THE CATHERINE AND LADY GRACE JAMES FOUNDATION

MARRIAGE and DIVORCE: some moral anomalies

Sir D.J. James Lecture 1992

by

The Right Reverend Cledan Mears
Bishop of Bangor

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Foreword

It would not be a gesture of false modesty on my part if I were to describe the study that follows as *superficial.* Its contents are in the main theoretical and as such skim over the surface of a reality that is by its very nature intensely personal with its attendant emotions of deep joy and sorrow. This is why the contributions of such writers as Dominian, Furlong and Oppenheimer mentioned in the select bibliography have such a unique quality arising as they do from either first hand experience or from counselling others in matters appertaining to marital breakdown.

The more one considers the subject under review the more one becomes aware of the need of a more careful examination of the nature of the one-flesh relationship that constitutes marriage. Here we find a oneness that is a unity was well as a union, a 'henosis' as well as a 'sunapheia', if one were to adapt the Christological terminology of the early Fathers. There is more to marriage than the cohabitation of a man and woman, or the juxtaposition of two persons who have agreed to face life together. There is a new state in which the two individual personalities interpenetrate without losing their identities and independence. This is the kind of expression of matrimonial meaningfulness towards which a person involved in divorce proceedings, or having been divorced, is reaching out when he or she describes that traumatic and harrowing experience as an amputation of a limb, a bereavement or as having being deprived of part of oneself. A study such as this cannot claim to reach such agonising depths as these.

November, 1991 †Cledan Bangor

Introduction

What has happened to the institution of marriage in Western contemporary society? What accounts for the fact that the number of divorces has risen so dramatically during the last hundred years, from 200 in 1881 to 150,000 in 1991? The ratio of marriages that end in divorce is now estimated as approximately one in three. Having said that, the resort to marriage, sometimes a second and a third time, seems as popular as ever.

A bewildering array of answers comes rushing in in response to such questions, each one of them containing a modicum of truth. Reasons, theological, moral, legal and sociological, are propounded for the failure of married couples to keep their initial vows of fidelity in a partnership that they firmly intended to be life-long.

Some would want to suggest a radical *theological* reason for such a failure, claiming that the vows made 'in the presence of God' become less meaningful in a century when there has been a gradual but marked decline in church and chapel attendance. It is not so much a decline in belief in God, as in the nature of that belief, moving from faith in the Biblical God who is both loving and righteous, to faith in a God whose love borders on condonement, to a broad and vague sense of God as an impersonal power.

Others would offer an equally radical assessment in terms of *morality,* and would want to suggest that the more ready resort to divorce proceedings emerges from a decline in the sense of moral responsibility and in the awareness of right and wrong, particularly with reference to the keeping of promises.

Yet again we find an inclination on the part of others to make the *law* of the land a scapegoat. They would claim that divorce has become too easily available especially with the change to irretrieveable break-down of marriage through the Divorce Act of 1969. Partners in marriage turn to what the law can offer instead of struggling to sort out differences between themselves. But those who are responsible for formulating the civil law will retort that the Law is reactive rather than productive in this respect, and that its function is to reflect rather than create the social customs of the time.

It is however *sociological* factors that are given most weight when marital behaviour is closely examined. The last century has witnessed many drastic changes in the life of the family: couples become married at a younger age, live longer, families have become much smaller, the husband's not being the sole bread winner is regarded as an undermining of his status and authority, the emancipation of women and the struggle for equality between the sexes, feminist demands for rights that sometime extend to bearing children without getting married. Most of these factors should add up to a greater opportunity for mutual, free and uncoerced giving between the man and wife of course, were it not for the basic human nature that they share in common, a nature that commerce and advertisement regard and exploit as acquisitive, and that Christian theology throughout the ages has deemed to be corrupt and fallen.

Not one of these four factors – theological, moral, legal, sociological – should be regarded in isolation in our analysis of the meaning and frequency of marriage and divorce in contemporary society, but not one of them should be neglected either. They all combine in the intricate web of personal relationships that characterises our rapidly changing social scene. Such intricacy should always make us hesitant in making value judgements. Sweeping moralistic pronouncements are not only un-Christian but they invariably fail to do justice to the details of individual cases.

From Matrimonial Offence to Marriage Breakdown

In the last one hundred and forty years there have been more changes in the civil law appertaining to marriage and divorce than there had been in the previous millenium. At the time of the Reformation the Church of England had inherited the Canon law which prohibited divorce and remarriage on the grounds that the initial marriage is indissoluble. Ecclesiastical courts within the Anglican tradition 'did not claim to have power to dissolve marriages, but only to grant decrees of nullity and separation'.[1] For the next three hundred years divorce was permissible for those who could afford to initiate a special private act of parliament, but only on the grounds of the Matthean exception of adultery. If we need any further evidence for the Church's preference of Matthew to Mark on this subject then it may be indicated by the fact that in only 4 out of 325 individual partners was it the wife who was granted divorce in that period. Matthew as distinct from Mark only speaks of the husband as seeking a divorce.

