

The Vicarious Power of the Pope and Marriage

Threefold power of the Church

In the preamble of the proposed Fundamental Law of the Church, it is stated that "based on her divine institution, as contained in the Gospel, the Church fulfills the mission entrusted to her by Christ: she carries it out by safeguarding the unity of faith and by defending and preserving intact her divine constitution, and helps the faithful to attain their salvation by guiding their actions¹. With these words the Church's divine mission as well as the way to accomplish it is summarized.

The Church's mission being universal, such as to spread the kingdom of Christ throughout the world by making Him rule the minds and hearts of all men, she was rightfully endowed with a threefold power, namely the power of teaching, the power of sanctifying, and the power of ruling.² The power of teaching is obviously ordained to the welfare of all men, baptized and pagans, since all men without distinction are called to enter her fold and be followers of Christ. However, the power of sanctifying and of governing properly refer to those who already belong to

¹ *Schema Legis Ecclesiae Fundamental*, Proemium.

² Matth. XXVII, 18-20; Ioan. XX, 21-23.

her fold, namely the baptized. The purpose of this paper asks for a short elaboration on the *powers of ruling and of teaching*, leaving aside the power of sanctifying.

The power of ruling

As regards to the *power of ruling* the Church was vested with the threefold faculty which is natural and proper to any juridical perfect society, namely the legislative, judiciary and executive, that are to be exclusively used for the building up of the people of God in holiness and truth.³

As a visible and perfect society the Church enjoys the jurisdictional power of ruling, thereby ordaining and guiding the social and individual activity of her members towards the attainment of the supernatural end, namely their sanctification and final salvation. This power is *natural and proper* to the Church inasmuch as it belongs to her social structure. No perfect society can exist without this jurisdictional power whereby the attainment of its own goal is ensured.

All the baptized and only the baptized are subject to the jurisdictional power of the Church. People who are out of her fold do not fall under the Church's law. This is clearly stated in canon 12 of the Codex: "Unbaptized people are not bound by the ecclesiastical laws". And canon 87 says: "Through baptism man becomes a member of the Church of Christ with all rights and duties of Christians".

The power of teaching

If the jurisdictional power alone is considered, the Church would not differ from any other perfect society. But the Church is not merely a *natural*, visible and perfect society, as the State is. The end assigned to her by Christ and the means entrusted her to attain said end surpass the bounds of the natural order. Her goal is entirely *supernatural*, namely the sanctification and salvation of souls. And the means to achieve this end surpass all temporal means disposed of by any other human society. This implies the existence and admission of the supernatural order, governed by a

³ Const. *Lumen gentium*, n. 27.

law higher than the human to which the Church's social activity and the actions of her members are to conform. In other words, this implies the existence of the divine law, both natural and positive, which any human law has to respect.

Because of this preeminence and supernatural mission of the Church, she was endowed with the *office of teaching* whereby she can lead all men to the knowledge and worship of God. Her office as teacher presupposes her having been entrusted by her Founder with the deposit of the divine revelation in order that, guided by the Holy Spirit, she may preserve intact the divine truth, grow in its knowledge, and faithfully transmit it to the world. In order that she might fulfill this divine mission, she was given the very special gift of the *infallibility* which makes her teaching conform to the divine truth. The prerogative of being infallible is enjoyed by the Roman Pontif, Head of the Universal Church, as Supreme Pastor and Doctor, when he proclaims solemnly a doctrine on faith and morals⁴, as well as by the College of the Bishops joined in Ecumenical Council, or otherwise united with the Church Head, the Pope⁵.

Pius XII referred to the Church's office of teaching when he said:

"Considered from the moral aspect the whole matter of the natural law, its exposition, interpretation and application come under the competency of the Church. It is God's will that the journey which man must make towards the supernatural goal is conditioned by its observance of the natural law, and in this journey it is the Church which guides and protects him".⁶

The special power enjoyed by the Church to declare and interpret authentically the divine law is called *power of teaching* or *magisterium*. Leo XIII comments on this office of teaching by saying:

"It belongs to the teaching Church to declare which are the doctrines divinely revealed, since God entrusted

⁴ Cf. Conc. Vat. I, Const. decree "*Pastor Aeternus*", 4: Denz. 1839 (3074); Conc. Vat. II, Const. dogm. *Lumen gentium*, n. 25.

⁵ Cf. Conc. Vat. II, Const. dogm. *Lumen gentium*, nn. 18, 25.

⁶ AAS., 46, 1954, pp. 671-672.

to her the keeping and interpretation of His Word the supreme teacher in the church is the Roman pontiff... The contents of the divine Scriptures partly refer to God, partly to man and to the things necessary for man's eternal salvation. What on both things should be believed and what should be done by the Church and within the Church by the Pope is prescribed by divine law. Hence the Pope can, by his authority, declare what is contained in the Scriptures, what is in conformity and what is in disagreement with them: and by the same reason he can declare what is honest, what is immoral, what should be done and what should be avoided in order to attain salvation."⁷

Dispensation from divine law

The faculty, however, to dispense from the observance of the divine law is not included either in the ordinary and proper jurisdictional power enjoyed by the Church to govern her faithful nor in her special prerogative of being the depository and interpreter of the divine revelation. It surpasses both her normal social jurisdiction and her office of teaching. To dispense from the observance of a law is to suspend its obligation in a given case, wherein its observance renders difficult the attainment of the end which is supposed to facilitate. To grant a dispensation from the law is an act of the legislative power and only the law-maker, his successor and superior may grant it. Since divine law comes from God Himself, He alone can relax it. This He can do either by His personal intervention or through the instrumental and intermediary action of somebody.⁸ No human power is, by itself, competent to grant a dispensation from divine law.

In this regard a distinction should be made. Two kinds of obligations binding human beings spring from divine law. There are obligations directly imposed by God upon us by virtue of our dependency and His infinite supremacy and there are obligations that man willfully assumes upon himself before God and that are accepted, ratified and confirmed by Him. To the first group of obligations belongs our duty to give due worship to God and to aim at our salvation by avoiding sin and practicing virtue.

⁷ Acta of Leo XIII, X, 1891, pp. 24; 26-27.

⁸ St. Thomas Aquinas says: "Quae sunt a Deo nullus potest dispensare nisi solus Deus vel is cui ipse specialiter committeret" (Sum Theol, II-II, 1-2, q. 67, a. 24 ad 3um).

To the second group of obligations belongs our duty to be faithful in keeping our promises and vows. The obligation whereby married people are bound to keep indissoluble their marital union belongs to the latter group. It springs from their mutual consent in taking each other as husband and wife for ever. The marital vow freely given and accepted by both contracting parties is accepted, ratified and sealed by God. Hence, the conjugal tie, which originally springs from the personal choice of the contracting parties is strengthened and ruled by divine law. All marital obligations draw their binding force not only from the spouses' personal will and choice but from God Himself, who instituted marriage as an indissoluble institution. God alone therefore may free married people from the obligations they willfully assumed before Him.

