

CATHOLICS AND DIVORCE

By M. V. McINERNEY*

So much emotional stress is involved in any discussion of divorce that the words we use are all liable to distortion. The statement that Catholics 'inflexibly oppose' divorce does not in practice imply that they are less sensitive to the sufferings of unhappy wedded couples than any-one. And that the Church 'forbids' divorce does not mean that this ecclesiastical institution made up some novel and harsh rule out of its collective head. Nor is it the Pope who 'insists' that validly married people must stay tied together; it is those people themselves who solemnly and sincerely declare on their marriage day that *they* insist on that very bond. It is therefore not a question for Catholics of easy or difficult divorce. 'Divorce' in the sense that it is generally used is simply impossible.

That is, a marriage validly contracted and consummated is, of its very nature, a permanent union. If it is not a permanent union, it is not marriage. (It's like *ubi jus ibi remedium* and *ubi remedium ibi jus*.) That is our primary assumption. There is only *one* kind of Christian marriage. People may make other kinds of arrangements to live together on this or that condition, for this or that time period. Such variations are common enough in pagan countries, but these do not constitute what Christians call marriage.

A logical positivist or materialist could play numerous variations on the theme of the many types of arrangement men make with women. Their relationship may range from a right to occasional sexual intercourse, or the more numerous functions expected from a mistress, to some form of long-standing companionship without legal consequences and finally to a fuller, closer and more lasting alliance. The woman may be a *de facto* wife, a 'common law wife', or a partner until death parts her from her man. The husband may be able to send her away for reasons slight or solid, following some legal or religious 'hearing'—or dispensing with any formality. It may be a marriage of convenience (as in many royal unions) or an association based mainly on intellectual or artistic interests.

Which of these arrangements amount (in the eyes of the positivist) to marriage? Is it a matter of how closely and finally the parties bind themselves? Is it an obligation to look after the children of the union? Is it the effect of a religious ceremony? Is 'love' essential?

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Broadly (still from the positivist viewpoint) the answer would seem to depend on what the *local community* regards as 'being married'. If the woman's place is regarded as 'respectable' as distinct from the lower status of a prostitute or concubine, then the women feel that 'marriage' is important. But *some* standard is set, either rigidly or loosely—and almost every woman craves to reach that standard. She has some hold on the man to protect herself and her children. She can hold her head up as she goes round the streets.

But there are many standards—even today. Today perhaps the essential, minimal *formal* requirement for many people is that the promises have been made before a functionary recognized by the State (e.g. a registrar) and that the State will enforce some of these promises, e.g. to maintenance, to the inheritance of property, to personal loyalty by punishing bigamy. This ceremony provides the sense of 'respectability'. It is to be noted that the form of declaration of marriage before a registrar (Marriage Act 1928, s. 22, and Second Schedule) omits the traditional words 'until death do us part'. Each party merely declares that he (or she) takes the other to be his (or her) lawful wife (or husband, as the case may be).

There has been, however, in the Western society from which we sprang another and more rigorous standard. To Christians, marriage has traditionally involved *inter alia*:

- (a) the right to cohabitation
- (b) what the law calls conjugal rights
- (c) the willingness to have and to look after children
- (d) the right of the wife to such food, clothing and accommodation as the husband can reasonably provide—'The sharing of worldly goods'
- (e) implied mutual promises not to cohabit with or seek to 'marry' any other person during the lifetime of the other partner
- (f) a religious ceremony, in which a clergyman acts as a 'witness'
- (g) the absence of impediments (impotence, intention not to consummate, too close blood relationship, etc.)

The essence of this discussion is then that many people in Australia (Catholics and many other Christians) have a different concept of marriage from other people (some Christians and most non-Christians). Simply put, the former view is that persons 'truly married' can never be divorced for any reason whatsoever. To allow 'divorce' in that sense would be to defy the natural law as laid down by God himself. In a Christian marriage, it is God who joins the parties together in such a way that 'no man may put them asunder'.

So let us be clear at the start as to whether we are talking about marriage or something else.

