

Theological Trends

SECOND MARRIAGE

Complications in the Catholic Church

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Introduction

THIS ARTICLE ACCOMPANIES ANOTHER in this issue which focuses on the spiritual potential of those whose *significant other* is not accepted by the Church because the individuals concerned are not considered to be free to marry. The circumstances in which these situations arise are numerous and often complicated.

The data for both articles is drawn from my research work in this field during recent years. This revealed that while Catholics who have suffered the trauma of marital breakdown retain a deep conviction about the permanence and sanctity of marriage, often what they cannot understand, and what adds to their spiritual distress, are the ways in which the Church addresses their problems. In practice they often find themselves trapped, caught in a predicament from which they can see no way out.¹ The challenge for the magisterium and for the community as a whole is to find ways of releasing those caught in the trap. The discipline as it stands can lead to grave injustices and I believe this has much to do with the theology of the bond on which it is based. This article explores the complications surrounding the whole question.

*The 'sensus fidelium'*²

One interesting phenomenon of the recent history of this question is that a ministry of support and spiritual encouragement has developed among the divorced and remarried which is independent of the official organs of church government. Self-help groups, like the *Association of Separated and Divorced Catholics*, have emerged to fill a void left by a Church which is struggling to find a language in which to address them. It is not that the members of such groups want to separate themselves from the wider Church; quite the contrary: much of their energy has been spent trying to dialogue with their bishops, priests and fellow Catholics in the hope that they might be understood and accepted.

Undoubtedly one of the fruits of their efforts has been to highlight the anomalies, injustices and inconsistencies of canonical practice and to concentrate the minds of those entrusted with pastoral care in the church community. I have found the consistent response of bishops, priests and lay people to be one of misgiving about the way the system works. Indeed I would go so far as to suggest that this misgiving represents an expression of the *sensus fidelium*.

My research indicates that the more people learn about the theory which underpins the practice of Catholic jurisprudence in this area, the more confused and even scandalized they are likely to become. This is not to condemn the diocesan tribunals, many of which do a valiant job in seeking to bring pastoral relief to those who turn to them for help, but it is to acknowledge that much of the theology which underpins their work is at least disputable. And I was comforted to find that a good many who work for the tribunals are in agreement with this opinion.

The bond of marriage

At the heart of the Catholic theology of marriage is the *bond*, this mysterious binding factor, which sometimes admits of dissolution, but in certain circumstances is declared to be irrevocable and indissoluble. The *Catechism of the Catholic Church* in article 1640 describes it:

Thus *the marriage bond* has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable, and gives rise to a covenant guaranteed by God's fidelity. The Church does not have the power to contravene this disposition of divine wisdom.³

The authority for this statement is given as Canon 1141.⁴ I would suggest that article 1640 does not sit easily beside article 1614, which offers Matthew's Gospel (19:6, 8) for its authority, and states:

In his preaching Jesus unequivocally taught the original meaning of the union of man and woman as the Creator willed it from the beginning: permission given by Moses to divorce one's wife was a concession to the hardness of hearts. The matrimonial union of man and woman is indissoluble: God himself has determined it: 'what therefore God has joined together, let no man put asunder'.⁵

It would take more than a little mental gymnastics to argue that these articles complement each other. In fact they do not. The tension arises between what the Church wants to teach about marriage as a social and religious institution (1614), and what in practice it has been willing to sanction (1640).

To begin with it is difficult to validate the statement that Jesus taught 'unequivocally' on this matter. The New Testament refers to the divorce question five times, and four of these include some form of exception or qualification.⁶ Luke makes a simple unequivocal statement (16:18), but Matthew refers to the subject twice and each time includes his famous *porneia* ('illicit marriage' [NJB]) clause for the benefit of his Jewish readers (5:31-32; 19:1-9); in his text Mark has to deal with the possibility of women initiating

the divorce process, which clearly shows that he is writing for a Gentile readership and cannot be quoting Jesus verbatim (10:1–12); finally Paul, who was the first to record the teaching of Jesus, goes on to qualify it with his own decision *in favour of the faith* should a non-believer decide to leave a converting partner (1 Cor 7:10–16).⁷

