CIVIL DIVORCE AND RELIGIOUS FREEDOM

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The ongoing discussion on divorce, occasioned by the circulation of a draft Presidential decree on the subject, poses at least two questions to a thinking Catholic: (1) Should the Catholic Church modify her teaching on the indissolubility of marriage? (2) Should Philippine law allow absolute civil divorce? These are not the only questions raised by the topic, but they are very basic and a few words will be said about the first and more about the second.

To the first question varying answers have been given and are being given today by Catholic thinkers. Some adhere closely to the traditional teaching of the Church. These traditionalists anchor their position on a combination of arguments based on reason, on Scripture, on historical evidence, and on theological reasoning. Since Vatican II, however, a growing number of Catholic scholars have produced works critical of the traditional Catholic position and advocating a modification of Church Law on the subject. Like the traditionalists, the critics base their position on arguments from reason, from Scripture, from historical evidence and contemporary Catholic practice, and from theological reasoning. In other words, it is the position of the critics that the traditional teaching of the Church on the subject does not belong to the body irreformable doctrine of the Catholic faith.[1]

It is not the purpose of this essay to enter into the ongoing theological and philosophical debate on the absolute indissolubility of marriage. It is a complicated and fascinating area of study and the interest on the subject has begun to bring out fresh insights which are bound to enrich contemporary understanding of marriage. However, it is the position of this essay that the rightness or

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[1] For a recent survey, see R.A. McCormick, S.J., *Notes on Moral Theology*, 36 THEOLOGICAL STUDIES 77, 100-177 (1975).

wrongness of the traditional Catholic position is not the issue in the current debate on civil divorce. The issue rather is whether the Catholic position, whether traditional or reformed, should be imposed on all citizens by civil law. What is at issue, in other words, is the extent to which civil law should reflect the constraints imposed by moral law.

It can safely be said, on the basis of past history and on the basis of fundamental differences in philosophy and faith, that a consensus on the issue of absolute indissolubility of marriage will not be reached in the foreseeable future. Yet men must live together under law. And marriage, a fundamental human institution which will be with us for as long as men are men, must be governed by law. Since man is a moral animal, marriage comes under the moral law. Since man is a member of civil society marriage must come under the civil law. To the extent that man is an ecclesial person marriage also comes under church law. The problem is one of reconciling the apparently irreconcilable divergences between the moral-ecclesial sphere and the politico-civil sphere.

The relation between law and morality has frequently been a subject of debate within the Catholic Church and within the broader human community. An older Roman Catholic approach to this problem views it from the perspective of the eternal law as God's plan for the world existing in His mind from all eternity. This plan is the foundation of natural law which is the rational creatures participation in the eternal plan of God. Natural law, however, does not cover all the particular human situations imaginable. Hence, it is the function of positive law to apply the natural law to particular human situations. This approach, however, also recognizes that at times it may not be possible to apply natural law completely. It may even be harmful for positive law to try to apply natural law completely. Hence, it may be necessary for positive law to *tolerate* situations that transgress natural law. The classic example here is the debate on whether prostitution should be legalized.[2]

To apply this older Catholic view to the problem of civil divorce one would have to determine first whether the absolute indissolubility of marriage is a demand of the natural law. If it is, then one would have to determine next whether civil dissolutions of marriage is an evil which is better tolerated than absolutely prohibited.

The first obstacle to such an approach is that fewer and fewer natural law philosophers, even within the Catholic communion, will admit that reason alone can establish that divorce is a metaphysical evil and therefore a metaphysical impossibility.[3] The ramifications of the problem are such that absolute indissolubility of marriage defies proof from mere natural reason. Reality is tragic and contradictory in character. The values involved in the total problem include the healthy interpersonal relations of the spouses, the wel-

[2] The bishops who spoke against civil divorce at a pre-conference meeting held in Mandaluyong, Rizal, recently were clearly speaking from the point of view of this older Roman Catholic approach.

[3] J.T. Noonan, Jr., *Indissolubility of Marriage and Natural Law*, 14 AMERICAN JOURNAL OF JURISPRUDENCE 79-94 (1969).

fare of the children, and the common good of society. Not only does none of these demand absolute indissolubility, but one or other of these may even demand the dissolution of the marital relationship. Hence the traditional Catholic position on divorce must ultimately be grounded on scriptural and theological considerations. Hence, further, to insist that the Catholic traditional position must be reflected in civil law or that at most civil law can tolerate divorce as a lesser evil is to insist that civil law must reflect Catholic theology. Can such an insistence be reconciled with the realities of pluralistic democratic societies? Would not such an approach trench on religious freedom?

