Joseph Ratzinger

On the question of the indissolubility of marriage

Remarks on the dogmatic-historical state of affairs and its significance for the present

Translated by Joseph Bolin*

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The attempt to make a dogmatic statement in the question of the indissolubility of marriage, as in all problems of dogmatic theology, can succeed only by looking at the entirety of the Church's tradition, striving to recognize its driving factors, to explain its tensions, and thereby to arrive at a distinction between primary and secondary tradition, which can at the same time establish criteria for further development.[1] The limited space afforded by an article forces me to restrict myself to illuminating the principal stages of the development, and even in this I can only draw a rough outline. Accordingly, I will attempt to state the principal findings of the patristic period, to sketch the reasons for the opposite developments in the East and the West, to describe the legal position that is reflected in the Decretum Gratiani, and to interpret Trent against this background. Finally I will attempt to make a summary assessment.

I. The Fathers[2]

Probably what is most surprising in the patristic tradition is that no attempt is made to

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1 The analyses of the biblical testimony must be here presupposed. Of course it was also impossible to aim at any kind of completeness in regard to the post-biblical tradition, or, given the many works on this topic, to present new texts. Nonetheless this work has been composed on the basis of the sources in an effort to bring out their perspective as clearly as possible.

2 The literature on this theme has recently increased greatly. B. Kötting has summarized the principal findings of his unfortunately still unprinted dissertation on this topic (Bonn 1940) in his article "Digamus", *RAC* III, 1016-1024. Cf. also A. Oepke, "Ehe", in : *RAC* IV, 650-666; G. Delling, "Ehebruch", *ibid.*, 666-677, "Ehegesetze", *ibid.*, 677-680, and "Ehescheidung", *ibid.*, 707-719. For recent writing on the question see especially P. Stockmeier, "Scheidung und Wiederverheiratung in der alten Kirche", *ThQu* 151 (1971), 39—51; O. Rousseau, "Scheidung und Wiederheirat im Osten und im Westen", *Concilium* 3 (1967), 322-334, but especially, surpassing what came previously, the comprehensive examination by H. Crouzel, *L'Église primitive face au divorce*, Paris 1971.

derive from Mat 5:32 and 19:9 a right to remarriage in the case of marital separation on account of adultery. The rejection of such a thought is at first completely unanimous, whether we think of *Hermas*, of *Justin*, of *Clement of Alexandria*, or of *Origen*—though admittedly a fundamental skepticism regarding second marriages may have had some influence in this matter.[3]

The thrust of the patristic exegesis of Mat 5 and Mat 19 aims largely at the complete ethical and legal equality of the woman in matters of divorce and adultery: to the man belongs no other right and no other ethos than to the woman; just as she may not dismiss him, so he cannot he write out the bill of divorce for her. This correction to the Old Testament and to the ancient moral ideas – which since the 4th century will again appear in ecclesial writers[4] – is seen as the central content of the text. Mat 5 is thereby interpreted in more or less the following manner: The man who dismisses his wife forces her into adultery, because he puts her in a situation in which she cannot be continent and thereby is compelled to violate the indissoluble bond to which she remains just as much subject after being sent away as she was before. It seems to me that from this point of view the contested *Matthaean clause* ("Except in the case of unchastity") loses its problematic character: the man who sends his wife away forces her into adultery; that of course does not apply to a woman who has committed adultery – she *is* an adulteress; but it still does not allow one who is sent away to marry.[5]

3 Revealing is the fact that according to Basil, ep. 188,4 (PG 32, 673 A) and ep. 199,18 (PG 32, 717 A-B) in the Cappadocian Church one or two years of church penance was imposed on the digamist, i.e., on one who married again after being widowed, three years on the trigamist, and so on; cf. the material in Kötting, "Digamus"; Crouzel, "L'Église primitive," 148 ff. The thesis of O. Rousseau, that the laxer practice that later came to be accepted in the Eastern Church does not derive from a corresponding interpretation of the unchastity clause, thus not from an interpretation of the NT, is – despite P. Manns' doubt of this statement ("Die Unauflöslichkeit der Ehe im Verständnis der frühmittelalterlichen Bußbücher", in: N. Wetzel [ed.], *Die öffentlichen Sünder oder Soll die Kirche Ehen scheiden?*, Mainz 1970, 47 f. u. 280) – completely congruent to the texts, as is further corrobated by Crouzel. After an examination of the material I must, accordingly, correct the suspicion I expressed in *ThQu* 149 (1969), 72, that in the community of the Church represented by Mat 5 and 19 there was a practice of divorce and remarriage in the case of adultery: in view of the complete unanimity of the tradition of the first four centuries to the opposite effect this position is wholly improbable.