Adultery remained the only matrimonial offence for which a divorce could be granted long after the Matrimonial Causes Act of 1858 when matrimonial cases were transferred from the ecclesiastical to the secular courts. Whenever divorce was granted, it was possible for the innocent party to remarry whilst the previous partner was still living. But then followed a period of entrenchment when the Anglican Communion found itself with the most rigoristic marital policy in Christendom. A strictly indissolubilist policy was endorsed partly because so many clergy of the Anglo-Catholic movement adopted the uncompromisingly indissolubilist view of marriage prevalent in the Roman tradition, but found themselves left without recourse to the practice of nullity. This was also the period that witnessed the dawn of New Testament criticism, and as more became convinced of the priority in time of Mark, they gave more credence to the fact that the Marcan version allowed for no exception whatsoever.

What is particularly pertinent to our present study is that in the passing of marital legislation into the hands of the secular courts a moral offence also became a criminal offence. This should be noted because by the end of this period, in 1968/69 when the sole ground for divorce in secular laws would be the irretrievable

breakdown of marriage, then although the offence would not be disgregarded, it would not 'per se' be treated as the ground of the divorce. There had been before this an increasing impatience amongst lawyers and the public in general with a divorce law that had been based on the concept of matrimonial offence.

In the intervening period we find an increasing number of marriages being contracted outside the Church of England: within the course of less than a century and a half the percentage of marriages solemnised in a church building fell from 90% to 34%. However register office marriages were not to be regarded as marriages of a different or less exacting nature; they were still deemed to be voluntary and exclusive unions for life, and undertaken by partners of opposite sexes.

But during the same period though there had been constant pressure for increasing the grounds on which a divorce could be effected, adultery remained the sole ground of divorce up to the year 1937, with the Matrimonial Causes Act of A.P. Herbert. An increase in the number of matrimonial grounds for divorce had already been recommended two years earlier by the Joint Committee of Canterbury and York report entitled 'The Church and Marriage'. Twenty years later it was again the initiative of the Church that was to lead to a radical change in the civil law appertaining to marriage when the Right Reverend R.C. Mortimer, Bishop of Exeter prepared the way for making irretrievable breakdown of marriage the sole ground for divorce in 1969, so it has not been a case of Church and State turning their backs on each other and going their respective ways. The deciding factor in the clinching between Church and State of such a major policy difference would of course be any suspicion that the intention of a marriage in a register office might be different from that recognised and authorised within the Church. The number of Church leaders hitherto who have harboured such a suspicion has been very much in the minority. What the Herbert Act of 1937 ensured was that cruelty, desertion and incurable insanity became additional grounds for the pursuit of a divorce petition. In this change we can already discern the first movement beyond the idea of matrimonial offence in any moral or criminal sense. Cruelty and desertion certainly came under this

category but it would be difficult, if well nigh impossible, to conceive how a married person could be held responsible for being in a state of incurable insanity.

It was not so much changes in the law as changes in society that accounted for further increases in the divorce rate and in the demand for law reform in the ensuing years. This was particularly true of the post war period with the strains and stresses of separation, and then the increasing demand for wives to go out to work. This is one of the examples of how law, both civil and ecclesiastical for that matter has been a reflection rather than a propagator of social trends. The final result emerged in the late sixties, when it could be agreed that there was a general deterioration in the sense of moral responsibility, in the radical change of matrimonial law in making irretrieveable breakdown of marriage as the sole ground for divorce. There had been growing dissatisfaction with the idea of matrimonial offence partly because so many 'offences' had been blatantly construed in order to be able to file a divorce petition. In other words the offence 'too often proved to be the result of the breakdown of the marriage rather than its cause'.[2] Morally speaking this meant that the offence was compounded two-fold, for untruthfulness was added to any form of moral infidelity.

It had been the intention of the authors of 'Putting Asunder', the prelude to the Divorce Reform Act 1969, to preserve the status of matrimony as it had been received in Church and society. No change in the Church's opposition to divorce was countenanced, but there was concern that the comparative ease with which the State law granted divorce should not result in inequitable treatment of the non-guilty partner, especially if that partner was unwilling to submit to the decree. They were concerned with the state of marriage as an essentially interpersonal relationship, and if a break-down in that relationship could be demonstrated, then this would mark the end of that marriage, and a break-down that could not be mended. It was not deemed sufficient, that the couple should *say* that their marriage had broken down. A thorough inquiry would have to be made as to whether this was the case and in the process every possibility of reconciliation would have to be investigated. This

however proved to be the undermining of the recommendations of the Church report that the break-down of marriage should become the sole ground for granting a divorce. Subsequent legislation did not accept the need for a judicial enquiry, and there was inadequate provision for ensuring that every effort would be made for making reconciliation between the parties possible.

In reality the Divorce Reform Act of 1969 led to the further disintegration of the status and integrity of marriage. This is proved by the steep and startling increase in the number of divorces. The number of divorces more than doubled between 1961 – 25,000 and 1970 – 58,000, but this was insignificant compared with the rise to 119,000 only two years later. Matrimonial offence was not overlooked when it became no longer regarded as the legal grounds for divorce, but the change had more radical consequences in the way that the marital relationship became assessed. Some were concerned because of the apparent removal of the distinction between the guilty and the innocent partner, not so much because such a distinction had long stood as a distinguishing legal criterion in the thinking of both Church and State, but because morally the distinction had been considered valid. More blame would seem to be predictable of one partner than the other, and this had been particularly evident in the immediate post war years, when many wives simply did not witness the return of their husbands or discovered that their husbands had had illicit relationships with other women while they were away from home.

