

THEOLOGICAL TRENDS

Marriage: Canon Law and Pastoral Practice

IT IS interesting to reflect on whether the commission entrusted with the work of composing the constitution, *The Church in the Modern World*, of the Second Vatican Council, in numbers 48 and 49, realized what a torrent of speculation they were creating. Likewise one would like to know whether the Fathers of the Council fully appreciated how such speculation would have the effect of changing or developing much pastoral practice. These two sections, 48 and 49, dealing with the sanctity of marriage and the family, as well as with the nature of conjugal love, form the basis of much of what I will consider within this very brief review.

The most significant theoretical change for pastoral practice has been the move from one model, the legal one of contract, to a biblical one, that of covenant. Another discernible trend has been an ever increasing attempt to use marriage tribunals to deal with the problem of marital breakdown, while at the same time there has been much exploration of what constitutes marriage for Christians. Part of this exploration has consisted in examining what is meant by indissolubility. In the mid-seventies there began much serious discussion on whether it is pastorally helpful to try to separate the question of the reception of the Eucharist from the fact of indissolubility. And it goes without saying that, in the face of spiralling divorce rates throughout much of the western world, marriage preparation is no longer being seen as an optional extra for the devout, but an absolute necessity if the community is to continue to present, as central to the gospel message, the absolute indissolubility of the marriages of all believers. Each of these trends merits attention.

Contract, covenant and nullity

The Council was faced with a situation in which the canon law — a prime instrument in the formation of the community — regarded marriage as a contract with a most definite objective, namely physical, sexual intercourse. Human love was irrelevant in terms of the contract, although that is not to say that the believing partners regarded it as such. In the law's view, love was an optional extra in that it did not form part of the contract. As is well known, the Council deliberately refused to discuss marriage in terms of contract, and, it seems, went out of its way to use words that made this eminently clear: 'conjugal covenant of irrevocable personal consent'; 'mutual gift of two persons'.

The point at issue is whether this is simply a matter of terminology, or whether we as a community have been given a new direction in our

catechesis of marriage. Certainly a small group of bishops at the Council saw this use of new terminology as having more than merely cosmetic significance, and went out of their way to request the commission, charged with the work of drafting the pastoral constitution, to re-define marriage in strictly legal terms. And they suggested: 'marriage is the mutual transfer of specific rights and duties'. The request went unheeded, not because marriage does not bring the concept of duty with it, but because such a legal definition is inadequate.

In fact much of the theological significance of the move from marriage as contract to marriage as covenant, is concerned with one simple question: has human love a crucial and central place in marriage? Or, in other words, is procreation to be regarded as the central value in marriage? In the early seventies, some of the judges on the Roman Rota attempted to hold that the Council had changed nothing, that love had no juridical relevance to the structure of marriage, and its lack had no effect on its validity. That view though, found its critics, who pointed out that if marriage is seen as the gift of oneself to the spouse, then love is the central value, to which all other values are subordinate. For what else is love but the gift of oneself? When that is lacking, there can be no marriage. In fact the proposed draft of the revised canon law on marriage states simply but powerfully that matrimonial consent is an act of the will by which a man and woman, through an irrevocable covenant, give themselves to each other to constitute marriage.¹ Palmer, in his magisterial study of marriage as contract or covenant, points out that the marital covenant engages the whole of the spouses' lives, while contract deals with more limited services, and for a stipulated period of time. Contracts, made between persons about things, can be terminated by mutual agreement, and rely on the law as their guarantor. Covenants, on the other hand, are witnessed by God and have him as their guarantor. And significantly, Palmer notes that covenants can be made only by the person who is mentally, emotionally and spiritually mature.²

The changed emphasis seems to correspond very closely to what married Christians are experiencing today, when they declare that the primary task of marriage is not procreation but love. Through their experience of each other they experience God; their relationship is crucial. This is not for a moment to deny that one of the elements of conjugal love is its fruitfulness. But what christian parents seem to be insisting on strongly is that to describe married love as fruitful and life-giving is to make a much broader statement than simply to say that it is procreative. The love of the man and woman creates the atmosphere in which new life can begin and develop over the years, until the children reach adulthood and leave home. The Encyclical letter, *Humanae Vitae*, when it enumerates the characteristics of human marital love, declares unambiguously that it is a very special kind of personal friendship, where man and woman are equal companions. One

reflects at this point that perhaps the main reason why the draft of the new marriage law is so promising is precisely because the Pastoral Constitution of the Council and the Encyclical are so positive in appreciating the centrality of human love in talking of marriage. A recent study sums it up thus:

An enriched theology of marriage will have to take into account the growth of human relationships, the need for true communication within marriage, and the understanding of sexual intercourse both as a life-giving act and as a communication of love and self to one's partner.³

It will be apparent that by moving from a view of marriage regarded essentially as a contract about physical sexual rights to marriage seen as a covenant relationship, one is also saying something significant about the people entering marriage. The covenant of marriage based on the gift of self makes matrimonial consent more difficult to give and receive, and this must be acknowledged as one of the main reasons for the extraordinary developments that have taken place in the field of jurisprudence from the late sixties to the present day.

Formerly, the attention of the community was focused on what took place before the altar, the moment of consent, as with every contract. Were the couple free from unjust external pressure, did they know what rights they were giving and receiving, were they of sound mind? These were the kind of questions in which the canonists were interested. But any consideration of the life-long relationship that came into being as a result of that initial consent was largely ignored. Now, however, the canon law is compelling us to examine much more fully the ability of persons to understand and accept the life-long obligations that flow from the gift of self to one's spouse and vice versa.

As a result of this change of emphasis new reasons for giving decrees of nullity have been accepted. The first of these has the unfortunate name of 'lack of due discretion'. This is simply canonical shorthand for saying that a person is too immature for marriage. Most people meeting this notion for the first time instinctively react, and understandably so, since the marriage relationship is a maturing one of its very nature, in that a couple who have been married twenty years will generally be more mature than when they were just married. And indeed the marriage tribunals are fully aware of this. But the implication here is that it is possible to have gross immaturity in a person that will never disappear and, as a result of such a defect, the person in question can truly be said to have no understanding of what marriage is or what obligations it brings in its train. It should be noted that we are not talking about ignorance, since the person in question may be

most intelligent; we are instead talking about an evaluative ability or its absence, so that while a person may know all about marriage in theory, he cannot evaluate such knowledge in relationship to himself, and significantly, lacks the mental vigour to appreciate that the consequences of the marriage ceremony stretch away into the future, since we are considering a life-long relationship.

Another new ground for nullity is when a person is unable to assume the essential obligations of marriage because of a serious psychic anomaly. Behind this statement is the well-known idea that nobody can be bound to do the impossible. It can happen that a person wishes to marry, and then finds that the relationship is beyond him — because of some serious psychological problem. The essential obligations of marriage are clearly those traditionally enumerated: permanence, fidelity and fruitfulness. But in addition, the right to a community of life and love must now be added, and the Church is obviously leaving it to marriage tribunals to work out in detail exactly in what a 'community of life and love' consists. This is a very clear example of the relationship between theology and law, where an enriched theological concept is given concrete expression by a canon law which takes into account culture, person and place. With regard to the question of whether or not an individual lacks the ability for marriage it is worth remembering:

when we are speaking of the inability of someone to form this close interpersonal relationship, we are not just speaking of an unhappy marriage of a couple who just 'didn't get on'. It cannot be said that a marriage which is unhappy is null and void. What the judges are looking for in such a case is the proved inability to form and sustain a recognizable married relationship.⁴

In keeping with marriage described as: 'a conjugal covenant of irrevocable personal consent', much work is being done in the area of the freedom needed by a person to make the self-donation that the covenant implies, and to receive the gift of the spouse. Thus, for the first time, in the revised canon law a norm regarding deceit or fraud will be introduced, saying that there cannot be marriage if one of the partners is deceived about some personal characteristic of the other which would seriously disrupt the community of conjugal life.⁵ What exactly such personal characteristics are that would seriously disrupt married life together will have to take into account factors that might differ from one local church to another, but there seems to be agreement that serious criminality might be one, or deliberate withholding of information about personal sterility might be another.

