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AMONG THE VARIOUS matrimonial impediments affecting the licitness as well as the validity of the marriage contract, the impediment of impotence has been polarizing the attention of canonists, theologians and medical experts for centuries. Even at the present time, it represents ground for prolonged discussions on the inner interpretation of the impediment, and on the application of the principles to practical cases.

This, we believe, is motivated by two main factors: impotence is an impediment based on the very law of nature and, as such, is out of reach of the Church's power to dispense from it, once it is shown present beyond reasonable doubt. Hence is felt the impelling necessity of delimiting the field within which the impediment can be classified as morally certain. Secondly, impotence, as a physical or physiological defect, is regulated essentially by medical science, which is involved in a constant process of development and improvement. This gives rise to the extreme difficulty of combining harmoniously the varying medical notions with the principles of canonical jurisprudence.

In general, impotence may be defined as the incapacity of performing the marital act, namely, the act towards which the matrimonial contract by its nature is directed, and by which the spouses become one flesh.[1] What is directly affected by a true condition of impotence is the object itself of the matrimonial consent, *i.e.*, the right to those acts which are of themselves suitable and adequate for the generation of offspring.[2]

The outcome of a properly performed conjugal act is of no concern to the law. The question of whether generation ensues has no juridical consequences, since it is the law of nature alone that governs this mysterious process. Besides, persons may be perfectly capable of a normal

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[1] See Can. 1015, § 1.

[2] See Can. 1081, § 2.

copula, and yet generation be impossible owing to some condition adverse to it in one or both parties. We are, in this instance, facing a case of sterility broadly understood, not of impotence; we are contemplating an incapacity for generation, not a condition that hinders marital acts. Sterility never affects either the licitness or the validity of a marriage contract.[3]

In order to be classified as a diriment impediment, *i.e.,* as a circumstance invalidating marriage, impotence must be antecedent to the celebration of marriage and, at the same time, of perpetual nature. The fact that the existence of such a defect is known to the other party or not, or that impotence is absolute or relative, has no bearing on the validity of the matrimonial contract.[4] The only valid issue is whether a condition of impotence is *de facto* present and possesses those essential requisites of antecedence and perpetuity which the law requires.

Perpetuity Is a Concept of Law

The question of the perpetual character of impotence is a most disputed one. It is the most frequent point of conflict between the medical approach to the problem and the doctrine held by the great majority of canonists.

In our opinion, the whole issue cannot be put into correct perspective, unless an important principle is first clarified: the concept of perpetuity of the impediment is essentially a juridical one, determined, regulated and enlightened by the law. It is a stable legal idea, not a mere question of fact, variable according to the fluctuating of circumstances.

Indeed, impotence is at first a phase or aspect of biology, and as such must be governed by medical science in general. When, however, this abnormal condition is raised to the standard of a matrimonial impediment, it becomes at once a juridic institute, which has to be disciplined by legal principles, even though the physiological concept of the defect in general is still based on biological notions.

Impotence, therefore, being primarily a *notio iuris,* must have also its two main features, viz., antecedence and especially perpetuity, determined by law rather than by medical science. This implies that all achievements of medicine and all discoveries of surgery cannot be immediately introduced with legal acknowledgment and force into the province of law. They must first, as it were, be sieved through juridical principles and adapted to the juridical order. For instance, the mere possibility of curing a true condition of impotence, without any moral assurance of success, cannot introduce an obligation for the patient to undergo a prescribed treatment. Such an expedient of medicine is positively outside the sphere of the canonical legislation, since it is based exclusively on the ontological order, while the laws of the Church pertain primarily to the ethical and juridical order.

This doctrine is not certainly an elaborate product of recent times, but was long ago conceived by our canonical predecessors. Schmalzgrueber once wrote that the perpetuity of the impediment of impotence does not depend on the fact of whether or not the abnormal condition may be cured, but relies rather on the circumstance of whether or not the defect may be cured without endangering the patient's life.[5]

[3] See Can. 1068, § 3.