4 The unequal treatment of man and woman that is again present in the so-called canons of Basil, i.e., in the regulations of the Church of Cappadocia that he records, and in general the mixing of Jewish, Graeco-Roman and New Testament view of marriage, is characteristic of these canons and makes them so hard to interpret. Basil was quite aware of this contradiction, as he shows in Canon 77: "He who leaves the woman legally entrusted to him and marries another, is, according to the Lord's word, to be judged as an adulterer. But by our Fathers it is so regulated, that..." (PG 32, 804f.) The canonical regulation by the "Fathers" and the Lord's word patently contradict each other – what a challenge it is to protest this... the classical example for the unequal treatment of man and woman is Ambrosiaster: see Anm. 10 and. 11. On the other side stands Jerome ad Oceanum, 3 CSEL 55, 39: Aliae sunt leges Caesarum, aliae Christi; aliud Papinianus, aliud Paulus noster praecipit. Apud illos in viris pudicitiae frena laxantur et, solo stupro atque adulterio condemnato, passim per lupanaria et ancillubas libido permittitur; quasi culpam dignitas faciat, non voluptas. Apud nos, quod non licet feminis, neque non licet viris; et eadem servitus pari condicione censetur. A similar statement is in Gregory Nazianzen, Oratio 37, 6 PG 36, 289.

5 See, for example, Clement of Alexandria, Stromata 2, 23, 145, GCS 2, 193: "ὁ δὲ ἀπολελυμένην λαμβάνων γυναῖκα μοιχᾶται,» φησίν, «ἐὰν» γάρ »τις ἀπολύσῃ γυναῖκα, μοιχᾶται αὐτήν,» τουτέστιν ἀναγκάζει μοιχευθῆναι." ... An interesting text is Hilary, in Matth. 4,22 PL 9, 939: "Nam cum lex libertatem dandi repudii ex libelli auctoritate tribuisset, nunc marito fides evangelica non solum voluntatem pacis indixit, verum etiam reatum coactae in adulterium uxoris imposuit, si alii ex discessionis

Augustine introduced a comprehensive systematization of this fundamental christian position. Over and above the two fundamental goods of marriage, which are common to all men and all nations, causa generandi and fides castitatis (the matter of procreation and the protection of the dignity of the human body by means of the space of fidelity established by marriage), comes in the "people of God" a third good: the sanctitas sacramenti (the relation to the realm of God's salvation history with men).[6] Its concrete content consists in the absolute indissolubility of marriage, which Augustine initially in *De bono coniugali* (400-401) compares with the indissolubility of priestly ordination: this is indeed bestowed "ad plebem congregandam" (to serve the assembling of the community), but it still remains when the assembling of the people is not accomplished by the representative ("ordained"), and also remains, if he is excluded from his office due to his fault. "The sacrament of the Lord, which has once been placed on him, is not lost, even if it remains on him only unto judgment."[7]

Still more fundamental is the classification and explanation of the properly Christian element, the "sacrament" in marriage, that Augustine makes 20 years later in *De nuptiis et concupiscentia* (419-420). Here the definitiveness and indissolubility of the bond received in marriage compared with the definitiveness and irrevocability of baptism: "Indeed it now remains as a wound of guilt, no longer as uniting power of the covenant, just as the soul of an apostate, in likewise leaving its marriage with Christ, even after losing its faith does not lose the sacrament of faith, which it once received in the bath of rebirth."[8] The definitiveness of christian marriage is thereby inserted into the fundamental context of the christian Mysterion as such, and is even identified with it: The irrevocability of the divine decision for man, for the "marriage" with man that has taken on flesh in the God-man Jesus Christ, shows itself in the irrevocability of the faithfulness in which baptized persons are united to each other, whose union points to the fundamental scheme of the Coniugium ("marriage") Christ-Church and its definitiveness.

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necessitate nubenda sit, nullam aliam causam desinendi a coniugio praescribens, quam quae virum prostitutae uxoris societate pollueret." Hilary understands therefore the λόγοσ πορνείασ of Mat 5,32 und 19,9 as the prostitution of the woman, which is thus the only valid grounds for divorce. The idea that dismissing the woman forces her into adultery and thereby makes the man himself guilty of adultery is found also in the canons of Basil; cf. Crouzel, *L'Église primitive*, 142 ff. Jerome offers a peculiar interpretation of the unchastity clause: In the case of fornication or suspicion of it (!), the dismissal of the guilty party is possible. But lest the one who is dismissed subject himself to a suspicion, he may not marry again: *In evang. Matth. comm.* 3, 19,9 PL 26, 135.

6 *De bono coniugali* 24,32 CSEL 41, 226; cf. *De nuptiis et concupiscentia*, 1, 10, 11 CSEL 42, 222.

7 *De bono coniugali*, ibid.

