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The Abortion Problem and the New Code of Canon Law

GERALD W. HEALY, S.J.

The revised Code of Canon Law will take effect on 27 November 1983, the first Sunday of Advent. Of the many possible topics in the new Code, only the matter of abortion will be treated here — first explaining the excommunication that is attached to the crime, and then the consequences, for the confessor, of the excommunication being reserved to the bishop. Likewise a few moral questions about abortion currently being debated by moral theologians will be discussed.

Abortion is, most unfortunately, a tragic reality in our modern world. From the day he became pope, John Paul II has been condemning abortion as forcefully as possible. But even in his beloved Poland the 1956 legalization of abortion has led to such widespread acceptance of the practice that current estimates place the number of abortions at one million a year, higher than the annual birth rate. Even here in the Philippines where Catholics are so markedly in the majority and abortions are not legalized, one international authority in the Pro-Life and Natural Family Planning movement, Fr. Paul Marx, O.S.B., estimates that there are a million abortions a year. If his estimate is off by even 50 percent, it is still a sad and depressing statistic for a nation that is often singled out as the only Catholic nation in Asia.

Faced with such a national problem it is fitting that we be well informed on the current teaching of the Church on abortion.

The Code of Canon Law does not define abortion nor explain the moral problems involved. As in most questions, Canon Law presupposes the teaching of moral theology with all its definitions and distinctions. It would be a serious mistake to consider the Code of Canon Law as a compendium of Church teaching in any area, for example, the sacraments, Christology, ecumenism. Canon Law is more concerned with the external life of the Church and takes

for granted the content of faith and the whole body of moral teaching of the Church. It is not within the scope of Canon Law to prove, for example, that the sacraments are divinely instituted, but rather to regulate their reception: Who can receive the sacraments? At what age? With what preparation? and so forth.

ABORTION IN THE NEW CODE

Thus in the new code we find abortion mentioned only twice: in the ten words of canon 1398, decreeing automatic excommunication for those who effectively procure abortion, and in canon 1041, 4 declaring that anyone who has actually procured an abortion is forbidden to receive Holy Orders. The code states that there is no penalty if the abortion did not actually take place. Beyond that we must consult the moral teaching of the Church for such matters as the very definition of abortion, the distinction between direct and indirect abortion, and various disputed points in the doctrine. An accepted definition of abortion is the removal of a non-viable human being from the life-sustaining mother's womb by human intervention. This can be done in the womb, e.g., by chemical or surgical means. It can also be done by removing the human being from the womb before it is viable and thus exposing it to certain death.

To deliberately and effectively abort the human being and cause its death either within or outside the womb is the crime condemned and penalized in the new Code by excommunication (c. 1398) and, for clerics, by irregularity (c. 1041, 4). These two penalties also existed in the 1918 Code of Canon Law. Anyone who attempts to cause an abortion, e.g., a pregnant woman taking certain medicines, but failing in her effort to abort, has the moral malice of intending the death of her unborn, but does not incur the penalty which explicitly states that the abortion must actually take place. As with all penal law in the Church the law must be interpreted strictly (c. 18). Since merely attempting abortion is not explicitly censured there is no penalty. If abortion was desired and some attempt was made but the result was not certain, there would be no excommunication in spite of the obvious moral malice. The crime must be certainly committed before there can be an excommunication. Thus, for example, a woman might fear that she was pregnant when she missed her period and take medicine to cause

an abortion. The result could be uncertain and instead of an abortion it could be her delayed menstruation. The uncertainty would preclude an excommunication in spite of her serious moral fault which was in her intention.

The new code explicitly excuses from excommunication anyone who is not yet sixteen years old (c. 1323), likewise anyone who without fault on his/her part did not know that he/she was violating a law or precept of the Church, or anyone who was the victim of physical force or grave fear. The general rule is that the external violation of the law must be imputable as a serious moral fault because of the malice or culpability (c. 1321,1). If it is not morally imputable, there is no excommunication.

The censure of excommunication is also incurred by all those involved in procuring the abortion. Canon 1329, 2 clearly states that those whose cooperation was necessary to accomplish the crime incur the censure attached by law, e.g., excommunication for those who effectively procure abortion. Thus the pregnant woman, the doctor who performed the abortion, the one who paid the money or convinced the woman to go through with the abortion, etc., would all be excommunicated. This was true also in the 1918 code.

What does excommunication actually mean in canon law? This is answered in canon 1331 where it states in part, that whoever is excommunicated is forbidden to take any ministerial part in the celebration of the sacrifice of the Mass or in any other religious ceremonies and is forbidden to receive the sacraments or to administer the sacraments or sacramentals. One who is excommunicated is also forbidden to enjoy any ecclesiastical office or ministry or benefits or to exercise authority.