The traditional Christian doctrine is that marriage is a *relationship*. It is a relationship which a man and a woman voluntarily take on themselves. The desire for that relationship comes from the depths of their human natures; they *want* it, for a variety of motives. They willingly promise lifelong loyalty to one another. . . . And God takes them at their word. . . . He holds them to their promise; it is He who obliges them to remain faithful to that promise. So that, at least, neither may make the same promise to another person while that original promisee is still alive. That is why 'divorce' is impossible – the very nature of true marriage 'forbids' it.¹ The parties have put it out of their power to revoke their relationship. They were not *compelled* to enter into any agreement of marriage: but if they do, they enter into an agreement which is and must be irrevocable.

Let us see why this is so: let us try to understand why God created and demands this irrevocable agreement. The prime reason is that marriage is a union between men and women destined to live for eternity—for endless ages after their life on earth has finished. Fortunately, they can help one another to behave on earth in such fashion as will enable them to achieve a destiny of endless happiness. Marriage is one such means; the State is another; so is a monastery or a trade union. A man and a woman who love one another assist one another to reach Heaven; by a system of mutual aid they help one another to develop those qualities of self-sacrifice, courage, tenderness, sympathy, which develop their personalities to a super-human level. So has God used human love for Divine ends.

Secondly, since God wants people to be as happy as possible in this world too, He designed marriage as the source of many of the noblest pleasures men and women can enjoy. So it is a union of minds, hearts and bodies, whose binding force is love, not constraint. Its purpose again is the development of the personalities of countless millions of human beings; a means of enabling us to rise far above our normal selfish, narrow, greedy selves. Again, love means essentially the desire to *give* the loved one pleasure, to seek his or her happiness, to protect the other from pain or harm, to work and suffer.

The primary purpose of marital love is that husband and wife 'help each other day by day in forming and perfecting themselves in the interior life, so that through their partnership in life they

¹ This was the difficulty which Hill J. felt in *Nachimson v. Nachimson* [1930] p. 85 (reversed in the Court of Appeal, [1930] p. 217).

may advance ever more and more in virtue, and above all, that they may grow in true love towards God and their neighbour.' The primacy of this purpose follows from the primacy of human person in creation. In relation to it, all other finite purposes are secondary and instrumental. (Pope Pius XII)

So far, marriage is a matter then for the individuals concerned. They express a preference for this kind of arrangement, as they might prefer Beethoven's C Minor Quartet to Johnny Ray. It is a matter between themselves and God. The law, the State do not come into the scheme at all.

But these personal relationships also lead to others—more *social* consequences, with which law and State are concerned. First, most marriages result in children; families come into existence. It is a further part of God's design that children should have the care and protection which only their parents can give adequately. Therefore, it is particularly vital that parents should stay together to provide that care and protection. But it often happens that parents neglect or ill-treat their children—or they decide to separate legally; they 'remarry'. There is often some argument about custody of the children. In all this the State is directly concerned—to see that young citizens are properly fed, educated, inoculated. . . . If parents *do* separate, the State can lay down conditions of *divortium* and rules to settle disputes if one parent establishes a new ménage.

Second, the relationship of marriage often is accompanied by some kind of legal contract. Now, obviously, marriage is not just a contract like that for purchasing a motor car. But it does involve usually matters of property, housekeeping moneys, perhaps (for the well-to-do) elaborate marriage settlements, rights of inheritance and so on. Here again, the State should—if the parties separate, or one deserts the other—make laws to provide justice for the injured party or the deserted children. That again gives the State some jurisdiction over the *making* of marriages—such as formal registration—or their *breaking*, in so far as legal promises should be kept and enforced. Catholics accept such laws (unless these laws flagrantly contradict natural law.)

