

## ORTHODOX OIKONOMIA AND CIVILLY REMARRIED CATHOLICS: AN OPPORTUNITY FOR DOCTRINAL AND CANONICAL DEVELOPMENT?

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This article considers select ecumenical dimensions of admitting divorced and civilly remarried Catholics to Holy Communion. It begins by presenting fundamental concepts in canon law and moral theology necessary to contextualize the current debate. The article then proceeds to examine the restrictive doctrinal developments in the apostolic exhortation *Familiaris consortio* and Cardinal Kasper's critical assessment of this teaching in *The Gospel of the Family*. It concludes with a brief assessment of the *status quaestionis*.

### 1. Introduction

In recent years, pastoral care for divorced and remarried Catholics has become an increasingly urgent issue. A study by the Center for Applied Research in the Apostolate (CARA) at Georgetown University shows that divorcees now comprise approximately one-third of the American Church's faithful, or eleven million Catholics – no small number.<sup>1</sup> However, the Catholic Church's current pastoral

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<sup>1</sup>This study can be found online at: <http://nineteensixty-four.blogspot.com/2013/09/divorce-still-less-likely-among.html> (accessed December 2015).

approach has left many of these Catholics “on the periphery.” At present, those who have remarried civilly are *ipso facto* excluded from the sacraments with limited possibilities for return: 1) a decree of nullity; 2) the death of their first spouse; or 3) a commitment to living in perpetual sexual continence with their civil spouse. These options are often physically or morally impossible, resulting in great anguish for the faithful in these situations.

During the recent Synod on the Family, the debate over admitting divorced and remarried Catholics to the sacraments brought to the fore several moral issues regarding the current discipline and the implications of altering it. Previously, both Pope Francis and Cardinal Walter Kasper identified *oikonomia*, the principle by which the Orthodox permit divorce and remarriage, as a possible inspiration for a reform of Catholic pastoral practice. In particular, Kasper noted that common ground between *oikonomia* in the East and *epikeia* and prudential judgment in the West might allow the Catholic Church to faithfully reconcile the two.

Although the synod has since ended, ecumenical concerns suggest that theologians continue to assess *oikonomia* in light of the Catholic moral tradition. The Orthodox Church does not generally consider first or second remarriages adulterous, but permits them as “tolerated” unions. However, Catholic canon law considers these myriad Orthodox marriages irregular and objectively adulterous. If reunion occurred today, these Orthodox would be barred from Holy Communion. This discrepancy poses a significant obstacle to ecclesial reunion.

Genuine ecumenical progress will eventually require Catholic and Orthodox authorities to determine whether and to what extent their Churches’ teachings on remarriage can be harmonized. To that effect, this article will serve as a very preliminary, rudimentary foray into this question. It will begin by presenting certain background concepts in canon law and theology necessary to contextualize the debate. Following this introduction, it will then proceed to present the restrictive doctrinal developments in the apostolic exhortation *Familiaris consortio*<sup>2</sup> and the critical assessment of this teaching in

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<sup>2</sup>John Paul II, Apostolic Exhortation *Familiaris consortio*, February 2, 1982: AAS 74 (1982): 81-191 [hereafter *FC*].

Cardinal Kasper's *The Gospel of the Family*. A brief assessment of the *status quaestionis* will bring this study to its conclusion.

## 2. Fundamental Canonical and Theological Concepts

The ongoing debate over admitting divorced and civilly remarried Catholics to communion is a complex one. On its surface, this dispute concerns a matter of ecclesiastical discipline, or "practice."<sup>3</sup> As this relatively muted term suggests, ecclesiastical "practices" or disciplines generally admit the possibility of change. In general, this is true; both legislative authorities and communities in the Catholic Church are capable of changing disciplinary<sup>4</sup> laws.<sup>5</sup> However, disciplinary changes cannot violate divine law.<sup>6</sup> From a moral perspective, the Catholic Church cannot compel or permit its faithful to behave contrary to God's own mandates. As we will see later, those in favor of maintaining the prohibition argue that loosening it would condone adultery, while those in favor of applying some form of *oikonomia* deny that the current discipline necessarily follows from divine revelation.

## 3. The Two Natures of Ecclesiastical Law

The law by which the Catholic Church directs its members' actions has both divine and human origins. The Decalogue and other

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<sup>3</sup>FC 84.

<sup>4</sup>The canons referenced in this article are taken from the Latin code (corresponding canons of the Eastern code are indicated in parentheses).

<sup>5</sup>CIC c. 23 (CCEO c. 1506 §1) allows communities of Catholic faithful to modify ecclesiastical discipline through the introduction of a custom: "Only that custom introduced by a community of the faithful and approved by the legislator according to the norm of the following canons has the force of law." Moreover, even a custom that violates canon law (*contra legem*) can obtain the force of law under certain circumstances. See CIC c. 24, §2 (CCEO c. 1507 §3): "A custom contrary to or beyond canon law (*praeter ius canonicum*) cannot obtain the force of law unless it is reasonable; a custom which is expressly reprobated in the law, however, is not reasonable." English translations from *Code of Canon Law, Latin-English Edition: New English Translation* (Washington, DC: CLSA, 1998). All subsequent English translations of canons from this code will be taken from this source unless otherwise indicated.