The relaxation in our obligations before God is only possible in regard to the obligations that man has freely assumed before Him, not in regard to the obligations that spring from his dependency. God cannot allow man to commit a sin or to refuse giving Him due honor and worship. However, He can free man from an obligation freely assumed by the latter. A religious binds himself with the three vows for ever. God may relax this obligation man has assumed, through the Church's dispensation. Similarly, married people have assumed the obligation derived from their valid marriage. God may dispense them from their marital vow, through the Church.

The vicarious power of the Church

Under the present economy of salvation God does not show His personal intervention in relaxing His divine law, but He does show His divine will through the instrumental or ministerial action of the Church established in the world by Him. For this purpose He endowed the Church with another most special and extraordinary gift, not included in the jurisdictional power which naturally belongs to her as a perfect society since it is not necessary for its normal social life. Nor is it contained in her office of teaching which properly refers to imparting the knowledge of divine truth. Through this special and extraordinary power, the Church acts not in her own name, but in God's name, as His

representative, thus surpassing the limits of her office of teaching and her jurisdictional power.

The concept of *vicarious* power is contrasted with that of *proper* power. Both are attached to the office, but while the latter is exercised by the office's holder in his own name, the former is exercised in the name of the superior whom the holder of the office represents. The Church enjoys her vicarious power by divine commission and exercises it in God's name, as His representative, by interpreting His divine will.⁹ In exercising this vicarious power, the Church's action goes beyond her own laws and enters the supernatural sphere covered entirely by the divine law. This extraordinary power enjoyed by the Church is what the theologians and canonists call *ministerial power*, *instrumental power* and more often *vicarious power*.⁹ This power belongs only to God originally and properly; it is only exercised by the Church instrumentally and by commission, inasmuch as she is the representative of God here on earth.

Cappello defines the vicarious power as "the power granted to the Church by special commission. Hence, she enjoys it inasmuch as she is God's instrument and representative, exercising the same in His name. By virtue of this power the Church declares with infallibility the word of God, dissolves a marriage which is ratified but not yet consummated..."¹⁰ A. Piamonte gives us a shorter definition: "Vicarious or ministerial power is the one whereby the Church dispenses from obligations of divine law assumed by men."¹¹

Whether in dissolving a valid marriage the Pope annuls directly the mutual consent given by the spouses when marrying each other or he relaxes in that particular case the law of indissolubility wherefrom the stability of marriage derives, is a question very much discussed by canonists. The actual effect of the papal concession is the dissolution of the marital bond, doing

⁹ Cf. Ottaviani, *Institutiones Iuris Publici Ecclesiastici*, Romae, 1958, pp. 190-191. Bender, *Potestas Ordinaria et Delegata*, Romae, 1957, 19 n. 10.

⁹ Cappello, *De Matrimonio*, Romae, 1947, p. 749; Santos Diez, *La potestad ministerial en el ordenamiento canónico, Ius Canonicum*, 5 (1965) pp. 63-11.

¹⁰ Cappello, *Summa Iuris Publici Ecclesiastici*, n. 139, p. 117.

¹¹ A. Piamonte, *De Causis Maioribus seu Negotiis Romano Pontifici Reservatis*, disertatio ad Lauream in Iure Canonico, nondum typis edita, p. 183.

away with a union which up to that moment was lawful and valid. No impediment of *ligamen* for a subsequent marriage may spring from it, since it ceases to exist. The important thing is to realize that the concession of the annulment is not a human but divine jurisdictional act, which is merely carried out by the Pope ministerially or instrumentally.

The vicarious power and other powers of the Church

At this stage it is most convenient to note the differences existing between this ministerial or vicarious power exercised by the Church only in the name of God as His representative on earth and other two powers which the Church is endowed with to carry out normally her divine mission, namely, her power of ruling which belongs to her as a perfect society and her power of teaching which is proper to her in order to accomplish her universal salvific mission. By comparing them, the true nature and characteristics of the vicarious power will be clearly shown.

1. *The power of teaching and the vicarious power.* Regarding the power of teaching and the vicarious power of the Church we see the following differences:

a) *The power of teaching* comprises the possession of truth as contained in the deposit of revelation entrusted to the Church as well as its faithful transmission to humanity for its guidance in the journey towards the supernatural end, to which all human beings are destined by God. Two stages therefore are to be distinguished in the exercise of this office of teaching, namely, the Church's continuous searching for the truth as revealed by God and its faithful transmission to men. In her searching for the truth the Church scrutinizes and inquires which is God's will in relation to man; in transmitting the truth to humanity, the Church bears witness to the divine will before the world. In bearing witness to God's will before the world, the Church acts as God's representative, enlightening men on what God expects from all and every one. In this respect both the *power of teaching* and the *vicarious power* of the Church coincide. Both presuppose the knowledge of God's will. They differ, however, in that the *power of teaching* merely shows the divine will and the moral obligation to follow it, while the vicarious power goes beyond

this function by determining and applying the concrete solutions whenever the welfare of souls seems to be in conflict with the strict fulfillment of divine law. The *vicarious power* therefore is more ample than the *power of teaching*. By the *power of teaching*, for instance, the Church knows that any valid marriage is indissoluble by divine law, but she also knows that God, Author of this law would dispense from it when, in certain circumstances, to follow it would hinder rather than help the salvation of souls. By the *vicarious power* based on this knowledge and as representative of God, the Church actually dispenses from the law of indissolubility in those cases wherein God Himself would relax His law. The *vicarious power* therefore, participates in the nature of jurisdictional power which the office of teaching does not.

b) Another difference is that the *power of teaching*, although divine in its origin, is connatural and proper to the Church. The accomplishment of her divine mission asks for this power in order to enable her to know and transmit God's will to humanity. It is necessary to her. However, the *vicarious* or *ministerial power* is not required to carry out the mission of the Church. Although it is very useful and convenient, it is not necessary. It is a gratuitous power she is endowed with by God.

2. *The power of ruling and the vicarious power.* Comparing the *power of ruling* and the *ministerial power* of the Church, we see that:

a) Both are derived from the same source, namely God; however, they differ in character. The *power of ruling* is connatural and necessary to her internal social structure, so much so that without it the Church cannot be conceived as a perfect society. That is why it is *proper* to her. When exercised, its primary active subject is a human person, the Church's Head, the Roman Pontiff. Though springing from God, as all power, it is however exercised by and attributed to a man, as to its *principal cause*. In the exercise of her *ministerial power*, however, the Church acts only in the name of God. She is to be regarded as the *secondary active subject*. She is the instrumental cause of an action which is attributed to God as its *primary active subject* and *principal cause*. The dispensation from the divine law is a prero-

gative of its Author alone, namely God.¹² It is attributed to Him as its principal cause, not to the Pope who is only the instrumental cause of the dispensation. The power of relaxing a divine law is, therefore, *proper to God, vicarious for the Church*.

b) This leads us to point out a second difference between the *vicarious power* and the *power of ruling* of the Church. Both refer to dispensing from or relaxing the law in cases wherein its fulfillment does not help to achieve the end wanted by the legislator. Both powers, therefore, are jurisdictional in nature. The *power of ruling* however is truly *ecclesiastical*, whereas the *ministerial power is divine*. Hence, the Church's dispensation coming from her power of ruling extends only to the implementation of her own laws while a dispensation given by her by virtue of her vicarious power is a relaxation of the divine law. This is why for the validity of the latter a just cause is absolutely necessary whereas it is not necessary for the former.

c) The jurisdiction *proper* to the Church is *social* in nature. It is exercised over the ecclesiastical body as well as over the individual members of the Church. As such it always tends to achieve the end of the Church as a means of salvation of humanity. The exercise of the *vicarious power*, however, is not social in character, but *individual* in the sense that it is always applied to

¹² St. Thomas, in his *Summa Theologica* says: "Sicut in lege humana publica non potest dispensare nisi ille a quo lex auctoritatem habet, vel is cui ipse commiserit; ita in praeceptis iuris divini, quae sunt a Deo, nullus potest dispensare nisi Deus, vel is cui ipse specialiter committeret" (I-II, q. 97, a. 4. ad 3um).