The figure of the judge has been largely lost sight of in the Catholic Church, except in the marriage tribunals. And the paradox is that while

there is much discussion about using a restored judicial function for the adequate protection of rights in the community, and for the settlement of disputes, the use of judges to deal with marital breakdown is being questioned more and more. It is no longer simply a matter of making marriage tribunals work more efficiently, by introducing various measures such as one judge instead of a statutory three. Nor is it just a matter of abolishing the necessity of further judges to examine the work of the first court. The heart of the matter is that the function of a judge is to deal with controversy by the disinterested application of the law, and most of the cases submitted to our church courts are not in any way contentious. In other words, we have inherited a system from the past where nullity cases, and they were few, were contentious and the courts were established to reach the truth in the midst of much contradiction.

It can hardly be said to be pastorally helpful that a legal fiction is still operative, when the condition of people in the West today seeking nullity is in a large number of cases entirely different from that envisaged in the twelfth century. Now we need a method that will enable the community and the people involved to discern the truth, in so far as they can, about their first marriage, rather than a legal system that contends about rights. It is still possible to have good law and good decision-making without courts as at present constituted.⁶

If some substitute were developed it would do much to counter the very haphazard growth of *internal forum* solutions to marital breakdown. An *internal forum* solution consists basically in persons being given permission, generally by a confessor, to receive the sacraments of penance and the Eucharist, leaving unchanged their status of being divorced and remarried. Very often this happens because there is no possibility of going to a marriage tribunal for a variety of reasons. Or they have been before such a tribunal but have been unable to convince the judges of the truth of their petition. A distinction obviously needs to be made between the different kinds of possibilities. It may be that the individual concerned is certain that his first marriage was never valid, but, as mentioned above, he cannot prove it. Or again it may be that the advanced age or illness of the person makes it impossible for the church authorities to be approached as required by law. The third possibility, to be discussed at much greater length in the next section, is the position of a remarried person who knows his first marriage was certainly valid, but has nevertheless broken down. It will be observed that the first two kinds of *internal forum* cases do not involve any question of indissolubility, dealing as they do simply with access to the sacraments of penance and the Eucharist. And the presumption is that no scandal will be given to the community. One's unease at such attempts to deal with the pastoral problem of divorce is based on the fact that there is no law to give security in this matter, and, significantly, no equality of treatment before the law.⁷

Divorce, remarriage and the Eucharist

Two developments have made this one of the most debated questions in the life of the contemporary Church; developments which have nothing in common. The first is the ease with which marriage can be terminated by law in practically all the nations of the western world, and as a consequence an ever-growing number of Catholics who in common with the rest of the population find marriage increasingly fragile and subject to breakdown. It has been pointed out that the problem of divorce has always surfaced in the Church in periods of great change or when new societies are in process of being formed; thus Paul having to deal with pagan christian communities, the early medieval Church, and above all the great missionary endeavours of the late sixteenth century.⁸ What makes our period unique is the magnitude of the problem.

The second development is a renewal of sacramental theology, along with a restored liturgy, both of which stress public Eucharistic sharing in the midst of one's own community as not only normal but absolutely essential. The catechesis on eucharistic sustenance has been so effective and powerful over the last decade that those Catholics who have been through the trauma of divorce and have subsequently remarried, find exclusion from the Eucharist almost impossible to bear. Thus the re-examination of the Church's teaching and practice that is presently taking place is in response to a deeply-felt pastoral need, and is not idle and dangerous speculation.

Richard McCormick, with his customary lucidity, sets out the problem: will the doctrine of indissolubility gradually be destroyed, if some divorced and remarried Catholics are admitted to the Eucharist? Can the Church still continue to proclaim the doctrine, if this happens?⁹ The official response of the Church to this has been to state that indissolubility and the right to receive the Eucharist are not separable, they go hand in hand, and the requirements of preaching the gospel unambiguously exclude the divorced and remarried from the sacramental life of the Church. There are several arguments alleged in favour of this stance, and McCormick examines and evaluates them all.