<sup>6</sup>CIC c. 24 §1 (CCEO c. 1506 §2): "No custom which is contrary to divine law can obtain the force of law."

divinely revealed norms constitute divine *positive* law, so named because God directly communicated it to humanity. As part of revelation, divine positive law is irreformable in itself. Laws created by the Church are not divine law, which originates from God alone. However, although not divine in themselves, some ecclesiastical laws contain formulations or logical consequences of divine law and so cannot be violated without also violating divine law. Canon 1057 §1, for example, contains a fundamental truth about human nature and Christian anthropology: “The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent.” To act or legislate contrary to this canon would violate divine law by denying the free will inherent in every human being.

In addition to these laws, the Catholic Church can also establish laws that are “merely” ecclesiastical.<sup>7</sup> The power to establish these laws is divinely given, and they ultimately aim at a supernatural end: the salvation of the Christian faithful. However, the laws themselves have only a human character. It is therefore possible to act contrary to their prescriptions or proscriptions without “objectively” violating divine law, intentionally or otherwise.

#### **4. Dispensation and *Oikonomia***

At times, the observance of a merely ecclesiastical law may do more harm than good. In these situations, an ecclesiastical authority can grant a dispensation, or “the relaxation of a merely ecclesiastical law in a particular case”<sup>8</sup> to serve a greater good or prevent a greater evil. Such a case could occur, for example, when a Catholic wishes to marry an unbaptized person. Canon law prohibits such marriages

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<sup>7</sup>CIC c. 11 (CCEO c. 1490): “Merely ecclesiastical laws bind those who have been baptized in the Catholic Church or received into it, possess the sufficient use of reason, and, unless the law expressly provides otherwise, have completed seven years of age.”

<sup>8</sup>CIC c. 85 (CCEO c. 1536 §1): “A dispensation, or the relaxation of a merely ecclesiastical law in a particular case, can be granted by those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation.”

under pain of invalidity;<sup>9</sup> however, a Catholic denied the right to marry an unbaptized person may choose to do so outside of the Church or even to leave it. The real possibility of this outcome justifies dispensation from the ordinary prohibition, provided that the marriage would not endanger the Catholic's faith.

Dispensations are not to be granted frivolously or indiscriminately, but only in individual cases and after careful discernment: *CIC* c. 90 (*CCEO* c. 1536)

§1: One is not to be dispensed from an ecclesiastical law without a just and reasonable cause, after taking into account the circumstances of the case and the gravity of the law from which dispensation is given; otherwise the dispensation is illicit and, unless it is given by the legislator himself or his superior, also invalid.

§2: In a case of doubt concerning the sufficiency of the cause, a dispensation is granted validly and licitly.

The phrase "just and reasonable cause" indicates a sort of legal probabalism.<sup>10</sup> To be valid, a dispensation must stand to produce a

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<sup>9</sup>*CIC* c. 1086 §1 (*CCEO* c. 803): "A marriage between two persons, one of whom has been baptized in the Catholic Church or received into it and the other of whom is not baptized, is invalid."

<sup>10</sup>See James T. Bretzke, *Handbook of Roman Catholic Moral Terms* (Washington, DC: Georgetown University Press, 2013), s.v. "Probabalism and Probabiliorism." In moral analysis, probabalism applies to genuine doubt about permissible courses of action. When equally strong arguments and authorities support two or more options, an agent may in good conscience choose the path of greater freedom. *CIC* c. 90 §1 (*CCEO* c. 1536 §1) applies this principle specifically to an ecclesiastical authority who grants a dispensation. If a dispensation stands to produce a good roughly equal to that of the law, then the authority may choose the path of greater freedom by granting it.

Probabalism is intimately connected with another moral and canonical principle, *lex dubia non obligat* ("a doubtful law does not oblige"). In canon law, this principle is a "general norm" used in interpreting any canon of the code: "Laws, even invalidating and disqualifying ones, do not oblige when there is a doubt about the law. When there is a doubt about a fact, however, ordinaries can dispense from laws provided that, if it concerns a reserved dispensation, the authority to whom it is reserved usually grants it" (c. 14). The second paragraph of canon 90 applies this principle to the norm stated

good equal to or greater than that achieved by the law. For the same reason, a person uncertain of a cause's sufficiency may err on the side of freedom and grant the dispensation validly.<sup>11</sup> However, laws that are *not* merely ecclesiastical are never subject to dispensation, even to achieve a perceived greater good or to avoid a greater evil. From a moral perspective, dispensing from a divine law would be considered probable formal cooperation in evil and the achievement of a good end through evil means. It would also contradict the Catholic belief that God's law is always good for man.

The Orthodox principle of *oikonomia*, now well-known by name, parallels the Catholic concept of dispensation in its substance. While Orthodox thoughts vary regarding the term's precise meaning and the conditions for applying it,<sup>12</sup> they do converge in several key areas. Like dispensation, *oikonomia* entails a relaxation of the law's rigor or a mitigation of its harshness in a particular case. Orthodox theologians consider the need to balance such applications with *akribeia*, or the need for strict adherence to the letter of the law.<sup>13</sup> While they disagree about which of the two, if either, should predominate, they agree that *oikonomia* "always must serve the salvation of souls."<sup>14</sup> Unfortunately, the fluidity of the concept renders a more precise understanding impossible:

An absolute condition for the application of *oikonomia* is a "special situation." It is not easy to determine what constitutes such "special situations" because there are no relevant directives or definitions in the tradition. It can therefore be deduced only from legal praxis. Praxis shows that when *akribeia* cannot serve the salvation of souls, which is the purpose of all the norms of the Church, *oikonomia* ought to come into play. This means that the norms and the context in which they are applied stand in a hermeneutical relationship: the special situation postulates a

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in the first. By attributing validity and liceity to a doubtful case, §2 serves to prevent anxiety over the negative effects (e.g. an invalid marriage) produced by violating §1.