This so-called *Pauline Privilege* has had an immense influence on the theology of the Western Church because eventually it formed the basis on which a clear distinction was made between *natural* and *sacramental* bonds. As with most theological positions this one took time to evolve. No such clear distinction is apparent in Augustine's treatment of marriage. Indeed, by following Jesus in citing Genesis as the definitive guide, he infers that there is something *sacramental* in every marriage bond.⁸ And while he likens the bond of marriage for the Christian to the sacramental character of baptism, this has more to do with the individual spouse's commitment to God than anything existing in the bond itself.⁹

The origins of the complex teaching with which we now have to wrestle can be traced to developments centuries later, when the Scholastics tried to define the bond according to Aristotelian categories. As a consequence the bond was no longer simply a metaphor for marriage, but was considered as a *reality* in its own right: hence the definition in article 1640 of the *Catechism*: 'this bond . . . is a *reality*, henceforth irrevocable'. Commentators like Thomas P. Doyle reinforce this notion. Writing on Canon 1085 of the 1983 *Code of Canon Law* he defines the bond as 'the ontological reality which exists between two persons who have exchanged marital consent'. He goes on to explain that while it comes into existence by means of the consent, it 'no longer depends for its continued existence on the will of the spouses alone'.¹⁰ Commenting on Canon 1134 he describes the bond as 'an integral and not a partial reality' and leaves us in no doubt about his interpretation of how this definition evolved historically:

When the Church acquired competence over marriage in the Middle Ages (the authority to declare when marriage began or ended), the understanding of the bond shifted from that of its being purely a moral obligation to that of its being a separate reality. It was something that *could* not be terminated or dissolved rather than a relationship that *should* not be terminated.¹¹

Ladislas Örsy argues that this is a serious misrepresentation of the true Scholastic position. In a series of footnotes in his book, *Marriage in Canon Law*, he takes Doyle to task, insisting that the bond cannot have 'an autonomous existence' because, according to Aquinas' categories of being, the bond cannot be defined as any kind of substance, *esse in se*, but only as an accident under the category of relation, *esse ad*.¹²

To those who have not studied Scholasticism, and this includes many priests and people now working for the diocesan tribunals, this may seem like

an unnecessarily pedantic discussion, but I maintain that it is at the heart of the question under review. It is from this part of the tradition that so many of the inconsistencies and injustices arise in the present discipline. While Örsy's opinion is attractive because it provides room for manoeuvre within the Scholastic tradition, I maintain that in practice it is Doyle's more restrictive interpretation which holds sway and is the way many practitioners understand the law. When this absolute position on the bond becomes mixed with other segments of Scholastic sacramental theology then a curious cocktail is created which can have quite disconcerting pastoral consequences.

I will illustrate this by focusing on Canon 1055.2. Canon 1055 deals with the dignity of Christian marriage. The second part of the canon, which is an exact restatement of Canon 1012.2 of the 1917 *Code*, posits that 'a valid marriage contract cannot exist between baptized persons without its being by that very fact a sacrament'. The Scholastic reasoning which informs this thinking is that by virtue of the character bestowed in baptism a person is ontologically changed and caught up in the new life of Christ. Thus when two baptized people marry, their bond is of necessity defined as part of this new order. The argument goes so far as to insist that this happens whether the people concerned like it or not, whether they want it or not. For example, should two baptized Anglicans marry in the Register Office, Catholic teaching concludes that they are sacramentally married, tied by a bond which the Church has no power to dissolve. And this is said to obtain despite the fact that the couple may not be aware even of having been baptized.

Ironically this could not happen to a person baptized in the Catholic Church because such a marriage would be rendered invalid according to the provisions of *canonical form* (cf Canon 1108). Thus a Catholic could enter into a series of civil marriages and subsequently be able to marry validly and sacramentally in the Catholic Church following an uncomplicated documentary process to establish that the previous unions were invalid, while his Anglican counterpart, wishing to marry a Catholic after a succession of such civil unions, would have to apply for a series of annulments. These are not hypothetical cases: every active pastor in the Catholic Church will know that they form part of the daily pastoral merry-go-round.