[4] See Can. 1068, § 1.

[5] "Impedimenti perpetuitas non pendet ex eo

Thus the practical theory of a more or less successful medical treatment as a test to discern whether a condition is permanent or temporary is overcome by a consideration of legal nature. Not the medical or surgical science, but the law must be the direct source and the criterion of distinction between temporary and perpetual impotence.

The Modern Canonical Approach To the Problem

In general, a condition of impotence is said to be perpetual not only when it cannot be cured either through the simple course of time or through appropriate medical treatment, but also when it can be remedied only by the use of extraordinary or illicit means, or by seriously endangering the patient's health and life.

The terms describing the concept of perpetuity in a definite way do not raise any particular problem as to their understanding; nevertheless, the application of the principles to concrete cases may often present difficulties, mainly in view of the exact interpretation to be given to the words "extraordinary," "illicit," and "dangerous." The present canonical jurisprudence does not register a complete uniformity of opinions or of judicial decisions on the issue. A particular remedy, for example, is by some classified as extraordinary when it surpasses the difficulty and risk of a common and easy surgical operation.[6] For others, however, a surgical treatment is not deemed extraordinary even if it is of a serious nature, provided no grave danger to the patient's health is involved.[7]

It is not our intention to indulge in the discussion of the theories set forth by various canonists. We rather prefer to illustrate a few principles which may hopefully contribute to an adequate interpretation of the concept of perpetual impotence, and thus enlighten the solution of practical cases.

Impotence is to be considered juridically perpetual, if the means to be employed in its treatment bring about a serious bodily harm

It is an undisputed principle of ethics that no human being is permitted to put his life, the integrity of his members, or his physical status into direct and proximate danger, even for a justifiable purpose. Whatever a person would do in this respect would be regarded as an illicit act, condemned primarily by the natural law, and consequently deprived of any legal effect by the canonical legislation.

Thus, if a condition of impotence is of such a nature as to be susceptible to cure only by means of a surgical operation in which the patient would risk his life, or put his health in a serious hazard, the surgical treatment must be classified as a *medium illicitum:* the patient is thereby relieved of any obligation to seek a remedy to his abnormal condition and his impotence is considered juridically incurable.

The danger, which makes a condition of impotence perpetual in the eyes of the law, embraces both the cases of death as well as of grave diseases, when resulting direct-

quod tollatur vel non tollatur, sed ex eo quod, spectata rei natura, tolli vel non tolli potest absque vitae periculo." 4 SCHMALZGRUEBER, JUS ECCLESIASTICUM UNIVERSUM, part III, tit. XIV, n. 44 (1843-45).

[6] See ROMANI, INSTITUTIONES JURIS CANONICI, DE MATRIMONIO 552, n.821 (1945).

[7] See CONTE E CORONATA, DE SACRAMENTIS, DE MATRIMONIO 386 (1946).

ly from medical intervention. In this, today's jurisprudence is considerably more specific than the old canonical doctrine, which described the risk theory on the question by the vague expression "danger of the body."[8]

In case of doubt as to the danger involved in a determined surgical treatment, namely, when medical experts are morally uncertain about the outcome of an operation as being dangerous to the patient's life or health, danger is deemed to be present, and consequently the condition of impotence considered legally perpetual.[9]

In the evaluation of the instances of possible serious danger, however, one must never take into account the innumerable factors which may, by any chance, bring about a great risk to the life or health of the impotent party, and thus conclude the existence of a canonically-understood danger. In the light of a principle affirmed by St. Thomas,[10] it is the necessary medical treatment itself, *i.e.,* the surgical operation, which represents the sole determining test as to the presence of a real danger; not the possible harmful effects and events that may follow *per accidens,* either because of complications not directly connected with the operation, or on account of unskillful medical assistance. In these cases, impotence would be termed as merely temporary.

