt, S.J., *SUMMA THEOLOGIAE MORALIS* (26th edition, Innsbruck, Leipzig, F. Rauch, 1940), III, n. 672, p. 682.

As to the second condition, however, the difficulty of ascertaining what would be a sufficient reason arises. As Father Henry Davis says,

"In estimating the sufficiency of the excuse for material cooperation, we must consider the spiritual character and needs of another, our relations to him, what and how great is his offence against God, the harm that may accrue to a third person, the public harm likely to ensue, how close the cooperation, how indispensable it may be. So many factors enter into all questions of material cooperation, that only the most general principles can be laid down. Great varieties of opinion, therefore, on any given case except the most obvious, are inevitable, and there is no more difficult question than this in the whole range of Moral Theology."²

In general the accumulation of wealth is not a sufficiently grave reason to justify a Catholic in taking a divorce case. But when the harm he, his wife, and his children suffer by his loss of profit is considered in connection with the fact that he does not thereby prevent the sin (since his prospective client may accomplish his end by merely going next door and hiring another attorney), and in connection with the fact that his cooperation is remote, such a reason does become sufficient. For while a man is obliged to go to great lengths to prevent the sin of another, where that is in his power, he is under no obligation to deprive himself of material goods merely for the purpose of entering upon a series of useless acts. The same situation does not exist in Italy, to whose jurists the Pope's remarks were directed. For Italy is 95% Catholic. Therefore, when a Catholic lawyer refuses to accept a divorce case in Italy, his act is not useless, since he thereby prevents many persons from getting a divorce. In America, the Catholic lawyer can accomplish no good by refusing a divorce case, whereas, on the contrary, by accepting it, he has the opportunity of effecting a reconciliation, if that is at all possible.³

Since these reasons are present in almost every divorce case, a Catholic may accept them, provided, however, that he does not recognize, himself, a dissolution of the marriage bond, and this is understood by all parties who know of the proceedings,⁴ and provided that no

² Henry Davis, S.J., *MORAL AND PASTORAL THEOLOGY* (5th edition, Sheed and Ward, New York, 1946), I, p. 342.

³ It should be noted here that the Catholic attorney is always under a moral obligation to try to reconcile the parties before instituting the action. He should do this by pointing out the sacredness of marriage, the indissolubility of its bond, the disastrous effect that divorce has upon children, the advantages which each spouse derives from the other, and by recalling them to the love with which they started out life together. This obligation ceases, however, if he sees that he merely antagonizes the parties by his good offices.

⁴ In the United States it is generally understood by all that a Catholic does not recognize the authority of any human agency to grant an absolute divorce from the bonds of a validly contracted marriage. What the Catholic asks for when pleading his case is merely a judicial separation. A reiteration of this point

scandal will redound to the spiritual detriment of any third party.

In regard to specific cases, the following may be said. If the lawyer has sufficient assurance that the divorce is being sought merely to protect one party from harm by the other, or to secure a financial settlement, and that there is no danger of either party remarrying, he may take the case without regard to the conditions given above, except that he must guard against the giving of scandal insofar as he is able.

Although a separation *a thoro et mensa* for grave cause is not sinful, Catholics are forbidden to apply for this civil decree without first obtaining the permission of the proper ecclesiastical authorities.⁵ It is therefore the duty of the Catholic lawyer to recall a Catholic client to his sense of obligation, and to put him in contact with the *Officialis* of the diocese. In the Archdiocese of Milwaukee, the *Officialis* is the Very Reverend John A. Wiczorek, 2000 W. Wisconsin Avenue, Milwaukee.

Where an ecclesiastical court has declared a marriage null and void, a Catholic lawyer may assist either of the parties in obtaining a civil divorce for the purpose of getting a property settlement, or for the purpose of clearing the way for a subsequent valid marriage. Again the attorney should take every reasonable precaution to avoid giving scandal to those who are uninformed of the true facts of the case.

Thus it is that in America such conditions exist that a Catholic lawyer may take most (but not necessarily all) divorce cases. And what we have said of the lawyer holds, *a fortiori*, of the Catholic judge.

Morality is one. The same principles which govern the lawyer, therefore, must also govern the judge. Yet, because of the difference in the positions they occupy, the judge may at times be justified in granting a divorce when the lawyer cannot in conscience seek it. It is held by most theologians that a judge may grant divorces to any party who fulfills the legal requirements.⁶ The granting of the decree is in itself a morally indifferent act. This satisfies the first condition. The second condition, the presence of a sufficiently grave reason for so acting, is satisfied by the consideration that Catholics would be barred from the bench if they could not grant divorces. This would work grave harm to both Catholics and to the State, and it is basic ethics that the common good overrides the individual good. Moreover, the judge is not free to accept or reject the cases that come into his court as the lawyer is free to accept or reject clients.

to the parties, to the judge, and to any who ask him concerning his role in divorce proceedings is always advisable, however.

⁵ ACTA ET DECRETA CONCILII PLENARIJ BALTIMORENSIS TERTII (Baltimore, 1886), n. 126, pp. 64-65.

⁶ Father J. Buceroni, S.J., in his INSTITUTIONS THEOLOGIAE MORALIS (6th edition, Rome, 1915), IV, n. 983, holds that it is an intrinsic wrong for a judge to grant a divorce to validly married parties who contemplate remarriage. This is a minority view, however.

There is yet another reason why judges are morally justified in granting divorces: it is not the judge who grants the divorce, it is the State acting through the person of the judge. As Fathers Rumble and Carty stated,

“Secondly, it is State authority which grants the divorce, and the judge merely decides whether applicants comply with the conditions laid down by civil law for a civil dissolution of the bond recognized by the State. If the judge is a Catholic, and the applicant is validly married in the sight of God, he does not personally believe that the civil decree of divorce breaks the bond of marriage in the sight of God. He intends merely the withdrawal of State recognition of the marriage and the abolition of civil obligations. He does not believe, and he does not say that the parties are free in conscience and before God to contract a further marriage whilst both parties still live.”⁷

The judge, while only the spokesman of the State, must still have grave cause before enforcing an unjust law. But this is supplied by the common good, as was said earlier. Also, the judge, no less than the lawyer, must carefully guard against giving scandal, whenever that is within his power. The last obligation of the judge is the same as that of the lawyer, i.e., he must attempt a reconciliation of the parties. The judge is in an advantageous position in this regard, as he is respected by both parties. He has the duty to use his position to prevent, if possible, the divorce. Even from a purely social standpoint this is a most desirable end. Many judges, of all faiths, have done much in this regard.

Referring again to the Pope's address, it is pertinent to point out that if Catholic jurists in Italy refuse to grant divorces, then the grievous sin of remarriage is prevented. And this is the duty of every Catholic where it is possible. It is not possible in this country, and the Holy Father's injunction is to be read in that light. The Catholic jurist, together with Catholics in every walk of life, must bend an obedient ear to the moral teachings of our Holy Mother Church. For it is the exclusive province of the Church to legislate in these matters, and it is precisely for this reason that there is no conflict in the respective authorities of the Church and of the State. When any pronouncement of the Church is made dealing with the law, Catholics can do no better than to ignore the secular newspapers, and to apply to their local pastors for guidance. It is the glory of the Church, of the State, and of the law, that the vast majority have always done this, and always will.

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⁷ Leslie Rumble, M.S.C. and Charles M. Carty, *RADIO REPLIES* (St. Paul, 1942), III, Par. 1264.