<sup>11</sup>CIC c. 90 §2 (CCEO c. 1536 §3): "In a case of doubt concerning the sufficiency of the cause, a dispensation is granted validly and licitly."

<sup>12</sup>Miriam Wijlens, "Salus animarum suprema lex: Mercy as a Legal Principle in the Application of Canon Law?" *The Jurist* 54 (1994): 561.

<sup>13</sup>Miriam Wijlens, "Salus animarum suprema lex, ..." 562.

<sup>14</sup>Miriam Wijlens, "Salus animarum suprema lex, ..." 562.

flexible application of the norms, which can be attained with the help of *oikonomia*. This implies that through the use of *oikonomia* the norms of the Church are open to an evolutionary process. In order to find justice, the Orthodox legal system is continuously challenged and, when necessary and desired, modified due to a hermeneutical process.<sup>15</sup>

Chorbishop John Faris, a Maronite canonist with experience in ecumenism, has suggested that dispensation might offer the Catholic Church a ready-made way to apply *oikonomia* to communion for the divorced and remarried. As an administrative act, a dispensation would allow the Church to admit divorced and remarried Catholics to communion without “affect[ing] the juridical stability of the law itself, which prohibits the reception of the Eucharist by those who are generally considered unworthy because of their irregular unions...”<sup>16</sup> In other words, the Church could excuse from its discipline without also denying the indissolubility of marriage. Although Faris’ observations accurately assess the juridical aspects of the problem, they do not address its moral dimensions. For dispensation or *oikonomia* to offer a way forward, the Church must first refute the argument that divine law requires adherence to the present discipline always and in all cases.

## 5. Indissolubility, Divorce, and Remarriage

As a divine institution regulated by the Church, Catholic<sup>17</sup> and Orthodox<sup>18</sup> marriages are subject to both divine and ecclesiastical law. Catholic marriages are ordinarily sacramental;<sup>19</sup> however,

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<sup>15</sup>Miriam Wijlens, “*Salus animarum suprema lex, ...*” 563.

<sup>16</sup>Jennifer Brinker, “Churches urged to develop better pastoral approach to divorce, marriage,” *National Catholic Reporter*, October 28, 2014, <http://ncronline.org/news/faith-parish/churches-urged-develop-better-pastoral-approach-divorce-marriage> (accessed December 2015).

<sup>17</sup>*CIC* c. 1059 (CCEO c. 780): “Even if only one party is Catholic, the marriage of Catholics is governed not only by divine law but also by canon law, without prejudice to the competence of civil authority concerning the merely civil effects of the same marriage.”

<sup>18</sup>Dimitros J. Constantelos, *Marriage, Sexuality, & Celibacy: A Greek Orthodox Perspective* (Minneapolis, MN: Light and Life, 1975) 29.

<sup>19</sup>*CIC* c. 1055 §1 (CCEO c. 776 §§1&2). The matrimonial covenant, by which a man and a woman establish between themselves a partnership of

dispensation can be given for a “natural” or non-sacramental marriage. Orthodox discipline contains similar restrictions but does not admit exceptions. Its faithful are also forbidden to marry outside the Orthodox Church or to attempt to marry an unbaptized person. Those who do are excommunicated. The Orthodox Church also considers marriages performed outside of it invalid, even in confessions that recognize marriage as a sacrament.<sup>20</sup> Since such “disparity of cult” marriages can occur only outside the Orthodox Church, every valid Orthodox marriage is also sacramental.<sup>21</sup>

### 5.1. Catholic Understanding of Indissolubility

Based on Christ’s prohibition of divorce, the Catholic Church holds that a valid marriage creates an indissoluble bond between the spouses. Here, Catholic teaching distinguishes between “intrinsic” and “extrinsic” indissolubility. The first type refers to the inability of the spouses themselves to dissolve the marriage. All *ratum* marriages – marriages lawfully and freely consented to – possess at least intrinsic indissolubility. Extrinsic indissolubility refers to the absolute inability of any human authority outside the marriage to dissolve it; death alone can dissolve an extrinsically indissoluble bond. Only consummated sacramental marriages (*ratum et consummatum*) possess this sort of indissolubility.<sup>22</sup> All other marriages are susceptible to extrinsic dissolution under certain circumstances.

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the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized. §2. For this reason, a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament.

<sup>20</sup>Dimitros J. Constantelos, *Marriage, Sexuality, & Celibacy*, 11.

<sup>21</sup>UR 16 acknowledges the authority of the Orthodox “to govern themselves according to the disciplines proper to them, since these are better suited to the character of their faithful, and more for the good of their souls.” In terms of canon law, this includes establishing invalidating impediments to marriage.

<sup>22</sup>CIC c. 1141 (CCEO c. 853): “A marriage that is *ratum et consummatum* can be dissolved by no human power and by no cause, except death.”