But the proliferation of cases of irretrievable marriage break-down as the sole ground for divorce has resulted in a more serious decline in moral behaviour, a decline all the more sinister for being less easily quantifiable in statistical terms. As long as grounds of divorce had been decided in terms of an offence, criminal or moral, the ideas of responsibility and culpability remained, but when offence no longer receives prime consideration, the matrimonial scene becomes open to radical change. The criterion of the offence of either or both partners is in danger of becoming the offence of neither, and this results inevitably in the lessening of the need for reconciliation. Accountability

is a factor that the married couple, social workers, counsellors and parish priests who seek to assist them, and the law, ecclesiastical and civil that looks for the fairest means of executing divorce whenever necessary, neglect at their peril.

The Woman's Choice

One of the main pre-requisites of marriage according to tradition in Western Christendom has been the free consent of both parties to the union. There must be no element of coercion on the part of either party. Neither should either party, or both parties, be subject to any pressure, or threat of blackmail from any other source to enter into a union in which they are totally committed the one to the other for life. Such emphasis on the freedom and rights of the individual comes however from the influence of Roman law on the life and development on Christian thinking from earliest times. Christianity had before this been bound up with Jewish culture and religion where admittedly individual responsibility had its place, and one recalls the teaching of the prophet Ezekiel to this effect, but it needs to be said that this went hand in hand with a corporate sense of the family as a whole. In this context the wife was considered to be part of the property of the man, the head of the household. She comes second to the house according to the Exodus version (chapter 20 v. 17) of the last of the Ten Commandments: 'thou shalt not covet', though the order is reversed in the book of Deuteronomy (chapter 5, 21). The patriarch Jacob had to work for fourteen years to earn Rachel as his wife, and was furthermore deceived into marrying Leah in the process. This is the kind of background that lies behind the wedding custom of the father giving away his daughter, although recent liturgical revisions make no specific arrangements for such a ceremony. There are other Eastern cultures where marriages are arranged sometimes before the partners have reached the age of discretion. One of the Oxford Dictionary's definitions of 'discretion' is particularly significant in our present discussion: 'liberty of power of deciding or of acting according to one's own judgement'. We must recognise that it has taken time for this element of free choice to emerge as one of the fundamental conditions of a valid marriage.

Neither should we forget the part that choice played in divorce proceedings in the primitive period of the early Christian Church. Despite the unequivocal prohibition of divorce in the teachings of the synoptic gospels particularly in the Marcan vesrsion, divorce was not regarded as absolutely impossible. There were recognised exceptions, the Matthean, which allowed it on the grounds of adultery, (Mt. 5,32, 19, 9) and the Pauline in the case of an unbelieving partner who insists on leaving his/her spouse. (1 Cor. 7, 15). What is pertinent for us in our assessement of the place of choice at that time is to note that according to Jewish law the husband had a choice to divorce his wife on the grounds of adultery but the wife could not divorce her husband, Roman law however also allowed the wife to bring a charge of adultery against her husband. Mark, if we are to accept the theory of his being influenced by Peter with his connection with Rome, does reflect the incursion of Gentile thinking into the Jewish tradition, and indicates the first realisation of the importance of the wife's choice in the formation and preservation of a healthy Christian marriage.

If we are convinced of the importance of free uninhibited choice on the part of the woman as well as the man in the case of a valid and effective marriage, should we not be surprised by the same token to discover that this has been one of the most influential factors in the steep rise of divorces in our society during the last one hundred and fifty years. From the Reformation period till the Matrimonial Causes Act of 1857 there were only 325 individuals divorced, and of these only four petitions come from wives. Divorce was only available for those who could afford to pay for it and through a special act of parliament. If the choice to divorce was very strictly limited on financial grounds, the limiation almost reached the category of impossibility in the case of the female partner. From 1857 till the present day, as divorce has become progressively easier to obtain, we have also witnessed ever increasing pressures to ensure women's rights, the right to vote, the right to work, to equal pay, to terminate marriages, the right to share half of the estate during marriage. The total effect of these developments, call it enfranchisement, emancipation, feminism, or what you will, has been to make the

wife increasingly less financially dependent on her husband during the marriage, and with more power to say No and even to take the initiative in the process of entry into marriage. In short her ability to choose has been enhanced. In theory the making of a healthy marriage with free mutual giving and receiving of love should have been ensured to a greater extent, but enhanced freedom has in practice led to even more marital instability and newly found freedom of choice has been exercised with devastatingly disruptive consequences. Unfortunately the greater the measure of choice of entry into marriage has been accompanied by a wider choice in the means of getting out of marriage.

Marriage of the Unbaptised in Church

Can those who are unbaptised get married in church? This is very much a rhetorical question because in practice it would be difficult to conceive why an unbaptised person or persons would want to get married in church rather than in a register office. The only situations where such a request might arise would be when the couple concerned yield to the pressures of parents who are themselves convinced Christians and regular church-goers or because of the weight and attraction of the traditional conventions that embellish the occasion with the externals of a church setting with music, flowers and ceremonies. Another possible quarter from which such a request might come would be that of the Salvation Army or the Quaker movement which are not wont to practise the initiatory rite of baptism as such.

