

EXCOMMUNICATION IN PHOENIX: WAS TRUE JUSTICE SERVED?

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A. THE FACTS OF THE CASE

A religious sister, who held a position in the administration of a Catholic hospital, approved a medical procedure which aborted an eleven week old fetus. This decision was reached after considerable deliberation and consultation with medical professionals and the hospital's interdisciplinary ethics committee. The sister understood that abortion is a crime in the Code of Canon Law and those directly involved in procuring an abortion are punished by automatic excommunication (*latae sententiae*). The sister did not have the intention of violating the law by approving the decision to abort. She believed that the circumstances of the case were such that she had no choice but to reluctantly approve the abortion as the lesser of two evils. In reaching the decision in consultation with the hospital ethics committee the sister believed that the procedure was allowed under the principle of double effect.

The patient was a 27 year old mother of four other children. She suffered from *pulmonary hypertension*. Her condition was considered to be critical by the medical professionals who gave her nearly 100% chance of death if the pregnancy were continued. The mother, the sister and all others directly involved were aware of the gravity of the situation. After due deliberation the decision was made to abort, with the mother's knowledge and informed consent.

The sister and the other medical professionals based their decision in part on two pertinent directives the Ethical and Religious Directives for Catholic Health Care Services, published by the U.S. Catholic Bishops' Conference.

No. 45: *Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion.*

No. 47: *Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.*

The abortion of the eleven week old fetus was not the primary or exclusive intention of the sister and the others, including the mother. Similarly the "sole, immediate effect" was not the termination of the pregnancy but the termination of the pregnancy as a necessary step to protect the life of the mother. Had the termination of the pregnancy not taken place the eleven week old fetus would have been given another two weeks of life according to the estimate of the medical professionals.

The sister saw the options thus:

1. If the pregnancy continued there was a nearly 100% chance that both the mother and the eleven week old child in the womb would die within one to two weeks
2. If the abortion were performed the eleven week old child in the womb would die but the mother of four living children would live and possibly recover.

There are no other realistic options. Induction of labor is not possible with an eleven week old fetus.

The procedure was performed on November 5, 2009. On March 5, 2010 the bishop called in the sister and the CEO of the hospital. In the course of this meeting he asked the sister if she approved of the abortion to which she replied in the affirmative. He did not tell her at this meeting that she had incurred the automatic excommunication. She believed she had not because of the circumstances in which she made the decision. As a result of their discussion the bishop decided that the excommunication was indeed applicable and since it was automatic, he did not *impose* it but officially declared it by a written decree issued on April 10, 2010.

The bishop did not inform her verbally or in writing that she had a right to appeal and that this right was exercised through a canonical process. She did not know she had such a right and obviously had no awareness of the appeal process. He did not offer the services of a canon lawyer and he did not inform her that she had a right to a canon lawyer and a right to due process.

B. THE APPLICABLE CANON LAW

The applicable canons are all from the Code of Canon Law now in force, that is, the 1983 Revision. The 1917 Code contained canons almost identical in wording and certainly identical in spirit and application. Since the commentaries on the similar canons from the 1917 Code are applicable and will be used, the equivalent canon numbers from the 1917 Cod will be included on **bold face** after the text.

Canon 18: *Laws which establish a penalty or restrict the free exercise of rights or which contain an exception to the law are subject to a strict interpretation. (canon 19)*

Canon 1398: *A person who procures a completed abortion incurs an automatic (latae sententiae) excommunication. (canon 2350, 1)*

Canon 1341: *Only after he has ascertained that scandal cannot be sufficiently repaired, that justice cannot sufficiently be restored and that the accused cannot sufficiently be reformed by fraternal correction, rebuke or other ways of pastoral care is the ordinary then to provide for a judicial or administrative procedure to impose or declare penalties. (no comparable canon)*

Canon 1352, 2: *The obligation to observe an automatic penalty (latae sententiae) which has not been declared and which is not notorious in the place where the offender is living is totally or partially suspended to the extent that the person cannot observe it without danger of serious scandal or infamy. (canons 2232, 1 and 2290, 1)*

Canon 1321, 1: *No one is punished unless the external violation of the law or precept committed by the person is seriously imputable to that person by reason of malice or culpability...3. Unless it is otherwise evident, imputability is presumed whenever an external violation has occurred. (canons 2195, 2199)*

Canon 1323: *The following are not subject to penalties when they have violated a law or precept:*

4. *a person who acted out of grave fear, even if only relatively grave, or out of necessity or out of serious inconvenience unless the act is intrinsically evil or verges on harm to souls; (canon 2205, 2, 3)*

5. *a person who for the sake of legitimate self-defense or defense of another acted against an unjust aggressor with due moderation. Canon 2204, 4)*