8 *De nuptiis* 1, 10, 11 CSEL 42, 222. In spite of this unambiguous conception, which for Augustine was an expression of the Church's faith, he was able in strictly limited cases to allow a certain range in the practical handling of them. As is well known, he shows this in *De fide et operibus* 19,35 (PL 40, 221): He who after dismissing his adulterous wife marries again, can "in his opinion", "in this case" be again allowed to Communion – thus we surely have to interpret the *venialiter* of this passage. It is misleading when Manns, in "Die Unauflöslichkeit der Ehe", 47, translates this to say that according to Augustine it is a matter of a "forgivable and understandable mistake". Crouzel rightly says in *L'Église primitive*, 333: In De fide et operibus Augustine speaks "avec une certaine attitude pastorale." He does not admit the dogmatic thesis that is the basis for similar and even more radical practices in the Church of his time (namely the idea of salvation through faith without works), "mais il ne refuse pas absolument toutes ses solutions." The further course of this examination will show that the Church Father of Hippo thereby reflects exactly the fundamental attitude of the entire tradition.

Thus our *first observation* must be: the Fathers in East and West are from the very beginning in complete agreement on the total impossibility of the separation of a christian marriage that could lead to remarriage during the life time of the spouses; no signs may be found for an opposite view in either half of the Church. The testimony is clear.

Of course to this first observation a *second observation* must be joined: below the threshold of the classical teaching, so to speak beneath or within this ideal form that is in fact determinative for the Church, there was evidently again and again in the *concrete pastoral application a more elastic practice*, which was not indeed seen as entirely in conformity with the true faith of the Church, but which also could not be absolutely excluded. The peculiar dilemma that is thereby opened up is nowhere more classically formulated than by *Origen* in his commentary on Matthew: "Now contrary to what is written, even some of the rulers of the church have permitted a woman to marry while her husband was living. In this they act contrary to Scripture... (1 Cor 7:39 and Rom 7:3 are cited), not indeed altogether senselessly (unreasonably), for we may suppose that this procedure was permitted, contrary to what was written from the beginning and ordained by law, in order to avoid worse things..."[9] He thus classically formulates what one feels and how one acts: it is contrary to Scripture and contrary to what was ordained from the beginning, but it is not entirely senseless – a custom that some of the leaders in the Church venture in order to avoid still worse things.

In two authors of the fourth century we encounter concrete forms and norms for such an attempt at steering away from worse things. In the West it is *Ambrosiaster*, who gives the following, highly individual interpretation of 1 Cor 7:11 (whereby he sneaks in the unchastity clause of Matthew): "The wife shall not leave her husband, except in the case of unchastity. But if she goes away, she shall either remain unmarried or else be reconciled with her husband. Likewise the husband shall not leave his wife. Paul does not here add the prohibition of remarriage, because the husband is allowed to marry again"[10] – an astuteness that would be a credit even to modern theologians – deeply opposed, of course, to the meaning of the text.

Differently oriented – in the line of *Origen* – is a likewise well known text of *Basil* that prescribes a longer Church penance for the second marriage and then tolerates it. In this he is aware of the contradiction to the words of Scripture. The whole text makes it clear that he, like Origen, does not want to simply eliminate an existing practice, although he considers it contrary to Scripture.[11] Ambrosiaster admittedly with his refined exegesis drops back behind the fundamental line of the patristic thought determined by the Bible, in

9 ἤδη δὲ παρὰ τὰ γεγραμμένα καί τινες τῶν ἡγουμένων τῆς ἐκκλησίας ἐπέτρεψάν τινα ὥστε ζῶντος τοῦ ἀνδρὸς γαμεῖσθαι γυναῖκα, παρὰ τὸ γεγραμμένον μὲν ποιοῦντες ... οὐ μὴν πάντη ἀλόγως· εἰκὸς γὰρ τὴν συμπεριφορὰν ταύτην συγκρίσει χειρόνων ἐπιτρέπεσθαι παρὰ τὰ ἀπ' ἀρχῆς νενομοθετημένα καὶ γεγραμμένα. *In Matth* 14, 23, PG 13, 1245.

10 It is thus cited by Gratian, Decr. P 2 C 32 q 7 c 17; the original in PL 17, 218 B is somewhat more detailed and nuanced, yet in the statement itself, exactly reproduced by Gratian. On the consequences this text had on the Council of Trent, see P. Fransen, "Das Thema Ehescheidung nach Ehebruch auf dem Konzil von Trient" (1563), in: *Concilium* 6 (1970), 343-348.