Nevertheless this is a question that needs to be asked if only to highlight the variation of answers that has emerged within the Anglican tradition depending from which angle one views the situation, that of liturgy, canon law, or theology. Let us consider these in turn:

Liturgy – The opening rubrics of the present rite of Holy Matrimony of the Church in Wales read:

> 'a Christian marriage is a marriage between two baptised persons' and 'if any one of the parties is unbaptised, the Minister shall act in accordance with the Bishop's discretion'.

The Bishop's discretion, by the way, will be governed by the information provided by the parish priest who is presumed to have interviewed the couple requesting the marriage, but it will also be conditioned in part by the pastoral precedent of the apostle Paul when he explained to the Church in Corinth that 'the unbelieving husband is consecrated through his wife and the unbelieving wife is consecrated through her husband'. (1 Cor. 7, 14). This admittedly was a counsel for not getting divorced but it could equally well be interpreted as counsel for remaining in the married state.

The present rubric derives of course in spirit from the rubrics of the Prayer Books of 1549 and 1662. The 1549 Prayer Book required that 'the new-married persons (the same day of their marriage) must receive the Holy Communion', and according to the 1662 version 'it is convenient that the new-married persons should receive the Holy Communion at the time of their marriage, or at the first opportunity afterwards'.

Now the requirement of both these rubrics must be read against the background of the final rubric of the Order of Confirmation: 'And there shall none be admitted to the Holy Communion until such time as he is confirmed, or ready and desirous to be confirmed'. That same service assumes that only the baptised qualify for confirmation.

The total effect of these various rubrics is that one cannot be married in church without having first been baptised. We should also remember that such a liturgical pre-requisite was naturally suited to a society in which almost everyone, except Quakers and Jews, was baptised by Christian rites. Baptism was in effect a civil registration and the parish church, prior to the introduction of the register office, was the only place where members of society could get married.

> 'However this state of affairs only dated from the passing of Lord Harwicke's marriage Act, 1753. Prior to that date no formalities were required for the solemnisation of marriages.
>
> It was sufficient for the couple to exchange vows, without the need ever for witnesses. If the vows were exchanged in the present tense, they were immediately married, if the vows were exchanged in the future tense, then they were married as soon as their union was consummated. This was the position in medieval canon law, and

> continued to be the position in England after the Reformation until 1753'. when Lord Hardwicke presented his legislation 'for the better preventing of clandestine marriages'. It ensured that marriages with rare exceptions, could not be validly contracted elsewhere than in a parish church and without the active participation of the parish priest.
> (Thomas Watkin)

So then we must ask how apposite are such rubrics in the predominantly secular society of today. Are the unbaptised who desire a church wedding to be turned away, especially when we consider that the practice of infant baptism means that the choice to be or not to baptised had not been their's in the first place, but that of their parents? The moral dilemma becomes even more acute if one begins to question the motive of the parents in the first place for having their children baptised. Of one thing we can be sure and that is the need to discredit the practice of baptising anyone simply to enable that person to qualify for marriage in church. This would be tantamount to subordinating a Dominically instituted sacrament, namely Holy Baptism, to one of the so-called lesser sacraments of the Church in the form of Holy Matrimony.

Law – An examination of the requirements of Canon Law presents us with a different picture. In 1947 a draft Canon was introduced by the Canon Law Commission of the Church of England with the express purpose of forbidding the marriage of unbaptised persons in church. This Canon was approved by Convocations and the House of Laity, but it could not be implemented without the approval of Parliament, but this does not seem to have been effected. The very attempt to introduce such a Canon assumes that according to civil and Canon Law it had been possible for unbaptised persons to get married in church, although it would be difficult to imagine why two persons who are unable to accept baptism wanting a church marriage or their suing the parish priest for refusing to marry them, when they have the Register Office at their disposal.

The Faculty Office of the Church of England has recently published a document entitled, Anglican Marriage in England and Wales: 'A Guide to the Law for Clergy' in which it declares:

'In England every resident of a parish is entitled to marry in

his/her parish church. The incumbent or priest in charge has a duty to solemnise the marriage of his parishioners on request, and is guilty of neglect of his duty if he refuses' (6.1). There are no exceptions to this rule other than a relationship of affinity, where one of the parties is divorced and has a former spouse surviving or where the provision of a licence or publication of banns procedure has not been followed. Then it states: 'the fact that a party (or both parties) are unbaptised does not deprive them of the right to marry after banns'. (6.2). Such ecclesiastical law however is not enforceable as law in the Church in Wales where persons who are not members of that Church cannot enforce a claim to marry in church 'against the wishes of the incumbent' (6.4).

In order to clarify the distinction between the Church of England and the Church in Wales as to the obligation to marry the unbaptised I consulted Mr. Thomas Watkin the legal assistant to the Church in Wales. He graciously consented to allow me to quote his reply at length:

(i) 'In England, every parishioner – with a few exceptions such as divorcees – has the right to be married in his or her parish church. The incumbent is under a legal duty to officiate at such weddings, and if he refuses because one or both of the parties is or are unbaptised, he commits an ecclesiastical offence. For this, he can't be disciplined in the ecclesiastical courts. He cannot be sued for damages in the civil courts, nor can he be prosecuted for his refusal in the criminal courts. Theoretically, as his obligation to marry the couple is a public duty he might be compelled by the civil courts to perform the ceremony by means of a prerogative order of mandamus. It is however highly unlikely that the courts would issue such an order, for it is a discretionary remedy and it is therefore unlikely that it would be issued given the availability of a civil ceremony in a Register Office.