Another approach to the problem views positive law in a very pragmatic way as merely mirroring the contemporary moral standards of a community.[4] Positive law is thus viewed as a communitarian compromise pounded out of conflicting moral views. Such an approach in large measure prescinds from questions of moral goodness or evil but seeks merely to achieve a social equilibrium which permits each one to live according to his personal moral standards while safeguarding at the same time the public interest. This approach does not deny the teaching function of law. However, its decided emphasis is on the pragmatic to the extent of practically ruling out any room for idealism. One can easily see that adherence to this aprroach can make any effort at social reform very difficult if not impossible.

The approach which this writer would prefer to follow as better suited to the problem of absolute civil divorce, which is a problem that has deep roots in religious belief, is one that is suggested by the *Declaration on Religious Freedom* of Vatican II. For this purpose, an understanding of the *Declaration's* answer to several questions is important: (1) Against whom may the religious freedom be asserted? (2) Who may assert religious freedom? (3) When may religious freedom be curtailed?

Since what is at issue in this discussion is the scope of *civil* legislative authority, we can prescind from the question whether religious liberty may be asserted against God or against the Catholic Church. This question can be discussed in another context. The principal topic of the *Declaration*, as a matter of fact, is the religious liberty of persons *vis a vis* other men or merely human powers. This is expressed in the subtitle of the *Declaration*: "On the Right of the Person and Communities to Social and Civil Freedom in Matters Religious." The very opening lines of the Declaration pose the problem as the demand increasingly "made that constitutional limits should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations" and the affirmation is made that the demand for freedom "chiefly regards the quest for the values proper

[4] This and the old Catholic approach are briefly discussed in C.E. CURRAN, NEW PERSPECTIVE IN MORAL THEOLOGY 164-167 (1974).

to the human spirit. It regards, in the first place, the free exercise of religion in society."[5]

The religious liberty affirmed is defined thus: "This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in any manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others."[6] The liberty asserted is thus a protection against any form of government constraint. And it is asserted against any form of government, whether confessional or secular: "If, in view of peculiar circumstances obtaining among certain peoples, special legal recognition is given in the constitutional order of society to one religious society, it is at the same time imperative that the right of all citizens and religious bodies to religious freedom should be recognized and made effective in practice."[7]

The next question: Who may assert religious liberty according to the *Declaration*? Does religious liberty belong only to him who professes the true religion or does it belong also to one who is in error? Does it belong only to one who professes a religion in good faith or does it also protect one who professes religion in bad faith?

A pithy answer to these questions is given in the subtitle: "On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious." The right therefore belongs to every person. The document does not distinguish. It in fact expressly declares religious liberty as a universal right: "This freedom means that *all men* are to be immune from coercion. . ." This is because religious liberty is an attribute of human nature itself: "The Synod further declares that the right to religious freedom has its foundation in the very dignity of the human person, as this dignity is known through the revealed Word of God, and by reason itself." The document elaborates further: "Therefore, the right to religious freedom has its foundation, not in the subjective disposition of the person, but in his very nature. In consequence, the right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it."[8]

It should also be noted that the *Declaration* speaks of religious liberty as a matter of *right* and not just of *toleration*. This idea is affirmed in the subtitle and runs through the entire document. "Injury, therefore, is done to the human person and to the very order established by God for human life, if the free exercise of religion is denied in society . . ."[9]

[5] *Declaration on Religious Freedom* [*hereinafter* cited as *Declaration*], no. 1. All quotations are from the English translation in THE DOCUMENTS OF VATICAN II, W.M. Abbot, S.J., ed. 675-696 (1966).
[6] *Declaration*, no. 2.
[7] *Declaration*, no. 6.
[8] *Declaration*, no. 2.
[9] *Declaration*, no. 3.

Important as the right is, however, it is not unlimited. What are its limits *vis a vis* the state?

