THE CESSATION OF INVALIDATION IN GRAVE DIFFICULTY

HILARY R. WERTS, S.J.

Alma College

INTRODUCTORY NOTE

The following article is part of a study of the ever-recurring rule of moral theology, "Positive law does not oblige in grave difficulty." This rule is founded upon general philosophical principles which require that a law be directed to the common good. For this purpose it must have certain essential conditions, including that of moral possibility of observance. A law which lacks this condition is not directed to its proper end, and this end is said to cease contrarily in as much as the law becomes too difficult to observe and therefore harmful to the community. Even if observance is morally impossible only in some individual cases, the enforcement of the law in these cases would be harmful to the community, indirectly, by harming its members.

Since individual good is subordinate to the common good, law may impose grave burdens and even demand heroism in the members of the community when this is necessary for the common good. Such necessary difficulty is intrinsic to the law and must be accepted by the subjects. Although every law imposes some difficulty or restriction of individual rights, sometimes there is an added difficulty arising from the circumstances of a particular case. This added difficulty is extrinsic to the law and not required for the sake of the common good intended. When the extrinsic difficulty is sufficiently grave, it causes the suspension of the law in the particular case because it then lacks the condition of moral possibility.

In such circumstances, omission of the prescription of the law results in a double effect: the loss of the common good intended by the law, and the avoidance of the difficulty involved in its observance. When the avoided difficulty is proportionate to the loss of the common good, the law does not oblige in the case. Although the common good is generally graver than the private good of an individual, there will be

frequent cases in which the law ceases to oblige in difficult circumstances, for its purpose is sufficiently attained if it is observed in ordinary circumstances and not in cases of grave difficulty.

Our rule, as used by moralists, has a broad scope and includes two principles which may be stated as follows:

1) When the observance of a law involves an extrinsic difficulty proportionate to the gravity of the law, that is, a greater restriction of the rights of an individual than can be justly imposed for the sake of the common good intended by the law, it is beyond the power of the legislator to impose his law in the case. The law then lacks the essential condition of moral possibility of observance.

2) When in a particular case the observance of a law involves a grave difficulty which might be justly imposed for the sake of the common good intended by the law, it may not be the will of the legislator to impose his law in such difficulty, if the difficulty was not foreseen or intended when the law was established.

In many cases it is not easy to distinguish between difficulties which are beyond the power of the legislator to impose, and those which are within his power but beyond his will. This distinction is usually unnecessary for in either case the result is the same: the obligation ceases.

It is also hard to interpret the will of the legislator when the difficulty is such that he could impose it if he wished to do so. In doubt about the cessation of the obligation, if the legislator himself cannot be consulted for an official interpretation, the solution is a matter of prudent judgment and the case must usually be settled by consultation of approved authors and in accordance with their solidly probable opinions.

The cessation of law in grave difficulty is confined to positive law, for the natural law is immutable. Although the natural law as incompletely expressed in human terms admits exceptions, the precise prescriptions of this law as it applies to the particular circumstances of any given case can never cease to oblige.

The following article discusses the application of our rule to positive invalidating laws.

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NATURE OF INVALIDATING LAWS

There are certain acts which by natural law would be valid, but which are rendered invalid because positive ecclesiastical law nullifies the act or prescribes certain formalities requisite for the validity of the act or disqualifies certain persons from performing the act validly. Thus simoniacal contracts are void, marriage without the prescribed form is invalid, first cousins are disqualified from contracting marriage.

Some of these laws (*leges irritantes*) affect the *act* immediately by denying to it the juridical efficacy which of its nature it would have if it were not obstructed by positive law. Others (*leges inhabilitantes*) concern the *person* rather than the act, and remove from him the juridical capacity for a determined act, which he would otherwise have from natural law.

Invalidating laws presuppose that the acts they nullify would be valid by natural law if there were no obstacle of the positive law. When an act is invalid by a prescription of natural law which is set down in the Code of Canon Law, this expression of the natural law is not an invalidating law in the strictest sense of invalidation as the term is used by canonists. Thus canon 1083, §1, is not strictly an invalidating law for it merely declares the natural law that marriage cannot be contracted in error concerning the person. In the second paragraph of the same canon there is a positive invalidating law voiding marriage contracted in error concerning the servile condition of the person. Similarly, the diriment impediments of impotence, previous bond, and certain degrees of consanguinity are not strictly invalidating laws, but rather expressions of the natural law. The Code however, uses the terms "invalid," "null," "irritated," to mark the invalidity of an act, whether it is invalidated by positive law or invalid by natural law which requires certain essential conditions for validity.

We may note here that laws which grant limited jurisdiction or determine the essential conditions for an act that exists only by virtue of positive law are not invalidating laws in the strict sense. Without the positive law there would be no power to act. These laws do not limit acts which would otherwise be valid by the natural law; rather they create new acts, rights, or powers, whose total validity is from positive law. Thus canon 1044 gives a priest the power to dispense

from matrimonial impediments in certain circumstances. If he exceeds the power here granted his dispensation is invalid, not because a positive law disqualifies him from dispensing, but because the positive law does not remove his natural disability. The dispensation is invalid, but not by virtue of an invalidating law in the strict sense. It is invalid by virtue of the general principle of law that one who acts without capacity acts invalidly.[1]

These laws may be called invalidating laws in an improper sense, since their violation actually results in invalidity.[2] As canon 1680 says, nullity may result from lack of an essential condition (e.g., lack of capacity which positive ecclesiastical law could grant); or from lack of conditions required by canon law under pain of nullity (i.e., by violation of an invalidating law).

In considering the obligations of conscience which result from ecclesiastical invalidating law two things are to be distinguished:

1) The law may impose an obligation in conscience against acts contrary to the law. Canon 1036, §2, says that diriment impediments gravely prohibit a marriage contract as well as prevent the contract from being valid. In such laws, if the prohibited act is not intrinsically evil, a proportionately grave cause may make the prohibition cease and excuse from the obligation of avoiding the act, without at the same time removing the invalidating effect of the law. Thus Suarez says that fictitious matrimonial consent between relatives may be excused because of fear of death, but the marriage would be invalid and confer no marriage rights.[3]

Not all ecclesiastical invalidating laws prohibit contrary action. Canon 1017, §1, invalidates betrothal which is not contracted with the prescribed formalities but does not forbid the informal betrothal which is almost universal in this country.

2) The law imposes the obligation of admitting the invalidity in the external forum and in the forum of conscience. Rights which would arise from a valid act cannot be received by an invalid act.

[1] Wernz-Vidal, *Normae Generales* (Romae: Apud Aedes Universitatis Gregorianae, 1938), n. 162, note 144.

[2] Van Hove, *De Legibus Ecclesiasticis* (Mechliniae: Dessain, 1930), n. 157.