Finally, the concept of what may constitute serious danger is not such as to be true and valid at all times, but varies according to the progress of medicine. Therefore, the principles of perpetuity, when based on the notion of danger, may and have *de facto* changed through the years in concomitance with new medical and surgical discoveries. Furthermore, it is the common doctrine of the experts, coupled with their constant practical experience, that determines whether or not a certain treatment may be considered dangerous. Unusual, fortuitous, and sporadic cases of successful interventions are not granted any juridical recognition, in conformity with the doctrine of independence of law from medical science, and in accordance with their different criteria of judgment.[11]

The extraordinary nature of the means of cure relieve the impotent party of the obligation of restoring his sexual capacity

A principle sanctioned by the natural law and adopted by moral theology prescribes that any person, bound to achieve a certain goal, is required to use only ordinary means, and not necessarily extraordinary ones.[12] It follows as a consequence

[8] "Impedimentum illud non erat perpetuum quod, praeter divinum miraculum, per opus humanum *absque corporis periculo* potuit removeri"—*Corpus Juris Canonici,* c. 6, X, *De frigidis et maleficiatis* etc., IV, 15.

[9] See SCHMALZGRUEBER, *op. cit. supra* note 5.

[10] "Quando periculum nascitur ex ipso facto, tunc illud factum non est expediens . . . Sed si periculum immineat ex hoc quod homo deficit ab illo facto, non desinit propter hoc esse expediens . . . Alioquin oporteret ab omnibus bonis cessare, quae per accidens ex aliquo eventu possunt esse periculosa." SUMMA THEOLOGIAE, II-II, q. 88, art. 4, ad 2.

[11] In a case decided by the S. Roman Rota, coram Wynen, on Oct. 25, 1945, the court, discussing the extraordinary cure of an obstruction of the seminal ducts, wrote: "Sanatio illa, quae contra uniformem doctrinam auctorum et constantem experientiam accidit, est res adeo extraordinaria et inexplicabilis ipsis medicis qui virum curarunt, ut *inde nihil deduci possit*"—S.R.R. Dec., vol. XXXVII, dec. 64, n. 24, p. 592.

[12] "Qui tenetur ad finem, tenetur adhibere media ordinaria, quae ad illum obtinendum requiruntur, non autem per se extraordinaria." 2 NOLDIN-SCHMITT, SUMMA THEOLOGIAE MORALIS 291, ad 3 (1955).

that, if the only available treatment for a condition of impotence is represented by an operation which may be classified as extraordinary, no moral obligation to undergo it is established and, therefore, the patient is considered by the law as perpetually impotent.

The determination of the precise meaning of "extraordinary," in relation to medical treatment in general, and of surgical operations in particular, has been a source of various and conflicting statements among legal experts. In our opinion, the issue could be enlightened by using as a criterion the difficulty involved or the rarity of occurrence as discriminating factors between common and extraordinary means.

The criterion of difficulty referred to indicates essentially the intimately delicate nature of the surgical treatment, which may require a meticulous preparation of the patient, a complex and highly precise apparatus of instruments and a special technique of operation so as to avert a possible deterioration of the conditions already existing. If these are the premises, the treatment surpasses considerably the characteristics of a common and easy surgical operation, and must, without hesitation, be judged as an extraordinary remedy.

The idea of rarity of occurrence has to be focused both on the number of surgeons who perform a certain operation, as well as on the number of cases in which the intervention in question is accomplished. Thus, for example, the operation of anastomosis of the seminal ducts is performed in the whole world by an extremely limited group of surgeons, mainly because of the peculiar specialization required. Should, therefore, a patient need this kind of treatment, and should he find himself in the moral impossibility of profiting from the services of a competent physician, no obligation to seek a cure to his condition would be imposed. Such a doctrine would apply also in the case of a very wealthy person, who could easily approach a skillful surgeon even in other countries or continents. Notwithstanding his financial means, he would not be required to resort to such extraordinary experiments.[13] Consequently, his condition of impotence would be looked upon as perpetual in the mind of the law.