Yet these social considerations are to the Christian, minor ones compared with the overwhelming facts that children must above all be assisted to achieve their eternal destiny and their worldly happiness and, that a permanent relationship between their parents gives them a vastly increased chance of being happy in either world. Christian marriage is no mere concession to the desires of the flesh. Nor is it a set of fetters imposed on human beings. It is a superb

device whereby human love leads to the creation of new souls as well as of new citizens. It is a response to urges implanted by God, it is essentially a religious act. It is, as St. Paul says, a great sacrament wherein the parties confer the 'grace of the sacrament' on one another. It is not the priest who administers the sacrament: he merely witnesses the parties conferring it on each other. It is a sacrament because God sees that the parties need sacramental strength if they are to overcome the obstacles to happiness which life will strew in their path. Few indeed marry for religious motives solely or seriously ponder over the development of their personalities. As Frank Sheed remarks: 'If a man draws a girl's attention to the falling birthrate and asks her to marry him in order to improve it, she would be well advised to refuse him; his wooing is a good deal too sociological.'² If God has joined them together, it is usually for purposes they discern but dimly; it is enough in some inexplicable way, that they wish to pass the rest of their lives together for a variety of motives (not consciously examined). Yet the *objective* purpose remains; it is that with which we here have to deal.

There again is our test; do the couple on their wedding-day mean it to be 'forever'? If they do, can they change their minds later? What if the marriage doesn't work out well? Divorce lawyers, social workers and 'realists' who see the tragedies of unhappy marriage all urge that marriage, like partnership, should be dissoluble. I have seen many cases of partnerships entered into for a fixed term, many more entered into for an undefined term — but never, oh never, a commercial partnership expressed to be 'till death do us part!' But unhappy marriages do make tragedies, do cause suffering, and emotion cries: Let this marriage be dissolved.

One remembers that hard cases make bad law. Emotion is a bad guide to the legislator. Yet, one asks, 'Cannot we give relief to the minority without harming the majority of contented families?' This can be answered by referring to two tests:

1. What has God decided?
2. What is best for human welfare in general?

1. On the first, Catholics should have no hesitation. They maintain that God has ordained that Christian marriage is indissoluble. 'What God hath joined together let no man put asunder.' The Catholic Church takes God at His Word; it understands Him as saying that no earthly tribunal has the power to sever the bond of marriage. This is not the place to discuss the reasons for a view which the Church has held firmly for nearly 2,000 years. In it are

² *Society and Sanity*, p. 90.

involved questions of Biblical interpretation, historical references, statements of Christ and decisions of early Oecumenical Councils. These have been the battleground of the theologians over the centuries. Suffice it to say that the Catholic view is that Christ forbade *absolutely* the 're-marriage' of one partner while the former was still alive, whatever harshness may have followed to unfortunate individuals. Let me add this: the Catholic does not think of it as a mere arbitrary prohibition imposed by a harsh God merely to vindicate His power over the world; on the contrary the Catholic can see the reasons of the prohibition and accept the prohibition as a wise and necessary one.

But these are not reasons for detailed presentation in a legal journal. I am concerned only to state the fact; that it is on the authority of God that the Catholic declares divorce—in the sense of a dissolution of a valid marriage—to be simply impossible. Whatever one's private feelings about hard cases, the law of God and the law of nature have to be observed. Every lawyer knows that every law inflicts hardship on some people. Modern statutory regulations dispense with the necessity of *mens rea*; tort demands the standard of 'the reasonable man', the rules about mistake in contract may impose hardship on well-meaning but ignorant purchasers. The essence of law, as Salmond reminds us, is 'generality'. Kings, Presidents, employers, officials, union secretaries, generals, all these may abuse their authority, but the authority is not thereby annulled, despite Wycliff's theories about dominion being based on grace. So it is with Divine authority.

2. As to the general welfare, debate among the experts has been keen and lengthy. Divorce in our society is a relatively modern phenomenon. Marriages could be—and still are—annulled for good reasons.³ Even Henry VIII's so-called divorce was really a suit for nullity. From the sixteenth century on 'divorce' was still very rare,

³E.g. a bigamous marriage. So also in cases of duress, mistake of identity, nonage, consanguinity. I am aware that in the later Middle Ages abuses crept in and specious (and spurious) grounds of nullity were sometimes accepted by corrupt ecclesiastical tribunals who thereby in effect gave the lie to the traditional teaching of the Church. These abuses were swept away by the Council of Trent which restated the traditional teaching of the Church as to the indissolubility of Christian marriage.