Cappello declares the difference between the power of ruling and the vicarious power by saying: "Potestas, qua Romanus Pontifex solvit matrimonium ratum tantum non est potestas iurisdictionis propria, quae competit Ecclesiae in quantum est societas iuridice perfecta quaeque proinde ipsi connaturalis est atque ordinaria, sed est potestas omnino peculiaris et extraordinaria, ministerialis quidem et instrumentalis quatenus exercetur auctoritate et nomine ipsius Christi, ideoque potestas proprie vicaria, vero et stricto sensu divina" (Cappello, *De Sacramentis*, Vol. V, *De Matrimonio*, n. 762, p. 690). Before Cappello, Wernz noted their differences when, dividing ecclesiastical jurisdiction in propriam et vicariam, he said: "Prior vocatur potestas quae connaturaliter sequitur existentiam Ecclesiae ut verae societatis perfectae, atque exercetur ab Ecclesia nomine proprio et in foro suo... Altera vero potestas dicitur illa, quae Ecclesiae concessa est vi specialis commissionis atque exercetur ab illa ut in foro Dei. Vi huius vicariae potestatis infallibiliter declarat verbum Dei, remittit peccata, concedit indulgentias, solvit vota, iuramenta, matrimonia rata" (Wernz, *F. Ius Decretalium*, v. II, pars I, n. 4, pp. 13-14).

individual cases where the relaxation of divine law is somehow necessary.¹³

d) Another difference between both powers is that the *power of ruling* is exercised only over the members of the Church, namely the baptized, while the *vicarious power* extends over all men baptized as well as unbaptized, under certain conditions. The reason is that all men are subject to divine law, whereas only the baptized are subject to the ecclesiastical laws.

Indissolubility of marriage

The divine law from which the Church dispenses through her vicarious power is the law of indissolubility enjoyed by any valid marriage, whether it be a natural marriage, as the one contracted among pagans, or a Christian marriage as contracted among baptized. A marriage, once validly celebrated is indissoluble by divine law.

The indissolubility of marriage can be considered in two ways, namely, *intrinsically* and *extrinsically*. The *intrinsic* indissolubility implies the impossibility of breaking the marital bond by the contracting parties concerned, either by mutual accord or by unilateral decision, while the *extrinsic* indissolubility refers to the impossibility of breaking the marriage bond by any human power. Any valid marriage enjoys absolute *intrinsic* indissolubility. Though the contracting parties have created the marital bond between themselves through their mutual consent, they cannot rescind the same for any reason whatsoever¹⁴ However, not all marriages enjoy *absolute extrinsic* indissolubility. Save the ratified and consummated marriage, which is absolutely indissoluble, all other marriages may be dissolved under certain circumstances. They enjoy only *relative extrinsic indissolubility*. Although the indissolubility of marriage is indeed substracted from any purely human authority because the law wherefrom its binding force derives is above any human power, however, the law of indissolubility of marriage can undoubtedly be relaxed by God, from Whom said binding force springs, or by His representative to whom He has given this power. The Author of the law may do away with

¹³ Jose Luis Santos, *La Potestad Ministerial*, in *Ius Canonicum*, vol. V, 1965, pp. 63 ff.

¹⁴ Cf. Mark, X, 11-12; Luke, XVI, 18; I Cor., VII, 10-11.

union. Therefore, it is not lawful for man to separate those joined in marriage... What the Roman Pontiff does in this regard is not done by human authority, but by divine, since he is truly called the Vicar of the true God, not of mere man. For although we are the successor of the Prince of the Apostles, we are not, however, his Vicar, nor the Vicar of a certain apostle, nor of man, but we are the Vicar of Christ Himself. Therefore, when the Pope separates those whom God has united, it is not man who acts, since he is not vicar of man, but it is God who acts, since he is the Vicar of God".¹⁷

And Pius XII appropriately says:

"There are two passages of the New Testament that indicate with certainty the limits within which the dissolution of the bond must remain and that exclude both modern laxism and the rigorism contrary to the divine will and ordinance. The first is 'What God has joined, let no man put asunder' (Matth., XIX, 6). This means that God, not man, can separate the spouses. And so, unless God dissolves the bond, the separation is invalid. The other passage is 'Non servituti subjectus est frater aut soror...', in pace autem vocavit nos Deus' (I Cor., VII, 15). This means that there is no longer any obligation or bond once God dissolves (the marriage), and so allows the parties to lawfully contract new marriage".¹⁸

Proof of the vicarious power

The fact of this divine power having been granted to the Church is implicitly contained in the revelation, a fact that is confirmed by the constant use and practice of this power by the Church throughout the centuries. To think otherwise would imply to attribute an error on faith and morals on the part of the Church, what is untenable.¹⁹ Based on the infallibility of the Church on matters of faith and morals, we may say that the truly solid and convincing reason in favor of the ministerial and

¹⁷ *Epistolarum Innocentii III libri undecimi*, t. I, Paris 1682, p. 181, col. 2.

¹⁸ AAS, XXXIII, 1941, p. 425.

¹⁹ "Sine temeritate et contumelia Sedis Apostolicae affirmari nequit tot Romanos Pontifices saepius errasse circa unum ex praecipuis capitibus Christianae religionis" (Gasparrì, *Tract. de Matrimonio*, II, n. 1130). Most of the theologians and canonists use similar words to point out the use of the vicarious power and consequently its existence.

vicarious power of the Church to dissolve a valid marriage is her constant practice of this power throughout the centuries.²⁰ Bender affirms that the vicarious power of the Church to dissolve marriages is an indirect object of infallibility.²¹ There is no dogmatic definition, however, which directly vindicates in favor of the Church this vicarious power of dissolving a valid marriage.²²

The Church has exercised the vicarious power in the past, though in various degrees, as it is reflected in her legislation and in several papal pronouncements. The practice of this ministerial power can be traced back to Alexander III²³ (1159-1181), who stated that the only marriage enjoying absolute indissolubility is the Christian marriage which has been consummated. Some authors of the thirteenth century, like Alanus and Vincent Hispanus defended the vicarious power of the Pope against numerous theologians who held a different view.²⁴ The number of writers in favor of the ministerial power became more and more numerous afterwards. There are clear testimonies supporting the use of this vicarious power of the Roman Pontiffs during the fifteenth century, so much so that Benedict XIV says:

"There is no doubt as to the existence of the power of the Roman Pontiff to dissolve a ratified non-consummated

²⁰ L. Míguez, *Coment. al Cód. de Der. Canónico*, II, Madrid, 1963, p. 690; Wernz-Vidal-Aguirre, *Ius Canonicum*, V, *De Matrimonio*, n. 624, nota 40; M. de Arquer, *Derecho matrimonial*, Barcelona, 1949, p. 55.