A morally certain success of the medical treatment may also be taken as a test of juridical distinction between temporary and perpetual impotence

As we had occasion to remark, no principle of law can be drawn from the mere hope of possibility of cure, in reference to the duty of restoring the sexual capacity. The obligation begins to operate only when the impotent person, after due consideration and comparison of the results of medical or surgical treatments, can be morally certain of remedying his abnormal condition in a short time, unless an unforseeable event occurs.

In fact, no one can be forced to undergo a considerable loss of goods, to upset his habitual way of life, or to submit to long and painful cures just to serve as an object for experiments. An obligation is created only when the party is compensated, for whatever loss he suffers, with the morally certain assurance of other goods of at least equal value, even though of different kind. Indeed, moralists teach us that not even a superior can compel a subject of his to

[13] "Nemo, ne ditissimus quidem, tenetur per se advocare medicos peritissimos ad gravem morbum depellendum" NOLDIN-SCHMITT, *op. cit. supra* note 12, ad 3a.

undergo a serious surgical operation, unless the patient is necessary for the good of the community and "the success of the operation is morally certain."[14] Lacking this requisite of morally understood certainty, the impediment of impotence is of juridical perpetual nature.

Conclusion

As we have briefly illustrated, the temporary or perpetual juridical character of a condition of impotence rests upon the determination of whether or not the impotent party may be bound to seek a restoration of his sexual capacity. The absence of such an obligation sanctions the legal perpetuity of impotence, which, if proved also antecedent, determines the absolute nullity of the marriage already contracted.

The expedients of the illicit or extraordinary means, as well as the criterion of a morally certain success, must all be taken into consideration before a definite judgment on the nature of the impediment is pronounced. This does not mean, however, that they must all unanimously concur towards the classification of a condition of impotence as perpetual in the eyes of the law. A positive answer to the question of whether a certain remedy is illicit or extraordinary, or a negative reply to the query of whether a successful result of a treatment can be morally assured, would amply justify a conclusion in favor of the juridic perpetuity of the impediment.

What would, however, be the legal status of an impotent person who, despite the physical danger involved in a certain operation, or notwithstanding the extraordinary character of an intervention, or regardless of the lack of moral certitude for its happy success, undergoes the surgical treatment and, by the concurrence of a number of inexplicable events, is restored in his sexual capacity?

The answer must be sought in the principles so far enunciated, and primarily in the doctrine establishing the essentially juridical nature of the concept of perpetuity. If a particular condition of impotence is considered perpetual by the standard of judgment of the law, no change in this legal attitude can be brought about by a medical fact, which, because of its illicit or extraordinary nature, or on account of its inability to guarantee a morally certain success, represents a *medium* deprived of any juridical consequence. Law and medicine follow two different patterns of reasoning and, since impotence is herein understood as an impediment rather than as a physical or physiological state, it must be governed by law, not by medical science. Therefore, if the capacity to perform the conjugal act is restored by means different from those contemplated by the law, the principle of perpetuity suffers no modification.

In the case at issue, the regained potency does not substantiate any indication of legal value that the party's abnormal condition was simply temporary. In the judgment of the law, that condition of impotence still remains *juridically* perpetual in its nature, at least up to the moment of the exceptional medical intervention. Thus, if a marriage has been already contracted, it would be absolutely invalid, provided the impediment possesses the other necessary qualification of antecedence.

Nevertheless, law cannot ignore the person's new condition of potency, especially in reference to a possible future marriage,

[14] NOLDIN-SCHMITT, *op. cit. supra* note 12, at 292.

even though the new physical state was obtained by the use of nonjuridical means. The party should, therefore, be allowed to enter into a licit and valid marriage contract. The example above cited is, in our estimation, one of the cases which clearly illustrates the absolute independence of law from medical science.