(ii) In Wales, since Disestablishment, there is no ecclesiastical law and there are no ecclesiastical courts. What was ecclesiastical law prior to Disestablishment is now part of the Constitution of the Church in Wales and binding upon the members of the Church in Wales only. Therefore, the only offence which a

clergyman commits by refusing to marry an unbaptised person is an offence against the Constitution of the Church in Wales, and the only persons who may complain of any such offence are members of the Church in Wales. It follows, therefore, that an unbaptised person cannot himself or herself complain of a refusal by a cleric of the Church in Wales to solemnise their marriage. Again, the cleric could find himself compelled to officiate at such a marriage given the availability of a Register Office ceremony.'

Nevertheless in the Church of England it seems clear that neither baptism nor confirmation are regarded as preconditions for marriage in church according to the law as it stands at present. The Lichfield Report said that the Legal Advisory Commission of the General Synod confirmed the view that 'baptism is not an essential qualification for the solemnisation of marriage in church, and that the clergy are not entitled to refuse to marry such persons after due publication of banns'. (p. 102). It goes on to recommend that such an obligation be removed. The more recent report 'An Honourable Estate' in its appendix is equally emphatic: 'it would seem doubtful whether it could be argued in 1986 that lack of baptism or confirmation is a legal impediment to marriage according to the rites and ceremonies of the Church of England'. (p. 83). If the obligation still stands, the strongest argument for its removal and the placing of the discretion to marry firmly in the hands of the parish priest in conjunction with the bishop, would be in the case of a couple who not only refuse baptism but explicitly reject the Christian Faith. But we would still wonder why such a couple would want to get married in church at all.

Theology – A glance at the theology of marriage which has crystallised within the Anglican tradition does not go far to help resolve the apparent inconsistency between liturgy and law outlined above as to whether baptism can be enforced as a pre-requisite of marriage in church.

What the successive major reports of the Church of England during the last twenty years make absolutely clear and with unanimity are:

1. that marriage as such is not confined to Christians.

2. that there is no entity as 'Christian marriage', only in the sense of marriage between Christians.

The former of these propositions does not mean that the term 'marriage' can be used for any sort of relationship entered into by contract or by mere mutual agreement. There must be free mutual consent given in public at a register office or 'in facie ecclesiae', in the presence of a congregation, by the couple to live together on the basis of exclusiveness, commitment and permanency. The essence of a valid marriage in the eyes of the Church and State is this exchange of promises before accredited witnesses.

The meaning of the second proposition is clearly spelt out in the wording of the above mentioned reports:
The *Root Report* of 1971: 'Christians experience marriage in the Lord and its true nature and meaning are for them expressed in Christian terms; but this is not to deny in any way the reality of marriage amongst those outside the Christian Church. Matrimony in the words of the Prayer Book is 'to be honourable among all men' (para. 24). *The Lichfield Report* of 1978 speaks to the same effect: 'Whatever else it may become for those who marry within the fellowship of Christ's religion, marriage is a universal institution which has its origins in nature. It does not derive from faith in Jesus Christ and membership of his Church' (para. 80). *An Honourable Estate* the 1988 Report is more succinct: 'We may not therefore make a fundamental distinction between marriage as entered into by the rites of the Church and that which is experienced outside the Church'. (para. 162).

Such teaching accords with the contents of the introduction to the services of Holy Matrimony of the Prayer Book of the Church in Wales: 'marriage is a gift of God to mankind' and of the Alternative Service Book of the Church of England: 'The Scripture teaches us that marriage is a gift of God in Creation and a means of grace'. The Scripture passage in question is Jesus' reference to marriage as being from the beginning when he quotes: Genesis 2, 24 from a Creation story.

This means that if we do not adhere to a Christian understanding of marriage which is applicable to everyone, acknowledging it as a sacrament of creation and insist on an explanation

of marriage that is specifically Christian, we are tacitly ascribing to a radical distinction between Church and State. This would lead to the practice of a universal form of civil marriage and they who desire that extra dimension of blessing could come to church for that purpose. This would implicitly cancel out the need for such partners to become baptised because this would be taken for granted, but it would encourage the illusion that there is such a thing as first and second class marriages, and deprive the clergy of an invaluable pastoral opportunity of reaching outsiders whom they could not otherwise have met.