To assert that the Catholic Church itself grants divorces under the guise of annulments betrays an inability to distinguish, which would be lamentable in any case but which in the case of a lawyer is unforgivable!

Persons interested in the question whether the Catholic Church decrees nullity readily might with profit study the record of the Roman Rota (the tribunal which grants decrees of nullity). Nullity is rarely decreed: even though the cost to the petitioning parties is astoundingly small. (In one case of which I have knowledge it was less than £20.)

and in England required a special Statute until a century ago. The recent English Royal Commission estimated that the number of British marriages ending in divorce had jumped from 0.2 per cent in 1911 to 6.7 per cent in 1954. Though agreeing on allowing new grounds for divorce, the Commission said that there is a real danger that the conception of marriage as a lifetime union of one man and one woman may be abandoned. Thus it is only now that the full consequences of widespread divorce are being experienced. What began as a trickle is developing into a flood—we can now see the effects on the parties and on their children.

The question is whether you can permit *any* breach in the permanence of marriage without finally destroying the family as an institution. The easier divorce becomes the harder it is made for all husbands and wives to remain faithful to their promises. If you know that you have committed yourself to a permanent union, then you more readily accept the disabilities and sacrifices that marriage inevitably involves. If you know you can 'get out of it', then you more readily give in to exasperation, boredom; you make less effort to be sympathetic and understanding. That is surely human nature at work.⁴ Often, after a particular crisis has passed, people find they have learned to live contentedly enough together, acquiring a new respect and tolerance, learning to give as well as to demand.

My own experience (and I am sure that it is the experience of many other lawyers) in alimony and custody cases is that many a wife who has obtained a divorce has ended up by being the loser. Very often the husband 'remarries'—usually to a much younger woman than the wife. By the time he has provided for the maintenance of his second wife there is not enough left for the support of the first wife who is then forced, in her middle age, to fend for herself. Such wives must often have cause to regret having given the guilty husband his 'freedom'.

As to the children, the case against divorce grows stronger with each year, I believe. The case is not one which is capable of overwhelming proof either way, as in a chemistry problem. But the available evidence about the tragic effect of 'broken homes' on children is impressive, as any lawyer with experience of custody or access cases knows. Dr John Bowlby's study *Child Care and the*

⁴ In this context, a saintly Belgian priest whom I knew once used the apt analogy: 'If you own your house and the roof leaks you mend it. If you do not own the house, but merely rent it, you don't bother about mending the leak—you move to another house.' It is to be understood that those words were spoken at a time before the housing shortage developed!

Growth of Love shows clearly that a child is enormously dependent on parental affection. In his classic study for the World Health Organization he pointed out that 'the unfolding of the child's self and conscience can only go on satisfactorily when his first human relationships are continuous and happy'.⁵ He adds that certain vital growth processes are impaired if the child is deprived of normal parental care, especially that of the mother.⁶ 'Observations of severely deprived children show that their personalities and their consciences are not developed—their behaviour is impulsive and uncontrolled and they are unable to pursue long term goals because they are the victim of the momentary whim.'⁷

So a sound family life is needed. . . . 'It is, for these reasons that the mother love which a young child needs is so easily provided within the family and is so very, very difficult to provide outside it. The services which mothers and fathers habitually render their children are so taken for granted that their greatness is forgotten. . . . This holds true even of bad parents.'⁸ Dr Bowlby names divorce as one important factor leading to the natural home being broken up and therefore not functioning. 'Separation and divorce are common factors, varying from 5 per cent to 25 per cent of all cases.'⁹ What is worse, the children of divorced parents are less likely than others to make happy marriages of their own.¹⁰ 'Deprived and unhappy children grow up to make bad parents.'

The experience of communist Russia illustrates the practical disasters that followed easy divorce, and led to a severe tightening up of the law to strengthen the family bond.