How is the excommunication removed? Since the excommunication is reserved to the bishop, the confessor must have authority to remove it (c. 1355, 2). The penitent must be sorry and repent of the crime. In fact once the penitent manifests true sorrow the excommunication *must* be removed (c. 1358, 1), since the purpose of the excommunication is medicinal, to bring the penitent back to Christ by making him/her aware of the gravity of the offense. When the absolution is given a proportionate grave penance should be imposed. In the older formula for absolution there was an explicit mention of excommunication. This is lacking in the current formula in use so the confessor is free to use the older formula or

any equivalent that expresses the act of jurisdiction in lifting the excommunication before giving absolution for the sin(s) confessed.

SOME PARTICULAR CASES

If it is a question of a doctor telling a pregnant woman that she should have an abortion for medical reasons, we are into a more complicated moral question. In such a case it is not a question of using abortion for birth control but it could be a doctor acting in good faith. Good faith or lack thereof, however, is not the issue. The issue is good medicine and good morality.

Before, medical books recommended abortion in the case of pregnant women with tuberculosis, heart disease, high blood pressure, and a host of other diseases. Gradually the medical profession learned to treat the diseases *and* to care for the pregnancy. They came also to appreciate the traumatic effect on the woman who undergoes an abortion. The sense of loss and the sense of guilt could be far more deleterious than the original illness. This sense of guilt in women who underwent an abortion has been found in Russia among those who never had a bit of religious instruction under atheistic communism (see for example, Walter Cizek, S.J., *With God in Russia* [New York: Doubleday, 1973], p. 223). Likewise in Japan where abortion has been legalized since shortly after World War II there has appeared the unique phenomenon of non-Christian mothers setting aside a place to honor their aborted "the water babies" as they call them. They go there to apologize for what they have done! They cannot forget. The moral is clear: we should never underestimate the reality of guilt feelings and their potential for harm to the woman patient.

When a priest is consulted about an abortion proposed by a doctor for medical reasons, the priest must consider the basic distinctions needed for making a correct moral judgment. Since the medical judgment is basic it is imperative for the priest, if at all possible, to know the competent Christian doctor(s) in his area in order to consult them in the more difficult cases. Such a doctor can often give medical support to a sometimes necessary moral condemnation of a proposed abortion. This is in accord with the teaching of Vatican II urging the priest to recognize the "experience and competence of the laity in the different fields of human activity. In this way they will be able to recognize, along with

them the signs of the times" (Decree on Ministry and Life of Priests, no. 9).

An operation or any medical treatment deemed necessary for a pregnant woman, before viability of the fetus, may result in the foreseen but unavoidable death of the fetus. This can be morally justified by the time-honored principle of double effect when the pathology is in the reproductive organs, and waiting for the viability of the fetus is too dangerous.

If the pathology of the pregnant woman is not in the reproductive organs but in another part of the body, for example, the lungs, the heart, or the kidney, good morality and good medicine dictate that the pathology be treated as necessary *and* the pregnancy also be cared for. A direct attack on the fetus would be an abortion and fall under the Church's condemnation. In such a case we must consider the possibility of mitigated guilt due to ignorance or fear or the woman's excessive trust in the doctor's abortion decision.

THE ONLY EXCEPTION

Some extraordinary cases reported in recent years have led some bishops and theologians to allow an exception to the strict prohibition against direct abortion. The cases are the most exceptional ones where both mother and fetus will die if the doctor does not directly remove the fetus. An example given is an aneurysm of the aorta directly behind the fetus with the fetus blocking any approach to the aneurysm which is threatening the life of the mother. A misplaced acute appendicitis also threatening the life of the mother is another case cited (*America*, 22 July 1978, "Abortion: Rules for Debate," Richard A. McCormick, S.J., p. 29). Bernard Häring, C.Ss.R., in his *Medical Ethics* (1973) gives another example wherein the pregnant woman was in danger of bleeding to death due to numerous and very thin and fragile varicose veins on the womb which bled profusely. Originally called to remove a benign uterine tumor in the fourth month of pregnancy, the doctor made his decision: he opened the womb and removed the fetus. The uterus contracted, the bleeding ceased and the woman's life was saved and, in addition, the uterus was preserved so that the woman, who was childless, could bear other children (p. 108).

Most doctors would readily approve of the action of the doctor as explained. They and most of the laity would be very confused

to hear that the doctor was condemned by traditional Catholic morality. The alleged fault of the doctor was that he had gone against all the official pronouncements of the Church concerning direct attacks on the fetus. The doctor could not appeal to the principle of double effect since he had *first* aborted the fetus as a preliminary step and then treated the uterine pathology.