Indissolubility

No examination of the nature of marriage and the moral obligation it entails is complete without reference to the concept of indissolubility. Christian thinkers of all shades of opinion would want to assert the permanence of the union of man and wife 'for as long as they both shall live'. In fact this lifelong fidelity is believed, ideally according to the interpretation of the Easter Orthodox Churches, to go even beyond death. Christians of both Western and Eastern Traditions would want to say that marriage ought not to be dissolved. Morally speaking marriages should not be dissolved. Western thinking however, particularly in the Roman Catholic tradition and to a certain extent within Anglicanism would want to go further. It moves from moral categories to metaphysics, under the influence of Latin and Scholastic philosophy and theology since the 12th century, whenever it is claimed that marriage not only ought not to be dissolved but that it *cannot* be dissolved. Divorce as such, in the sense of the breaking of the 'vinculum' or the bond of marriage, as distinct from separation 'e mensa et thoro', from bed and board, is impossible. The clearest and most uncompromising expression of indissolubility in this sense is that made by T.A. Lacey: 'A law which purports to effect the absolute dissolution of the marriage bond must be unconditionally condemned. It is not so much an infraction of the divine law as an impotent pretence, an attempt to alter a fact of nature, and a denial of the existence of that which exists. It may be compared with a law which should purport to destroy the kinship of a brother and a sister of a parent and a

child'.[3] The nature of this claim and its underlying philosophy demands more rigorous investigation, if we are to examine the theory and practice of moral responsibility within the context of marriage.

The basic question that has engaged the minds of the world's foremost thinkers from time to time is: 'Is a thing what it appears to be?' Various answers have been offered depending on which particular 'ism' a thinker happens to represent.

Perhaps the clearest and most dramatic illustration of what is at stake is to relate what happened when two giants of discursive thought came face to face in the persons of the seventeenth century French thinkers, Descartes and Pascal. Descartes was the brilliant exponent of rationalist metaphysics and method. Pascal was the equally exciting and provocative pioneer of modern scientific methodology. He had been engaged in experiments on barometric pressure at a time when Toricelli was beginning to challenge the centuries-old maxim that nature abhors a vacuum. Pascal resorted to repeated experiments in true scientific manner with semi-inflated balloons and inverted test-tubes of mercury which he conducted at the base and summit of the Puy de Dôme mountain near Clermont Ferrand. As a result he was able to present his contemporary Descartes with a direct challenge: 'What do you see at the top of this inverted test-tube?' So strong was Descartes' conviction that nature abhors a vacuum, that for him the very possibility of a void was untenable. Such a presupposition dictated his answer to the question, namely: 'I see a very rarified form of matter'. In other words the apparent emptiness was an illusion. A thing is *not* what it appears to be. But Pascal for this part accepted the evidence of his senses, though not without careful prior scrutiny. For him a thing is what it appears to be. Subsequent scientific research and discovery have proved him correct, and have opened up new scientific avenues into the spheres of barometric pressure and meteorology.

The clash between Descartes and Pascal as outlined above is not without its relevance to the ways in which the Church has endeavoured to address and express the central doctrines of the Christian Faith. A classic example is in the various interpretations of the Eucharistic doctrine of the Real Presence. The main

body of the Western Church has used the Aristotelian, Scholastic and Cartesian philosophy of substance and accidents in this respect culminating in the theory of transubstantiation. The elements consecrated at the service of Holy Communion by a person ordained and authorised as a priest to act in this capacity become the body and blood of Jesus Christ. The elements appear to be bread and wine, but they are in fact, in reality, the body and blood of Christ. They are no longer what they appear to be; their substance has changed though the accidents remain the same. Indeed the Congregation of the Faithful insists on transubstantiation as the proper interpretation of what takes place, and is somewhat critical of the ARCIC Report that relegates its reference to this doctrine to a footnote. On the other hand the 39 Articles of the Anglican Prayer Book claim that 'transubstantiation overthroweth the nature of a sacrament' because it presupposes the annihalation of the defining form that normally underlies the appearances of bread and wine. In other words the consecrated elements are still bread and wine; they still are what they appear to be, even though they have become the body and blood of Christ.

It will not demand much stretch of imagination to extend these different ways of thinking to our assessment of the meaning of Holy Matrimony and in consequence to the possibility of divorce. Every Christian who holds the teachings of Holy Scripture and the traditions of the Church in high esteem would want to affirm the sanctity of marriage. He would claim that it is a life-long union between one man and one woman to the exclusion of all others, and a union that is valid for Christian and non-Christian alike. This is because marriage belongs to the order of creation, is 'from the beginning'. The description of the partners in the married state as becoming 'one flesh' (Gen. 2, 24), comes significantly from the first eleven chapters of Genesis whose theme, according to C.H. Dodd, is God's covenant with creation, the whole of mankind that preceded this covenant with His People through the person of Abraham recorded in chapter 12. Divorce as such is regarded as an affront and a disobedience to God's will:

'what (rather than 'those whom') God has joined together, let no

man put asunder'. By becoming man and wife the couple have entered a new status. The distinctive and precious nature of this marital state is indicated in the teaching of the New Testament in that:

> 'whoever divorces his wife and marries another commits adultery' (Mk. 10) but even more so because: 'whoever marries a divorced woman commits adultery' (Mt. 5, 32 b).

The New Testament scholar Jeremias regards this second statement as an early pointer to the truth of indissolubility. 'Jesus' attitude to the subject of marriage was an entirely new one. He was not content to stand up for monogamy; he completely forbade divorce when talking to his disciples, and unhesitatingly and fearlessly criticised the Torah for permitting divorce because of the hardness of human hearts. Marriage to him was indissoluble to the extent of seeing the remarriage of divorced persons, whether men or women as adultery because the first marriage still stands. By this estimation of marriage, and this unexampled sanctification of it, Jesus puts into practice; the scriptural saying that marriage is an ordinance created by God'.[4] These are strong words and in a footnote on the same page the writer dismisses the Matthean exception as an interpolation.