## 5.2. Orthodox Views on Indissolubility

Orthodox thought also considers Christ's opposition to divorce an "incontrovertible fact"<sup>23</sup> that implies indissolubility. However, the Orthodox hold different views on the latter's nature and its moral implications for divorce and remarriage. Regarding indissolubility, there appear to be at least two major schools of Orthodox thought. The first holds that marriage ends by either physical or "spiritual" death. It considers indissolubility as an *ideal*, a property every marriage should but may not necessarily have. The second school rejects this idea entirely: its adherents maintain that marriage is an eternal reality that even death cannot dissolve.

## 6. Marriage Is Dissoluble

The first view follows from a strict interpretation of the Lord's prohibition on divorce. According to its logic, the Lord established a negative moral obligation that universally binds *semper et pro semper*, and one who violates it is guilty of grave sin; however, Christ's prohibition of the act did not alter man's capacity to commit it. In other words, man can but should not destroy a marital bond. This destructive capability itself necessitates the Lord's prohibition, which is thus analogous to the Decalogue's prohibition on killing:

The theory of the indissolubility of marriage has a strong pedagogical significance. The motivation Christ gives is a command. Those who commit themselves to the covenant of marriage should do all they can not to separate, as they have God to thank for their oneness. But the additional motivation: "Therefore what God has joined together, let man not separate." (Mark 10, 9; Math. 19, 6) does not signify a magical adherence. In every mystery or sacrament, excluding baptism, the exertion of man's free will is required. The "not separate" is a divine request, as is "do not kill." But man is free and can dissolve his marriage and kill his fellow man. In both cases he commits grievous sin.<sup>24</sup>

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<sup>23</sup>Peter L'Hullier, "The Indissolubility of Marriage in Orthodox Law and Practice," *St. Vladimir's Theological Quarterly* 32/3 (1988): 200.

<sup>24</sup>Athenagoras Peckstadt, "Marriage, Divorce, and Remarriage in the Orthodox Church: *Economia* and Pastoral Guidance," *University of Leuven International Congress* (18-20 April 2005): <http://www.orthodox>

Consequently, divorce and the adultery caused by remarriage are viewed as discrete (separate and distinct) acts, not ongoing ones. If the Catholic Church shared this interpretation, civil remarriage would pose a lesser obstacle to Holy Communion than it does now. Remarried divorcees who sincerely repented of their actions could be readmitted immediately without ending their second marriage or pledging to live in perpetual sexual continence.

Orthodox who believe in the dissolubility of marriage attribute it to physical or spiritual death. *Physical death* is self-explanatory; it occurs when one or both of the spouses in a sacramental marriage die. Under those circumstances, death itself dissolves the marital bond. Orthodox and Catholic theology essentially correspond on this point; however, the Orthodox do not encourage the remarriage of widows and widowers. The idea of *spiritual death* derives from the Matthean "exception clause," in which Christ permits divorce in cases of "*porneia*," or unchastity. Understood here as adultery, *porneia* is believed to destroy the very essence of a sacramental marriage.<sup>25</sup> By extension, other causes of spiritual death are also possible. When adultery occurs in such cases, it indicates that the marriage has already died.<sup>26</sup>

The meaning of *porneia* has occasioned some dispute even among Orthodox scholars. It can refer to specific sexual sins, such as adultery, fornication, and public immodesty, but it can also indicate any type of sexual misbehavior whatsoever.<sup>27</sup> Some theologians have argued that Matthew, writing for a Jewish audience, employs *porneia* as shorthand for marital relationships considered incestuous by Jewish law. However, Orthodox theologians who uphold divorce dismiss this interpretation as nonsensical. Jewish law did not consider persons in such forbidden relationships as actually

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researchinstitute.org /articles/liturgics\_athenagora\_s\_remarriage.htm (accessed December 2015).

<sup>25</sup>Paul Evdokimov, *The Sacrament of Love*, trans. Anthony P. Gythiel and Victoria Steadman (Crestwood, NY: St. Vladimir's Seminary Press, 1985) 190.

<sup>26</sup>Paul Evdokimov, *The Sacrament of Love*, 190.

<sup>27</sup>Theodore Stylianopoulos, "The Indissolubility of Marriage in the New Testament: Principle and Practice," *Greek Orthodox Theological Review* 34/4 (1989) 343.

married.<sup>28</sup> Because these persons would have been incapable of divorce, these Orthodox hold that Christ's words must have had a different meaning that established an actual exception.

## 7. Marriage Is Absolutely Indissoluble

The second school of thought rejects the idea that anything, even physical death, can dissolve the marital bond. It relies heavily<sup>29</sup> upon the vision of marriage articulated in Ephesians 5:22-23, which models human marriage on that of Christ and his Church. For Orthodox who hold this view, the passage indicates the fundamental truth that marriage is eternal: if Christ and his Church are joined forever, so too are Christian spouses. Consequently, the branches of Orthodoxy that hold this view expect marital fidelity even of widows and widowers.<sup>30</sup> This view is the official teaching of the Orthodox Church in America (OCA):

The perfect marriage can only be one, single and unique. The prototype of marriage, the unity between Christ and His Church, excludes multiple marriages: Christ has only one Church; the Church has no other Christ. Even death cannot break the bond of perfect love. Therefore, the Church does not advocate second or third marriages, even for widows or widowers; rather, they are tolerated as condescension to human frailty and weakness, while fourth marriages are totally forbidden.<sup>31</sup>

In accord with this teaching, John Meyendorff, a renowned OCA theologian, disputes the idea that the scriptural passage about the "levirate" (Matthew 22:23-32; Mark 12:18-27; Luke 20:27-37) implies that death dissolves marriage. According to Meyendorff, Christ intends only to rebuke the erroneous logic behind the question of the Sadducees, who do not believe in the Resurrection. Christ's answer

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<sup>28</sup>Theodore Stylianopoulos, "The Indissolubility of Marriage..." 343.