[3] Suarez, *Tractatus de Legibus*, lib. III, cap. 30, n. 13, in *Opera Omnia*, Tom. V–VI (ed. Carolus Berton; Parisiis: Vivès, 1856); cf. Vermeersch, *Theologia Moralis* (ed. 3a; Romae: Pont. Università Gregoriana, 1933), III, n. 175.

This second obligation, which requires a person acting invalidly against positive law to admit the invalidity of his act and to conduct himself accordingly, is the obligation we are about to consider. We wish to find the effect of grave difficulty or moral impossibility upon the invalidating effect of these laws. When an act will be invalid according to positive ecclesiastical law, can proportionately grave difficulty permit valid action against the letter of the law? The question is important.

In this discussion we confine ourselves to positive ecclesiastical law that is, to invalidating laws which create invalidity in acts which would otherwise be valid. We do not include laws which are merely declarations of the requirements for validity according to the natural law, for the natural law is immutable and does not admit excusing causes. We will also confine ourselves almost exclusively to discussions of the Church's marriage laws, since these are the invalidating laws most frequently treated by the authors, and consequently they afford a practical basis for our investigation.

GRAVITY OF INVALIDATING LAW

Like all law, invalidating law is established for the common good, but there is a special connection between this law and the common good, which is not found in other laws. There are certain public juridical institutions such as elections, vows, benefices, and contracts, which can contribute greatly to the good or harm of the community and which are essentially related to public order.[4] The common good demands that there be uniformity and certainty about these institutions. Hence they must be regulated by law. Laws which merely prescribe or prohibit are not sufficient to safeguard these institutions against such dangers as fraud, coercion, secrecy, or lack of proper decency and respect for their public and religious nature. The law, therefore, establishes certain conditions for their validity, certain formalities by which their validity is publicly demonstrable.

The need for invalidating laws is well expressed in the decree *Tametsi* of the Council of Trent which prescribed the form necessary for valid marriage:

[4] Michiels, *Normae Generales Juris Canonici* (Lublin Poloniae: Universitas Catholica, 1929), I, 363.

Although it cannot be doubted that clandestine marriages entered upon with the free consent of the parties were true marriages as long as the Church did not render them invalid . . . yet for very just reasons the Church of God has always detested and prohibited them. Indeed because the Holy Synod realizes that these prohibitions have not been effective on account of the disobedience of men, and considers the grave sins which arise from such clandestine unions, especially among those who live in the state of damnation when, having left their first wife with whom they have secretly contracted, they openly contract with another and live with her in continual adultery, an evil for which the Church which does not judge in occult matters cannot provide unless it use some more efficacious remedy, therefore it prescribes . . . [the form required for validity of marriage].[5]

The uniformity and certainty of public institutions which are protected by invalidating laws make these laws very grave, generally graver than merely prohibitory laws, and their observance is more necessary for the common good. They must be observed even at the cost of great inconvenience. For this reason Suarez holds that invalidating laws do not admit *epikeia*,[6] which by his definition is a correction of the law when it commands evil or imposes difficulty beyond the power or beyond the will of the legislator to impose.[7]

Suarez states this as a morally universal rule. Our present question is whether this rule admits of any exceptions when compliance with the law involves grave difficulty.

There are two principal arguments against permitting exceptions to invalidating laws. The first is the necessity of these laws for the common good, which we have just seen. This necessity is considered by some early authors as so grave that it does not admit of any exception to the law.[8]

The second reason is that no one has the power to place an act contrary to an invalidating law. An excusing cause can remove the obligation of law but it cannot give the capacity to act validly. This requires a positive act of the will of the legislator.[9] This reason is not convincing, for a dispensation by the legislator does not give the capacity to act. An invalidating ecclesiastical law presupposes that prior to this

[5] Concilium Tridentinum, Sess. 24, Cap. I, "De Reformatione Matrimonii," in Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, XXXIII, col. 152.

[6] Suarez, *op. cit.*, lib. V, cap. 23, nn. 2 and 6.

[7] *Ibid.*, lib. VI, cap. 7, n. 11.

[8] E.g., Sanchez, Castropalao, Lessius, *ut infra*.

[9] Suarez, *op. cit.*, lib. V, cap. 23, nn. 3 and 6; St. Alphonsus de Ligorio, *Theologia Moralis* (ed. Guadé; Romae: Typographia Vaticana, 1905–12), lib. VI, n. 1079.

law there is a natural capacity for the act, by virtue of the natural law. The positive law then places an obstacle to this natural capacity, and a dispensation merely removes the obstacle. If a legitimate cause other than a dispensation can remove the obstacle of positive law, the act will be valid by the natural law without any need of a positive act of the will of the legislator.[10]

Suarez himself, although stating his rule as universal, still advances it with some hesitation, saying that one can hardly establish a rule so universal that there might not be some exception.[11]

From these arguments it is clear that because of the intimate connection between invalidating laws and the common good, cases of excuse due to grave difficulty in fulfilling the law will be very rare. But an examination of the common teaching shows that such cases may occur.

COMMON DIFFICULTY

The more recent authors generally distinguish between common moral impossibility of a community and particular moral impossibility of an individual, and it is universally taught that invalidating laws cease in the common need of some province or region.[12]

There are two classical cases in which this doctrine is developed. One such discussion dates from the Tridentine decree *Tametsi*. For some time before the present Code of Canon Law the universal teaching admitted that in common impossibility, physical or moral, the Tridentine law prescribing the form of marriage ceased to oblige. Marriage contracted before two witnesses without the assistance of the pastor was valid even in places where the decree had been promulgated. The doctrine accepted under the Tridentine discipline was this:

> Impossibility, physical or moral—great difficulty, grave danger—not momentary but relatively lasting, of having a legitimate minister for the celebration of marriage with the Tridentine form, can excuse the parties from the observance of this form, provided the impossibility is general and notorious in the respective community, and not merely particular for the parties concerned, and provided that the Tridentine form be observed if and as far as possible, namely, using at least two witnesses for the solemnization of the marriage.[13]

[10] Van Hove, *De Legibus*, n. 294. [11] Suarez, *op. cit.*, lib. V, cap. 23, n. 2.

[12] Van Hove, *loc. cit.*

[13] Oesterle, "Elucubratio Historica circa Declarationem Authenticam Canonis 1098," *Jus Pontificium*, VIII (1928), 176.