But if the evidence of Scripture and Church tradition upholds the truth of indissolubility, whether we think in moral terms that marriage ought not to be dissolved or in metaphysical terms that it cannot be dissolved, a glance at the contemporary scene presents us with a very different picture. There is grave concern that marital vows made before God either in a church or in a register office are so often blatantly broken. The hard and unpalatable truth is that one in three marriages in Western society ends in divorce. (the ratio is one in two in Soviet Russia). The following figures prompt us to do some hard questioning and heart searching as to why marriages come to grief:

Year	Marriages	Divorces
1957	340,903	23,785
1967	386,952	43,093
1977	358,954	129,053
1987	351,781	151,007

There are sociological reasons for the steep rise in the number of divorces, but we must not be tempted to take these as the sole factor, for that would lead to a deterministic and behaviouristic view of human nature and practices. However much our attitudes and actions are conditioned by social pressures, there remains a hard core of that which is unique to human dignity, viz responsibility, conscience, the moral imperative. Otherwise the key categories of making and maintaining the marital union, the promises, the giving and receiving of love, the steadfastness in the face of rejection and misunderstanding, the healing power of forgiveness become meaningless categories. But these are all the ingredients of what we mean by marriage in the positive sense.

It is when we turn to the negative side of the picture and consider what is meant by divorce and matrimonial break-down that we discover how deep is the divide between the different schools of Christian thought. If we apply the question: 'Is a thing what it appears to be?' to divorce, break-down and nullity, we find that the answer is consequently No from the Catholic and Scholastic point of view. Because the marriage 'vinculum' cannot be broken, partners who have gone through divorce proceedings are regarded as still married. The marriage that appears to have broken down is still intact in essence. If either partner remarries, then the second union is not what it appears to be in the eyes of the civil law, viz a marriage. By the same token there are marriages which are declared null and void by the appropriate Church authorities, and this despite the fact that the couple concerned have gone through the proper marriage procedure – the oaths and ceremonies, – and have even lived together for a number of years. They appear to be married, but theirs is not a marriage in reality. What matters is that which cannot be observed, or that which is not matter, according to this philosophy.

Given the philosophical presuppositions outlined above, then what follows in this theology of marriage and the ecclestiastical discipline of the 'Catholic' Church is perfectly logical and consistent.

But philosophies of an Empiricist nature present us with a different answer, and are more likely to answer Yes to the

question 'is a thing what it appears to be?' Such thinking of course is much more recent and more in tune with the pragmatic and practical outlook of the British. Its proponents in the persons of Locke, Berkeley and Hume were more inclined to accept the evidence of the five senses at their face value. 'To be is to be perceived' – 'esse est percipi' according to Bishop Berkeley.

If we examine the concepts of marriage and divorce according to such Empiricist principles, then a marriage that is deemed to have broken down irretrievably is no longer regarded as a marriage and the parties to the marriage are free to marry again. Indeed the Divorce Act of the late sixties can be regarded as the logical outcome of such thinking. The secular court concludes from the evidence provided that such and such a marriage no longer exists. There is in short a radical departure from the Western tradition, and from the 'a priori' presumption that marriage as such is indissoluble, or the teaching that a husband/wife can no more cease to be the wife/husband, than a son can cease to be the son of his father. The indissolubilist in contrast cannot entertain the possibility of divorce, and must resort to what some would describe as a 'reductio and absurdum', viz that the only way we can say a marriage has ceased to exist is to claim that it did not exist in the first place. Herein lies the strength, and the weakness, of the doctrine of nullity.

A blanket term to describe the approach of the rest of Christendom, viz the majority of the Free Churches, the main thrust of Anglicanism, and the practice of the Eastern Orthodox Churches, would be 'non-dissolubilist', which is a refusal to accept that marriage cannot be dissolved, but which would strongly maintain that marriage ought not to be dissolved. In other words it would want to change the emphasis from the metaphysical to the moral. Indeed advocates of this way of thinking would claim that this would be a reversion to the dominant trend of thinking within the Christian Church as found in the first millenium and originating in the thinking of the New Testament.

According to the New Testament and to Scripture in general divorce is wrong: 'I hate divorce, says the Lord the God of Israel' (Malachi 2, 16a). It is sin in that it is a breaking of promises made

before God, and a breaking of covenant relationship that is likened in the Old Testament to that of God and his Chosen People, (Hosea 2, 16, 19, 20; Isaiah 54, 5; 62, 4b; Jeremiah 3, 6.8) and in the New to that of Christ and his Church (2 Cor. 11, 2; Ephes. 5, 22-23; Revelation 21, and 29; 22, 17a). It is the love that God shows and practises towards his People, and that Christ shows to the Church by giving himself up for her that provides the pattern of the love that binds husband and wife together in marriage. Love in this particular context is an instance of how love in the sense of 'agape' should be exercised in general by Christians towards one another, and should derive its impetus and inspiration from the same source: 'even as I have loved you, that you also love one another', (John 13, 34b).