In support of the traditional teaching Popes Pius XI and Pius XII can both be cited, specifically condemning such a direct attack on the fetus even to save the life of the mother. Pius XI in his encyclical on Christian marriage rejects the possibility of an "extreme necessity" justifying the direct killing of the fetus (n. 64). Pius XI then continues to say that "upright and skillful doctors strive most praiseworthily to guard and preserve the lives of both mother and child; on the contrary those show themselves most unworthy of the medical profession who encompass the death of one or the other, through a pretense of practicing medicine as through motives of misguided pity" (ibid.). The next paragraph cites St. Augustine as confirmatory of the previous statement and shows that Pius XI is condemning the anti-life mentality.

The *most rare cases* are treated by only a few theologians today and they argue for the liceity of the direct abortion on the part of the doctor. If he does nothing, the mother will soon die and, within moments, the nonviable fetus will also die. To tell a doctor that he must stand by and watch mother and fetus die would go against all his medical training and Christian pro-life instincts. The theologians propose various solutions to justify the direct attack on the fetus. Some argue that the evil of the death of the fetus is unavoidable, pre-moral evil, allowed by the proportionate reason of saving the life of the mother. Others would modify the understanding of a double effect de-emphasizing the simultaneity rule and allowing the evil effect to precede the good, evaluating the morality of the human act as a whole rather than using a piecemeal, step-by-step approach.

A few bishops have recently allowed this one exception explicitly, e.g., the Bishop of Augsburg (1978), and the hierarchy of Belgium in a declaration on abortion in 1973, choosing the lesser evil in a tragic situation.

This one exception, to save the life of the mother when there is no other possibility, is written into the law of the Philippines.

Following the general norms of Canon Law there could be no question of excommunication in these extraordinary cases where a doctor would decide that there was no medical possibility of saving the life of the mother except by means of a direct abortion. The very fact that it is defended by some bishops and theologians rules out the possibility of any canonical penalty since it is not certainly condemned.

ABORTION AS BIRTH CONTROL

Most abortions taking place in the world today are done as a means of birth control. Allowing the child to be born presents no medical danger whatsoever for the mother. The reasons that perfectly healthy women turn to abortion are numerous. Some are under great pressure from their government which severely penalizes births beyond the prescribed number, as in Red China. Others are motivated by materialism, the desire for more and more material possessions, considering the fetus in the womb a financial burden or a restraint on their freedom. Still other women fear giving birth to a defective child. Unwed girls may resort to abortion to save their reputations. Married women temporarily separated from their husbands may be tempted to have an abortion lest their husbands discover their infidelity during their absence. In their shame and confusion it may seem the only way to save their marriage. Many are confused when they learn that it is legalized even in so-called Christian countries. They mistakenly equate legality and morality.

In some of these situations it is easy to see how people might be morally confused, how they might give in to the social pressure. But in most cases in the modern world the motive is ultimately an unchristian selfishness, a subordination of the person in the womb to the convenience, utility or advantage of the parent. How to combat this totally unchristian mentality?

Evidently preaching against and condemning abortion is not enough or else the practice would have given way before the constant denunciations of Pope John Paul II as he repeats his pro-life message in every corner of the globe. Even the penalty of excommunication is not sufficient as a deterrent. But one hopeful sign is the impact on audiences of the modern films which show

the developing living fetus in the womb, easily recognized as a baby waiting to be born. In fact these films have such an impact on the audience that pro-abortion groups do everything to prevent their being shown to women debating whether or not to have an abortion. Pro-abortionists are even more opposed to showing films of aborted babies. It can be as disturbing as looking at pictures of Hitler's gas chamber victims in World War II. Likewise the continual progress of medical science and technology is pushing back to an earlier and earlier time the date when the premature baby can be kept alive in a well-equipped hospital. The films and this advancing viability should silence forever the argument of pro-abortionists that the fetus is undifferentiated matter, a mere appendage of the mother, as disposable as any unwanted tumor or growth. The films and slides are available through Pro-Life groups here and abroad. With appropriate lectures they could be made available to charismatic and Bible-study groups, funneling their faith and fervor into this crusade in defense of immortal human life at its weakest and most vulnerable stage, in the womb, where as the Psalmist sings to the Lord: "For it was you who created my being, knit me together in my mother's womb. . . . You know me through and through, from having watched my bones take shape when I was being formed in secret, knitted together in the limbo of the womb" (Psalm 139: 13-15).