The first is the so-called *state of sin* argument: divorced persons who remarry are in a permanent state of serious sin because their second union is adulterous as long as the first spouse is still alive. Unless and until the couple in a second marriage determine to live as brother and sister, namely renounce a physical sexual relationship, they must not be admitted to eucharistic communion, although it should be pointed out they can and should share in the life of the catholic community in all other respects. A second argument would utterly repudiate the above *state of sin* consideration on the grounds that only God knows the human heart in all its complexities, and therefore only God can judge consciences — human beings cannot and should not attempt to judge another's sin. However, having said all that, the remarried Catholic is still to be denied the Eucharist since he or she is

an *imperfect and inadequate symbol* who cannot witness fully to the holiness of the Church. Such a person's life undermines a most important part of the gospel message, and the practice of refusing to admit to the Eucharist is a sign of this. The third argument often alleged is that of *scandal* in its strictly theological meaning of being a stumbling block to one's brethren in their search for God. It is supposed that if remarried people receive the Eucharist, it will be thought that the Church is changing her position on the absolute centrality of indissolubility, so that it is not wrong to remarry after divorce. Consequently a strong commitment to permanence in the community vanishes.

McCormick is severely critical of such argumentation. As regards the *state of sin*, his most telling point among many is that the Church from her practice is compelled to regard a canonically irregular union as the one unforgivable sin. No other violation or weakness merits such an attitude. The problem of the argument that remarried Catholics are imperfect symbols lies in the fact that it raises uncomfortable questions such as: who is a perfect symbol in a sinful pilgrim Church? Or: what level of 'belonging' is essential before one can communicate? In fact when the Holy See issued its document on 1st June 1972: 'Concerning cases when other Christians may be admitted to Eucharistic Communion in the Catholic Church', implicit in it was the conclusion that full integration into the Catholic Church is not absolutely necessary in order to communicate. While the Eucharist is certainly the symbol of the fulness of ecclesial communion, there may be situations in which the spiritual need of the individual becomes an exception to the general rule which still of course remains valid. In other words, exceptional cases need not necessarily destroy the unity in faith and discipline. This is used by many authors to justify the admission of some divorced and remarried Christians to the Eucharist, although it must be doubted whether the framers of the Roman Document realized it would be used in this way.

As regards the third argument, *scandal*, it can be pointed out that to share the Eucharist need in no way imply approval of what has gone before, namely remarriage. What it does imply is that we belong to a community with a twofold function: to preach the gospel in its totality, and at the same time to bring healing, forgiveness and the possibility of renewal. It is not infrequently said that scandal in the community lies precisely in the fact of debarring from the Eucharist those who have suffered from the fragility of marriage and have remarried. The 1980 Synod of Bishops dealing with marriage and the family were ambivalent about this matter. They urged pastors to differentiate between those persons who really tried to save their marriage, but were subsequently abandoned, and those who were responsible for the breakdown. Yet the Synod went on to reaffirm the traditional practice of excluding from the Eucharist, based on the fact of imperfect symbolization:

They cannot receive communion because their status and condition objectively contradict that indissoluble covenant of love between Christ and his Church which the Eucharist signifies and effects. From the pastoral point of view, a change in this practice would lead believers into error and confusion about the Church's teaching on the indissolubility of marriage.¹⁰

This is a perfectly understandable prudential judgment of the Synod, since it would be the height of irresponsibility to attempt to introduce a new custom into the Church without in any way preparing the community for it by means of a most thorough catechesis. However, one uses the phrase 'a new custom' with some diffidence, since, for a long time, there seems to have been a custom in the Western Church of readmitting Christians who had remarried to the sacraments under certain conditions. And that during the lifetime of the first spouse.¹¹

Immediately following their statement on imperfect symbolization, the bishops, in a carefully nuanced manner, go on to say that remarried persons can receive the sacrament of penance and the Eucharist if they are penitent for having destroyed the sign of Christ's covenant (presuming they are responsible), and they sincerely commit themselves to a way of living that does not contradict the indissolubility of the sacrament of marriage. There is no explanation or description of what such a way of living should consist in, but it need not automatically be presumed that it means a couple must live as brother and sister, since the Synodal statement goes on to call for a very detailed study to help develop pastoral care, and such a study should take into account the practices of the Eastern Churches.

