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ABORTION – A MORAL AND CANONICAL ISSUE

Abstract: The present study aims to examine the issues surrounding abortion and its consequences from the standpoint of current legislation in Romania and other European Union countries, as well as in relation to Christian theology, particularly the canonical tradition of the Christian East. This approach allows us to highlight numerous testimonies from the rich Christian tradition that are genuinely useful and, paradoxically, highly relevant to current ethical and social debates on the value and rights of the person, including during the embryonic stage.

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From the perspective of the current legislation in Romania, no major differences can be observed with regard to abortion, compared with the Penal Code in force. According to Article 185,¹ a woman who induces a

¹ Art. 185 Cp. Termination of a pregnancy, by any means, committed in any of the following circumstances: a) in a medical institution or medical office authorised to this end; b) by a person who is not a qualified physician; c) if the period of the pregnancy exceeds fourteen weeks, it is punishable with imprisonment of between six months and three years. Termination of a pregnancy, carried out in any circumstances, without the consent of the pregnant woman is punishable with imprisonment of between two and seven years and the proscription of certain rights. If by the acts stipulated in paragraphs 1 and 2 any serious bodily harm has been done to the pregnant woman, the punishment is imprisonment of between three and ten years and the proscription of certain rights, and if the act results in the death of the pregnant woman, the punishment is imprisonment of between five and fifteen years and the proscription of certain rights. In the case where the act stipulated in paragraphs 2 and 3 was committed by a physician, then besides the punishment of imprisonment, there shall also apply the interdiction to continue in the medical profession, according to article 64 letter c). See: <http://www.codpenal.ro/legislatie/document/lege-301->

miscarriage is not punishable under the Penal Code, as non-punishment is deducible from the regulations as a whole,² and so the new Penal Code has clarified this issue by introducing Paragraph (7), Article 199: “A pregnant woman who terminates her pregnancy is not punishable.”

In order for a crime to exist, one of the following circumstances must exist: the termination is made outside a medical institution or medical practice authorised to do this; is carried out by a person who is not a qualified physician; is effectuated after the fourteenth week of pregnancy. The material element of the crime is the act of terminating the pregnancy. The act can be carried out by any means, even without the consent of the pregnant woman.³ We ascribe to the opinion according to which: “from the examination of the alternative conditions stipulated in the text of the incrimination it results that the legislator has not meant to ban abortion, but has aimed to ensure that pregnancies be terminated only by qualified persons under safe conditions.”⁴

From the standpoint of legislation on abortion, the EU countries can be divided into three groups. The first includes Malta, Ireland, and (in ef-

din-2015-codul-penal-articol-190-avortul-1260-63256.html. Termination of a pregnancy carried out by a physician is not punishable: a) if termination of the pregnancy was necessary in order to save the life, health or bodily integrity of the pregnant woman from serious and imminent danger that could not otherwise be prevented; b) in the case stipulated in paragraph 1 letter c), when termination of the pregnancy was required for therapeutic reasons, in accordance with the legal provisions; c) in the case stipulated in paragraph 2, when the pregnant woman was not able to express her wishes, and the termination of the pregnancy was required for therapeutic purposes, in accordance with the legal provisions.

² Up until the publication in *Monitorul Oficial* no. 4/27 December 1989 of Decree no. 1/1989 regarding the repeal of certain laws, decrees and other acts, articles 185-188 of the Penal Code made abortion illegal. According to article 186, pregnant women who terminated their pregnancies were to be punished with prison terms of between six months and two years or a fine. Law no. 140/1996 to amend and supplement the Penal Code, published in *Monitorul Oficial* no. 289/14 November 1996 introduced article 185 regarding illegal inducement of an abortion, which referred to termination of a pregnancy in certain circumstances, according to the specialist literature on conditions of safety for the bodily integrity, health and life of the pregnant woman, for the birth of children without malformations, and for increasing the birth rate. If the legislator had wished to sanction pregnant women for terminating pregnancies, the clauses of article 186 of the Penal Code would have been retained.

³ Lack of consent on the part of the pregnant woman constitutes an aggravating circumstance according to paragraph 2, article 185 Cp.