<sup>29</sup>John Meyendorff, *Marriage: An Orthodox Perspective* (Crestwood, NY: St. Vladimir's Seminary Press, 1970) 17. Meyendorff states that this scriptural passage "became the basis of the entire theology of marriage as found in Orthodox tradition."

<sup>30</sup>John Meyendorff, *Marriage: An Orthodox Perspective*, 18.

<sup>31</sup>Holy Synod of the Orthodox Church in America. encyclical letter "On Marriage" (1976), <https://oca.org/holy-synod/encyclicals/on-marriage> (accessed December 2015).

thus does not imply that marriage has no place in the Resurrection, but only that resurrected persons will not have carnal urges.<sup>32</sup>

## 8. Divorce and Remarriage

All varieties of marriage can and do fail, and the pains of divorce do not discriminate along confessional lines. However, the means of pastoral care available to divorced Catholics depend upon the nature of their marital bond. Under certain conditions, those in a natural marriage may have it dissolved by the Pauline or Petrine privilege. A similar possibility is available to persons in unconsummated sacramental or natural marriages.<sup>33</sup> These dissolutions are essentially “Catholic divorce”: they dissolve a valid marriage and morally and canonically free the former spouses to enter a new one. However, the Catholic understanding of indissolubility precludes offering these remedies to those whose consummated sacramental marriages have failed. Catholics in this position cannot remarry unless their partner’s death dissolves the bond or an ecclesiastical tribunal declares that it never existed, i.e., that the marriage is invalid.

The morality of divorce and remarriage varies among the Orthodox. In cases where marriages are believed to have died spiritually, divorce can be a moral imperative. Since spiritual death ends marriage with the same finality as physical death, failed marriages are “dead marriages” with no sacramental essence. Remaining in such a marriage can be considered dishonest, as the spouses’ ongoing common life testifies to a marriage that no longer exists. Consequently, spouses in a spiritually dead marriage are practically obliged to divorce to prevent sacrilege: “Thus the Church recognizes that there are situations in which the nuptial life has lost its sacramental essence and has become a prolonged profanation, which may lead to the soul’s perdition. The indissolubility of the bond can provoke lies; by protecting the common good, the private good is sacrificed.”<sup>34</sup> Nevertheless, the Orthodox do not impose divorce even when a marriage has obviously failed. In these cases, the spouses

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<sup>32</sup> John Meyendorff, *Marriage: An Orthodox Perspective*, 15-16.

<sup>33</sup> CIC c. 1142 (CCEO c. 862): “For a just cause, the Roman Pontiff can dissolve a non-consummated marriage between baptized persons or between a baptized party and a non-baptized party at the request of both parties or of one of them, even if the other party is unwilling.”

<sup>34</sup> Paul Evdokimov, *The Sacrament of Love* 190.

must discern the truth of their situation and make a conscience-based decision about their future.<sup>35</sup> A subsequent divorce thus functions as a post-mortem declaration of spiritual death.

No such obligation exists in the Catholic Church, which does not accept the Orthodox theory of spiritual death. Nevertheless, Catholic canon law does suggest that, in cases of adultery, an innocent spouse may be morally culpable for remaining in the marriage. Ordinarily, an innocent victim of adultery has the right to leave his or her unfaithful partner.<sup>36</sup> However, the victim can lose this right by committing what canon 1152 §2 terms “tacit condonation.” When a victim of adultery remains with an adulterous spouse for six months or voluntarily consents to marital relations, he or she is considered – legally, if not morally – to have condoned the adultery.<sup>37</sup>

Additional marriages beyond a first are discouraged among the Orthodox, who consider them a concession to fleshy desires. However, second and third marriages can be permitted as a “lesser evil” and the best solution for a particular person.<sup>38</sup> These concessions are made possible by *oikonomia*, a “divine dispensation” based on Mt. 5:32 and 19:9<sup>39</sup> that allows an innocent victim of adultery to remarry. In practice, permission to remarry has been extended to guilty parties, albeit with a penance attached. Orthodox teaching has also evolved to admit other grounds for divorce besides adultery, “such as desertion, extreme cruelty and incompatibility,

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<sup>35</sup>Paul Evdokimov, *The Sacrament of Love*, 190.

<sup>36</sup>CIC c. 1152 §1 (CCEO c. 863 §1): “Although it is earnestly recommended that a spouse, moved by Christian charity and concerned for the good of the family, not refuse forgiveness to an adulterous partner and not disrupt conjugal life, nevertheless, if the spouse did not condone the fault of the other expressly or tacitly, the spouse has the right to sever conjugal living unless the spouse consented to the adultery, gave cause for it, or also committed adultery.”

