

# Dissolution of Marriage According to Canon Law

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## Abstract

In the Canon law, dissolution of marriage is not allowed since it was considered sacred and as such cannot break until the two spouses are alive, except only if one of the spouses passes away. But throughout history we find cases when allowed dissolution of the marriage and causes specific conditions set by the church. Thus, according to the Old Testament, if, a man married to a woman, didn't like something about his wife, should write a request for divorce and allow her to leave his home. Meanwhile according to the New Testament records, divorce is prohibited. Although most Protestants continue to espouse the view that marriage was sacred and as such should not be divorced, from those who had supported the idea of granting the divorce. One of them was Luther, who in his remarks before his preachers said: *"In my opinion, the issue of divorce belongs to the law, are not they to whom called for regulation of parental relationships, why not have they the authority to regulate the relations between spouses"*. Protestant churches allow the dissolution of marriage:

- a) Because of adultery by the wife; allowed by Jesus,
- b) Unjustified abandonment of the marital community;
- c) If there were other reasons: if one spouse refuses to have sexual marriage, if the husband abuses his wife repeatedly and without cause, severe illness of one spouse.

**Key words:** Canon law, Divorce, Old Testament, New Testament, Catholic Church.

## 1. Dissolution of marriage according to Canon law

Based on the concept of Canon law, for a long time the places that had been influenced by the Catholic Church had refused to accept the dissolution of marriage. The only way for the termination of a marital union, was the death of one of the spouses. The concept of marriage has been based on „*consortium omnis vitae*” or „*consortium totius vitae*”, which was considered as an eternal union, because it was based on the concept that after the marriage, the two spouses were unified in one body.<sup>1</sup>

According to The Old Testament, if the man married to a woman, has something that does not like about his wife, he should write a request for divorce and will let her go from his house. The woman after leaving the house of her first husband, she could marry another man. If the second husband disgusted by this woman, writes a request for divorce and if he removes her from his house or in case he dies, the first husband could not take her back as his wife, (because it has been considered that this woman isn't "clear").<sup>2</sup>

By testing Jesus (the messenger of God, peace be upon him), according to the Old Testament (Matthew), the Pharisees asked him: „*Is a man allowed to divorce his wife with any reason ?*” And he answered: „*Haven't you read that , at first, The Creator created a man and a woman, and then they should become one body ? And now, they are only one body, not two. Do not separate those people whom God had decided to unite.*” The Pharisees asked him again: *If it is so, than why Moses ordered to give the divorce and a woman could get a divorce?* Than Jesus said: *Moses because of your heart closeness, allowed you to divorce your women. But in the beginning, it wasn't in this way, and I am telling you that, who will divorce a woman because of prostitution, if marries another woman, he will commit an adultery, and who marries the divorced woman, he will also commit an adultery*<sup>3</sup>. Based on this, in Christianity divorce is prohibited.<sup>4</sup> But most of the protestant scholars, based on the following words, prove that divorce is allowed, if a man leaves a woman

<sup>1</sup> Applying this principle *-erunt duo, in carne-una*, argued the ignorance of dissolution of marriage, because after this merger resulted a single entity which can not be separated, except as a result of death.

<sup>2</sup> Topollogllu B. ., *Gruaja në islam*, Logos-a, Shkup 1995, p. 66.

<sup>3</sup> Raleviq S., *Brak i Razvod*, Dobra vest, Novi sad 1991, p.47.

<sup>4</sup> Until the mid-twentieth century, in Italy, divorce was forbidden. But due to major changes in marriages, in moral and ethical norms, million Italian people, today live separately from their husbands, and the more frequently it makes being in communion without crown. Vatican stiff resistance for divorce lasted until 1974 where in the organized referendum, Italians accepted divorce, the same time it was the result of the commitment of the government of that time to harmonize the positive right to real life human society. Glendon, M. A. *The transformations of Family-State, Law and Family in the United State and Western Europe*, The University of Chicago Press, Chicago and London 1989, p. 88.

for a long time:,, *Do not a woman separate from her husband- and if she separates, do not stay without a husband or let her agree with her husband – and do not a husband abandon his wife.*” Most of Protestants continued to support the opinion that marriage was sacred and as such should not be divorced, but there were also those who supported the idea of dissolution to marriage. It's known Luther, who in a speech before his preachers, said: In my opinion, the issue of divorce belongs to law, aren't they whom are called for regulation of parental relationships?! Then why should not they also have the authority to regulate the relationship between spouses?!<sup>5</sup>

So, for the protestant church, divorce was allowed for these reasons:

- a) Because of adultery by the wife, this was also allowed by Jesus.
- b) Because of the unjustified abandonment of the marital community.
- c) If there were other reasons, such as: If one of the spouses refuses to have marital relationship, if the husband constantly and without any reason abuses his wife, and serious illness of one of the spouses.