The subject of consummation adds yet another bewildering dimension to the whole question. Left out of the original draft of the *Catechism*, it had to be included in article 1640 because it is another vital ingredient when it comes to determining the indissolubility of the bond. Furthermore it provides an example of how the theology of marriage in the Catholic Church has often been forced to accommodate disciplinary practices which initially were responses to the pastoral problems of the day. The story behind this particular prescription is so remote in terms of today's religious and social perspectives that it is difficult to see it as anything other than a bizarre legacy. However, non-consummation is legislated for in Canon 1142, and each year the occasional case will be processed by a tribunal.

There is a common misconception that non-consummation invariably provides grounds for an annulment, but in fact, like decisions *in favour of the*

faith, it simply provides the conditions in which a dissolution of the bond becomes possible. The interesting thing about this pastoral development is that the bond in question is not just a natural but a sacramental one. The origins of this procedure, which is still reserved to the pope himself, can be traced to certain papal decisions in the Middle Ages, especially in relation to disputes over the possibility of a partner abandoning a marriage contract for the sake of a religious vocation. One celebrated example of such a decision was that of Pope Alexander III in the twelfth century, who argued that provided the couple had not physically consummated the marriage and therefore could not be said to have become 'one flesh', the wife taking the solemn vows of religion would *de facto* dissolve the previously established marriage bond.¹³ Central to the argument was the conviction that religious life was a higher state than marriage.¹⁴

Unravelling the history

The pastoral confusion which results from this complex history does lead many to become disillusioned. I can sympathize with their frustration, which I myself feel deeply, but I believe there is a way of interpreting the story which avoids seeing the whole tangle as impossible to unravel and provides hope for the future. I return to the two articles in the *Catechism*, 1614 and 1640. Article 1614 posits the fundamental belief of the Church in the sanctity and permanence of marriage. This applies to all marriages in every age and culture. My research clearly revealed that this teaching is not in dispute within the Catholic community, including those who have suffered the trauma of marital breakdown. However what so many find hard to understand is why, when people fail, the compassion and forgiveness of God, which infuses the whole of the Gospel, cannot be dispensed to them. Why is it that uniquely in this area of life the Church requires that from the very outset the ideal must be achieved?

I am convinced that there is an extraordinary paradox at the heart of this discussion: namely that the very history which has given rise to article 1640 and its definition of the bond of marriage demonstrates the Church's perennial desire to bring pastoral relief to those in difficulty; in other words, to bring Christ's compassion and forgiveness to the pastoral problems of each successive age. St Paul was looking for a way out for his converts in Corinth and he insisted that it was more important that they live 'in peace'. The popes who sought a way forward over the consummation question in the Middle Ages were genuinely trying to find a pastoral solution to a pastoral problem. The Council of Trent finally challenged the scandal of clandestine marriages by introducing the legislation of canonical form which invalidated the marriages of those who did not comply.

The principle that 'pastoral solutions are sought in the face of pastoral problems' is further illustrated by the action the Church is taking in our own times. Today the Church is trying to find a solution to the pastoral tragedy of so many broken marriages by extending the grounds for nullity to include a

range of psychological factors. And therein lies the rub. The Church is cornered by its own history and its own legislation. It can only operate in the restricted field of the annulment process because this is the only avenue open to it. Having defined the bond of marriage in certain circumstances to be absolutely indissoluble (namely when it is sacramental and has been consummated), the only way out in such circumstances is to establish that the bond never existed in the first place. The dramatic increase in the number of annulments granted in the past thirty years illustrates that the response has had a major effect: indeed the number of annulments granted worldwide between 1968 and 1983 increased by over fifteen thousand per cent and continues to rise.¹⁵ But the question remains: is this really the only way in which the Catholic Church can defend its belief in the sanctity and permanence of marriage, and remain faithful to its tradition? I am convinced that it is not, and that we need the courage to challenge the absolutist position on the sacramental consummated bond.

The way out?

The doctrinal position of the Church is ambiguous and calls for clarification. The problem which confronted Aquinas and the Scholastics still confronts us today. How are we to develop a coherent theology of marriage as intrinsically indissoluble (cf *Catechism* 1614), when in fact the Church comprises its own teaching by finding ways of dissolving marriages which fall outside the defined category of the consummated sacramental ones (cf *Catechism* 1640)? The best the *Code of Canon Law* can offer is that in Christian marriage the sacrament strengthens the couple who form this bond 'which of its own nature is permanent and exclusive'. This prompts Doyle to comment that the consummated sacramental bond is 'absolutely indissoluble'.¹⁶ But surely something is either indissoluble or not: how can indissolubility be strengthened?