Before answering this question it is important to understand the content of the right. The *Declaration* defines the right in the negative. It is an immunity from coercion. It does not have for its object the actualization of the positive values inherent in religious profession and worship. Its content is identical with that of the constitutional guarantee: *No law shall be made prohibiting the free exercise of religion.*[10] Hence the truth or falsity of one's religious belief is irrelevant to the right. The only juridically relevant matters are the allowable limits which the state may impose on the right. "The right to religious freedom is exercised in human society; hence its exercise is subject to certain regulatory norms."[11]

What are these norms? The *Declaration's* development of these norms is premised on one overriding basic principle: "For the rest, the usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary."[12] The presumption therefore is always for freedom. The presumption yields only to necessity: "when and in so far as necessary." When may it be said that it is "necessary" for political society to curtail religious liberty?

In considering religious freedom *vis a vis* the coactive power of the state, it must be remembered that man's freedom to act *internally* is not in issue at all. "For, of its very nature, the exercise of religion consists before all else in those internal, voluntary, and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind."[13] The only matter in issue is the freedom to act *externally* according to one's conviction.

One familiar with the jurisprudence on religious freedom and non-establishment, which occupies a preferred position in the Philippine Bill of Rights, will readily see how well the Vatican II approach corresponds with the constitutional approach to the problem. In the classic language of *Cantwell v. Connecticut*:[14]

> The constitutional inhibition on legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.

[10] Article IV, Section 8, 1973 Philippine Constitution; Article III, Section 7, 1935 Philippine Constitution.
[11] *Declaration*, no. 7.
[12] *Id.*
[13] *Declaration*, no. 3.
[14] 310 U.S. 296, 303-4 (1940)

And if the freedom to act according to one's belief is not absolute, what is the extent of the state's power to curtail action that flows from religious belief?

The *Declaration* begins its discussion of the juridical norms for limiting freedom of religion by an unequivocal affirmation not only of the power but also of the duty of civil society: "Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection." Then it proceeds negatively: "However, government is not to act in arbitrary fashion or in an unfair spirit of partisanship." Then positively: "Its action is to be controlled by juridical norms which are in conformity with the objective moral order."[15] Finally, what these juridical norms are is stated in a key paragraph of the Declaration:[16]

> These norms arise out of the need for effective safeguard of the rights of all citizens and for peaceful settlement of conflict of rights. They flow from an adequate care of genuine public peace, which comes about when men live together in good order and true justice. They come, finally, out of the need for a proper guardianship of public morality. *These matters constitute the basic component of the common welfare: they are what is meant by public order.*

The paragraph contains two important concepts: *common welfare* and *public order*. The limitive cause of religious freedom is not the common welfare but public order. The distinction between the two therefore must be clarified.

The *Declaration* states: "The common welfare of society consists in the entirety of those conditions of social life under which men enjoy the possibility of achieving their own perfection in a certain fullness of measure and also with some relative ease."[17] Common welfare is thus a very broad concept. It includes not only everything that is necessary for the survival of society but also everything that is merely useful for the well being of society.[18]

The common welfare in all its breadth cannot be the limitive cause of religious liberty because "this welfare consists chiefly in the protection of the rights, and in the performance of the duties, of the human person," and the "protection and promotion of the inviolable rights of man ranks among the essential duties of government."[19] Religious freedom then is an essential element of the common welfare. If this is so, it is a fallacy to say that government may curtail religious freedom in the name of the common welfare. Hence, a different criterion for limiting religious freedom must be sought. This is found in the narrower concept of "public order." John Courtray Murray, S.J., a *peritus* of Vatican II who was instrumental in the drafting of the *Declaration*, puts it thus: "Since religious freedom is declared to be a human right,

[15] *Declaration*, no. 7.
[16] *Id.* Italics added.
[17] *Declaration*, no. 6.
[18] This corresponds to the "good of order" which is claimed, erroneously, as this writer sees it, as a limitive cause of religious freedom in W.L. Ysaac, S.J., "Civil Divorce, Liberation and Culture: Reflections of a Filipino" 4. Mimeographed handout.
[19] *Declaration*, no. 6.

the common good itself, and the purpose of society as well, require that the right to the free exercise of religion should be fully protected. Neither of these concepts can be alleged as a norm of restriction. A different and more narrowly defined juridical criterion is therefore needed. The schema finds it in the concept of 'public order.' "[20]