The jurisprudence of the Church was in accord with this doctrine, and the history of the Roman declarations is given briefly in a response of the Holy Office to Quebec, November 17, 1835:

Ad 5.... The inhabitants [where parishes are established] can by no means be considered free from the law of the Tridentine decree, hence their marriages are invalid if contracted without the presence of witnesses. The second marriage mentioned in the question [marriage before two witnesses in a place where they cannot have the ministry of an approved priest] must be held to be valid: for the Sacred Congregation of the Council, on March 30 in the year 1669, declared that where the Catholic pastor or other priest *is either entirely absent or there is not freedom to approach him*, marriage contracted without the presence of any priest is considered valid. Also Pius VI, following this declaration, held as valid marriages contracted in France during the revolution, when the Churches were deprived of their legitimate pastors.[14]

Even before the declaration of 1669 here referred to, the Sacred Congregation of the Propaganda gave a response for Japan, June 27, 1625, for marriages contracted without the pastor, due to lack of priests, especially after the persecution which began in 1614. The petition asked whether the Pope could dispense so that the defect of form would not have to be remedied by renewal of consent. The Sacred Congregation answered:

'The Sacred Congregation has decided that it should be declared by His Holiness that in these cases the Council, although promulgated, did not oblige in Japan, and that therefore the marriages there contracted without the pastor were and are valid, provided they were celebrated at least before two witnesses.'—On July 2, 1625, His Holiness Urban VIII, approving the decision of the Sacred Congregation, declared that the aforesaid marriages in Japan, contracted without a priest as stated, were and are valid, according to the declaration of the Cardinal Interpreters of the Council of Trent given for Holland, Zeland, and Frisia.[15]

From these responses we see that in places where the decree of the Council of Trent had been promulgated and where it continued to bind with regard to the two witnesses, the presence of the pastor was not required when there was moral impossibility of having him assist at the marriage. There is no indication of a dispensation, or of abrogating the law. Rather they speak of a "declaration" that the marriages were valid in spite of the letter of the law. They are statements of the

[14] *Collectanea Sacrae Congregationis de Propaganda Fide* (Romae: Typographia Polyglotta, 1907), n. 842. [15] *Ibid.*, n. 17.

meaning and extent of the original decree which was not to be enforced in cases of common impossibility to observe it.

The chief reasons used by theologians in favor of this doctrine were that the natural right to marry prevails over the ecclesiastical law,[16] and that the enforcement of the law would be harmful to the common good and detrimental to society.[17]

Before this solution became common among the authors, various reasons were advanced in favor of the more severe opinion, that marriage without the prescribed form was always invalid. It was argued that since the decree *Tametsi* said that those attempting marriage without the prescribed form were *omnino inhabiles*, no exception could be made;[18] that necessity cannot supply the defect of proper sacramental matter and form;[19] that necessity cannot supply the capacity to act validly in a person who is disqualified.[20]

These arguments say little more than that the marriage is invalid because *Tametsi* is an invalidating law. This is true as long as the law is applicable but it does not prove that the law never ceases to be applicable. If grave difficulty can cause the law to cease to bind in the case, the person is no longer disqualified, the matter of the sacrament is valid by natural law, and the consent required by the natural law can be given without the formalities prescribed by ecclesiastical law.

To the above arguments Sanchez adds that the marriage is invalid not merely by ecclesiastical law, as if this human law were binding in such grave need, but by reason of the natural law which forbids intercourse without marriage rights.[21] This seems to be a *petitio principii* for lack of the marriage rights presupposes what is to be proved, namely the invalidity of the marriage. If, as he seems to suggest, the human law is not binding in such grave need, then the marriage is not invalidated.

[16] Laymann, *Theologia Moralis* (Venetiis: Poleti, 1706), lib. V, tr. 10, pars 2, cap. 4, n. 7; Wernz, *Jus Decretalium*, Tom. IV, *Jus Matrimoniale Ecclesiae Catholicae* (ed. 2a; Prati: Giachetti, 1911), n. 173; Gasparri, *Tractatus Canonicus de Matrimonio* (ed. 3a; Paris: Beauchesne, 1904) n. 1171.

[17] Gury-Ballerini, *Compendium Theologiae Moralis* (Romae: 1907), II, n. 652, q. 4.

[18] Thomas Sanchez, *De Sancto Matrimonii Sacramento* (Venetiis: Pezzana, 1737), lib. III, disp. 17, n. 4–5; Castropalao, *Opus Morale* (Lugduni: Barbier, 1682), tr. XXVIII, disp. 2, punctum 13, § 8, n. 9. [19] Sanchez, *loc. cit.*

[20] Leonardus Lessius, *In D. Thomam Commentarium* (Louvanii: 1645), Auct., verb. "Matrimonium," casus 17; Suarez, *De Legibus*, lib. V, cap. 23, nn. 3 and 6.

[21] Sanchez, *loc. cit.*

All these arguments are sufficiently refuted by the fact that the more favorable opinion became common soon after the Council of Trent and was applied in many responses of the Holy See.[22]

The second classical case of common moral impossibility is concerned with the cessation of diriment impediments in grave difficulty. Modern opinion holds that in cases of moral impossibility an ecclesiastical impediment ceases to invalidate marriage.[23] The discussion centers around a decision of the Holy Office, June 4, 1851. There was question of the validity of marriages contracted between Christians and infidels with the impediment of disparity of cult, in a place where there were so few Christians that they could not marry among themselves. It was morally impossible to obtain dispensations because of the great distance from a missionary who could dispense. With the approval of the Sovereign Pontiff the Holy Office replied that such persons were not to be disquieted.[24]

This case is used by many authors as an example of the cessation of a diriment impediment in common moral impossibility. The reasons they give for the cessation of the impediment are the same as those seen above in the case of cessation of the law of the marriage form, namely, the natural right to marry[25] and the harm which would result in the community if the law were enforced.[26]

The prevalence of the natural right is well expressed by Payen who says that the Church forces no one to celibacy.[27] Gasparri says that when a person must remain unmarried or marry an infidel without a dispensation, there is no doubt that the impediment ceases since it is opposed to the natural law.[28]

[22] Cf. responses cited above; also S. Off., July 1, 1863, *Coll. P. F.*, n. 1240.

[23] Ayrinhac-Lydon, *Marriage Legislation in the New Code of Canon Law* (revised ed.; New York: Benziger, 1938), n. 253; Cappello, *De Matrimonio* (ed. 3a; Taurinorum Augustae: Marietti, 1933), n. 199; Gasparri, *Tractatus Canonicus de Matrimonio, Editio nova ad Mentem Codicis Juris Canonici* (Typis Polyglottis Vaticanis, s.a.), n. 260; Vlaming, *Praelectiones Juris Matrimonii ad Normam Codicis Juris Canonici* (ed. 3a; Bussum: 1919), I, n. 198; *et al.*

[24] *Coll. P. F.*, n. 1062.

[25] Chelodi, *Jus Matrimoniale juxta Codicem Juris Canonici* (ed. 4a; Tridentini: Ardesi, 1937), n. 81; Gasparri, *loc. cit.*; Payen, *De Matrimonio in Missionibus* (ed. 2a; Zi-ka-wei: 1935), I, n. 1100.

[26] Cappello, Vlaming, *locis cit.*; Merkelbach, *Summa Theologiae Moralis* (ed. 3a; Paris: Desclée de Brouwer, s.a.), III, n. 862; Vermeersch-Creusen, *Epitome Juris Canonici* (ed. 5a; Mechliniae-Romae: Dessain, 1930–36), I, n. 117.