11 Ep 217, 77 PG 32, 804f.: Seven years of Church penance – one year at the stage of the weeper, two years as hearer, three years as kneeler; in the seventh year he can, without receiving Communion, participate in the Mass of the Faithful.

doing away with the equal demand on husband and wife, and by an exegetical trick seeking to find authority for the special treatment of the husband in the Church, converting the New Testament back into the Old Testament … this text gained significance through the fact that in the Middle Ages it was considered as a saying of St. *Ambrose*; thus it stood against the otherwise unanimous consensus of the Fathers with the authority of the great Church father, made the unity of the tradition uncertain, and thereby seemed to exclude a strictly dogmatic statement.[12]

II. The Decretum Gratiani[13]

Gratian, in his attempt to gather the Church legal regulations on the indissolubility of marriage into a collection of effective laws, found himself here, as in other questions, faced with the task of doing justice to a complicated and to some extent inconsistent tradition. On the one hand stands *Augustine* with all his weight, the Pseudo-Clementine texts (which of course are attributed to Clement himself), and the tradition of the papal and synodal legislation; on the other hand, in addition to Pseudo-Ambrose there is a text of *Gregory II* from a letter to St. Boniface, and, probably in connection with it, a provincial synod from approximately the same time period. The letter of Gregory is situated, indeed, not entirely within the problem with which we are dealing: when the woman, not from malice, but from weakness (sickness), is not in a condition to render the Debitum, the husband should *of himself* remain continent. "But because this is something demanding moral heroes, he who cannot remain continent should rather remarry."[14] Touching yet another situation is the *Concilium Triburiense*, from which Gratian cites the following regulation: if someone has had relations with his mother-in-law, neither of them may remarry, "but her husband can, if he wants to, take another wife, if he is unable to remain continent." The same thing applies if someone has had relations with his stepdaughter (daughter-in-law? – filiastra) or with his sister-in-law (the sister of his wife).[15]

How does Gratian deal with these texts? First of all we must observe that for him the Augustinian tradition is quite clearly the normative one, the one in accordance with Scripture, that its strict binding force and validity is not doubted for a moment, not even in view of the weighty authority of Ambrose that apparently is opposed to it; this certainty of

12 Cf. Crouzel and the further literature listed in footnote 2 for details, not touched upon here, regarding the synodal legislation and the later patristics.

13 I know of no satisfactory study of the texts of Gratian that regard this; even in R. Weigand, "Das Scheidungsproblem in der mittelalterlichen Kanonistik", in: *ThQu* 151 (1971), 52-60, Gratian is only summarily treated. Of course the following analysis can likewise by no means exhaust the historical and material problematic of P 2 C 32 q 7 of the decree, in which the many-layered tradition of a millenium comes together. Perhaps the suggestions that are given here can nevertheless indicate the significance of the text and give a direction for further thought. For the complicated material from the early medieval period, from which Gratian chose the pieces that had come to have greater impact, and which we will not here go into further, see P. Manns, "Die Unauflöslichkeit der Ehe", 42-75 and 275-302.

14 Decr. P 2 C 32 q 7 c 18. The letter dates from 22. Nov. 726; cf. Jaffé-Ewald, 2174; P. Manns, "Die Unauflöslichkeit der Ehe", 52 f.

15 Ibid., c 24 (cf. also the texts adduced in c 20-23, which deal with similar cases). The text goes back in any event to the Zeit of Pippin the Younger and is encountered – as far as I can see – initially in Capitulare Vermeriense, MGLL I 23, n. 11. On the related text of c. 23, attributed by Gratian to Pope Zachary, see P. Manns, "Die Unauflöslichkeit der Ehe", 285, note 93.

the tradition seems to me scarcely less remarkable than the uninterrupted assurance that was present in the ancient Church in spite of the apparently opposed Matthaean clause.

Since Gratian is completely certain regarding the decisive tradition, his task remains only that of explaining the deviation. In reference to Gregory II he says with astonishing sharpness: "this stands in clear contradiction to the holy canons, indeed to the teaching of the Gospel and of St. Paul."[16] The decisiveness with which the saying of a pope is denounced as contrary to tradition and rejected makes us think. The medieval author relates different to Ambrose. In reference to the text supposedly coming from the great Father of the Church he offers three interpretations, deriving from different ways of attempting to deal with the history:

1. The Ambrosian passage is a forgery.

2. It concerns only cases of incest.

3. It affirms only that remarriage is possible after the death of the perpetrator of incest. Accordingly the term "wife" refers equally to men *and* women who have become guilty; it expresses an attitude, not bodily sex – the equal treatment of the sexes is thus restored through the roundabout way of a rather fantastic exegesis.

Most interesting is his treatment of the *Concilium Triburiense*. He links it with the limitation of the impediments to marriage that *Gregory the Great* had granted for the Anglo-Saxon mission, and generally with the conduct of the three Gregories in regard to the Anglo and Germanic mission, and describes it as a "temporary permission" (pro tempore permissum): as a missionary temporary arrangement, which in the context of the gradual transformation of paganism into Christianity could occur from time to time.[17]

Viewed as a whole we may say that with the definitive victory of the Augustinian tradition the line is rather sharpened in comparison with the Fathers, but the whole perspective remains quite the same: there is complete clarity regarding the fundamental Church form, which found its classical formulation in the Augustinian concept of the sacramentum; but it also remains true that – to speak with *Origen* – "contrary to what is written and yet not entirely senseless" limited emergency solutions in the concrete pastoral practice cannot be entirely excluded: Gregory II's formulation: "It would be what is right (good), but it demands moral heroes" seems to me to be here characteristic. This text, like the regulations of the Concilium Triburiense, may stand here as representative for similar regulations in the Penitential Summae: they represent the same orientation towards tradition and the same attempt to find solutions, so to speak, below the threshold of the dogmatic statement, which remains untouched.