Public order is narrower in scope. It is merely a part of common welfare. It consists of the three elements enumerated as juridical norms in the paragraph cited earlier. John Courtray Murray analyzes the paragraph and restates the elements of public order thus: "First, the order of society is essentially an order of justice, in which the rights of all citizens are effectively safeguarded, and provision is made for peaceful settlement of conflicts of rights. Second, the order of society is a political order, an order of peace ('domestic tranquility' is the American Constitutional phrase). Public peace, however, is not the result of repressive action by the police. It is, in the classic concept, the work of justice; it comes about, of itself, when the demands of justices are met, and when orderly processes exist for airing and settling grievances. Third, the order of society is a moral order, at least in the sense that certain minimal standards of public morality are enforced at all."[21] In the words of the *Declaration*: "These matters constitute the basic component of the common welfare: they are what is meant by public order."[22] John Courtray Murray summarizes the distinction between common welfare and public order thus: "The underlying distinction here is between what is necessary for the sheer coexistence of citizens within the conditions of elemental social order, and what is useful in providing their collaboration toward more perfect conditions of social welfare and insuring their fuller coparticipation in the benefits of social life. The category of the necessary is the category of public order. The wider category of the useful covers the more comprehensive concept of the common good."[23]

To go back then to the problem of divorce and remarriage, what is the significance of Vatican II's *Declaration on Religious Freedom* for the problem?

It must be emphasized that the problem of divorce and remarriage has deep religious overtones. It can safely be said that the present Philippine law which disallows absolute divorce owes its existence to a potent Catholic lobby. Even a cursory examination of the history and fate of attempts to reintroduce absolute civil divorce in the 1950's will bear out this observation. Moreover, the concession given to Muslims under Republic Act No. 394 and extended indefinitely by Presidential Decree No. 793 allowing divorce and remarriage is also founded on religious considerations. Hence, when the state prohibits divorce and remarriage even to

[20] J.C. Murray, S.J., *The Declaration on Religious Freedom: A Moment in Its Legislative History*, in RELIGIOUS LIBERTY: AN END AND A BEGINNING, J.C. Murray, S.J. ed. 34 (1966).
[21] *Supra*, note 5 at 687, footnote 20.
[22] *Declaration*, no. 7.
[23] *Supra*, note 20 at 35.

those for whom remarriage is allowed by their religion, as happens in the Philippines with reference to most Protestants, the state thereby denies them the opportunity of satisfying, in a manner consonant with their conscience, a very basic human impulse to live with a stable conjugal partner. Should the State therefor continue to disallow absolute civil divorce?

In the light of what has been said, the problem of divorce and remarriage may be formulated in terms of the Vatican II *Declaration on Religious Freedom*: Does *public order* demand that the state disallow divorce and remarriage? Put differently, is the prohibition of divorce and remarriage "necessary for the sheer coexistence of citizens within the conditions of elemental social order?"

For this writer, the question is answered in the negative by incontrovertible facts: countries where divorce and remarriage obtain have managed to maintain the coexistence of citizens within the conditions of elemental social order. Even the Philippines managed to survive two divorce laws, Act. No. 2710 and Executive Order No. 141 of the Japanese occupation. Nor can it be said that divorce which is allowed among Muslim Filipinos is responsible for dismantling conditions of elemental social order. Finally, the Catholic Church itself grants divorce under the Pauline and Petrine privileges and by the dissolution of sacramental but unconsummated marriages.

The question of divorce and remarriage have thus far been discussed from the view point of Catholic Church teaching on freedom of religion. The question may also be posed in constitutional terms. To the extent that the prohibition of divorce and remarriage trenches upon an unfettered right to act according to one's religious conviction, the constitutionalist may also ask whether divorce and remarriage present a clear and present danger of a substantive evil which the state has the right and duty to forestall such that they should not be allowed by the state. What is at stake here is not just any ordinary right but one which under Philippine jurisprudence occupies a preferred position in the constitutional hierarchy of rights. "Religious freedom, although not unlimited, is a fundamental personal right and liberty, and has a preferred position in the hierarchy of values."[24] What then would justify its limitations?