[27] Payen, *loc. cit.* [28] Gasparri, *loc. cit.*

Wernz objects that the decree of the Holy Office cited above does not establish a principle but grants a favor.[29] He draws a parallel with an Instruction of the Holy Office, December 18, 1872, which gave the singular faculty to dispense in advance certain Christians who were setting out for distant regions where there was no opportunity to obtain dispensations, and where they would have to marry infidels or persons whom they would convert and baptize.[30] Cappello responds that this latter instruction is a practical procedure which decides no theoretical question.[31] Chelodi says that the principle of the prevalence of the natural right to marry when this right is in conflict with canon law is not affected by the Church's desire to diminish the number of cases in which it would be applicable.[32] The Church rightly safeguards the external forum by foreseeing such cases when possible, but it would be unreasonable to presume that she can foresee and provide for all such difficulties.

The opinion of Wernz is modified in Wernz-Vidal where the probability of the reason derived from the natural right to marry is admitted.[33] Wernz himself admitted this reason in the question of common impossibility of observing the form of marriage.[34]

Oesterle objects that if the natural right to marry prevails in conflict with ecclesiastical law, it is difficult to explain how the Church can and does establish ecclesiastical impediments and denies dispensations. He cites canon 1016 which says that Christian marriage is ruled by canon law as well as by divine law.[35] We may answer that in conflict between the divine or natural law and human law, the divine law must prevail. The ecclesiastical law is not in conflict with divine law in establishing impediments unless they are such as invade the natural right to marry. This right does not mean the right to marry anyone, but the right to marry someone. Canon law as well as divine law limits the field of choice, but human law cannot remove the right to choose someone,[36] unless one first voluntarily renounce his right.

[29] Wernz, *Jus Matrimoniale*, n. 510, note 37.
[30] *Coll. P. F.*, n. 1392.
[31] Cappello, *loc. cit.*
[32] Chelodi, *loc. cit.*
[33] Wernz-Vidal, *Jus Matrimoniale* (ed. 2a; Romae: Apud Aedes Universitatis Gregorianae, 1928), n. 273, note 41.
[34] Wernz, *op. cit.*, n. 173, pt. VI.
[35] Oesterle, "De Validitate aut Nullitate Matrimoniorum a Captivis ex Bello in Russia Initorum," in Bernardini et al., *Consultationes Juris Canonici* (Romae: 1939), II, p. 141.
[36] Cf. Leo XIII, *Rerum Novarum*, *ASS*, XXIII (1890–91), 645.

This natural right to marry includes the right to the means necessary for a valid marriage, according to the axiom, *qui vult finem vult medium*. It includes the right to a valid form of marriage, and the right to choose a spouse from among those who are available within the bounds of moral possibility. If this right cannot be exercised except by contracting marriage in a way contrary to the prescriptions of invalidating ecclesiastical law, this law must cease to invalidate, for it is in conflict with a higher law.

It is to be noted that the right to marry does not imply the right to marry immediately. If the common difficulty of obtaining a dispensation is foreseen to be only temporary, the parties must wait, for the common good demands that they submit to delay in order to observe the law. Hence the authors use such expressions as "very long," "quasi-perpetual." Payen says that if a place is visited by a missionary every year or even every second year, the impediment of disparity of cult would not cease for a Christian who must marry an infidel or remain single until the arrival of the missionary.[37] The Church is more indulgent in her positive law concerning the form of marriage. Canon 1098 grants an exception to the ordinary form when there is a foreseen delay of one month.

The second reason for the cessation of invalidating law in the classical cases above is the principle that a law which is harmful to the community ceases to oblige. When it is very difficult or morally impossible to fulfill a law, its prescriptions lack the essential condition of moral possibility. It no longer promotes the common good and must cease to bind. This is a general principle of the natural law, applicable to all human law, invalidating as well as prohibitory. When the enforcement of an invalidating law would prevent marriage in a community for some time, it would cause spiritual and temporal ruin.

These two reasons for the cessation of invalidating laws in common moral impossibility of observing them may be reduced to the general principle that human law ceases to bind when it is in conflict with a higher law—in this case the natural law granting to all men the right to marry, and the natural law prescribing the essential conditions of positive law. In other words, in common moral impossibility of observing an invalidating ecclesiastical law, this law must cease to bind

[37] Payen, *op. cit.*, n. 1102.

for it would be beyond the power of the human legislator to impose his law in such difficult circumstances.

From the illustrative cases found in the authors it is clear that outside places which are very remote or in which the civil law usurps the Church's legislative rights, there can hardly be a common difficulty which would render the observance of the Church's invalidating laws morally impossible. Other cases of grave difficulty will usually be cases of individual rather than common difficulty. Whether individual difficulty can be grave enough to cause the cessation of invalidating law in a particular case will now be discussed.

INDIVIDUAL DIFFICULTY

The supreme law of the Church is the salvation of souls, and in making her laws with this end in view she is always guided by the moral principles of the natural law. This is especially apparent in the new Code of Canon Law which manifests a great solicitude to legislate in a way that will prevent the cases in which common or individual impossibility of obeying her marriage laws might occur. Canon 1098 provides against moral impossibility of celebrating marriage with the ordinary canonical form. Canons 1043–45 provide against the difficulty of obtaining dispensations through the usual channels when there is urgent need to celebrate a marriage either in danger of death or because an impediment is discovered when it is too late to postpone the marriage without grave difficulty.

But the Code has not provided for all possible cases of moral impossibility which might arise in a particular case. For example, in danger of death two persons might wish to marry without the priest in accordance with canon 1098, but be hindered by a diriment impediment which a priest could dispense by canon 1044 if he could be called. Since there is no priest available, would the impediment cease in the case? Or if it is impossible in the same circumstances to have the two witnesses required by canon 1098, could valid marriage be contracted?

The care with which the Code provides against the cases of moral impossibility which were commonly discussed by theologians before the Code shows that the Church wishes to forestall exceptions to her laws. On the other hand, this care might also be taken as a sign of the mind of the legislator who does not wish the marriage laws to be too burdensome. Since the law makes exceptions for cases of grave

difficulty, and since it cannot foresee all cases which might justify exceptions to the law, we may be inclined to think that the mind of the legislator is to except other cases which are similar to those for which exceptions are expressly set down in the law.

Furthermore, in so far as these expressed exceptions are made in accordance with the requirement of natural law defining moral possibility as an essential condition of positive law, they involve a general principle applicable to all similar cases.