So the chief victim of every divorce is the child. It is true that a child is often better away from a home where the parents detest one another. A judicial separation providing for adequate maintenance for the mother could deal with such cases. Even so the question of custody of or access to the children would remain, with all its attendant bitterness. Divorce tends to increase the frequency of such cases. An American authority, Dr David Mace, estimates that 'unless current trends are reversed, approximately thirty-two million husbands and wives now living together in the United States will be divorced.'¹¹ What of their children? Does not their welfare demand that a secure stable home life be assured to them, even

⁵ *Child Care and the Growth of Love*, p. 57.

⁶ See the discussion of this monograph by Barry J. in *Harnett v. Harnett* [1954] V.L.R. 533.

⁷ *Op. cit.* pp. 69-70.

⁹ *Ibid.* p. 86.

⁸ *Ibid.* p. 76.

¹⁰ *Ibid.* p. 95.

¹¹ *Companion* (April, 1956).

though some parents may be denied the happiness of a second marriage?

The community well recognizes that in many matters one can have no exceptions to general rules. In all detective stories everyone recognizes that, though the victim may have been a monster of depravity or an intolerable pest by whose death the world is far better off, yet the murderer must not escape the law. For if any one law-breaker is excused, there is no drawing the line—and life ceases to be sacred. This sound community sense that one murder leads to others leads the average man to feel personally concerned that no killer should escape; it sets a high social standard for all of us to keep up to, just as in marriage. As Frank Sheed put it very simply: 'For any human power to break a marriage because it is unhappy means that marriage as such is breakable; and if marriage as such is breakable, then anybody's is, everybody's is . . .'¹²

But, in any event, the problem is essentially a personal and a spiritual one. And the modern confusion has been caused, not by the Christian Church, but by the failure of the secular State to make it clear what it means by marriage. Does it mean, as Lord Penzance¹³ said it meant, 'the voluntary union for life of one man and one woman to the exclusion of all others'. Is it as Lord Russell said in *Fender v. St. John Mildmay*,¹⁴ a holy estate enduring for the joint lives of the parties or is it a mere contract for a tenancy at the will of the parties? The State speaks with two voices. But people cannot have it both ways. It might conduce to more realism and less pretence if the law provided for two kinds of marriage certificates—a Blue certificate to those who ask for a permanent union, a Pink certificate for the others. The holder of the Blue would never be granted a divorce under any conditions whatever, the holders of the Pink would be divorced on the application of either party. . . . It would provide an interesting test.¹⁵

The Catholic knows where he is. He does not *have* to marry; if he does, he knows well what he is engaging himself to perform.

¹² *Society and Sanity*, p. 113.

¹³ *Hyde v. Hyde* (1865) L.R. 1 P. & D. 130, 133.

¹⁴ [1938] A.C. 1.

¹⁵ The Second Schedule to the Marriage Act 1928 would of course require consequential amendment, e.g. 'I, John Smith of . . . do hereby declare . . . that I take Mary Edwards of . . . to be my lawful Blue certificate (or Pink certificate, as the case may be) wife.'

The novelist's treatment of the proposal would require rewriting, e.g.: Edgar: 'It cannot have escaped your attention, Miss Agatha, that for some time past I have entertained towards you sentiments stronger than mere friendship. . . .'

Miss Agatha (ever to the point): 'Pink or Blue?'

God understands him to imply that he is undertaking to care for the happiness and welfare of his wife in a special way. It is with God that he has to deal; the State may declare that his *legal* obligations are ended under a 'divorce decree', and that he has no longer the *status* of a husband—but the State cannot dispense him from his spiritual obligations. That is outside the State's jurisdiction, for it concerns his soul and the soul of another immortal being.