<sup>37</sup>CIC c. 1152 §2 (CCEO c. 863 §2): Tacit condonation exists if the innocent spouse has had marital relations voluntarily with the other spouse after having become certain of the adultery. It is presumed, moreover, if the spouse observed conjugal living for six months and did not make recourse to the ecclesiastical or civil authority.

<sup>38</sup>John Meyendorff, *Marriage: An Orthodox Perspective*, 34.

<sup>39</sup>Paul Evdokimov, *The Sacrament of Love*, 184.

inability on the part of either partner to consummate the physical union[,] or incurable mental illness.”<sup>40</sup>

Not all Orthodox find this expansion justified. According to Orthodox theologian Alvian Smirensky, the morality or immorality of a subsequent marriage traditionally depended upon the circumstances surrounding it. He finds a gradated approach in the conciliar canons, which were “not favorable” to any remarriage; however, the Church’s preference for widowhood over remarriage did not necessarily imply that it viewed the latter as immoral. Such a judgment did appear in conjunction with remarriage after divorce, which was judged to be as egregious as adultery.<sup>41</sup>

The divorce and remarriage of an innocent party could be tolerated in virtue of the Matthean exception, but an adulterer’s could not. Because adulterers were not admitted to the Eucharist, it would have been morally impossible for them to participate in the “Eucharistically centered [sic]” Orthodox marriage rite. According to Smirensky, this abuse resulted from the Church’s unjustified efforts to cater to secular society’s demands. In the Russian Orthodox Church, further abuses, such as a formula to remove the nuptial blessing, developed in order to reconcile these irreconcilable realities.<sup>42</sup> Smirensky ultimately concludes that the Orthodox Church may allow only widows/widowers and innocent parties to remarry.<sup>43</sup>

### 9. *Familiaris Consortio* and the *Status Quaestionis*

The debate over proper pastoral care for divorced and civilly remarried Catholics is not new to the life of the Church, nor is Cardinal Kasper the first theologian to suggest that *oikonomia* might offer such Catholics a “way out.” By the time the “Kasper thesis” took print form in 1977,<sup>44</sup> this Orthodox principle had already begun to generate discussion among Catholic canonists and moralists. In

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<sup>40</sup>Dimitros J. Constantelos, *Marriage, Sexuality, & Celibacy*, 62.

<sup>41</sup>Alvian N. Smirensky, “The Evolution of the Present Rite of Matrimony and Parallel Canonical Developments,” *St. Vladimir’s Seminary Quarterly* 8/1 (1964) 45.

<sup>42</sup>Alvian N. Smirensky, “The Evolution of the Present Rite ...,” 45.

<sup>43</sup>Alvian N. Smirensky, “The Evolution of the Present Rite ...,” 46.

<sup>44</sup>Walter Kasper, *Zur Theologie der Christlichen Ehe* (Mainz: Matthias-Grünewald, 1977).

the American Church, scholarly studies on the issue had already begun to appear by 1970, when *The Jurist* published a special issue containing related articles by Bernard Haring and other moralists and canonists.<sup>45</sup> It is also now common knowledge that Joseph Ratzinger advocated a similar position in 1972, less than a decade before he arrived at CDF. By the end of the 1970s, it had also aroused the interest of the hierarchy.

Convoked by John Paul II to discuss “the Christian Family in the Modern World,” the 1980 meeting of the synod of bishops addressed several topics including the admission of divorced and civilly remarried Catholics to Holy Communion. By that time, the Church had adopted as a matter of discipline the so-called “brother-sister” arrangement,<sup>46</sup> which allowed an “irregular” couple to receive the sacraments only after committing to a life of perpetual sexual continence. While some of the synod fathers defended this practice, others proposed adopting *oikonomia* or another means that would allow communion for the divorced and remarried.<sup>47</sup> Still others reserved judgment and advocated a post-synodal investigation into the Eastern practice.<sup>48</sup>

Joseph Ratzinger later implied that such debates were possible only because the Church had not yet taught definitively on the matter. At the time, communion for the divorced and remarried was an open issue. This openness was evident in the CDF’s 1973 “Letter regarding the indissolubility of marriage,” which purported to correct certain unspecified errors. Among other things, the letter rebuked tribunals that had issued false decrees of nullity to facilitate access to the sacraments. Tribunals were not divorce courts and could not proceed as though sacramental marriage were dissoluble. However, the congregation did not yet view a subsequent civil marriage as an absolute obstacle to the sacraments. While urging adherence to the discipline of the Church, the congregation also alluded to the possibility of a more permissive practice in the internal forum:

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<sup>45</sup>See, *The Jurist* 30/1 (1970) for several timely articles discussing this issue as well as the situation of the divorced and remarried in general.

<sup>46</sup>James Provost, “Intolerable Marriage Situations: A Second Decade,” *The Jurist* 50/2 (1990) 580, note 32.

<sup>47</sup>James Provost, “Intolerable Marriage Situations ...,” 578, note 21.

<sup>48</sup>James Provost, “Intolerable Marriage Situations ...,” 580, note 32.