In this place the *question* must be raised, how is it that the common patristic basis, which initially reveals no difference between the western and eastern Church, led to *two so totally different legal forms*: on the one hand, to the very hard attitude of Gratian, which did not entirely do away with the tension between the two levels visible in Origen, yet distinctly strengthened the decisive weight of the ideal form; on the other hand, to the practice of the

16 Gratian on c 18: Illud Gregorii sacris canonibus, immo evangelicae et apostolicae doctrinae penitus invenitur adversum.

17 Gratian on c 19-23: ...Illud vero Gregorii ad Bonifatium Anglicis pro tempore permissum est...

eastern Churches, in which the fundamental form remains just that—an ideal form—whereas that which previously was only tolerated on the margin as "not entirely senseless" and was limited as far as possible, influenced ever more strongly the concrete practice.

First of all, against a misunderstanding that is becoming ever more wide-spread, what is fundamentally common to both structures must be here underlined. Even the eastern Churches' very extensive practice of divorce retains the structure of the position of Origen-Basil. That is to say, also for them there can be no valid sacramental marriage while the first spouses are alive; the second marriage does not become a properly ecclesial marriage. It remains a tolerated marriage, and the reception of the sacraments is permitted by way of tolerance (today termed economy). What shifts is not the doctrinal structure, but the proportions in practice: the marginal possibility becomes a daily affair and thereby covers up in practice what in doctrine remains the ideal and fundamental form.

Only against this background can we rightly ask how it is that on the one hand in the West the practice of a tolerating permission beneath the ideal form of the dogmatic statement increasingly disappeared, whereas in the East it grew to such strength that it virtually conceals the ideal form. I do not know of more precise examinations of this subject. We can therefore for the time being only make guesses. It seems to me that we should look for the decisive reason in the different political and legal state-church development of the two halves of the Empire. In the East the Roman Empire continued to exist as a christian empire, in which the difference still emphasized by *Chrysostom* between the standards that are valid before the Church and before God and the standards of secular law[18] gradually become insignificant. The christian state creates christian law, in addition to which there is no reason to develop a comprehensive church law. In fact the state marital law increasingly, even if hesitatingly, adapted itself to the ecclesial demands. As we know, the concrete administration of justice remained certainly much more flexible; here, too, was the difference between the "written" and the practically "not senseless" greatly developed. The written law could evidently not prevail against the legal practice. Under *Emperor Leo III*, the iconoclast, the law itself is then brought into a more flexible form, which influences the following time period.[19] In the West a corresponding secular power is absent; thus the legislature falls to the popes and can only take place within the line of the Church tradition with its much stricter commitments. Accordingly, on this account the reason for the difference is that in the one case imperial, and in the other case papal law decisively influenced the path of development.

III. Luther and Trent

18 On this point see the assessment of the question in Rousseau, "Scheidung und Wiederheirat im Osten und im Westen" (see note 2), and the presentation of the legal development in the east roman empire in N. van der Waal, "Aspekte der geschichtlichen Entwicklung in Recht und Lehre. Einfluß des profanen Rechts auf die kirchliche Eheauffassung im Osten", in: *Concilium* 6 (1970), 337-339. In contrast to this Chrysostomus had formulated with tremendous clarity: Μὴ γάρ μοι τοὺς παρὰ τοῖς ἔξωθεν κειμένους νόμους ἀναγνῷς … Οὐ γὰρ δὴ κατὰ τούτους σοι μέλλει κρίνειν τοὺς νόμους ὁ Θεὸς ἐν τῇ ἡμέρᾳ ἐκείνῃ, ἀλλὰ καθ' οὓς αὐτὸς ἔθηκε. (*Hom. De libello repudii* PG 51, 219). Cf. Ambrosius, Expos, ev. sec. Luc. 8,5 CSEL 32, 4 S. 394: Dimittis ergo uxorem quasi iure, sine crimine, et putas id tibi licere quia lex humana non prohibet; sed divina prohibet... Audi legem Domini, cui obsequuntur etiam qui leges ferunt...