²¹ Bender, *Prael. Iur. Matrim.*, p. 490.

²² It is true that the Council of Trent gave us this dogmatic pronouncement: "Si quis dixerit, matrimonium ratum, non consummatum, per solemnem religionis professionem alterius coniugum non dirimi, anathema sit" (Sess. XXIV, can. 6). But as Bender says, "canon ille, utut dogmaticus, non definitiv nisi inerrantiam Ecclesiae in condenda disciplina de qua agitur. Videlicet definivit, non praetergressam esse limites potestatis clavium Ecclesiam nec quidquam detraxisse revelatae doctrinae doctrinae fidei et morum, quum professionem religiosam ut causam sat gravam pro dissolvendo matrimonio rato generali sua disciplina admisit" (Bender, l.c.p. 488). It should be recalled that there was a discussion among the writers whether this virtue of dissolving a marriage ratified non yet consummated attached to solemn religious profession derived from divine law, natural and positive, or from ecclesiastical law.

²³ "Sane, quod Dominus in Evangelio dicit, non licere viro, nisi ob causam fornicationis uxorem suam dimittere, intelligendum est... de his quorum matrimonium (christianum) carnali copula est consummatum" (C. 7, X, III, 32).

²⁴ Cfr. Al De Smet, *De Sponsalibus et Matrimonio*, Brugis, 1927, p. 283.

marriage, since the opinion of theologians and canonists in its favor is common and it is accepted in practice".²⁵

One thing appears clear. The progressive use and practice of the vicarious power has been always ahead of its doctrinal exposition.

Extension of the vicarious power

During the last years a number of marriages not covered by the existing norms contained in the Codex, have been annulled. These various dissolutions cannot be explained by the pauline privilege, by the concessions made in the Constitutions mentioned in canon 1125 nor by the norm prescribed in canon 1119. This recent practice in granting the dispensation from the indissolubility of marriage has brought about a new outlook on the vicarious power of the Roman Pontiff. Several studies have appeared considering the dispensations from various angles.

There is no definite pronouncement pointing out the limits wherein its exercise should be contained. The most enlightening teaching on the matter are the following words of Pius XII addressed to the Officials of the Sacred Roman Rota on October 3, 1941:

"It is superfluous to repeat that a ratified and consummated marriage, is by divine law, indissoluble, in so far as it cannot be dissolved by any human power; whereas other marriages, though they are intrinsically indissoluble, have not absolute extrinsic indissolubility; but granted certain necessary prerequisites (and we are speaking, as you know, of relatively rare cases), these marriages can be dissolved, not only through the pauline privilege, but also by the Roman Pontiff in virtue of his ministerial power".²⁶

Considering this declaration made by Pius XII and the actual practice of the Church, it is to be held that the Roman Pontiff enjoys the vicarious power to dissolve any valid marriage which is not ratified and consummated. Aside from the pronouncement of Pius XII there is no guideline to point out the limits of this power. It is by her practice rather than by her doctrine that the Church has marked the limits wherein her vicarious power is exercised.

²⁵ Benedict XIV, *Quaest. Can.*, (q. 479).

²⁶ AAS., XXXIII, 1941, pp. 424-425.

The reason why a ratified and consummated marriage is absolutely indissoluble cannot be deduced from the natural law, since natural and legitimate marriages which are consummated may be dissolved in various ways and in the Old Testament the Jews were allowed to remarry through the use of the bill of divorce. Nor does its sacramentality make it indissoluble, because the merely ratified marriage is also a sacrament and admits of dissolution by the solemn religious profession and by the vicarious power of the Pope. The true reason for the absolute indissolubility of a consummated Christian marriage is to be deduced from the natural law, its sacramentality and its consummation, these three elements taken together, not isolated from one another. God can indeed dissolve any valid marriage, even a Christian marriage which has been consummated, but nowhere is it shown that God approves of dissolving a ratified and consummated marriage.²⁷ On the contrary, it is only this marriage which has been given in the Scriptures the mystical and mysterious significance of the union of Christ with His Church, which is an unfailing union.²⁸

Aside from the Christian marriage which has been consummated, there is another marriage which does not fall under the vicarious power of the Church. Such is the case of a legitimate marriage wherein both spouses remain unbaptized and there is no third Christian party's interest in its dissolution. To our knowledge there is no case of this kind upon which the Church has acted up to now. It seems that the Church's vicarious power does not extend to this kind of marriage.

The Pope's prerogative

This ministerial power of the Church is reserved to the Roman Pontiff since He alone is the Vicar of Christ on earth. Whether this reservation comes from divine law or from the positive disposition of the Church is a question under discussion.

²⁷ Cf. Al. De Smet, l.c.p. 308, n. 356.

²⁸ "Matrimonium ante carnalem copulam significat illam coniunctionem quae est Christi ad animam per gratiam, quae quidem solvitur per dispositionem spiritualem contrariam, scilicet per peccatum mortale; sed post carnalem copulam significat coniunctionem Christi ad Ecclesiam quantum ad assumptionem humanae naturae in unitatem personae, quae omnino est indivisibilis" (St. Thomas, *Summa Theologica*, *Supplem.*, q. 62, a. 2, ad. 1).

St. Thomas Aquinas, talking about the dispensation from vows, holds that "since the Roman Pontiff is the Vicar of Christ for the Universal Church, he enjoys full power to dispense from all vows that admit of dispensation".²⁹ Suarez said in this regard:

"The common opinion among the doctors is that the bishops inferior to the Roman Pontiff may not dispense from evangelical divine law... The reason is because, although this faculty is necessary for the Church, it is not needed in the bishops, since the one enjoyed by the Supreme Pontiff would be enough, because of its rare use".³⁰

That the vicarious power of the Church to dissolve a valid marriage is de facto reserved to the Roman Pontiff is affirmed by practically all writers. A good number of them sustain the papal reservation not simply because it is stated in the ecclesiastical discipline but because of the very nature of the vicarious power.³¹

The first known official pronouncement on this matter, pointing to the *exclusive* prerogative of the Roman Pontiff by divine law, was made by Innocent III, who said:

"There is no doubt that the Almighty God... reserved the dissolution of the marital union, existing between a man and a woman, *only* to the judgment (of the Roman Pontiff)".³²

This papal reservation is clearly stated in canon 1119 which states:

"Marriage non consummated between two baptized parties or between one baptized and one unbaptized, is dissolved... by dispensation of the Holy See".