General Principle

It is a general principle of law, unanimously taught by canonists and moralists, that when the end of a law ceases contrarily in a particular case the law ceases to bind. That is, when an otherwise just law cannot be observed in a particular case without sin, injustice, or grave difficulty and inconvenience, the law is suspended in the case. This is a universal principle which must be admitted as governing invalidating laws as well as other laws. If the observance of an invalidating law involves an inescapable and proportionately grave difficulty which the subject cannot justly be required to undergo for the sake of the common good intended by the law, the law cannot be enforced in the case. It would be beyond the power of the legislator to do so. Enforcement would be unjust because the law would not be morally possible of observance.

The question to be answered in regard to invalidating laws is not whether this principle is true. Rather the question is whether in such grave laws there can be any particular, individual difficulty so grave that the subject may not be forced to bear it for the common good. In other words, if the end of an invalidating law ceases contrarily in a particular case, the law must cease to bind. But the question remains: Can an invalidating law cease contrarily in a case of particular difficulty; can there be an individual difficulty which is grave in proportion to the gravity of the law?

The defenders of the severe opinion, who hold that no particular difficulty is sufficient to cause the cessation of the voiding effect of these laws, derive their arguments from the great necessity of these laws for the common good[38] and from the danger of abuse and uncer-

[38] Suarez, *De Legibus*, lib. V, cap. 23, nn. 2 and 6.

tainty which might result in regard to the validity of the acts involved.[39] These reasons do not exclude the cessation of invalidating laws in common difficulty, as is now universally admitted. Nor do they demonstrate the impossibility of a private difficulty so great that it outweighs the gravity of invalidating laws. Such impossibility cannot be established a priori in regard to any positive law which is subject to a higher law and which in a particular case may come into conflict with a higher law.

Classical Cases of Individual Difficulty

To throw some light on this problem it will be useful to examine the doctrine of the authors who discussed the cases of canons 1098 and 1043–45 before they were incorporated into the Code as express exceptions to the general law.

In the matter of diriment impediments to marriage, before the Code there was the classical *casus perplexus* in which an occult impediment is discovered just before the marriage is to be celebrated, when there is not sufficient time to obtain a dispensation from Rome, and the marriage cannot be postponed without scandal or infamy of one of the parties. This case was most likely to occur when one of the parties manifested the diriment impediment of illegitimate affinity, which could not be made public without grave defamation of the guilty party. Postponement of the marriage could not be easily explained and even if an apparently good reason could be given, suspicion would remain.

Sanchez taught that in such urgent need the bishop could dispense from the impediment because in such difficulty the Pope could not be presumed to reserve this dispensation to himself. Such reservation of dispensing power would be contrary to good government and charity, for it would be the occasion of scandal and other sins.[40] Pignatelli taught that the bishop could dispense because in such urgent and difficult circumstances the law becomes unjust and ceases to bind; it is in conflict with the higher law of charity by which the bishop should provide for his subjects in grave need; it is in conflict with the person's right to his reputation and with the law of avoiding scandal; the Roman

[39] Marc-Gestermann-Raus, *Institutiones Morales Alphonsianae* (ed. 19a; Lugduni: Vitte, 1933–34), II, n. 2003.

[40] Sanchez, *De Sancto Matrimonii Sacramento*, lib. II, disp. 40, n. 8.

Pontiff can be presumed to grant the bishop the faculty to dispense in such need, otherwise he would be acting against the good of his subjects and causing scandal.[41]

The opinion that in such urgency the bishop could dispense from occult impediments originated with Sanchez and became the common doctrine.[42] But most of the authors gave the reason of Sanchez, that the bishop had the presumed faculty to dispense, rather than the reason of Pignatelli that the law ceases to bind in the case. Either reason involves cessation of invalidation in a particular case. In the first, the bishop is granting a dispensation in a matter reserved to the Holy See and therefore acting invalidly according to the letter of the law;[43] in the second, the invalidating law establishing the impediment ceases to bind. Since nearly all theologians held one or the other of these solutions, there was agreement as to the principle that invalidation can cease in a particular case of grave difficulty.

This doctrine was not sufficient to solve the *casus perplexus* in which not even the bishop could be asked for a dispensation. Roncaglia, accepting the reasoning of Pignatelli, drew the logical conclusion that since the law ceases to bind in such need, the pastor can make a doctrinal interpretation and declare the cessation of the impediment.[44] He adds that out of reverence for the Church's authority and for greater security, a dispensation should afterwards be sought, which is a proper precaution to safeguard the marriage in the external forum.

St. Alphonsus quotes the doctrine of Pignatelli and Roncaglia, apparently with approval, for he says that Pignatelli "proves it at length" and that it is "not without foundation," and he seems to admit its use in practice.[45] The probability of this opinion is admitted by Gury, Giordanini, Gousset, d'Annibale, Rosset, Gasparri, and Lehmkuhl.[46]

[41] Pignatelli, *Consultationes Canonicae* (ed. 4a Veneta; Venetiis, 1722), tom. III, cons. 33, n. 3 sq.

[42] Wernz, *op. cit.*, n. 619.

[43] This is an invalidating law in the wide sense seen above.

[44] Roncaglia, *Universa Moralis Theologia* (Venetiis: Pitteri, 1749), tr. XXI, quaestio 5, cap. 1, q. 2.

[45] St. Alphonsus, *Theologia Moralis*, lib. VI, n. 613; *Homo Apostolicus* (Mechliniae: Hanicq, 1849), tr. XVI, n. 114; *Praxis Confessarii*, n. 8, in *Opera Moralia*, Vol. IV (ed. Gaudé; Romae: Typis Polyglottis Vaticanis, 1912).

[46] Gury, *Casus Conscientiae* (Lugduni: 1881), n. 1036; Giordanini, *Istruzione per i Novelli Confessori*, *Opus Anonymus* (Roma: Societá della Minerva, 1841), pars II, n. 32; Gousset, *Théologie Morale* (Bruxellis: Vanderborght, 1844–45), II, n. 850; d'Annibale,

Wernz and Feije oppose the opinion but finally admit that it can be used in practice in very urgent cases because of its probability.[47]

This doctrine was restricted to occult impediments although Roncaglia says that if the same causes occur in the case of public impediments, the doctrine is applicable at least in regard to the bishop's power to dispense.[48] But St. Alphonsus points out that the same causes could hardly occur when the impediment is public. Scandal would be given by the celebration of the marriage rather than by its delay.[49]

As the above solution was restricted to occult impediments, it was not applied to the case of private difficulty in having the pastor assist at a marriage, even in danger of death or when an unauthorized priest could be present.[50] Exception to the law of the Tridentine form was restricted to common difficulty. There were a few early authors who held the opposite opinion[51] but it was not accepted by their successors.