19 Cf. N. van der Waal, "Aspekte der geschichtlichen Entwicklung" (see note 18).

The dogmatic development that was already sketched in this tradition found, as is well known, its provisional conclusion in canon 7 of the canons of the Council of Trent on the sacrament of marriage (DS 1807); on a closer look we can see that this text, apparently so closed, corresponds exactly to that double-sidedness of the tradition that we have sketched: *Piet Fransen* has made that clear in his thorough examinations of this issue. What we here say substantially follows his research.

Trent is accordingly marked by a tradition that above all contains a clear knowledge of the implication of the "sacrament" of christian marriage, but at the same time is influenced by the existence of Auctoritates that in regard to practice seem to give a certain unclarity to the margins of the clear doctrinal statement. Moreover, the text is influenced by the peculiar form of the Church union with the orthodox that existed in the Venetian colonies: acknowledgment of the Pope while maintaining all orthodox Traditions without change, including the orthodox practice of divorce. This was all considered part of the "rite", i.e., the ecclesial form of life, which had a place in the one Church.[20]

To these elements came, additionally, the unprecedentedly sharp attack that *Luther* brought against the entire sacramental theology of the Catholic Church in his book on the Babylonian captivity. Luther clearly interprets – perhaps for the first time? – the unchastity clause of the Gospel of Matthew in the sense of a permission of remarriage and says: "Christ thus permitted divorce, of course only in the case of adultery. Accordingly the Pope must be in error as often as he separates a marriage for other reasons... Moreover, I am amazed why they force a man to celibacy who is separated from his wife by divorce... If Christ, namely, permits divorce in the case of adultery, and conversely, forces no one to celibacy; if Paul wills that we marry rather than burn with desire, then he certainly clearly allows him to take another wife in place of the one he has sent away."[21] Still, the reformer does not dare to pronounce a definitive judgment: "As one individual against all I can determine nothing in this case."[22] The observation remains decisive: Errare Papam necesse est – here the Pope errs. From the perspective of the entirety of the chapter on marriage this saying refers generally to the authority of the ecclesial office, summed up in the Pope, over the legal regulation of marriage, and thus to the binding western doctrine and practice concerning the sacrament of marriage generally. This Errare Papam necesse est is very consciously taken up when the Tridentine Council anathematizes those who assert that "the

20 Cf. P. Fransen, Das Thema "Ehescheidung nach Ehebruch" (see note 10).

21 I cite according to the edition of O. Clemen I, Berlin 6 1966, 496, lines 23-33. Important here for the understanding of Trent is the beginning of the section De matrimonio (p. 486, 30 f.): Matrimonium... sine ulla scriptura pro sacramento censetur. On top of that comes a fullness of futher remarks such as these : Quod si assit eruditio diuinae legis, cum prudentia naturali, plane superfluum et noxium est scriptas leges habere. Super omnia autem Charitas nullis prorsus legibus indiget (p. 491, 15-18). Disce ergo in hoc uno matrimonio, quam infoeliciter et perdite omnia sint confusa, impedita, irretita, et periculis subiecta, per pestilentes, indoctas impiasque traditiones hominum quaecunque in Ecclesia geruntur, ut nulla remedii spes sit, nisi reuocato libertatis Euangelio, secundum ipsum, extinctis semel omnibus omnium hominum legibus, omnia iudicemus et regamus. Amen (p. 494, 35-41). The deep distress from the perspective of which Luther's agitation is to be understand can be seen in a passage such as the following: Nihil enim est impedimentorum hodie, quod intercedente mammona non fiat legitimum, ut leges istae hominum non alia causa uideantur natae, nisi ut aliquando essent auaris hominibus rapacibusque Nimbrotis rhetia pecuniarum et laquei animarum, staretque in Ecclesia dei loco sancto Abominatio ista... (p. 490,33-38)

22 p. 496, 19f.: ...digamiam . . . an liceat, ipse non audeo definire. line 40f.: Ego sane, qui solus contra omnes statuere in hac re nihil possum...

Church errs, when ..."[23]

Following the examinations of Fransen it is today entirely clear what the Council of Trent condemned and what it did not condemn: it did not condemn the *eastern* practice, leaving it rather as a valid part of a "rite", which can certainly continue to exist in the framework of a Church union. It condemned an attack against the ecclesial authority over the formation of doctrine and life, according to which the teaching and practice of the Western Church, of the Church of God generally, was put forth as an unauthorized perversion of the biblical Word, in the face of which one should rather hold fast to the judgment of two educated persons – Luther in the course of his considerations came to this conclusion.[24] In contrast to that the Council lays down: the Church is right when it teaches and forms its life as it does. It acts, lives, and teaches thereby "in accordance with the teaching of the Gospel."[25] Fransen has convincingly interpreted the well-considered meaning of this formula: the ecclesial practice is not simply the teaching of the Gospel; but it is also not merely "not contrary to the teaching of the Gospel" (a formulation that had been suggested), but "iuxta" – in line with the Gospel, taking it up and concretising it.