Canon 1324, 1: *One who violated a law or precept is not exempt from a penalty but the penalty set by law or precept must be tempered or a penance substituted in its place if the offense was committed:*

5. *by a person who was forced through grave fear, even if only relatively grave, or through necessity or serious inconvenience, if the offense was intrinsically evil or verged on harm to souls. (canon 2205, 3)*

8. *by one who erroneously yet culpably thought one of the circumstances in can. 1323, nn. 4 and 5 was verified (no comparable canon)*

10. *by one who acted without full imputability provided there was grave imputability. (no comparable canon)*

Canon 1324, 3: *An accused is not bound by an automatic penalty (latae sententiae) in the presence of any of the circumstances enumerated in paragraph 1. (No comparable canon)*

C. THE SOURCES OF JURISPRUDENCE

The most extensive commentaries on the canons listed above are those pertaining to the comparable canons in the 1917 Code. The commentary on the canons above from the Canon Law Society of America's first general commentary is most helpful though brief. The following are the works consulted:

Coriden, Green, Heintschel, editors. The Code of Canon Law: A Text and Commentary. Mahwah, NJ. Paulist Press. 1985.

Bouscaren, T, Ellis, A, Korth, F. Canon Law: A Text and Commentary. Milwaukee. 1963.

- Michiels, Gommarus. De Delictis et Peonis. 3 vols. Lublin. 1929.
- Wernz, Franciscus et Vidal, Petrus. Ius Canonicum. 7 vols. Rome. 1923-38.
- Roberti, Franciscus. De Delictis et Poenis. Rome. 1938.
- Sporer, Patricius. Theologia Moralis decalogalis et Sacramentalis. Paderborn. 1897-1901.
- Ayrinhac, H. and Lydon, P. Penal Legislation in the New Code of Canon Law. New York. 1936.
- Huser, Roger. The Crime of Abortion in Canon Law. Washington D.C. 1942.
- Sangmeister, Joseph. Force and Fear as Precluding Matrimonial Consent. Washington, D.C. 1932.
- Smith, S.B. Elements of Ecclesiastical Law. Vol. III. Ecclesiastical Punishments. New York. 1888.
- Lewis, C. and Short, C. A Latin Dictionary. Oxford. 1975.

D. SOME COMMENTS ON THE LAW

The fundamental purpose of the penal law of the Church is medicinal in nature and not primarily punitive. In keeping with this canonical spirit, the law clearly states that the imposition or declaration of an excommunication is a last resort. Canon 1341 urges a pastoral intervention that includes all reasonable means to accomplish the goals of the law: a) the reparation of scandal; b) the restoration of justice and; c) the reformation of the accused. In the case of an automatic penalty, the bishop is not obligated to issue a declaration of the penalty. Before such a decree is issued the bishop *must* be objectively sure that the crime is imputable to the accused and that such a declaration will better serve the common good. The degree to which these three goals are applicable to each case is determined by the facts.

Canon 1341 must be followed as an essential element of the due process of law to which the accused is guaranteed by right (canon 221). The spirit of canon 18 is such that the first priority should not be the imposition of the severe penalty of excommunication but rather to discover conditions and factors that either eliminate the penalty or temper it.

Although it is not specifically mentioned in Canon Law, the accused in a criminal action is presumed innocent until proven guilty. In cases of automatic excommunication the nature of the crime is such that the Church sees fit to presume that the person is responsible for the act and therefore it imposes the penalty immediately upon completion of the act. Nonetheless this does not mean that the accused person is also presumed guilty without possibility of recourse or appeal. In spite of the automatic nature of the penalty, the law provides for the application of

several canons especially the afore-mentioned canons which, when conditions deem them applicable, either eliminate the penalty altogether or mitigate the presumed responsibility to the extent that the penalty must be tempered.

Canon 18 requires that all laws which establish a penalty must be interpreted strictly, that is, in such a way that the broadest consideration is accorded to the accused. In this case the crime of abortion is distinct from the *act* of abortion. The performance or facilitation of the act of abortion alone does not automatically constitute the *crime* of abortion.

There are three essential elements for every canonical crime:

1. The act or omission of an act which constitutes the violation of the law;
2. The juridical element which is the canonical sanction that makes the act or omission of an act a crime
3. The subjective element which is responsibility of the person for the criminality of the act or omission. The canonical term for this element is the *imputability*. This means that the person has a deliberate will to violate the law.¹

The presence or absence of imputability is to be determined by the ecclesiastical judge prosecuting a case or by the bishop either during the administrative process that will either impose a penalty or, in the case of an automatic penalty, declare it.

If the act that constitutes a crime is not actually performed, there can be no crime. Similarly if there is no sanction attached to a particular act, there can be no crime.