Also the Roman Church recognized the right of the new marriage, in case if one of the spouses, dies. But at the other side, the Catholic Church through centuries, wanting to keep under control the power of the Roman Empire and the judiciary, implemented disciplinary measures against believers who did not respect the religious rules about marriage, even when this was in contravention of the state legal acts. Sanctions of non-compliance of the religious provisions were: exclusion of believers from the church, withdrawal from life, remission of sins etc. However, during the implementation of its rules for the marriage and its dissolution, at various times the Church had encountered difficulties due to political reasons. For this reason, we have had cases when the Church has allowed divorce for: kings, emperors, etc. <sup>6</sup>

Gradually, losing its power and authority, the Catholic Church, began to make concessions to the religious general rules for the dissolution of marriage, and that in four directions:

1. If in a marital community between two pagan spouses, one of them had accepted Christianity, and if the other spouse refuses to continue the coexistence with them, or didn't agree to live in harmony without offending the Creator (God), then between the ruling of the insolvency rule and for the good of the religion – *favor fidei*, the catholic spouse could marry again with another

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<sup>5</sup> Mladenović M., *Razvod Braka I uzroci za razvod braka A*, Shtëpia botuese "Rad", Beograd 1974, 84.

<sup>6</sup> Mladenović M., *Razvod Braka I uzroci za razvod braka A*, Shtëpia botuese "Rad", Beograd 1974, p.74.

catholic person, being released automatically by the previous spouse – *ipso iure*, without any specific provision or specific procedure by clergy and church.<sup>7</sup>

2. Whether Christian or non Christian spouses, if they haven't consumed their marriage for any reasonable cause, the marriage can be resolved even if it was connected between such persons, respectively blessed and ratified by the priest<sup>8</sup>. Divorce was done with the request of the parties or the requirements stated by one party only if the other party was against, by the Pope of Rome. In this case, the impotence hypothesis was not part of it, since it triggered the annulment of marriage. The procedure for such separation, provided that the diocesan Bishop, after he had received the request, he continued the investigation to determine whether exist the conditions to grant permission to get a dissolution of marriage. The necessary facts with which he should confirm the present matter to the competent authorities, i.e., the power of the church, were two:

- The absence of consummated marriage, according to Canon Law, results when spouses perform the marital act freely and consciously, which means not only to commit the act, but it should be carried freely and consciously, not by force and under the influence of substances, such as under the influence of alcohol or drugs.
- To exist a reasonable cause for what the dissolution of marriage is required, since marriage even though was not consumed, it was celebrated regularly, which is proved by the Church before it decides for this, because in those cases, the divorce was not considered as a right of spouses (as was the case in the declaration of nullity of sacred marriage), but a boon granted by ecclesiastical authorities for spouses. Once the diocesan investigation ended, the procedure passed under the jurisdiction of the Roman Curia-ecclesiastical power, by which the subject followed from the appropriate office to the Regular Court to the Holy headquarter, then to the Secretary of State to obtain the signature of Pope, who was the only one that was authorized to allow divorce.

3. If at the time of marriage existed a marriage barrier, Canon Law recognized the marriage prohibitions and obstacles. The first ones would take to divorce, while marriage prohibitions would take to punish the spouse who was guilty.

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<sup>7</sup> Pauline privilege can.1143-Canonical Code 1147, which means the power of the divine origin of the Apostle Paul proclaimed by Christ, as is clear in Sacred Scripture, and was later transferred to the Roman Pope as Vicar of Christ.

<sup>8</sup> Petrine privilege can.1142-1148 which means the power of the Pope to give permission for divorce in ratified marriages, but not rconsumed-matrimonium ratum et consummatum, and it was arranged with the Catholic Canon.