The claim of the text is to this extent clear; it is also clear that in its careful formulation it corresponds exactly to the two-sidedness of the tradition. For again this text winds up saying that the faith provides an indubitable directive, and on the other hand leaves, indeed "against that which is written," beneath this teaching leeway for pastoral practice, which actually is not something to justify, when it is so, and yet which is not simply to be excluded, even if one cannot make it one's own and tolerates it only for the sake of union; we could put it as follows: its exclusion is not numbered among the minimal conditions of the union.

Thereby, in view of the text of Trent, the question that we experience in view of the whole tradition suggests itself again, renewed and strengthened. We are tempted to argue in the following manner: the Church can teach and order her life as she does, she can do so "in accordance with the teaching of the Gospel" (Mk 9, 1-12) and the Apostle (1 Cor 7) – so Trent teaches. But, as it seems, she can also according to this Council permit something else. But then we must ask: If she *can* do that, *must* she not do it as well? Does she not only have the right to impose a demand of such a weight if she *must* impose this demand, if she herself is bound by it? Does not the "able to do otherwise" here become an obligation to mercy, of the rightly understand "Evangelium (Good news)"?

To that we must first of all quite formally respond: if the "can" in view of human need were a "must", the maintenance of the other possibility therefore only an arbitrary decision between two equally valid possibilities, a decision that ultimately can have no real basis, we would have to give up the Tridentine statement together with its biblical and patristic basis. For then it would precisely not be true that the Church may so teach and live. And we must add that the Gospel, if we let it speak for itself, precisely does not say that which in *our* opinion would be an "Evangelium (Good news)" for men.

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23 DS 1807, Can. 7, Canones de sacramento matrimonii.

24 P. 497, 13-16: Sola autoritate Papae aut Episcoporum hic diffiniri nihil uolo, sed, si duo eruditi et boni uisi in nomine Christi consentirent, et in spiritu Christi pronunciarent, eorum ego iuditium praeferrem etiam Conciliis...

25 Cf. P. Fransen, "Das Thema Ehescheidung nach Ehebruch", 345 and 347.

In this way it is very clear that the "can" cannot in both instances have the same meaning. That is already clear by the differentiated treatment of the two aspects in Origen: the commencing practice of the eastern Churches remains clearly "contrary to the Scripture", "against that which was laid down from the beginning", and has in its favor only that it is "not entirely unreasonable", "in order to avoid still worse things." That means, however, that in reality, seen in daylight, we can precisely *not* speak of a double-sidedness of the facts, but only of a reality that in itself is clear, and in connection with which a certain marginal unclarity appears.

In other words: the Church can certainly not choose one or the other. It can, *of itself*, only live and teach "according to the teaching of the Gospel and the Apostle". But it cannot entirely exclude the limit cases, in which, to avoid still worse things it must remain beneath that which is *strictly speaking* to be done. Two such collective limit cases appear till that point in time (i.e., until Trent): the transitional stage from paganism to Christianity (Gregory II), and the Church unity, which requires a limitation of demands to the minimum. No one will assert that these are the only and the last cases in which we must ask in detail and with great care where concretely we can be flexible and where we cannot. What is not possible is to lay down a universal norm that makes generally possible what is in itself impossible.

IV. Conclusions

The result may be summarized in two theses.

1. The marriage of baptized persons is indissoluble. This is a clear and unambiguous directive of the faith of the Church of all centuries, a faith nourishing itself from the Scriptures. It is a categorical directive, that is not at the disposal of the Church, but is given to the Church to witness and to realize; it would be irresponsible to give the impression that anything on *this point* could be changed. The "yes" of marriage in the Church participates in that definitiveness that in the definitive decision of God for man at the same time has become visible as human possibility. It continues the "decisive decision" of God for man in the decisive decision of man for man. Marriage is one of those fundamental decisions of human existence that can only be made completely or not at all, precisely because therein man as a whole is involved, as his very self, unto that depth where he, touched by Christ, transformed, is taken into his "I" opened on the cross and open for us all.[26] This is what is meant when we call marriage a "sacrament".[27]

Marriage does not remain in the "law", but is incorporated into the Gospel as the reality of the decisive decision, and is structured by this decision: as Christian. But this means that two fundamental tendencies of modern thought prove to be just at this point incompatible with the Christian faith, or that marriage is exactly the point where fundamental anthropological decisions become concrete and have to be determined one way or the other. First, the reduction of being to consciousness, in which only that which is present in

26 On the notion of the "decisive decision" see H. Schlier, *Das Ende der Zeit*, Freiburg 1971, 297-320; on the idea of definitiveness see also J. Ratzinger, "Zur Frage nach dem Sinn des priesterlichen Dienstes", in: *GuL* 41 (1968), 347-376, on this point 373 ff.