The Sacred Congregation for the Discipline on Sacraments clearly pointed out that "the power to grant this dispensation belongs to the Roman Pontiff alone".³³ The Sacred Congregation for the Oriental Church affirms the *exclusive* prerogative of the Pope by

²⁹ St. Thomas, *Summa Theologica*, II-III, q. 88, a. 12, ad, 3um.

³⁰ Suarez F., *De Legibus*, l. X. c. VI, n. 2, *Opera Omnia*, t. 6, p. 579.

³¹ Cfr. Abate, A., *The dissolution of the matrimonial bond*, Rome, 1962, p. 20; Coache, mentioned by A. Piamonte, l.c.p. 244.

³² C. 2, X, 1, 7.

³³ S. C. de Disc. Sacram. *Decretum Catholica Doctrina*, May 7, 1923: ASS., XV, 1923, p. 389.

divine law when she says that "*only* the Roman Pontiff was *divinely granted* the power of dispensing from a marriage ratified and non-consummated".³⁴ The post-Conciliar *Motu Proprio De Episcoporum muneribus*, issued by Paul VI on June 15, 1966, points out also that the vicarious power is a prerogative of the Roman Pontiff. It states that

"the supreme Pontiff alone may dispense, when using the vicarious power, from the divine laws, natural and positive; as it happens in dispensing from a ratified and non-consummated marriage, on matters related to the privilege of faith and others".³⁵

How the vicarious power is exercised

The question arises: How does the Church know the will of God as regards the dissolution of marriage? When the Church dissolves a marriage, she exercises both *her office of teaching* and *her vicarious power*. We have pointed out before that the Church enjoys a special faculty to declare and authentically interpret the divine law inasmuch as she has the supernatural mission to guide men towards their supernatural goal. Through this *power of teaching* she interprets the divine law and knows when it admits of exception, i.e. when the law of indissolubility may be relaxed. Pius XI declared this doctrine in the following terms:

"If, in certain rare occasions, the firmness (of the bond) seems to admit of exceptions, as in the case of certain natural marriage between pagans, or of non-consummated Christian marriages, it is to be remembered that such exceptions do not depend on the will of man, nor on any merely human power, but are allowed by the divine law, whose sole guardian and interpreter is the Church of Christ".³⁶

Besides this power of interpreting the divine law, the Church exercises her *vicarious power*. Seeing that the law of indissolubility admits of exceptions she, through her *ministerial* or *vi-*

³⁴ S. C. pro Eccl. Orient. Instruction *Quo facilius*, June 10, 1935: AAS., XXVII, 1935, p. 334. The same words appear in the revision made on the Instruction *Quo facilius* updating the ecclesiastical discipline of the Oriental Church, on July 13, 1953.

³⁵ AAS., 58, 1966, pp. 467-472, n. V.

³⁶ Pius XI, Enc. *Casti Connubii*: AAS., XIII, 1930, p. 522.

carious power, grants the dispensation from the indissolubility of marriage in the sense explained before.

Cause for dispensation

Since the dispensation from the indissolubility of marriage granted by the Pope through his vicarious power refers not to an ecclesiastical law, within the limits of which his proper jurisdictional power is exercised, but to the divine law, on which he has no proper power, a *just cause* for the dispensation should exist for its validity. The principle on dispensation from a law imposed by a higher superior applies here perfectly. The use of vicarious power in granting a dispensation without a just cause would be not only illicit but also invalid. Pius XII declared this by saying:

“In the use of the vicarious power, the validity itself of the dissolution of the marital bond depends on the existence of the necessary requirement”.³⁷

For a valid dispensation, therefore, there must be a just cause which may justify the relaxation of the binding force of the indissolubility.

As we have pointed out before, God is supposed to allow a valid marriage to be dissolved when a good greater than the one involved in the indissolubility of marriage may be attained. This greater good is no other than the *interest of the faith* or the *salvation of souls*. According to Bank, “the supreme value here on earth is the faith, which joins the creature to the Creator. This relationship is stronger than any other relationship, marriage included”.³⁸ This greater good exists whenever the preservation of the marriage might be an occasion for spiritual ruin to the spouses themselves or to a third person rather than a means to spiritual growth and advancement. In such cases the Pope, interpreting God’s will, dissolves the marital bond for the benefit of the persons concerned. This is the reason why a just cause is always necessary and its inexistence would render the

³⁷ Pius XII, *Allocution* on Oct. 3, 1941: AAS., XXXIII, pp. 425-426.

³⁸ Bank, *Connubia Canonica*, Romae, 1959, p. 555.

dispensation invalid. Pius XII expressed this in the following terms:

"In every case, the supreme norm according to which the Roman Pontiff uses his *vicarious power* of dissolving marriage is... the *salus animarum*, in the attainment of which not only the common good of religious society, and of human society in general, but also the welfare of individual souls will receive due and proportionate consideration".³⁹

Since the vicarious power to grant the dispensation from the marriage indissolubility is endowed to the Roman Pontiff as Vicar of Christ, he alone may determine when this justifiable cause of the salvation of souls is present. As Lehmkuhl A. said:

"The reason why the dissolution of a concrete marriage is allowed by divine law, is the *favor fidei*. Since this cause is general, I believe that to determine the special and immediate cause with its conditions and circumstances, belongs to the Church, i.e. to the Roman Pontiff".⁴⁰

In this respect it should be added that it is not necessary that the cause be of public interest. The welfare of an individual would be enough. However, not only the spiritual welfare of the individuals concerned is to be considered, but the possible effect to be caused on the community by the annulment of marriage has to be pondered. The danger of scandal should always be removed, and whenever the individual welfare and the common good are in conflict, the latter should prevail, and the dispensation should be refused. According to Gasparri:

"In order that this dispensation may be obtained from the Roman Pontiff, it is necessary that no scandal be derived thereof, otherwise it would not help the salvation of souls but cause their ruin".⁴¹

The Instruction on the dissolution of marriage "in favorem fidei" of December 6, 1973, not yet published but sent to the Bis-

³⁹ AAS., XXXIII, 1941, p. 426.

⁴⁰ Lehmkuhl A., *Theologia Moralís*, vol. II, Friburgi Brisg., 1910, p. 534, n. 929.

⁴¹ Gasparri, *De Matrimonio*, n. 1165.

hops for its implementation, points out the following requirements for the concession of the marriage annulment:

“ut nulla detur possibilitas restaurandi vitam conjugalem, manente dissidio radicali et insanabili”, and “ut a concessione gratiae absit publici scandali periculum, vel gravis admirationis”.

The cause of the *interest of the faith* or the *salvation of souls* is present in the following instances:

1. *When a person, without being baptized, shows however a real interest in being converted to the faith.* The Instruction just mentioned before implies clearly this possibility when it requires for the granting of the grace that “cum agitur de catechumeno, quocum contrahendum sit, certitudo moralis habeatur de baptis-mate proxime recipiendo, si expectari (quod suadendum est) ipse baptismus non poterit”.