⁴ O. Loghin, T. Toader, *Drept penal român. Partea speciala*, Bucharest, 1993, 127.

fect) Poland, to which may also be added Northern Ireland, part of the United Kingdom.

- Malta completely bans abortion, despite huge pressure from the UN and EU, which demand this legislation be altered;

- In Ireland, abortion is banned except in cases where the mother is at risk of committing suicide, although both the government and the Catholic Church are trying to do away with this loophole;

- In Poland and Northern Ireland, an abortion may be carried out, in theory, if the pregnancy is the result of rape or incest, if the foetus has serious malformations, and if the life and health of the mother are placed in danger; but in effect, both the specific regulations and state assistance for women seeking to terminate pregnancies significantly reduce the number of abortions. In Poland, the rate of abortion is very low: in 2002 there were three abortions per ten thousand births.

The second group includes states where it is possible to have an abortion under certain quite relaxed conditions: Cyprus, the Faroe Islands (a Danish territory), Finland, Luxembourg, Spain, Portugal and Great Britain.

- Abortion motivated by difficult social and material circumstances is, in effect, allowed only in Great Britain (which might sooner be included in the third group) and Finland;

- In the Faroe Islands, the consent of the husband is required, if the woman is married;

- In Luxembourg, the woman must be given counselling as to the alternatives and wait for seven days before having the abortion. Here, objections on the grounds of conscience, generally for religious reasons, are frequent.

The third group includes all the other EU member states, where abortion is available “on request.” These include the former communist bloc countries, with the exception of Poland—the Baltic states, Bulgaria, the Czech Republic, Slovenia, Hungary—which have retained such legislation from the time of the “Iron Curtain” (this is explainable, given that the first country in the world to legalise abortion was the USSR, in 1922) and countries with a longstanding democratic and liberal tradition, where so called “individual freedoms” are fundamental: Belgium, Holland (where “euthanasia” has also been legalised), Germany, France, Sweden, Denmark. Italy is also part of this group.

In the view of Christian theology, infanticide is taken to be the killing of both a newly born child and the product of conception, the foetus. The embryo or foetus is, according to the Church Fathers, a person in its own

right. They make no distinction between abortion and the killing of a newly born child. Their claims are based on the biblical texts and the givens of science.⁵ Although the human body since man's fall has its origin in the seed of Adam, the soul is given by God at the moment of conception, becoming the body's principle of life.

Of the Ten Commandments that God handed down to Moses on Mount Sinai, the first four concern man's relationship with God and the following six relations between men. The Sixth Commandment says: "Thou shalt not kill" (Exodus, 20:13). This commandment forbids murder, given that life is the most precious gift that God has given to man.⁶ In the first centuries of the Church, many of the Fathers and a large number of synodic canons took a stance against the practice of infanticide, which seems to have been widespread throughout the pagan world.⁷

In apostolic times, Christianity recognised that abortion is incompatible with turning towards God. The oldest texts that describe life within Christ speak of the issue of abortion. For example, in *The Teaching of the Twelve Apostles* (or *Didache*), a work dating from 50-70 A.D. (which among other things describes Christian conduct, showing that Christians fasted on Wednesdays and Fridays as early as the apostolic period), abortion is included among the serious sins: "Thou shalt do no murder; thou shalt not commit adultery; thou shalt not commit sodomy; thou shalt not commit fornication; thou shalt not steal; thou shalt not use magic; thou shalt not use philtres; thou shalt not procure abortion, nor commit infanticide."⁸

Similar interdictions, including abortion, can also be found in the *Letter of Barnabas*, from the first or second century: "Thou shalt not commit fornication, thou shalt not commit adultery, thou shalt not commit sodomy . . . Thou shalt not procure abortion, thou shalt not commit infanticide."⁹ Abortion has always been condemned by Christianity, and this has remained constant in time. The third and fourth centuries abound in Christian declarations against abortion. For example, Tertullian (160-240) stressed: "But, with us, murder is forbidden once for all. We are not per-

⁵ See Father John Breck, *Darul sacru al vieții*, Cluj: Editura Patmos, 2001, 187-221

⁶ Eugeniu Safta – Romano, *Arhetipuri juridice în Biblie*, Jassy: Editura Polirom, 1997, 173.