The opinion that marriage could be validly contracted without the pastor in private difficulty of having him assist was revived by Ballerini. He argued that the opposing reasons could be reduced to one, namely, that the law of Trent prescribing the form of marriage is an invalidating law. The same argument, he said, could be applied equally to impediments which were admitted to cease in the particular difficulty of the *casus perplexus* and to the case of common impossibility in which the cessation of the prescribed form of marriage was admitted to cease. Further, the responses of the Holy See concerning common impossibility of fulfilling the Tridentine form are not dispensations, but declarations of the validity of the marriages contracted without the form. The reason for these declarations is the need of the faithful who must not be deprived of the opportunity to marry validly, by the impossibility of observing the prescribed form. This reason is equally true in cases of particular impossibility. Why then should we distinguish between common and particular need?[52] Gasparri, writing be-

Summula Theologiae Moralis (ed. 4a; Romae: Typographia Polyglotta, 1896–97), III, n. 454; Rosset, *De Sacramento Matrimonii* (Paris: 1895–96), IV, n. 2389; Gasparri, *De Matrimonio* (ed. 3a), n. 249; Lehmkuhl, *Theologia Moralis* (Friburgi Brisgoviae: Herder, 1914), II, n. 1055.

[47] Wernz, *op. cit.*, n. 619, note 87; Feije, *De Impedimentis et Dispensationibus Matrimonialibus* (ed. 3a; Louvanii: Peeters, 1885), n. 648.

[48] Roncaglia, *op. cit.*, Q. I.

[49] St. Alphonsus, *Theologia Moralis*, lib. VI, n. 1122.

[50] Wernz, *op. cit.*, n. 173, note 165. [51] Cf. Rosset, *op. cit.*, IV, n. 2142.

[52] Gury-Ballerini, *Compendium Theologiae Moralis*, II, n. 652, note 80.

fore the Code, said that this argument is difficult to refute, but that we should not depart from the common doctrine.[53]

Ballerini's argument that cessation of the marriage form should be admitted in particular cases of impossibility as well as in common difficulty, is quite cogent. The reason derived from the natural right to marry which must be protected by cessation of the law in common difficulty should apply equally to particular cases. The right to marry is an individual right which cannot be legislated away even for one person capable of marriage, except with his consent.

In the cessation of the impediment of disparity of cult where there is no Christian to marry, the difficulty is called "common" but would better be called "individual." The presence of a Christian community would destroy the difficulty. This is rather a case of individual impossibility of exercising the right to marry without neglecting the invalidating law, the impossibility being due to a territorial difficulty since there is no possible Christian spouse in the place.

It is therefore reasonable to say that an invalidating law must cease to invalidate if otherwise some private cause prevents the exercise of the right to marry, for life or for an indefinitely long time. But cases of individual difficulty which perpetually prevent marriage would be extremely rare, and there are other cases of particular difficulty of observing invalidating laws which do not involve such rigorous impossibility.[54]

Modern Opinion

After the promulgation of the new Code of Canon Law, the question of cessation of invalidating laws in individual difficulty is discussed as to the general principle and in particular cases. Michiels says that individual moral impossibility can never excuse from invalidating laws.[55] Merkelbach says that in an urgent case of private need, invalidating laws cease if the Church is known to dispense in the case, or can be presumed to do so; but he denies that in a particular need a diriment impediment of marriage ceases.[56]

DeSmet says that many authors deny that *epikeia* can ever be in-

[53] Gasparri, *De Matrimonio* (ed. 3a), n. 1175.

[54] Even in the extreme difficulty just seen, there is moral and not physical impossibility, for it would be physically possible to obey the law by remaining unmarried.

[55] Michiels, *Normae Generales*, p. 370, cf. p. 363.

[56] Merkelbach, *Summa Theologiae Moralis*, I, n. 353; cf. III, n. 862.

voked in a particular case against an invalidating law, while others admit it in very urgent need, and he agrees with the latter opinion.[57] Treating of the *casus perplexus* as it may arise under the new Code, he holds that canon 1045, §3, does not give the confessor power to dispense in confession from an impediment that is of its nature public although in fact occult. But if one party is conscious of the existence of the impediment and cannot manifest it to the other without grave difficulty, the impediment ceases by *epikeia*. He argues that although invalidating laws do not generally admit *epikeia* except in common need, this principle primarily concerns public cessation of the law. This public relaxation of the law would be harmful to the common good, but the same cannot be said of an occult case.[58]

Van Hove says that like all human laws founded in the presumption of universal danger, invalidating laws do not cease when their purpose ceases negatively in a particular case, that is, when in a particular case they merely cease to be useful for the common good; but they do cease in a particular case when their purpose ceases contrarily, that is, when they become harmful or too difficult, for it is beyond the power of the legislator to enforce the law in such circumstances.[59] Ayrinhac says that it is probable that ecclesiastical impediments cease when there are urgent reasons of conscience for celebrating marriage which cannot be postponed without danger to salvation.[60]

Various particular applications of this principle are discussed by canonists and moralists, some of which will be briefly stated.

When the pastor cannot be had in danger of death or in other extremely urgent cases, or when marriage would otherwise have to be postponed for a very long time, valid marriage can be contracted with only one witness or with none, although two are required by canon 1098.[61] In such necessity, if there is an impediment from which the Church is accustomed to dispense and from which a priest assisting at the marriage could dispense by virtue of canon 1044 or 1045, it is probable that if there is no priest to dispense, valid marriage can be

[57] De Smet, *Tractatus Theologico-Canonicus de Sponsalibus et Matrimonio* (ed. 4a; Brugis: Beyaert, 1927), n. 469. [58] *Ibid.*, n. 839.

[59] Van Hove, *De Legibus*, n. 335. [60] Ayrinhac-Lydon, *Marriage Legislation*, n. 253.

[61] Aertnys-Damen, *Theologia Moralis* (ed. 13a; Taurini-Romae. Marietti, 1939), II, n. 843; Cappello, *De Matrimonio*, III, n. 695; Dalpiaz, "Matrimonium a Catholico in Captivitate coram Uno Teste Contractum," in Bernardini et al., *Consultationes Juris Canonici*, II, p. 116; Gasparri, *De Matrimonio* (ed. nova), n. 998; *et al.*

contracted without the dispensation because the law establishing the impediment ceases in conflict with the natural law.[62]

If marriage is celebrated before a delegated priest and a secret impediment is discovered just before the marriage when it is impossible to seek a dispensation or to delay the marriage, the delegated priest probably cannot dispense by virtue of canon 1045, §3, but in such a case he may use the doctrine that the impediment ceases, as in the solution of the *casus perplexus* before the Code.[63]

After marriage, one of the parties may discover that an impediment exists unknown to the other, but be unable to manifest it without grave difficulty such as personal defamation. If it is morally impossible to decline the marriage act until a dispensation is obtained, an impediment for which the Church is accustomed to dispense at least for the internal forum probably ceases in this difficulty.[64]

The Ordinary, dispensing from the impediment of disparity of cult in an urgent case, cannot dispense from the required promises unless he has a special faculty for this. If in a very urgent case the non-Catholic party refuses the promises and the marriage must be celebrated in order to provide for the salvation of the Catholic party, the bishop may probably declare the cessation of the law demanding the promises, after the requirements of the divine law are satisfied by making the danger of perversion of the Catholic party remote.[65] If the formal promises are omitted because of lack of time when a marriage is celebrated in danger of death, a valid dispensation cannot be given but the marriage is valid because the ecclesiastical law ceases.[66]

The cessation of the law prescribing the form of marriage when it is impossible to have the assistance of the pastor without grave difficulty is no longer a matter of opinion. An exception is expressly made in the new Code of Canon Law, in canon 1098. This canon allows marriage without the pastor when there is danger of death, or when the difficulty will continue for one month. The exception is made for

[62] Cappello, *op. cit.*, n. 692; Cerato, *Matrimonium a Codice Juris Canonici Integre Desumptum* (Petavii: 1929), n. 95.