The *Declaration on Religious Freedom*, as already seen, sets *public order* as the sole juridical limitive cause of religious liberty. Constitutional jurisprudence on the subject does not use the same language as Vatican II, but the conclusion reached is the same. Philippine jurisprudence sets down "compelling state interest" as the only justification for laws which conflict with scruples of concience.[25] Jurisprudence even goes to the extent of saying "that coerced unity and loyalty even to the country . . . is not a goal that is constitutionally obtainable at the expense of religious liberty.

[24] Victoriano v. Elizalde Rope Workers, 59 SCRA 54, 72 (September 12, 1974).
[25] *Id.* at 75.

A desirable end cannot be promoted by prohibited means."[26] Or, as the American Supreme Court has put it: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[27]

From the above considerations it is the conclusion of this writer that, whether from the point of view of the teaching of Vatican II or from the constitutional point of view, the question is not whether the state may *allow* civil divorce and remarriage. Rather, the question is whether in a pluralistic society such as ours the state may *prohibit* divorce and remarriage. The teaching of Vatican II is that "the usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible and curtailed only when and in so far as necessary" and that curtailment becomes "necessary" when it is demanded not by the "common welfare," which is a very broad concept, but by the "public order," which is a much narrower concept. The teaching of the Constitution is that the Bill of Rights withdraws "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials,"[28] and that religious liberty is one of these subjects and may be curtailed only when demanded not by the ordinary requirements of public welfare, which also is a broad concept, but only by the narrower concept of "compelling state interests."

Fear may be expressed that the position espoused by this essay leaves society powerless to promote the common welfare. That is to misconstrue the function of the constitutional order. The constitutional guarantee, also demanded by Vatican II, is not an assertion of the laicist creed that religion is purely private matter. Rather, it is merely a recognition that the juridical order as the legal armature of human rights has a limited function. By guaranteeing a maximum degree of freedom of action the juridical order merely creates a constitutional climate wherein the various forces of society are free to pursue the common welfare of all. This common welfare "consists chiefly in the protection of the rights, and the performance of the duties, of the human person," and the duty to pursue the common welfare "devolves upon the people as a whole, upon social groups, upon government, and upon the Church and other religious Communities . . . in the manner proper to each."[29] Neither the Constitution nor the *Declaration* of Vatican II demands an abdication of social responsibility. Rather, both together pose a challenge to all to work towards building a city of man without doing violence to a right that is as original as the human person itself.

[26] *Id.* at 76.
[27] Wisconsin v. Yoder, 40 LW 4476, 4479 (May 15, 1972).
[28] Philippine Blooming Mills Employees v. Philippine Blooming Mills, 51 SCRA 189, 201 (June 5, 1973).
[29] *Declaration*, no. 6.

THE LEGALITY OF DISCIPLINING AN ELECTIVE OFFICIAL FOR A WRONGFUL ACT COMMITTED BY HIM DURING HIS PRECEDING TERM OF OFFICE

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There are very few cases dealing on the subject matter of suspension and removal of public officials for offenses committed during the previous term of office. The evident lack of jurisprudence on the matter is accepted by no less than the Supreme Court, when it resorted to American authorities, in resolving the issues in *Pascual vs. Provincial Board of Nueva Ecija.*[1] American cases on the question are also in conflict, due to differences in statutes and constitutional provisions, and also in part to a divergence of views.

In the case of *Pascual vs. Provincial Board of Nueva Ecija,*[2] Pascual, then mayor of San Jose, Nueva Ecija was administratively charged by the Acting Provincial Governor of Nueva Ecija for abuse of authority and usurpation of judicial functions. Pascual filed with the provincial board a motion to dismiss on the ground that the wrongful acts alleged therein had been committed during his previous term and could not therefore constitute a ground for disciplining him during his second term. The Supreme Court resorted to American authorities in the absence of any precedent in this jurisdiction. The weight of authority of the United States cases seem to incline to the rule denying the right to remove one from office because of misconduct during a prior term. The Supreme Court subscribed to this weight of authority of United States cases. "The underlying theory is that each term is separate from the other terms, and that the reelection to office operates a condonation of the officer's previous misconduct to the extent of cutting off the right to remove him therefor.[3] To remove a public officer

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[1] 106 Phil. 466 (Oct. 31, 1959).
[2] *Id.*
[3] 43 Am. Jur. 45, cited in *Pascual V. Provincial Board, supra,* note 1.