⁷ Elena Scurtu, „Avortul sau rătăcirea în umbra morții”, *Ziarul Lumina* 10, November, 2013.

⁸ *Didache*, II, 2. *The Apostolic Fathers*, trans. Kirsopp Lake, Loeb Classical Library, Cambridge, Massachusetts: Harvard University Press, 1965, 403.

⁹ *Ibid.*

mitted to destroy even the foetus in the womb, as long as blood is still being drawn to form a human being. To prevent the birth of a child is a quicker way to murder. It makes no difference whether one destroys a soul already born or interferes with its coming to birth. It is a human being and one who is to be a man, for the whole fruit is already present in the seed.”¹⁰ He goes on to ask what is the nature of human conception, whether it involves both the substance of the body and that of the soul, and whether both are formed simultaneously or whether one has priority over the other: “My view is that both are conceived, formed, and perfected at the same time, just as they are born together, and there is not a moment’s interval in their conception by which any priority might be assigned to either one of them. Now, from man’s last moment of life we may get some idea of his first. If death is nothing else than the dissolution of body and soul, life, then, should be defined as the union of soul and body . . . we believe that life begins at conception, since we hold that the soul begins to exist at that time.”¹¹

We find a similar position in the works of Octavius Minucius Felix (170-215). Christian ethics in the apostolic period classed the taking of human life as immoral. But after Christianity was reconsolidated after the persecutions, there appeared synodic canons against abortion, which asserted that the embryo was a person. The first important local synod was held at Ancyra in the year 314 and its twenty-first canon reduced the epithymia for abortion to ten years, underlining that the act of abortion previously entailed an interdiction from communion for life. “Concerning women who commit fornication, and destroy that which they have conceived, or who are employed in making drugs for abortion, a former decree excluded them until the hour of death, and to this some have assented. Nevertheless, being desirous to use somewhat greater lenity, we have ordained that they fulfil ten years [of penance], according to the prescribed degrees.”¹²

Around the year 315, the sixth canon of the Synod of Neo-Caesarea, when speaking of the baptism of pregnant women, recognises the child in its mother’s womb as a separate person: “Concerning a woman with child, it is determined that she ought to be baptised whenever she will; for in this the woman communicates nothing to the child, since the bringing forward

¹⁰ Tertullian, *Apologia* 9.8, in: *Apologetical Works*, trans. Rudolf Arbesmann, Sr. Emily Joseph Daly, Edwin A. Quain, Washington, DC: Catholic University of America Press, 1999, 31-32.

¹¹ *Ibid.*

¹² <http://www.epenor.org/ecumenical-councils/ancyra-314.asp?pg=21>.

to profession is evidently the individual privilege of every single person.”¹³ The second part of the canon regards the child in its mother’s womb as a person for whom individual baptism is required. The baptism of the mother has no connection with the baptism of the child. The child must have a separate place within the Church and be baptised in its own right, and this is possible only after it has been born.

The canonical punishment of abortion is repeated consistently throughout the first two third of the first millennium. For example, in his *Canonica Prima* (Letter 188), St Basil the Great forbids abortion, as follows: “The woman who purposely destroys her unborn child is guilty of murder. With us there is no nice enquiry as to its being formed or unformed. In this case it is not only the being about to be born who is vindicated, but the woman in her attack upon herself; because in most cases women who make such attempts die. The destruction of the embryo is an additional crime, a second murder, at all events if we regard it as done with intent. The punishment, however, of these women should not be for life, but for the term of ten years. And let their treatment depend not on mere lapse of time, but on the character of their repentance.”¹⁴

Likewise, Apostolic Canon 66, Canon 5 of St Gregory of Nyssa, and Canons 13, 45 and 55 of St Basil demands the defrocking of priests guilty