[63] Vermeersch, *Theologia Moralis*, III, n. 703.

[64] Arregui, *Summarium Theologiae Moralis* (ed. 12a; Bilbao: El Mensajero del Corazón de Jesús, 1934), n. 731; Cappello, *op. cit.*, III, n. 199; De Smet, *op. cit.*, n. 238; *et al.*

[65] Cerato, *op. cit.*, n. 35; De Smet, *op. cit.*, n. 591, cf. n. 508. This opinion seems no longer tenable, in view of the decree of the Holy Office, Jan. 14, 1932, *AAS*, XXIV (1932), 25. Cf. Cappello, "Annotationes," *Periodica*, XXI (1932), 103–4.

[66] Cappello, *De Matrimonio*, n. 231.

particular cases of grave difficulty as well as for common difficulty. But a dispute remains concerning the nature of the impossibility which prevents the pastor's assistance. Must it be physically impossible for the pastor to assist, or is moral impossibility sufficient?

The same question was discussed under the decree *Tametsi* because with the rise of Gallicanism the civil power began to usurp the Church's right to legislate for marriage. Under such conditions it might happen that a marriage could be validly contracted according to canon law but not according to civil law. A priest who would assist at such a marriage was liable to severe penalties in some countries.[67] The threat of these penalties made it morally impossible for the pastor to assist at the marriage.

Before the promulgation of the new Code of Canon Law it was commonly taught that marriage under these conditions was valid when contracted before two witnesses without the pastor[68] although the question was reopened by a response of the Sacred Congregation of the Sacraments, January 31, 1916.[69]

In the new Code, canon 1098 makes the exception in general terms, "If it is impossible without grave inconvenience to send for or go to the pastor." It does not distinguish between physical absence and moral restraint upon a pastor physically present. Hence many authors held that moral absence was sufficient to permit valid marriage before two witnesses only. But an interpretation by the C. I. C., March 10, 1928, said that canon 1098 refers only to physical absence of the pastor or bishop.[70] This seemed to settle the question in favor of the severe opinion.

A later response, July 19, 1931, said that when the pastor or Ordinary, although materially present in the place, cannot assist at the marriage because of grave inconvenience, the case is to be referred to the physical absence required in the interpretation of March 10, 1928.[71]

Many theologians who held that moral impossibility of having the pastor satisfied the conditions of canon 1098 were led to abandon the opinion by the response of 1928 but returned to it after the second response.[72] After 1931 the more common opinion reconciles these two

[67] De Smet, *op. cit.*, n. 453 sq., gives a short history of this civil legislation.
[68] Gasparri, *De Matrimonio* (ed. nova), n. 1017. [69] *AAS*, VIII (1916), 36.
[70] *Ibid.*, XX (1928), 120. [71] *Ibid.*, XXIII (1931), 388.
[72] E.g., Vermeersch, *Theologia Moralis*, III, n. 742; cf. Vermeersch, "Annotationes," *Periodica*, XVII (1928), 76.

interpretations by saying that canon 1098 is applicable when the pastor or Ordinary is physically absent in the sense that he is unable to witness the contract physically and actively by asking and receiving the consent, whether he is prevented by physical absence from the place or by moral pressure.[73] But some authors continue to demand that the presence of the pastor be physically impossible.[74] A private response of the Sacred Congregation of the Sacraments, April 24, 1935, accepts the favorable opinion.[75]

This is properly a canonical question of the interpretation of canon 1098 when the discussion includes the canon's provision that the difficulty need be expected to continue for only one month. But in view of what has been seen concerning the natural right to marry which cannot be invaded by positive law, it seems that the more favorable interpretation of this canon must be adopted when the impossibility is expected to endure indefinitely. The fact that the pastor cannot be had as a witness to the contract would prevent the exercise of this right if the law were enforced. If this condition is to last for a long time, the ordinary law of the marriage form must cease, no matter what prevents the assistance of the pastor. Whether he is prevented by physical absence or moral pressure, the fact remains that it is impossible for him to assist at the marriage, and the marriage must be valid without his presence.

Such cases might occur where civil law forbids religious marriages, or establishes impossible conditions sanctioned by severe civil penalties, or requires a previous civil ceremony which in a particular case might be impossible because of the lack of required documents or because of the existence of an invalid but civilly recognized marriage.[76]

Where such cases occur, good order demands that the liceity of marriage without the pastor be decided by the proper ecclesiastical authorities.[77] It is also generally taught that when an impediment is con-

[73] Gasparri, *op. cit.*, n. 1017; cf. Aertnys-Damen, *op. cit.*, II, n. 843; Ayrinhac-Lydon, *op. cit.*, n. 252; Cappello, *op. cit.*, n. 694; Chelodi, *Jus Matrimoniale*, n. 137; Creusen, "Célébration du mariage, Réponse du 25 Juillet, 1931," *Nouvelle revue théologique*, LVIII (1931), 827 sq.; Vlaming, *op. cit.*, n. 590; *et al.*

[74] De Becker, "De Recta Canonis 1098 Codicis Juris Canonici Interpretatione," *Ephemerides Theologicae Lovanienses*, IX (1932), 284 *sq.*; Maroto, "Responsa ad Proposita Dubia 25 Julii 1931," *Apollinaris*, IV (1931), 381.

[75] Cf. *Periodica*, XXVII (1938), 45.

[76] Cappello, *De Matrimonio*, n. 694.