Regarding the administration of the Sacraments, local Ordinaries should strive, on one hand, to encourage the observance of the discipline in force in the Church, and on the other hand, to act so that pastors of souls show particular solicitude toward those who live in an irregular union, seeking to resolve these cases through the use of the approved practices of the Church in the internal forum, as well as other just means.<sup>49</sup>

The openness to *oikonomia* evident in the synodal discussions ended with the promulgation of the apostolic exhortation *Familiaris consortio*. In the document, John Paul II clearly rejected the concession to human weakness that motivated the Orthodox practice. The pontiff insisted that the response to sinful influences on Christian families must be a “continuous, permanent conversion” that “advances gradually with the progressive integration of the gifts of God and the demands of His definitive and absolute love.” A passive toleration of divorce and civil remarriage would preclude such gradual development, preventing a married couple from fulfilling the requirement “to progress unceasingly in their moral life.”<sup>50</sup>

The exhortation rejected any possibility of admitting divorced and civilly remarried Catholics to communion, regardless of their individual circumstances. While acknowledging certain mitigating cases, especially those involving abandonment and natural obligations to children, John Paul denied that such distinctions give cause to admit such persons to communion. The pope concludes that two consequences necessarily follow from Sacred Scripture: 1) all divorced and civilly remarried Catholics are in an “objectively” sinful situation (i.e. adultery), and 2) they must be prevented both from scandalizing others and from eating and drinking their own condemnation:

However, the Church reaffirms her practice, which is based upon Sacred Scripture, of not admitting to Eucharistic Communion divorced persons who have remarried. They are unable to be admitted thereto from the fact that their state and condition of life

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<sup>49</sup>Sacred Congregation for the Doctrine of the Faith, “Letter Regarding the Indissolubility of Marriage,” April 11, 1973, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19730411\\_indissolubilitate-matrimonii\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19730411_indissolubilitate-matrimonii_en.html) (accessed December 2015).

<sup>50</sup>FC 34.

objectively contradict that union of love between Christ and the Church which is signified by the Eucharist. Besides this, there is another special pastoral reason: if these people were admitted to the Eucharist, the faithful would be led into error and confusion regarding the Church's teaching about the indissolubility of marriage.<sup>51</sup>

A 1994 letter from the CDF to the world's bishops later affirmed that this proscription was to be considered a matter of divine law, from which the Apostolic See "has no power to dispense."<sup>52</sup>

As part of the ordinary papal Magisterium, the teaching of *Familiaris consortio* is fallible by definition.<sup>53</sup> However, John Paul's understanding of the relationship between magisterial authority and theological investigation limited the possibilities for substantial criticism of the text. *Familiaris consortio* exhorted theologians to act as apologists for its content, "asking them to unite their efforts in order to collaborate with the hierarchical Magisterium and to commit themselves to the task of illustrating ever more clearly the biblical foundations, the ethical grounds and the personalistic reasons behind this doctrine."<sup>54</sup> This understanding ultimately derived from John Paul's conviction that all magisterial pronouncements on morality contained truth and bound the consciences of the faithful:

When people ask the Church the questions raised by their consciences, when the faithful in the Church turn to their Bishops and Pastors, *the Church's reply contains the voice of Jesus Christ, the voice of the truth about good and evil.* In the words spoken by the Church there resounds, in people's inmost being, the voice of God

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<sup>51</sup>FC 84.

<sup>52</sup>Congregation for the Doctrine of the Faith, "Letter to the Bishops of the Catholic Church Concerning the Reception of Holy Communion by the Divorced and Remarried Members of the Faithful," September 14, 1994, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_14091994\\_rec-holy-comm-by-divorced\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_14091994_rec-holy-comm-by-divorced_en.html) (accessed December 2015).

<sup>53</sup>Vatican II, *Lumen gentium* 25, November 21, 1964: AAS 57 (1965) 29-31.

<sup>54</sup>FC 31.

who “alone is good” (cf. Mt 19:17), who alone “is love” (1 Jn 4:8, 16)<sup>55</sup> [emphasis added].

If the Church’s teaching contains the “voice of Jesus Christ,” Catholic faithful who act in accord with it do so in certain conscience<sup>56</sup> and thus cannot act contrary to it except due to ignorance, error, or evil. Consequently, dissent could only confuse and scandalize the faithful.

In the first year of his papacy, Pope Francis suggested that the Church had not yet exhausted all means available to it. During an in-flight press conference, the pontiff acknowledged that current teaching presented a “problem” for admitting divorced and remarried persons to the sacraments but implied that further developments might be possible.<sup>57</sup>In this context, the pope parenthetically acknowledged the principle of *oikonomia*, noting that the Orthodox used it to permit a “second chance” at marriage.<sup>58</sup> While the pope did not suggest this practice as a solution, it subsequently became the basis for the more permissive approach proposed by Cardinal Kasper.

At the invitation of Pope Francis, Cardinal Kasper addressed the extraordinary consistory of cardinals that met from February 20-21, 2014. This lecture aimed to provide a “theological basis” for the cardinals’ subsequent discussion and, ultimately, for the 2014 and 2015 meetings of the Synod of Bishops.<sup>59</sup>

In his address, Kasper carefully distinguished between dogma and doctrine. He noted that sacramental indissolubility itself pertains to dogma, which concerns the deposit of faith<sup>60</sup> and therefore cannot be

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<sup>55</sup>FC 117.

<sup>56</sup>When one’s properly formed and informed conscience has discerned the moral course of action with certainty, the subject is said to have a certain conscience and is obliged to act in accord with it. See *Catechism of the Catholic Church* [hereafter CCC] 1776 and 1790.