¹³ <http://www.newadvent.org/fathers/3803.htm>

¹⁴ *The Treatise De Spiritu Sancto, the Nine Homilies of the Hexaemeron and the Letters of Saint Basil the Great, Archbishop of Caesaria*, trans. Rev. Blomfield Jackson, Edinburgh: T. and T. Clark, 1895, 225. “Faced with the physical and metaphysical evil of abortion, St Basil adopts the most effective position to combat it, in the conditions of his time. Rather than the distinction between the formed/unformed or ensouled/non-ensouled foetus, which was of Judaic origin (inspired by the text of Exodus 21:22-23), a distinction that seemed ‘scientific’, but was very controversial, St Basil draws on two concrete arguments, which are impossible to refute. Regardless of the moment when the foetus can be regarded as a person, abortion must be tried as murder because: a) it voluntarily destroys that which ‘will be a man,’ since this is precisely what is aimed at in its destruction, and whose coming into the world rests under God’s absolute providence; and b) it involuntarily affects the life of the mother, but with very grave consequences. Even today, the advocates of ‘human rights’, some legislators and even certain experts seek all kinds of phases in the continuous development of the foetus as a human being, prior to which this is supposed to be nothing but a ‘mass of cells,’ and when they can no longer find them, they invoke the ‘rights’ and even the ‘health’ of the mother. The truth is that medicine is increasingly in agreement with St Basil, both with regard to the life of the foetus and the consequences of abortion. The unborn foetus is the only innocent party, but not the only victim.” See: <https://teologiesibiu.files.wordpress.com/2010/01/05-avortul-dupa-sfintele-canoane.pdf>

of complicity with those who commit the crime of abortion, whether they have granted invalid absolution during confession to those that have no awareness of the true gravity of their sin or whether they themselves are guilty of the crime, it having been committed in their own family. St John the Abster, Patriarch of Constantinople, says the same thing in his twenty-first canon. Abortion is singled out for special punishment in Canon 91 of the Quinisext Synod, which drew up canons for two councils. Orthodox Christianity's consistent position is accepted, without there ever being any question of whether or not the embryo is a creature with a soul and, even less so, without there ever being any distinction drawn between early and late abortions.

The same view falls within the Orthodox teaching which, according to St Gregory of Nyssa, holds that the foetus in the mother's womb is a person possessed of both body and soul from the moment of conception, in the image and likeness of God and therefore in possession of human identity.¹⁵

In this respect, Jean Claude Larchet says: "Abortion is from many points of view a genuine tragedy. It is a tragedy because it involves the death of a creature that is already a human being. It is a tragedy because such a death always profoundly affects the mother and results in a trauma which, even if it does not cause conscious suffering, injures her deeper sensibility, often scarring her unconscious forever. Even in the case of voluntary abortion, the Church regards the mother not only as guilty, but also as a victim, taking her to its bosom, comforting her, soothing the wounds of her soul, supporting her and helping her to begin a new life."¹⁶ This vision is in keeping with Orthodox teaching, which, according to St Gregory Nyssa, says that even in the womb, the human being has both a body and a soul: "

This is how things stand in Christianity, although it is known that according to the Book of Exodus, in the Septuagint version, a distinction is made between the fully formed and the not fully formed embryo, between early abortion and late abortion caused by violence done by a third party. The subject dealt with in the Septuagint demands special attention, given the particular influence of western Christian circles in the second millennium. The text is as follows: ἐὰν δὲ μάχωνται δύο ἄνδρες καὶ πατάξωσιν γυναῖκα ἐν γαστρὶ ἔχουσαν καὶ ἐξέλθῃ τὸ παιδίον αὐτῆς μὴ ἐξεικονισμένον

¹⁵ Grégoire de Nysse, *La Création de l'homme*, trans. Jean Laplace, s.j., (Sources Chrétiennes 6, 2002), 222-227.