[77] Wernz-Vidal, *Jus Matrimoniale*, n. 548 note 72.

sidered to cease in a particular case and a marriage is contracted without a dispensation, the dispensation should afterwards be sought. This is not an admission of weakness in the opinion that the law ceases in the case. It is rather a provision to safeguard the marriage in the external forum, which should generally be done even in cases of certain cessation of the law, just as marriage without the priest is to be recorded by the parties or witnesses.[78]

Examples of cessation of invalidity may also be found in laws restricting jurisdiction, which are invalidating laws in the wide sense we have seen. Thus canon 884 refuses a priest jurisdiction over an accomplice so that absolution of the accomplice is invalid. If there is no other priest to absolve this sinner and no hope that one will ever come to the place, there is a grave need which is considered sufficient cause for an exception to the law. Grave scandal or infamy which would result from neglect of the sacraments, especially paschal communion, is also considered to be a sufficient excusing cause. The legislator did not intend to include such extraordinary cases, in which there is no other possible confessor, and in which the accomplice would have to wait until the point of death for valid absolution. The Church does not wish to neglect the ordinary economy of salvation by forcing the accomplice to seek grace through perfect contrition instead of through the sacrament of penance.[79]

Noldin taught that this exception to the law is the more likely because the human law is in conflict not only with the natural law of avoiding scandal, and the natural right to reputation, but also with the positive divine law which prescribes the reception of the sacraments of penance and the Holy Eucharist at least occasionally during life.[80] Schmitt inclines to the opposite opinion because the priest can have recourse to the Sacred Poenitentiary for the faculty to absolve, or the accomplice can make an act of perfect contrition.[81] Many authors also teach that the priest can validly absolve the accomplice

[78] Canon 1103, § 3.

[79] Aertnys-Damen, *op. cit.*, II, n. 401; Arregui, *op. cit.*, n. 647; Cappello, *De Poenitentia* (ed. 3a; Taurinorum Augustae: Marietti, 1938), n. 632; Lehmkuhl, *Theologia Moralis*, II, n. 1205; Vermeersch-Creusen, *Epitome Juris Canonici*, II, n. 160.

[80] Noldin, *Summa Theologiae Moralis* (ed. 15–16a; Oeniponte: Rausch, 1923), III, n. 371.

[81] Noldin-Schmitt, *Summa Theologiae Moralis* (ed. 26a; Oeniponte: Rausch, 1939), III, n. 372.

if otherwise he cannot avoid grave infamy, when for example, his identity and priesthood were unknown to the accomplice.[82]

CONCLUSION

A law, whether prohibitory or invalidating, must have the essential condition that it be morally possible of fulfilment. If its end ceases contrarily in general or in a particular case so that its observance would be evil or too difficult, the law must cease to oblige. If the cessation of the invalidating effect as well as of the prohibition or command is required in order to avoid a proportionately grave difficulty, then the law must cease to invalidate.

Despite the great gravity of invalidating laws, there may be particular cases of individual difficulty which is proportionate to the gravity of invalidating law. There may not be a sufficient number of authors teaching one or the other of the above cases of exception to invalidating laws to give their solutions probability merely by weight of their authority. But there is practically unanimous agreement in the principle that invalidating laws cease to invalidate in particular cases of proportionately grave difficulty. This is clear not only from their discussions of the general principle, but also from the many cases in which they apply the principle.

The argument of the few opposing theologians that the common good is to be preferred to the private good of an individual is not true in every case, especially when the individual good is of a higher order than the common good in question, as may happen when the salvation of a soul is involved. As most of the exceptions made by the authors concern occult cases, there is little harm to the common good and scandal is avoided. The only probable harm to the common good would be a conflict between the internal and the external forum. This should be forestalled by seeking a dispensation or declaration of validity at the opportune time.

The arguments with which the favorable solutions of cases are supported may be reduced to two: conflict with a higher law, and an interpretation of the mind of the legislator.

There may be conflict with the natural law defending the natural rights of the individual, such as the right to reputation and the right

[82] Ballerini-Palmieri, *Opus Theologicum Morale* (ed. 3a; Prati: Giachetti, 1898–1901), V, n. 417; Cappello, *De Poenitentia*, n. 632–33; Lehmkuhl, *op. cit.*, II, n. 1202.

to marry, or with the natural law forbidding scandal. There may be conflict with divine positive law, such as the law commanding the reception of the sacraments during one's life. The danger of the loss of a soul by death in the state of sin may cause the law to cease in some cases which are not included under the wide powers given to bishops and priests for the help of the dying, or in cases in which there is not a priest available to exercise these powers.

In many cases it is difficult to determine with certainty whether these exceptions of the authors involve difficulties which exceed the power of the legislator to impose, or those which are merely beyond his will to enforce. Although they frequently say a case is beyond the will of the legislator, they add reasons that involve a conflict with a higher law. If the higher law prevails, it is beyond the power of the legislator to enforce the inferior law.

However, in some of the exceptions made, it seems that the enforcement of the invalidating law would be within the power of the Church. When the subject of the law is culpable, as when two persons have lived in sinful union with every opportunity to remedy their condition, the Church is not bound to provide extraordinary means or to relax her laws in order to validate the union when one of the parties is dying, especially since the dying person can repent and be saved without this validation. But it is certainly the mind of the Church to offer every aid to her dying wayward children.

Such persons are in urgent difficulty through their own fault. If, instead of imposing penalties for the fault, the Church makes an exception to her law in order to remove the difficulty, the exception is not forced upon her by the limitation of her power, but is granted by her will.

In the solution of the *casus perplexus* before the Code, some authors invoked the mind of the legislator; others argued that enforcement of the law was beyond the power of the legislator because of conflict with the superior natural law. Of course when the enforcement is beyond the power of the legislator it is also beyond his will rationally interpreted.

The ultimate decision as to the extent of the Church's legislative power rests with the Church herself, as the infallible custodian of faith and morals. Her will concerning her laws is indirectly manifested in canon 15 which says that even invalidating laws do not oblige in doubt

of law. There may be doubt about the existence of a diriment impediment, because of the solid probability that the impediment ceases in a given case of grave difficulty. From this canon it is certain that the invalidating law does not apply to the case. The legislator foresees that there will be cases in which the law is probably beyond his power to enforce, or beyond his will as interpreted doctrinally, and this canon expresses the Church's unwillingness to enforce the law in such difficulty.

Since the promulgation of the new Code of Canon Law, the most frequent difficulties that might interfere with invalidating law are excepted by the law itself. But some cases unforeseen by the Code may occur, as has been seen in the examples given.

Briefly stating these conclusions:

1) If the end of an invalidating law ceases in a particular case because the invalidation involves a proportionately grave difficulty not intrinsic to the law, the law ceases to invalidate in the case.

2) Particular, individual difficulty proportionate to the gravity of an invalidating law is possible and may arise from conflict with the natural law or other law which is superior to the law in question.

3) The prevailing law need not be one that forbids compliance with the inferior law; it may be one which protects action contrary to the invalidating law even though the protected right could be legitimately ceded, e.g. the right to reputation or the right to marry.

4) The difficulty may be one which is not sufficiently grave to be beyond the power of the legislator to impose, but which is beyond his will.

These conclusions may not be applied indiscriminately to all invalidating laws. The relative gravity of the law and of the difficulty must be weighed in each particular case. A decision against the invalidating law must be made under the guidance of approved authors who teach their opinion in such a way as to give it solid probability. Due to the gravity of invalidating laws it is only in the most extraordinary circumstances that such a decision may be made in a case not discussed by approved authors.