In the light of such Scritpural background we must ask whether divorce between man and wife, and the break-down of their married relationship is possible; and the answer is Yes. The Old Testament is a catalogue of historical incidences where the people of Israel proved unfaithful to the Covenant God had made with them, God's continuing faithfulness is met with human unfaithfulness, and his steadfast promises are rendered inoperable when Israel continues to break his commandments and play the harlot. The drama of the New Testament culminates, or rather preculminates in the rejection of the promised Bridegroom. We say 'preculminates' because the very rejection is also the means of God's total giving of himself in love, and issues in the triumph of that love through the cross and the resurrection.

But there are other reasons why divorce must be regarded as a possibility, howbeit a tragic possibility. It would seem that what God has joined together is intended to remain. But the appendage 'let no man put asunder', assumes that divorce or separation is at least a possibility. Furthermore the teaching of Jesus on marriage and divorce must be seen in the context of his moral teaching as a whole. Helen Oppenheimer reminds us that 'one of the contexts in which Christ's teaching on marriage and divorce is presented is the Sermon on the Mount. 'Surely Everyone who divorces his wife . . . makes her an adulteress' does indeed belong alongside 'Everyone who looks at a woman lustfully has already committed adultery with her in his heart' and 'If

anyone strikes you on the right cheek, turn to him the other also'. These are neither vague ideals to be ignored nor legislation to be enforced . . . We still have the problem the early Church already had, of translating these insights into policy'.[5]

The Church has accommodated the rigoristic teaching of Jesus on such matters as taking oaths, loving one's enemies and selling of one's possessions, but are we to interpret the break-up of marriage by means of divorce as the one sin against the Holy Spirit for which there is no forgiveness? Neither will it do to resort to a double standard in the case of marriage by saying that the New Testament on marriage only applies in the case of dedicated Christians. Of course we must accept Jesus' teaching in the Sermon on the Mount seriously but this does not necessarily involve taking it literally.

But the most fundamental and serious objection to the strictly indissolubist position is on moral grounds. If marriage cannot be dissolved then its dissolution is an impossibility and the terms 'right' or 'wrong' cannot be predicted of divorce. A basic principle of ethics is that the 'ought implies the can', and the converse is also true: 'cannot' cannot imply the 'ought'. Divorce proceedings in a secular court become a meaningless exercise, and the culpability becomes attached to the 'divorced' person in the form of adultery, if that person should remarry.

'Marriages however do break down: a broken marriage is not a contradiction but a disaster, an unnatural smashing of what was built to last'.[6]

The clash between the indissolubist and non-dissolubist points of view is evident:

(a) in the difference between Western Catholics and the churches of Eastern orthodoxy which from the sixth century until today recognise that marriages can die, and allow re-marriage mainly on the grounds of adultery once or twice to the laity, but never to the clergy.

(b) in the difference in the West between the tradition of the Roman Catholic Church and that of the Reformers, who believed they were recalling the Church to Scriptural teaching by abandoning the principle of absolute indissolubility but continued to emphasise life-long fidelity as a strict moral obligation.

David Atkinson traces both points of view to the writings of Augustine who was mainly responsible for the definition of marriage as a sacrament. Western tradition has from this premiss inferred that the marriage bond is thus absolutely indissoluble, but 'sacramentum' in its common Latin usage was originally the term used for the Roman solder's oath, and 'it is in that sense of moral obligation and sacred sign that Augustine uses the term (and not in the later medieval sense of the sacrament as an ontological bond)'.[7]

Perhaps we should leave the description of the place of moral choice and responsibility in respect of getting married and the resort to divorce to the testimony of a non-professional theologian and of one who experienced for herself the traumas of divorce proceedings. Monica Furlong writes: 'Marriage will only become the free choice that it ought to be when remaining 'single' is an equally honourable state'.[8] She says this because we so often imply that there must be something wrong with a person who is not prepared to get married, and 'this in itself operates against a free choice'.[9] As for divorce she remarks: 'What, as a divorced person, makes me intensely angry in official pronouncements, is the suggestion that all couples who stay together despite their difficulties are performing an heroic Christian act, whereas those who have undergone the ordeal of divorce have somehow let the Christian side down'.[10] The heroism of some couples is something to be admired, but there are other couples who because of cowardice in the face of public opinion or greed because of their fear of financial loss, prefer to continue in a state of mutual spite and intolerance. Such misbehaviour is not likely to be the best witness to the sanctity of marriage nor to the grace of Christian love and forgiveness. Having said that, the most powerful evidence of Christian love is the healing forgiving acceptance that partners in marriage persist in exercising towards one another despite constant rejection and misunderstanding. This is an instance of the Good News that we call the Christian Gospel, and simply because it is good, it is not likely to attract the attention of the media.

[1] Marriage, Divorce and the Church p. 152. (Appendix 7. Marriage and Divorce in the Anglican Communion: Herbert Waddams).
[2] An Honourable Estate p. 34.
[3] Marriage in Church and State – T.A. Lacey, p. 89.
[4] Jerusalem in the time of Jesus, Jeremias, p. 376.
[5] Marriage, Helen Oppenheimer, p. 47.
[6] *idem.* p. 46.
[7] To Have and to Hold, David Atkinson, p. 42.
[8] Divorce – Monica Furlong, p. 10.
[9] *idem.* p. 20.

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