¹⁶ Jean-Claude Larchet, *Etica procreației în învățătura Sfinților Părinți*, trans. Marinela Bojin, Bucharest: Editura Sophia, 2003, 143

ἐπιζήμιον ζημιωθήσεται καθότι ἂν ἐπιβάλῃ ὁ ἀνὴρ τῆς γυναικός δώσει μετὰ ἀξιώματος. ἐὰν δὲ ἐξεικονισμένον ἦν δώσει ψυχὴν ἀντὶ ψυχῆς, ὀφθαλμὸν ἀντὶ ὀφθαλμοῦ ὀδόντα ἀντὶ ὀδόντος χεῖρα ἀντὶ χειρός πόδα ἀντὶ ποδός, κατάκαυμα ἀντὶ κατακαύματος τραῦμα ἀντὶ τραύματος μώλωπα ἀντὶ μώλωπος (If two men fight each other and strike a pregnant woman and her not fully formed [μὴ ἐξεικονισμένον] child be miscarried, damages shall be levied inasmuch that if the woman's husband demand, he [the other man] shall pay according to that which is thought fit. If it be fully formed [ἐξεικονισμένον], he shall pay a soul for a soul, an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise (Exodus, 21: 22-25).

The sense of the Hebrew *textus receptus* is as follows: “And when men strive, and have smitten a pregnant woman, and her children have come out, and there is no mischief, he is certainly fined, as the husband of the woman doth lay upon him, and he hath given through the judges; and if there is mischief, then thou hast given life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe” (Exodus, 21: 22-25, Young's Literal Translation). The Hebrew makes no distinction between the fully formed and the not fully formed embryo, while verse 23 refers only to the injuries suffered by the adults as a result of the fight.

Two issues need to be pointed out. Firstly, the text ought to deal with the question of abortion, but refers to a case of manslaughter. Secondly, nor is the Septuagint version more elastic and in fact deals with the punishment for manslaughter more than the Hebrew version. The Septuagint version may therefore be understood as an intermediary phase between the more lax approach permitted by Moses and the more exigent and fuller understanding achieved by Christianity. As Christ reminds us in the case of divorce, “Moses because of the hardness of your hearts suffered you to put away your wives, but from the beginning it was not so” (Matthew, 19:8), the Law of Moses demanded less of the Jews than is now demanded of the Christians.¹⁷

¹⁷ In the divine economy, those who prevent the birth of a foetus „contravene the plans of God with regard to the world, and these plans are thwarted precisely through the stifling of the life of people sent by the deity in order to contribute to the good of mankind or even to its salvation.” This probably refers to Isaiah: “The righteous perisheth, and no man layeth it to heart: and merciful men are taken away, none considering that the righteous is taken away from the evil to come” (Is. 57:1). See Petre Semen, „Cuvîntul Scripturii în fața

What is important for Christians is that the distinction between fully formed and not fully formed embryos is categorically rejected by Christianity as without theological significance.¹⁸ Basil the Great argues clearly against such a distinction when discussing the ethics of abortion in the aforementioned Epistle to Amphilochius (Letter 188): “The woman who purposely destroys her unborn child is guilty of murder. With us there is no nice enquiry as to its being formed or unformed.”¹⁹

St Basil the Great’s position needs to be placed in opposition to two significant questions, the first moral, the second biblical. The moral question regards the Christian duty not to shed innocent blood, a duty that mirrors a fundamental biblical interdiction (Genesis, 9:6), regardless of any consideration as to whether or not the embryo has a soul, and which is expressed in the Christian condemnation without exception of abortion ever since the apostolic period. The biblical question has two viewpoints. Firstly, as mentioned above, the Septuagint version of Exodus does not diminish, but makes more drastic the legal punishment for killing with intent. Secondly, what was demanded of the Jews in the 613 rules of the Law of Moses in general and with regard to abortion in particular cannot be employed without careful examination when establishing what exactly is demanded of Christians.

For example, the Talmud recognises that the law regarding abortion is harsher for ben Noah (pagans) than for Jews (Sanhedrin 57b), and so, at least according to some orthodox Jewish scholars, as long as for Jews abortion be permitted in a number of certain situations, it ought not be permitted to ben Noah (pagans). For a pagan, abortion represents an infringement of one of the seven interdictions of the Covenant of Noah and constitutes a crime punishable with death.²⁰

imoralității: pruncuciderea, abandonul de copii, divorțul, drogurile și homosexualitatea”, in: *Dialog Teologic*, Review of the Roman-Catholic Institute, Jassy, Year 1, No. 2, 1998, 45