2. *When at least one of the parties, being pagan, is baptized.* The case submitted to and studied by the Sacred Congregation of the Council (now S. Congregation for the Clergy) in 1726-1728 is well known. Both spouses were Jews. The wife was baptized and the interpellations for the use of the pauline privilege were made. However, she did not marry again. The husband married another Hebrew woman. Later on these two who were converted and were baptized, asked that their union be legalized by the Church. The Roman Pontiff granted their request by dissolving the first marriage.⁴²

Another case was that of Martha, a pagan, married to G. baptized in a Protestant sect, in 1944. After some time they separated and Martha was baptized. She knew a Catholic whom she wanted to marry. She requested that her marriage with G. be dissolved. Pius XII granted her petition and dissolved the marriage “in favorem fidei”, on May 1, 1950.⁴³

Bouscaren mentioned the case⁴⁴ of Titius, a Catholic, married to Berta, a pagan, with a dispensation from the impediment of disparity of worship. Later, being separated from Titius, Berta

⁴² Cfr. Cappello, *De Matrimonio*, n. 790.

⁴³ Cfr. J. Bank, *Connubia Canonica*, Romae-Barcinone, 1959, p. 557.

⁴⁴ Cfr. Bouscaren, *The Canon Law Digest*, vol. III, p. 485.

showed interest in becoming a Catholic herself, and wanted to marry another Catholic man. Though the request to dissolve her marriage with Titius was based on the non-consummation of their marriage, this was not sufficiently proved. However, the Holy Office suggested that the favor could be granted "in favorem fidei", because she was unbaptized during the entire time of her cohabitation with Titius. In view of the special circumstances of the case, where it was advisable for her not to restore her marital life with Titius, and to marry instead a Catholic after her baptism, Pius XII granted the favor of dissolution of the marriage on January 30, 1950.

3. *When a separated brother wants to enter the fold of the Catholic Church.* The following case was mentioned in *Periodica de re morali et liturgica*. Elizabeth, a baptized non-Catholic married Charles, a Jew, in 1919. Their marriage being unsuccessful, a divorce was resorted to. After some years, the woman became a Catholic. Wanting to marry another Catholic, she requested that her previous marriage be dissolved. The favor was granted by Pius XI on April 2, 1932.⁴⁵

Another case was that of a Catholic who attempted a civil marriage with an unbaptized woman. After obtaining the dispensation from the impediment of disparity of worship, their union was convalidated in 1941. The marriage, however, was not successful. They separated and the woman obtained a civil divorce. The man, wanting to re-marry a baptized non-Catholic who intended to enter the Church and give a Catholic education to their children, asked for the dissolution of his marriage, and it was given.

4. *When a Catholic can be saved in the profession of faith and in the reception of the sacraments.* A Catholic married a pagan Chinese woman with the dispensation from the impediment of disparity of cult. During the war the wife disappeared. An informative process on his freedom was made after five years, and a new dispensation from the impediment of disparity of cult having been obtained, the Catholic party married another pagan woman, who later on became Catholic and brought up their children

⁴⁵ Cfr. *Periodica*, vol. XXI, 1932, p. 170; cf. also Joseph Bank, *Connubia Canonica*, Romae-Barcinone, 1959, p. 547.

in the Catholic Church. The reappearance of the presumed dead wife, who had remarried another man, posed the question on the validity of the second marriage. Hence, a petition was made by the husband that his first marriage be dissolved in order to convalidate the second one. It was granted by Pius XII on July 24, 1947.⁴⁶

Another case was that of two pagans who got married. The wife committed adultery and divorce was resorted to. Both parties remarried, the wife to a pagan and the husband to a Catholic. The children of the latter couple were baptized and educated in the Catholic religion. The husband, without any intention to be baptized, allowed his wife and their children to practice their religion freely. The Catholic wife wanted to legalize their union which would imply the dissolution of her husband's first marriage. A request was made to that effect to the Holy See. The Holy Father granted the dissolution of the first marriage "in favorem fidei partis Catholicae et prolis", on May 11, 1958.⁴⁷

The Instruction on the dissolution of marriage "in favorem fidei" of December 6, 1973, mentioned before, requires as a condition *sine qua non* for the granting of the concession "ut persona non baptizata vel baptizata extra Ecclesiam Catholicam libertatem facultatemque parti catholicae relinquat profitendi propriam religionem atque catholice educandi filios: quae conditio, cautionis forma, in tuto ponenda est". The same Instruction provides also as a requirement "ut pars catholica cum qua novum matrimonium ineundum sit, iuxta baptismatis promissiones vivat et novae familiae consulat".

5. *When the offspring can more easily be baptized and receive a Catholic education.* Two pagans were married. The wife left her husband and lived with another pagan after marrying him civilly. Likewise, the husband took another woman, from whom he had six children. His second wife wanted to be baptized, marry in the Church validly and give a Christian education to their children too. Her husband did not object to her desire.

⁴⁶ Mentioned by A. Bernárdez Caton, *Manual de Derecho Matrimonial Canónico*, Madrid, 1966, p. 465.

⁴⁷ Cf. A. Bernárdez, l.c.p. 467.

An obstacle, however to carry out her wishes was her husband's former marriage. This was dissolved by Pius XII on July 4, 1958.⁴⁸

During the war, a husband abandoned his wife and lived with a Catholic woman, whom he allowed to practice her religion and to give their children a Catholic education. He did not intend, however, to change his religion. The Catholic party requested that her union be legitimated, which was done after dissolving her husband's previous marriage "in favorem fidei partis Catholicae et prolis" by John XXIII, on Aug. 1, 1959.⁴⁹

In all the foregoing cases the *bonum fidei* or *salus animarum* is present for either spouse or for a third person.

However, the Instruction issued on December 6, 1973, mentioned before, states clearly that the dissolution of a legitimate marriage is not granted in two instances:

1. "Solutio matrimonii legitimi initi cum dispensatione ab impedimento disparitatis cultus non conceditur parti catholicae petenti, ad ineundas novas nuptias cum non baptizato qui non se convertit";
2. "Non conceditur solutio a matrimonio legitimo quod contractum vel convalidatum sit post obtentam dissolutionem a priore legitimo matrimonio".

The privilege of faith

Until the XVIth century the *privilege of faith* was identified with the *pauline privilege*. However, when the doctrine on the power of the Roman Pontiff to dissolve a natural marriage prevailed, a distinction between both privileges was sustained. At present the concept of the privilege of faith is considerably more ample than the pauline privilege. It comprises the pauline privilege itself, the papal concessions contained in canon 1125 and the direct concession granted in particular cases by the Roman Pontiff "in favorem fidei." The *pauline privilege* therefore is only a part of the *privilege of the faith*.

The Codex uses the phrase "privilege of faith" in canon 1127 to mean the favor granted by the Church to those who either wish

⁴⁸ Ibid., Ibid.