27 See my "Theologie der Ehe", in: *ThQu* 149 (1969), 53-74, on this point 54-60.

a man's consciousness is what is truly valid for him (which practically means a throwback to the pre-Christian-Roman consent theory: if the consent ceases to exist, says this theory, then the marriage has ceased to exist[28]). Theories such as these, that a marriage can be just dead and so no longer exist, are forms of this Phenomenologism, which reduces man to his consciousness, thus concealing from him just that depth that faith wants to open up to him.

Besides that – in much the same sense as what has just been said – is the reduction of being to time, which knows only the sequence of becoming and loses what is beyond it, the constancy of being. In contrast to this sale of man to "Chronos," to the changing gods of the moment and to immediacy stands "Pistis" as fidelity, which in trusting [or in marrying: im Trauen] keeps man for the abiding and thus breaks open the circle of the recurring, gives man the possibility of growth, of going ahead, which has fidelity as its condition ...

2. The Church is the Church of the *New* Covenant, but it lives in a world in which the "hardness of heart" (Mat 19:8) of the Old Covenant remains unchanged. It cannot stop preaching the faith of the New Covenant, but it must often enough begin its concrete life a bit below the threshold of the scriptural word. Thus it can in clear emergency situations allow limited exceptions in order to avoid worse things. Criteria of such action must be: an act "against what is written," is limited in that it may not call into question the fundamental form, the form from which the Church lives. It is therefore bound to the character of exemption and of help in urgent need - as the transitional missionary situation was, but also the real emergency situation of the Church union.

Thereby arises, however, the practical question, whether we can name such an emergency situation in the present-day church and describe an exception that satisfies these criteria. I would like to try, with all necessary caution, to formulate a concrete proposal that seems to me to lie within this scope. Where a first marriage broke up a long time ago and in a mutually irreparable way, and where, conversely, a marriage consequently entered into has proven itself over a longer period as a moral reality and has been filled with the spirit of the faith, especially in the education of the children (so that the destruction of this second marriage would destroy a moral greatness and cause moral harm), the possibility should be granted, in a non-judicial way, based on the testimony of the pastor and church members, for the admission to Communion of those in live in such a second marriage. Such an arrangement seems to me to be for two reasons in accord with the tradition:

a) We must emphatically recall the room for discretion that is built into every annulment process. This discretion and the inequities that inevitably come from the educational situation of the affected parties and from their financial possibilities should warn against the idea that justice can in this way be flawlessly satisfied. Moreover, many things are simply not subject to legal judgment and are nonetheless real. The procedural affair must necessarily limit itself to the legally provable, but can for that very reason pass over crucial facts. Above all, formal criteria (formal errors or conscious omission of ecclesiastical form) thereby receive a preponderance that leads to injustices. Overall, the transferal of the question to the act establishing the marriage is indeed legally unavoidable, but still a narrowing of the problem that cannot fully do justice to the nature of human action. The annulment process provides a concrete set of criteria to determine that the standards of

28 Cf. N. van der Waal, "Aspekte der geschichtlichen Entwicklung" (see note 18), 337; a more discriminating examination: Delling, in: *RAC* IV 712 f.

marriage among believers are not applicable to a particular marriage. But it does not exhaust the problem and therefore cannot claim that strict exclusivity that had to be attributed to it under the reign of a certain form of thought.

b) The requirement that a second marriage have proven itself over a long time as a moral greatness and have been lived in the spirit of faith in fact corresponds to that type of forbearance that is palpable in Basil, where after a long penance Communion is granted to the "Digamus" (= the one living in a second marriage) without terminating the second marriage: in trust in in the mercy of God, who does not leave the penance unanswered. If in the second marriage moral obligations to the children, to the family, and so also to the woman have arisen, and no similar commitments from the first marriage exist, and if thus for moral reasons the abandonment of the second marriage is inadmissible, and on the other hand practically speaking abstinence presents no real possibility (magnorum est, says Gregory II), the opening up of community in Communion after a period of probation appears to be no less than just and to be fully in line with the Church's tradition: The granting of communio cannot here depend on an act that is either immoral or practically speaking impossible.

The distinction attempted with the mutual relatedness of thesis 1 and 2 seems to be in accordance with the caution of Trent, although as a practical rule it goes beyond it: the anathema against a teaching that wants to make the Church's fundamental form an error or at least a custom that should be overcome, remains in full vigor. Marriage *is* a sacramentum, it stands in the irrevocable fundamental form of the decisive decision. But this does not mean that the Communion community of the church does not also encompass those people who accept this teaching and this life principle, but are in a special predicament, in which they especially need the full communion with the Body of Christ. The Church's faith will also thus remain a sign of contradiction: That is essential to it, and precisely by this fact it knows that it is following the Lord, who foretold to his disciples that they should not expect to be above the master, who was rejected by the pious and by the liberals, by Jews and by Gentiles.