Marriage is notoriously a risky undertaking, but life involves such risks. There is truth in Chesterton's dictum that 'marriage is a duel to the death which no man of honour should decline'. Let me add this. Although the Catholic holds that marriage is indissoluble, he recognizes that there may be (and, all too often, are) cases where the conduct of one of the spouses is such as to render it impossible for the other to live with the offending spouse. Every Catholic parish has its quota of these cases and there must indeed be few Catholic parish priests who have not at some stage been consulted by some married member of his flock who knows that divorce is 'out', but who declares that he (or she) cannot live one moment longer with the offending spouse. In such cases the Catholic approach will be to see whether the matter permits of a reconciliation of the parties, to see whether the wrong-doer can be induced to reform his or her ways. But if it is clear that reform and reconciliation are impossible, then separation may be necessary to protect the physical, mental or moral well-being of the injured spouse and the children. There may indeed be some cases so grave that a Catholic will be permitted by his bishop to petition in the civil courts for an order to protect custody or property rights. But such a divorce, in Catholic eyes, while it terminates the 'legal bond of marriage' leaves the sacramental bond of marriage still subsisting between the parties and if either party is a Catholic he (or she) is not free to remarry during the lifetime of the other spouse. (I am, of course, assuming a marriage valid under the canon law.)

Putting it shortly, the Catholic view is that where a reconciliation is impossible, or when there is no hope of reform, separation is permissible. In certain cases even legal divorce is permissible. But never in any circumstances is remarriage during the lifetime of the divorced spouse permissible. The divorced Catholic who remarries during that time thereby incurs the guilt of the sin of adultery.

One point must be added. Many—perhaps most—non-Catholics believe that a divorced person is at liberty to remarry during the lifetime of the divorced spouse. Persons who, holding that belief in good conscience, contract such a second marriage obviously do

not incur the guilt of the sin of adultery. From the material aspect, their act is wrong,¹⁶ but from the moral point of view they must be judged from the standpoint of their conscience, and if their conscience is clear on the matter they can incur no moral guilt.

Many divorcees have contracted eminently happy and enduring second marriages. Nearly every Catholic knows such people and knows that they are trying to lead good lives. No Catholic is at liberty to think (much less say) of such people that they are guilty of adultery.

I make these points in conclusion:

1. The State cannot really 'unmarry' any one who is already married. If people had only a provisional contract, then they can with State consent, avoid the contract on terms.

2. We believe that if the State allows divorce at all (in the sense of recognizing a 'provisional contract' with consequent liberty to 'remarry') it is unwise in that the social consequences will be disastrous in point of suffering.

3. All this involves no *condemnation of individuals* whose marriages 'failed' or who sought divorce for what they considered proper motives. The Catholic knows his own selfishness and his other defects too well to imagine that it is due to his personal virtues that his own marriage has survived. That is why he is so dependent on light and strength from supernatural sources. 'There, but for the Grace of God, go I.'

The Catholic desires that every practical effort be made to enable more marriages to be happy. Here in Melbourne, Christian bodies have set up Marriage Guidance Councils and expert advisers to unhappy couples. The Catholic Church itself conducts 'Cana conferences' and 'Pre-Cana conferences' for engaged couples and newly-weds to help them to build a happy and lasting marriage. There is also a Catholic Marriage Guidance to help persons whose marriages have broken or are in danger of breaking up. The Catholic bishops repeatedly urged that a proper family wage be established to relieve the heavy economic burdens on parents of large families so that mothers will not have to go out to work and so that families can own their homes and provide against illness, accident and old age. They want to get at the root *causes* of broken marriages, to cut down hasty and unwise matches. Often it is the State that has failed to deal with housing shortages and other conditions which directly tend to increase the break-up of marriages. All too often the State

¹⁶ An act is said to be wrong from the *material* aspect if it is in fact against God's law, although the doer is ignorant of that law.

has forgotten that we are a community of families rather than of individuals.

4. The Catholic knows that it is often difficult to achieve lasting married happiness. But he does not believe that the idea of indissoluble marriage is impracticable in our present world or that it can work only in an ideal society, in a 'communion of saints'. On the contrary, the Catholic believes that indissoluble marriage can and does work in the world of here-and-now. Of its nature this must be so, for God ordained that marriage, and God, while He often asks the difficult, never demands or compels the impossible.