Introducing the question of the Eastern Churches immediately calls to mind the concept of *Oikonomia*, that method, namely, by which a person on the breakdown of a marriage attempts to discern whether a second marriage would be a help to salvation when no call to a life of celibacy is felt. Kasper claims that this practice does not violate the proclamation of indissolubility, but simply tries to help a person continue to live a christian life in a situation of great difficulty. The second marriage is not, in the Eastern tradition, considered as 'strong' as the first, and the wedding liturgy for the second marriage is overshadowed by the theme of penance.¹²

In general those authors who advocate a change in pastoral practice to enable some remarried Catholics to receive the Eucharist, do so under the following or similar conditions: (a) such eucharistic sharing should in no way be seen as a questioning of the teaching on indissolubility, and by preaching and teaching, such a practice must be regarded as entirely exceptional; (b) that there is no possibility of reconciliation between the spouses since the first marriage has irreparably broken down; (c) acknowledgement of any responsibility for the failure of the first union, and where necessary reparation is made; (d) the second marriage has been in existence

for some time, morally speaking it is impossible to separate because of new obligations arising from the second union, and the partners to it are genuinely doing their best to live an authentic christian life; (e) there is no scandal in the theological meaning of the term, namely, the community is not given cause to think that the Church is growing lukewarm in defence of indissolubility.¹³ Of course there is a very close connection between (d) and (e), so that a community seeing a couple trying to live a christian life will find grounds for edification rather than scandal. It is useful to recall the words of Pope Paul VI:

Let us be in no doubt about it: this action of God is at work even in the hearts of those men and women who, through inadequate preparation, human weakness or the harmful pressures of the permissive society, have experienced the breakdown of a love which they certainly wanted to be more permanent.¹⁴

When the Council of Trent made its famous declaration that the practice of the Western Church in regarding marriage as indissoluble was a very sound pastoral one, little did it know how vigorously such a claim would be debated, denied and distinguished. That is why it has been so stimulating over the years to follow the work of Dr Jack Dominian as he has so painstakingly demonstrated the truth of the tridentine assertion. In his latest work: *Marriage, Faith and Love*,¹⁵ while fully acknowledging the fragility of modern marriage, he makes a most compelling case for indissolubility based on human needs. We all require sustaining and healing if we are to grow, and permanence in human love is crucial for this. Thus the permanence of married love provides for the couple three things: continuity, reliability and predictability. And for modern marriage these three elements are not to be regarded as negative and repressive, but vital for the couple and their children. This book is bound to become a 'textbook' as we realize more and more our responsibility to ensure that, while preaching the unbreakable covenant between God and man upon which is modelled marriage, we help our communities prepare for this relationship.

Theodore Davey C.P.

NOTES

- ¹ For a very full discussion of the question, cf Cunningham, R. G.: 'Recent rotal decisions and today's marriage theology: nothing has changed — or has it?', in *Proceedings of the 38th Annual Convention of the Canon Law Society of America* (1976), pp 24-41.
- ² Palmer, P.: 'Christian marriage: contract or covenant?', in *Theological Studies*, 33 (1972), pp 617-66; and, by the same author, 'Needed: a theology of marriage', in *Communio*, I (1974), pp 243-60.
- ³ *The Easter People* (London, 1980), p 36.
- ⁴ Brown, R.: *Marriage annulment* (London, 1977), pp 50-51.
- ⁵ Felhauer, D. E.: 'Matrimonial consent', in *Proceedings of the 42nd Annual Convention of the Canon Law Society of America* (1980), p 91.
- ⁶ Bernard, J.: 'Who is to judge?', in *Judgement in the Church* (New York, 1977), p 37-46.
- ⁷ Davey, T.: 'Alternatives to nullity proceedings', in *The Month* (1980), pp 365-69.
- ⁸ Kasper, W.: *Theology of christian marriage* (London, 1980), pp 62-63.
- ⁹ 'Indissolubility and the right to the Eucharist: separate issues or one?', in *Proceedings of the 37th Annual Convention of the Canon Law Society of America* (1975), pp 26-38.
- ¹⁰ *The Tablet* (31 January 1981), p 117.
- ¹¹ May, W.: 'Marriage, divorce and remarriage', in *The Jurist*, vol xxxvi (1977), pp 166-86.
- ¹² Kasper, W.: *op. cit.*, pp 56-57.
- ¹³ Lehmann, K.: 'Indissolubility of marriage and pastoral care of the divorced who remarry', in *Communio*, I (1974), pp 219-43.
- ¹⁴ *Documentation Catholique* (4 December 1977), p 1012.
- ¹⁵ Dominian, J.: *Marriage, faith and love* (London, 1981), pp 84-89.