<sup>57</sup>Pope Francis, Press conference during return flight from Rio de Janeiro, July 28, 2013: [http://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papafrancesco\\_20130728\\_gmg-conferenz\\_a-stampa.html](http://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papafrancesco_20130728_gmg-conferenz_a-stampa.html) (accessed December 2015).

<sup>58</sup>Pope Francis, Press conference ... .

<sup>59</sup>Walter Kasper, *The Gospel of the Family*, trans. William Madges (New York/Mahwah, NJ: Paulist Press, 2014) v.

<sup>60</sup>Walter Kasper, *The Gospel of the Family*, 26.

altered. As a consequence, the Church cannot espouse theological positions or actions that would explicitly or implicitly deny it. Allowing of a second “sacramental” marriage while the first bond continues to exist would constitute such a denial.<sup>61</sup> Doctrine, on the other hand, is open to further developments that may even draw new and different conclusions. When the Church’s pastors err, they can and must make such radical changes: “[T]he Church should be aware that we too, as pastors, are also underway and often enough do wrong and must begin anew. And, because of the never-ending mercy of God, we may repeatedly begin again.”<sup>62</sup>

Because of the importance of the question, Kasper advocates returning to the sources to ensure that they are properly reflected in the teaching. He concludes that the answer is not as clear as *Familiaris consortio* claims. Based on Scripture and tradition, he finds the issue doubtful and subject to equiprobabilism.<sup>63</sup> Consequently, he also concludes that the current discipline is unnecessarily tutorist and rigorist, creating a moral impossibility for the divorced and remarried by placing “intolerable burdens” on them.<sup>64</sup> Because doubt and uncertainty exist, the Church can allow one to resolve these matters within his or her own conscience. The guidance of a well-trained priest would help a person discern their conscience and satisfy the Church’s concern that the individual in question acts in good faith. But, as in all moral decisions, the agent must make his or her own choice. Once the Church permits communion, the remarried communicant must decide whether receiving it accords with his or her conscience.

## 10. Analysis

Despite its heterogenous understanding of *oikonomia*, Orthodox teaching on divorce and remarriage contains valuable insights for the development of Catholic doctrine. Since the promulgation of *Familiaris consortio*, the Catholic Church has held that divine law as revealed in Sacred Scripture necessarily implies that civilly remarried divorcees cannot receive Holy Communion. In the

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<sup>61</sup>Walter Kasper, *The Gospel of the Family*, 26.

<sup>62</sup>Walter Kasper, *The Gospel of the Family*, 51.

<sup>63</sup>Walter Kasper, *The Gospel of the Family*, 46.

<sup>64</sup>Walter Kasper, *The Gospel of the Family*, 52.

interests of upholding this teaching, the Church has inadequately addressed other elements of the debate, such as the Matthean exception clause. This unquestioning adherence has at times resulted in internally inconsistent doctrinal statements like the following, which describes Christ's teaching as "clear" yet acknowledges an extensive and inconclusive debate about its meaning:

Extensive literature exists regarding the correct understanding of the *porneia* clauses, with many differing and even conflicting hypotheses. There is no unanimity among exegetes on this point. Many maintain that it refers to invalid marital unions, not to an exception to the indissolubility of marriage. In any case, the Church cannot construct her doctrine and praxis on uncertain exegetical hypotheses. She must adhere to the clear teaching of Christ.<sup>65</sup>

The Church could not adopt *oikonomia* without also changing its doctrine. The current teaching and praxis of the Catholic Church presumes that a properly formed and informed conscience would not allow a divorced and civilly remarried person to either persist in this state of life or to receive sacramental communion. The Roman Curia and many Catholic hierarchs – including the two previous popes – have insistently defended this practice. Consequently, if the Church changed its praxis, it would also have to sufficiently explain to the faithful why these reasons were incorrect or no longer applied. Likewise, it would be necessary to explain that certain teachings were not being changed. For example, if the Church adopted an Orthodox-inspired solution, it would need to clarify that it does not also accept the theology that consummated sacramental marriages can be dissolved.

Such changes would also prompt doctrinal and disciplinary questions about subsequent civil marriages. In the Orthodox tradition, persons must remarry in an ecclesiastical but non-sacramental marriage officiated by the Orthodox Church. Presently, Catholic pastors are forbidden "to perform ceremonies of any kind for divorced people who remarry" in the interest of avoiding

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<sup>65</sup>Congregation for the Doctrine of the Faith, "Concerning some objections to the Church's teaching on the reception of Holy Communion," undated, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_\\_doc\\_19980101\\_rattinger-comm-divorced\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith__doc_19980101_rattinger-comm-divorced_en.html) (accessed December 2015).

scandal.<sup>66</sup> Although the current proposals speak of tolerating *civil* unions, a Catholic version of the Orthodox practice may better guarantee the “sacramental seriousness” that Kasper has posited as a prerequisite for readmission to communion.

## 11. Conclusion

The ecclesial status of divorced and civilly remarried Catholics has implications beyond the Catholic Church. An eventual reunion between East and West will depend at least in part on how the Catholic Church intends to treat divorced Orthodox in second and third “ecclesiastical” marriages. A better understanding of the principle of *oikonomia* by Catholic theologians is therefore necessary; however, diverse Orthodox views and practices will make this difficult to achieve. Until such an understanding is achieved, the Catholic Church cannot justify such doctrinal and disciplinary changes based on this principle.

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<sup>66</sup>FC 84.