⁴⁹ Cf. A. Bernárdez Canton, l.c. pp. 467-468.

to convert to or to practice the faith by availing of the use of a dispensation from the law of indissolubility of marriage. This happens in various ways, namely:

a) Through the use of the *pauline privilege*, whenever the conditions specified by the Apostle⁵⁰ and stated in the Codex⁵¹ are fulfilled;

b) Through the use of the general concessions originally granted by the Church for some particular places and presently extended to other countries with similar conditions, as stated in canon 1125. The cases contemplated in these concessions are different from the case subject to the pauline privilege;

c) Through the use of the vicarious power of the Pope in dissolving the marriage even consummated between a baptized and a pagan. The reason for its dissolution is the "*favor fidei*", which is either the conversion of the pagan party or the perseverance of the person baptized in the practice of faith;

d) Through the use of the vicarious power of the Pope in dissolving a marriage of two pagans without the conversion of the parties, in *favor of the faith of a third person*. It is the case of a baptized Catholic living in concubinage with a married pagan, especially if they have the children baptized and receiving a Catholic education. In this case, the vicarious power of the Church is exercised in favor of a third person baptized, subject to her jurisdiction. The existing marriage is a hindrance to his salvation, and it is dissolved for this reason. If the third person's faith is not involved, the legitimate marriage is indissoluble, not subject to the Church's jurisdiction.

The *privilege of the faith*, therefore, is more ample than the *pauline privilege*. It is a manifestation of the vicarious power of the Pope, which in its turn is not restricted either to the privilege of the faith, since it extends to other cases which do not fall under the said privilege. The cases mentioned in canon 1119, namely, the dissolution of non-consummated marriages between a pagan and a baptized or between two baptized, either Catholic or non-Catholic, have no direct relation to the "*favor fidei*", though its

⁵⁰ I. Cor., VII, 12-14.

⁵¹ Canons 1120-1124.

dissolution might be regarded as an effective means to live one's religion in a better way and achieve thereby more easily the salvation of souls, the supreme end of our human life. In both cases the dissolution is effected either through the general concession attached by law to the solemn religious profession⁵² or through a direct individual papal concession by the *petrine privilege*, i.e., the vicarious or ministerial power of the Pope, Vicar of Christ and Successor of Saint Peter, which covers all cases wherein the dissolution is possible.

The phrase *petrine privilege* is not given identical meaning by the authors. Some limit the meaning of the *petrine privilege* to the power of the Roman Pontiff in dissolving a marriage wherein at least one of the spouses is not baptized. In other words, the *petrine privilege* would refer to the annulment of non-sacramental marriages.⁵³ Navarrete rejects this interpretation as inaccurate and inconvenient⁵⁴. Bank restricts even more its meaning, identifying it with the power of the Roman Pontiff to dissolve the marriage contracted between a baptized and a pagan.⁵⁵ He mentions Hurt, as a defender of this notion. Others, however, identify the *petrine privilege* with the exercise of the vicarious power regarding marriage, covering therefore all cases of possible dissolution, the pauline privilege included. Its definition then would coincide with the notion of the vicarious power given by Genicot-Beyer: "A most ample faculty to dissolve all marriages that are not ratified and consummated, for a just cause".⁵⁶

The following table shows how the various kinds of marriage may be dissolved when a just cause exist for granting the dispensation:

⁵²If the Pope may in individual cases grant the dispensation of the indissolubility of a marriage, he can also attach its automatic dissolution to an act whenever it conforms to the conditions specified by him. This is what happens with the dissolution of marriage attached by law to the solemn religious profession. The solemn vows do not dissolve by themselves the marriage; its dissolution is effected by the vicarious power of the Roman Pontiff, who has decided to grant this favor through the solemn religious profession.

⁵³ Cf. A. Bernárdez Canton, l.c., p. 460.

⁵⁴ Navarrete, *De termino "privilegium petrinum" non adhibendo*, in *Periodica*, 53, 1964, pp. 323-373.

⁵⁵ Joseph Bank, l.c. p. 552.

⁵⁶ Genicot-Beyer, *Institutiones Theol. Moralis*, vol. II, n. 672.

MARRIAGE AND ITS EXTRINSIC INDISSOLUBILITY

<i>Initial Stage</i>	<i>Further Development</i>	<i>Dissoluble through</i>
A. Legitimate marriage (between pagans)	1. <i>One party is converted and baptized —whether the marriage is consummated or not.</i>	Pauline privilege Concession in Constitutions (c. 1125) Solemn religious profession Pope's vicarious power
	2. <i>Both parties are baptized</i>	
	a) the marriage is not consummated after baptism of both —It is practically C, 1	Solemn religious profession Pope's vicarious power
	b) the marriage is consummated after baptism of both — It is practically C, 2.	Indissoluble
	3. <i>No conversion of either spouse</i>	
	a) a third person's faith is involved —whether marriage is consummated or not	Pope's vicarious power
	b) no third person's faith is involved —whether marriage is consummated or not	Indissoluble

B. Natural marriage (between a baptized and a pagan)	{	1. <i>The pagan is not baptized</i>	
		—whether the marriage is consummated or not.	{ Solemn religious profession Pope's vicarious power
	{	2. <i>The pagan is baptized</i>	
		a) the marriage is not consummated after baptism	
		—It is practically C, 1	{ Solemn religious profession Pope's vicarious power
	{	b) the marriage is consummated after baptism	
		—It is practically C, 2	Indissoluble
C. Ratified marriage (between 2 persons baptized)	{	1. Not consummated	{ Solemn religious profession Pope's vicarious power
		2. Consummated	Indissoluble

Who may ask for the favor

No matter how the marriage bond is broken, its dissolution is effected by God alone Who dispenses from His own law of indissolubility through the ministerial action of the Church. Since the law of indissolubility affects any valid marriage, be it contracted between two pagans, or between a pagan and a baptized or between two baptized, any married person may ask for

a dispensation of the law of indissolubility, provided however that all conditions for the granting of the dispensation are met. Two requirements are always necessary, namely, that the marriage in question is not ratified and consummated and that the *bonum fidei* or *salus animarum* is involved.

Canon 1973 states that the spouses alone may ask for the dispensation of the marriage which is ratified but not consummated. Moreover, canon 1119 provides that any of the two parties concerned, even if the other does not know of it or is opposed to it, may ask for the dispensation. The reason why the Church may grant the favor even against the will of one of the spouses is pointed out by the Sacred Congregation of the Council in the following words: "The Pontifical power is not dependent on, nor derived from, the permission or consent of private individuals, but derives from the supreme authority granted to the Pope for the governing of the Church, for the greater good of the faithful and for the well-being of souls".⁵⁷

However, the Instruction on the dissolution of marriage "in favorem fidei" of December 6, 1973, mentioned before, points out clearly a restriction as to the persons who will be granted the concession. It requires that:

"pars oratrix causa culpabilis non extiterit naufragii matrimonii legitimi, et pars catholica, quacum contrahendum vel convalidandum sit novum conjugium, separationem coniugum ex propria culpa ipsa non provocaverit".

Finally, it should be noted that the papal concession is entirely *gratious*. The parties, although entitled to request for the dispensation, do not enjoy however any strict right to obtain the favor of the dissolution of their marriage. Their request may be denied without doing them any injustice, even though the necessary requirements be present. The dissolution of a marriage is in itself an exception of the law of indissolubility, to which no married person may claim a right.⁵⁸

Informative process

A question may be raised: if the vicarious power is a prerogative of the Roman Pontiff as Vicar of Christ and the consum-

⁵⁷ Cfr. A. Abate, *The Dissolution of the Matrimonial Bond in Ecclesiastical Jurisprudence*, 1962, p. 17.