¹⁸ The central concept of the ethical argument regarding abortion is that of personhood and all that this entails. By virtue of their personhood, which includes their awareness of self, reason, relationships and so on, people have rights, including the fundamental right to life. See Christopher Kaczor, *The Ethics of Abortion. Women’s Rights, Human Life and the Question of Justice*, New York and London: Routledge, 2011, 48

¹⁹ *The Treatise De Spiritu Sancto, the Nine Homilies of the Hexaemeron and the Letters of Saint Basil the Great, Archbishop of Caesaria*, trans. Rev. Blomfield Jackson, Edinburgh: T. and T. Clark, 1895, 225.

²⁰ Baruch A. Brody, „The Use of Halachic Material Discussions of Medical Ethics“, *Journal of Medicine and Philosophy* 8 (1983), 317-328.

In short, the orthodox Hebrew authorities are in agreement with Basil the Great: it is not possible to base an argument, as the Roman Catholic Church did in the Middle Ages,²¹ on the exigencies of the Law of Moses with regard to involuntary manslaughter. Orthodox Christianity, unlike Western Christianity, recognises that the Law of Moses cannot be employed as an unmediated guide to a correct understanding of the ethics of abortion. The position of St Basil the Great and the canons of the Church, which were validated by St Photius the Great (810-895) in the Constitution of the Canons and the Nomocanon, as reconsidered at the command of Emperor Constantine VI, delimits Orthodox Christianity from the various innovations with regard to abortion that arose in the Latin Church in the early twelfth century.

But it should also be noted that the Catholic Church of today firmly condemns the practice of abortion. John Paul II was consistent in this point of view, as are the majority of Roman-Catholic and Orthodox bishops. In the matter of abortion it is possible to speak of unanimity between the Orthodox and Roman-Catholic Churches both in the past and in the present. John XXIII reconfirmed the principles of the Western Church in *Mater et Magistra* (paragraph 194) when he emphasised the harmful effects of legalised abortion on the whole of human society: “Human life is sacred—all men must recognize that fact. From its very inception it reveals the creating hand of God. Those who violate His laws not only offend the divine majesty and degrade themselves and humanity, they also sap the vitality of the political community of which they are members.”²²

Conclusions

It is regrettable in a democratic country that in the analysis of problems of such general interest the teaching of the Church has been ignored and, out of commodity, avoided, thereby demonstrating both a lack of understanding and a lack of love toward our fellow man. Moral and social issues with a great reverberation in the consciousness of civil society, such as incest and abortion, need to be treated with responsibility and in depth.

²¹ *Corpus Juris Canonici Emendatum et Notis Illustratum cum Glessae: decretalium d. Gregorii Papae Noni Compilatio* (Rome, 1585), *Glossa ordinaria*, vol. 5, title 12, chapter 20, 1713. Between 1234 and 1869, with the exception of the period 1588-1591, the Roman-Catholic Church did not regard early abortion as murder.

²²http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_150_516_61_mater.html

Let us not overlook the fact that eighty-seven per cent of Romania's citizens are Orthodox Christians, responsible members of this society, promoters of moral values, and as such responsible legislation should not be put forward and promulgated without consultation with representatives of all the religions in this country.

In fact, the claim to legitimise abortion from the legal standpoint refuses to see the intrinsic juridical contradiction on which it is based. If the idea of the "rule of law" arose and has been consolidated over the course of time by virtue of the fact that it has defended the rights of all, against anarchy or totalitarianism, then how can its legal framework allow a law that makes the fundamental and primary right, the right to life, the object of an arbitrary concession? If each of us is alive because his mother was not given this "gift", then it is no longer possible genuinely to speak of a "right," but then the whole concept collapses and the structure of the modern rule of law with it, since its primary and fundamental right has been rendered nothing more than a favour.

Therefore, in losing his religious sense, which in fact constitutes his fundamental sense, man has taken upon himself an unlimited freedom, becoming the prisoner of an exacerbated subjectivism, which has allowed him completely to dispose of life and death. Based on its inherent dignity and value, human life, at whatever stage, must be protected from the moment of conception to that of natural death.