The most important issue in this and most criminal cases is the determination of the imputability or full responsibility of the accused for the commission of the crime. Imputability or the deliberate will to *violate the law* is either eliminated or reduced by certain factors that bear directly on the decision making process followed by the accused.

In the canonical tradition force and fear have, for centuries, been considered as factors that excuse from guilt. *Force* is an absolute or relative evil from without that is so powerful that it causes fear in the person, a fear so powerful that it causes he or she to perform or omit and unlawful act. In the absence of the external force there would be no fear and the person would be able to freely chose not to commit the crime. In time the canonists and moral theologians made several distinctions in the kinds and degrees of force relative to the act or omission that was presumed to be criminal in nature.

The Code recognizes other external factors that can have a seriously detrimental effect on the decision making process. These include *necessity* and *grave inconvenience*. The English word “inconvenience” does not really convey the grave nature of the Latin term *incommodum*.

¹ Roberti, I, 87.

Other possibilities would be “grave unsuitability,” “unfortunate,” “unfit.” Or “gravely injurious.”²

Necessity and grave hardship or inconvenience occur when a set of circumstances beyond the control of the person, are such that they cause the person to feel morally powerless to freely avoid commission of the crime. In other words, the circumstances, in this case the grave condition of the 27 year-old pregnant mother, puts the accused in a position where she honestly believes she has no choice. The danger posed by the mother’s condition was the high (nearly 100%) probability that she would die if the procedure were not performed very quickly. The crime involved is an intrinsic evil which can put the accused in an even more severe state of uncertainty and powerlessness. Did she see herself as making a choice that would facilitate death either way? Faced with the probability of the death of the fetus through abortion or the death of the mother and the fetus together without the abortion puts the choice maker in a lose-lose situation. The question is which life to save or more accurately which life to prolong.

The commentators have said that necessity and grave inconvenience also cause fear although the object of the fear is not an external agent but some other circumstances that make observance of the law a serious hardship.³ Was the fear of making a choice that would cause the death of the mother of four children so powerful that it made a clear decision impossible?

The mitigating element of *necessity* is present if the law could not be observed without serious harm to the body and the soul of the mother. Necessity is present when there is a necessary choice to be made between the violation of the law, or a hardship so severe that it would result in almost certain death.⁴ When the violation of the law is an intrinsic evil, the decision-making process of an observant Catholic is even *more* profoundly disrupted.

E. CONCLUSIONS

The accused in this case is a vowed member of a venerable congregation of religious women. She is a trained health-care professional who held a highly responsible position at a Catholic hospital. Her integrity and truthfulness should be presumed and her description of her feelings and her emotional, cognitive and spiritual state when she was in the process of making the choice to approve the abortion should be taken as credible and accurate.

If the actual facts as related by the accused conform to the canonical norms which speak of factors that remove or mitigate imputability, then canon 1324, 3 applies which states clearly that in the presence of any of the circumstances enumerated in paragraph 1, the accused is *not bound* by the automatic penalty. Consequently the decree of declaration of the penalty is to be rescinded.

It is crucial to review and take into consideration the sister’s emotional state at the time she spoke with the bishop in March, 2010. Did she fully understand what was happening?

² Lewis and Short, p. 925.

³ Wernz-Vidal, VII, 107.

⁴ Michiels, I, 199-200.

Simply accusing her of facilitating an abortion does not constitute an atmosphere of pastoral concern that would foster an open dialogue. Was she able to clearly and accurately relate the steps of the decision making process and relay her feelings as she recalled them at that time? Did she feel threatened? Did she feel she was being listened to in an honest attempt to determine the truth of the matter or did she feel that her guilt had been pre-determined?

When she was informed that the bishop had declared the excommunication did the bishop also make her aware of her rights in Canon Law, especially her right to appeal? Did the bishop inform her that her right to appeal would be done according to a specific process? Did he inform her that she had a right to a canonical advocate?

The integrity of the canonical procedure which necessarily includes the required attempts to seek a pastoral solution is not a suggestion but a requirement. Essential to the process to vindicate her rights, according to the canons, was the bishop's obligation to follow the letter and spirit of canon 1341 and to inform the accused sister of all of her rights as guaranteed in Canon Law. It is not sufficient if the accused learned of her rights from other sources. The official Church itself, acting through the bishop, must guarantee these rights.

The accused had the right to appeal the bishop's declaration using the procedures provided for administrative recourse of administrative decrees (canons 1732- 1739). The right to appeal is also to be presumed in light of canon 1353 which says: "*An appeal or recourse from judicial sentences or from decrees which impose or declare any penalty whatsoever has a suspensive effect.*" This canon not only presumes the right to appeal but clearly says that the declaration of the penalty is suspended pending the appeal. The accused cannot be presumed to have waived her right to appeal if she did so without the opportunity to consult with a canonist and without full knowledge of the appeal process.