The way out of this seemingly impossible conundrum is to define our terms carefully. If we use language to say that it is clear from the Scriptures that marriage is indissoluble in the same way that we use it to say that men and women are made in the image and likeness of God, then we can work towards a solution. On the other hand if we conclude with Germain Grisez, John Finnis and William E. May that sacramental consummated marriage 'simply cannot fail, nor can the partners themselves or anyone else on earth destroy it, for marriage is without exception indissoluble in earthly society, just as sand is without exception indissoluble in water',¹⁷ then there is no solution. The latter is the consequence of that absolutist mentality which I have described above, albeit that the physical example used is manifestly absurd. Whatever we may posit about the metaphysical reality of the bond, whether we like it or not, in earthly society marriages do fail. Physically the partners do separate, sometimes forming new unions and having more children. And we know this applies to those who are Christians and who, we believe, have formed valid, consummated sacramental bonds, just as readily as it does to those outside the

Christian community who exercise their right to form the natural bond of marriage.

I use the comparison of marriage as indissoluble with the fact that we are created in the image of God because the Scriptures of the Judaeo-Christian tradition are at pains to determine the right order of God's creation and our place within it. God is revealed to us as love and it is precisely in our potential to love that we can be said to be created in God's image. The most perfect human expression of love is in the unity of a man and a woman in marriage, and the author of Ephesians indicates that this love should be an image of Christ's love for his Church (5:21–32). However, by acknowledging our dignity as children of God, we are not claiming that we always reflect God's image faithfully, any more than in professing our belief in the permanence and sanctity of marriage we are claiming that we always successfully live a life of love.

Jesus came into a broken world to reveal God's love to us and offer us redemption. In the minds and hearts of the faithful there is an instinctive belief that his redemption can reach into every situation. It is a tragedy that in the midst of one of the most painful expressions of our brokenness, a failed marriage, the Catholic Church has so constrained itself with its discipline that often it has been able only to add to the trauma rather than bring hope, healing and redemption. In my research I highlighted this fact, while noting the wonderful ministry of the support groups. The Bishops of England and Wales responded to this finding with a moving and encouraging statement after the Low Week Meeting in 1994.

We acknowledge that many in the midst of the pain and trauma of marital breakdown have felt alienated and ostracized. As pastors we feel a special sense of responsibility towards them and therefore we wish to reach out to the separated and divorced who have experienced hurt within the Church.¹⁸

This was in keeping with the mood set by the Pope himself in *Familiaris consortio* (84) when he called upon 'pastors and the whole community of the faithful to help the divorced, and with solicitous care to make sure that they do not consider themselves as separated from the Church'.

Although the Pope reiterated the discipline of not admitting to the eucharist those who have formed canonically irregular marriages, his language was a far cry from the absolute condemnation which concludes that a remarried spouse is in 'a situation of public and permanent adultery'. It is all the more surprising then that the *Catechism* has returned to such language in article 2384, especially as it cites St Basil for its authority. Ironically it was Basil's canonical regulations which helped lay the foundations for an entirely different tradition in the Orthodox Churches,¹⁹ and many commentators are suggesting that the Catholic Church would do well to look to the East for a way forward. It is surely significant that even at the Council of Trent the Catholic

Church was very careful not to condemn the Orthodox tradition in this matter,²⁰ and if the churches are serious about a millennial movement towards reunion then this is an area which will call for much dialogue.

It would be naïve to suggest that the Orthodox Churches are immune from the struggle to find just ways of implementing their discipline in the face of the huge number of divorces in society today. However, they are not bound by the constraints of the Catholic Church because they are not burdened by the Scholastic categories which we have examined above. They too believe in sacramental Christian marriage and its indissolubility, but confronted with human failure in this area, as in any other, their salvific theology of *oikonomia* gives them ample room for manoeuvre.²¹ Their theology of sacrament is much more focused on the celebration of Christ's life within the community than on the validity of its matter and form. Thus it is inconceivable for them that Christian sacramental marriage could be celebrated unknowingly in a Register Office. As Catholic theology moves from describing sacraments as channels of grace to meditating on them as signs of Christ as the *Primordial Sacrament* of God and the Church as the *Fundamental Sacrament* of Christ, the opportunity of a more fruitful dialogue with the East draws closer.