4. Since the Catholic Church has been assertive in stopping the divorce, the Roman Church had recognized the dissolution of incomplete marriage – *divortium imperfectum*- or as it is known nowadays- *separatio quod toro et menso*.<sup>9</sup>

Under the influence of the theory of St. Augustine, who interpreted the quotation of Jesus (the messenger of God, peace be upon him) that didn't allow the dissolution of marriage, but allowed the interruption of wedlock in violation of marital fidelity, was allowed due to the reasoning of this instrument. Then the number of resources with whom divorce was permitted, greatly expanded based on interpretations of the sacred paper and under the influence of the real social needs of spouses. But, even allowing the dissolution of marriage, the Church forbade the re-marriage, which led to major distortions as at the marital community, also at the social and family circle.

By separating the Church in the West and East, the views about the issue of divorce, changed a lot. While the Catholic Church of the West categorically forbade divorce in the beginning, although the Catholic Church of the East had considered marriage as sacred and didn't prefer dissolution of it, it didn't forbid it completely. Thus, the king Leo Isaurian and his son Constantine in their code called „Ecloga“, which was brought about since 726 year<sup>10</sup>, proclaimed the dissolution of marriage, also they made calls in studying the Old Testament and the New Testament, and made an exception of this principle considering the weakness of human nature. The number of the resources that affected the dissolution of marriage, decreased in small steps. In their code Ecloga, a husband could require dissolution of marriage:

- a) Because of the violation of marital fidelity, by the wife.
- b) If the wife bring her husband's life in real and serious risk, on her own or through someone else.
- c) If the woman was infected by a contagious disease or suffered from any serious illness. Meanwhile, the woman could require dissolution of marriage:
- d) If during the following three years after the marriage, the husband was not capable for marital relationship
- e) If he brings her life in a real and serious risk
- f) If he is sick from a serious illness.

The law also prohibited the dissolution of marriage by mutual agreement of both spouses and that was the final prohibit, in which weren't allowed exceptions.

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<sup>9</sup> From the lat. Separation from bed and table

<sup>10</sup> Mladenović M., *Razvod Braka I uzroci za razvod braka A*, Shtëpia botuese "Rad", Beograd 1974, p.81

Slowly, with the evolution that occurred in the Eastern countries, came the union of legal and church's provisions about the divorce. This happened because besides adultery, the Church also recognized other reasons for divorce. That is so, the rule 48 of the Apostles, forbade the remarriage of a person who had left the marital union of his first wife, with another woman, or another released woman. The term "released", according to the interpretation of Valsamon, it means the woman who was "divorced by her first husband, but not by law". From this comes the conclusion that, there existed and it was allowed a dissolution of marriage which was regulated by law.<sup>11</sup>

## 2. Conclusion

Based on the concept of Canonical law, for a long period, countries were influenced by the Catholic Church and have refused to accept the dissolution of marriage. The only way for its termination was considered the death of one spouse. The concept of marriage based on *Omnis consortium totius vitae consortium vitae* or which was considered as an eternal community based on the concept that after the marriage the spouses account as one body. Applying this principle *-erunt duo, in carne una-*, and also argued legitimize ignorance of the divorce, because after this merger resulted a single entity which cannot be separated but as a result of death.

Also, the opinion about the issue of divorce in Christian West church differed a lot from the opinion of East church. While the Catholic Church of the West categorically forbade divorce in the beginning, the East allowed the divorce. Thus, King Lav Isavrijanin and his son Constantine proclaimed in their Eklogi law which was brought about since 726 to not dissolve the marriage, however, calls made in the study of the Old Testament and the New, made an exception to this principle, having the weakness of human nature.

Even in Italy divorce was prohibited until the mid twentieth century. But due to major changes in marriage, moral and ethical norms, more Italians today live separately from their spouses, the more frequently it makes being in communion without crown. Vatican's stiff resistance for divorce lasted until 1974 where in an organized referendum, Italians accepted divorce, at the same time it was the result of the commitment of the government of that time to harmonize the positive right to real life human society.

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<sup>11</sup>Mladenović M., *Razvod Braka I uzroci za razvod braka A*, Shtëpia botuese "Rad", Beograd 1974, fq.83.

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