⁵⁸ Joseph Bank, *Connubia Canonica*, Romae-Barcinone, 1959, p. 538.

mation of a ratified marriage and the existence of a just cause are conditions sine quibus non for the validity of its exercise, how does the Pope know whether the marriage in question is consummated or not and a just cause for the dispensation exists? The normal thing to do for married people is to submit the petition for the dispensation of indissolubility of their marriage through their local Ordinary, who enjoys now the faculty to instruct the informative process on the case in order to see whether there is a juridical basis for the dissolution of marriage or not.

The Holy See issued on March 7, 1972, the Instruction *Dispensationis matrimonii*, giving the residential Bishops the power to institute the informative process in cases *super rato et non consummato*⁵⁹. On December 6, 1973, the S. Congregation for the Catholic Doctrine sent the local Ordinaries another Instruction, not yet published, granting them the faculty to instruct the process for the dissolution of marriage "in favorem fidei", either by themselves or through a delegate. The purpose of these two Instructions is to expedite the study of the cases wherein a dispensation is possible. There is no need, therefore, to ask permission from the Holy See as before. The local Ordinaries, however, or their delegates have to follow the existing norms for these processes, which now are to be considered as purely administrative. Three authenticated copies of the acts of the process and of the documents should be sent to the Holy See.

Delegation of the vicarious power

A final question may be raised: May the Roman Pontiff delegate his ministerial power to dissolve marriages? Before answering this question we think it proper to make a distinction between *reservation of the vicarious power* and the *impossibility of its delegation*. A faculty may be reserved to a Superior, who may delegate the same to his subordinates. The reservation of the vicarious power to the Supreme Pontiff has been established somewhere in this paper, when we pointed out that such a power is a prerogative of the Pope. But may this power be delegated to others?

⁵⁹ A.A.S., 64, 1972, pp. 244-252.

A good number of canonists answer in the affirmative⁶⁰. Cassio sustains that the vicarious power is *de facto* reserved by its nature. Therefore it may be delegated⁶¹. Scherer and Buijs hold the same opinion.⁶² Some authors say that this faculty has actually been delegated already.⁶³ Finally, others sustain the impossibility of its delegation. Casoria, for instance, says that "the nature of this power is such that, in itself does not admit of any delegation", so much so that he regards as invalid any delegation that could take place.⁶⁴ Bride holds also that the vicarious power cannot be delegated.⁶⁵

There are three different pronouncements on the matter made by the S. Congregation of the Holy Office (now S. Cong. for the Catholic Doctrine), which undoubtedly favor the opinion sustaining the impossibility of granting a delegation of the vicarious power. The first pronouncement is contained in a letter to the S. Congregation for the Propagation of Faith on May 28, 1955, which reads as follows:

"Together with your esteemed communication of December 1, 1954, was forwarded a letter of the Most Rev. Bishop of . . . , who, in consideration of the particular circumstances affecting the Church in China, asks whether the Holy See can delegate the faculty of dissolving marriages in *favorem fidei* and, if so, whether it intends to do it, at least in favor of the Ordinaries who have many cases to resolve and who cannot communicate freely with the Holy See. In reply to the question, I hasten to communicate that the Holy See cannot delegate the power of dissolving marriage in *favorem fidei* since this power pertains to the Roman Pontiff through his vicarious power".⁶⁶

⁶⁰ Cf. Coronata, *De Matrimonio*, Romae, Taurini, 1958, n. 620, p. 867; L. Miguez, l.c. p. 69.

⁶¹ Mentioned by A. Piamonte, l.c. p. 237.

⁶² Buijs, *De potestate Episcoporum dispensandi*, in *Periodica*, 56, 1967, pp. 101-108.

⁶³ Wernz-Vidal-Aguirre, *Ius Canonicum*, v. V, *De Matrimonio*, Romae, 1946, n. 625, p. 739, nota 40.

⁶⁴ Casoria J. *De matrimonio rato et non consummato*, p. 72: mentioned by A. Piamonte, l.c. p. 239.

⁶⁵ Bride, in *L'Ami Du Clerge*, 69, 1959, 579: Mentioned by A. Piamonte,

⁶⁶ S. C. Sti. Officii, May 28, 1955, Prot. N. 2784/54.

However, the same Congregation of the Holy Office gave on January 2, 1959 the following reply to a petition of several Ordinaries who have requested "the delegation of the power to dissolve non-consummated marriages and to dissolve marriages in *favorem fidei*": "All things considered, recourse must be had in each case".⁶⁷ The tone of the latter reply undoubtedly implies that it is not intrinsically impossible to delegate the vicarious power, though "all things considered" it is not opportune to do so. Finally, a third pronouncement on the matter took place when an Apostolic Vicar asked for "the faculty to dissolve marriages contracted between pagan parties in *favorem fidei*, i.e. in order that one party, who at the moment cannot be baptized, may be able to marry a Catholic". The Sacred Congregation replied that "the faculty belongs to the Roman Pontiff in such a way that it may not be delegated to others".⁶⁸

Based on the practice of the Church as shown in the norm of canon 1125, regarding the Constitutions given in olden times for particular places and at present extended to all countries presenting similar conditions, we can safely say that the Pope might in the future dissolve marriages through a general provision by way of law, as long as the conditions determined by him are fulfilled and verified by the Ordinaries of the places or somebody else delegated for this purpose. Such a procedure does not offer any difficulty whatsoever, since the concession of the dissolution of marriages is actually granted by the Pope for any marriage which meets the conditions and requirements specified by him through the law. In such a case the person designated by the Holy See receives the commission only to verify the existence of the conditions required for the dispensation granted by the Pope. This seems to be the explanation to be given to the case mentioned by some authors⁶⁹, Wernz-Vidal-Aguirre⁷⁰ among them.

Aside from the foregoing kind of delegation which actually should be regarded as a mere *execution* of the papal will stated in the law, we do not think that the vicarious power may be de-

⁶⁷ S. Cong. Sti. Officii, January 2, 1959, Prot. 4082/59.

⁶⁸ S. Cong. Sti. Officii, August 12, 1960: mentioned by A. Piamonte, Piamonte, l.c. p. 268.

⁶⁹ Casoria, J. *De matrimonio rato et non consummato*, pp. 75-76.

⁷⁰ Wernz-Vidal-Aguirre, *Ius Matrimoniale*, n. 625, nota 40.

legated to a particular person who, in turn, might grant or deny the favor freely. As we have seen before, this ministerial power is closely connected with the infallible teaching of the Church. True that the exercise of both the infallibility and the vicarious power constitute a different act. However, the latter always presupposes the former. The fact is that up to present time no personal delegation has been granted.⁷¹

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⁷¹ Capello, *De matrimonio*, n. 762; A. Bernardez, *Curso de Derecho Matrimonial Canónico*, Madrid, 1966, p. 440.