The Bishops of England and Wales concluded their 1994 statement by saying that they were 'aware of many of the difficulties of the present system for attending to marital breakdown', promising that they would 'continue to seek ways of addressing them'.²² I am convinced that satisfactory progress will be made only when we attend to the inadequacy of our systematic theology.

During the last twenty-five years much pastoral care has taken place in the internal forum, but even this is now held in suspicion by the Roman magisterium.²³ It is to be hoped that until we can attend to all these matters justly in the external forum, priests and people will be sufficiently acquainted with the moral theological tradition of the Catholic Church to know that when serious doubts exist, freedom always holds sway. 'It is to peace that God has called you' (1 Cor 7:15).

NOTES

¹ Bernard Häring actually entitled his book on the subject *No way out?* (Slough: St Paul Publications, 1989).

² Literally, 'the sense of the faithful'. It is one of the norms of theological truth, namely, the actual belief of Christians down through the centuries.

³ *Catechism of the Catholic Church* (London: Geoffrey Chapman, 1994), p 367.

⁴ *The Code of Canon Law* (London: Collins, 1983), p 201. This simply states that 'a marriage which is ratified and consummated cannot be dissolved by any power or by any cause other than death'. It is the first of fifteen canons dealing with the separation of the spouses.

⁵ *Ibid.*, pp 361–362.

⁶ For a full treatment of this question see Michael G. Lawler, *Marriage and sacrament: a theology of Christian marriage* (Collegeville: The Liturgical Press, 1993), pp 84–93.

⁷ The phrase 'in favour of the faith' is a standard way of summing up this Pauline exception and became enshrined in law: see Canon 1143.

⁸ *Anti-Pelagian works* in 'A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church', First Series, ed Philip Schaff, 14 vols (Grand Rapids: Eerdmans, 1956), vol 5, trans Peter Holmes and Robert Ernest Wallis, rev Benjamin Warfield, p 273.

⁹ Cf Theodore Mackin, *Divorce and remarriage* (New York: Paulist Press, 1984), p 215.

¹⁰ *The Code of Canon Law, a text and commentary*, ed James A. Coriden and others (London: Geoffrey Chapman, 1985), p 766.

¹¹ *Ibid.*, p 808.

¹² *Marriage in Canon Law: texts and comments; reflections and questions* (Leominster: Fowler Wright, 1988), pp 203–205.

¹³ Cf Mackin, *Divorce and remarriage*, pp 303–305.

¹⁴ This is not an argument readily accepted today although Pope John Paul II does speak of celibacy as a superior charism in *Familiaris consortio* no 16 (London: CTS, 1981), p 30.

¹⁵ The statistics are very revealing. In 1968 only 338 annulments were granted worldwide and of these only 12 were in Great Britain. By 1983 the number had increased to 52,000, of which over 1,000 were granted in Great Britain. While there has been a gradual increase since then, the figures are not so dramatic, particularly in Britain where the number of second instances completed per annum has levelled out at between 1,000 and 1,200. I surveyed all the tribunals in England and Wales and their returns indicated that the vast majority of annulments are now granted on the psychological grounds covered by Canon 1095.2/3. Eleven of the dioceses stated that 90 per cent or more are granted under these titles.

¹⁶ *The Code of Canon Law, a text and commentary*, p 809.

¹⁷ *New Blackfriars* (June 1994), p 327.

¹⁸ Cf *Catholic Times* (24 April 1994), p 3.

¹⁹ Cf *Divorce and remarriage*, p 147.

²⁰ Cf Denzinger-Schönmetzer (Freiburg: Herder, 1965), footnote to 1807, p 416.

²¹ *Oikonomia* is commonly but inadequately translated as 'economy'. The Bishop is the *oikonomos*: the one who manages God's household. Therefore it is good management, making God's saving presence available to God's people.

²² Cf *Catholic Times* (22 May 1994), p 8 (letter from John Murphy).

²³ The most recent debate on the subject followed the initiative of the German bishops of the Upper Rhine Province in 1993. This is fully documented by Kevin T. Kelly in his new and expanded edition of *Divorce and second marriage: facing the challenge* (London: Geoffrey Chapman, 1996), pp 90–141.