

THE EMBRYO IN BYZANTINE CANON LAW

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I. General statements

The temporal, spatial and other limitations arising from the title of this contribution cannot be abided by with absolute precision in the text. Most apparent will be the deviations concerning secular law, but this phenomenon can be simply explained as follows: the pronounced relationship of mutual interaction between canons of law set by state organs on the one hand, and legislative organs of the Church on the other, as well as the fact that each of these two legal orders has incorporated into its own law the regulations of the other—displaying legal rules, regardless of their different origin, as unified in common collections—prohibits an absolute and precise separation.

The embryo has been the object of regulating interventions by the Byzantine canonical legislator primarily with respect to two issues: abortion and the sacrament of Baptism. The specific problems posed were: whether abortion constituted a penally significant act according to the law of the Church and, if so, with what justifying reason; and whether the embryo is supposed to be "cobaptised" together with the mother during gestation. A common starting point for the answer to both of these questions was the definition of the embryo from an ontological point of view, as well as whether and from what moment in time it constituted a living being.

These problems did not first arise in the realm of canon law. They had occupied Greek philosophical thought—great schools of thought having confronted each other over their basic positions—which directly influenced Roman law. Independent of the theoretical inquiries of Greek philosophers and Roman legal experts, these same problems also appear in the legal corpus of Israel.

II. Greek philosophy and Roman law

According to the Stoics the embryo did not possess a distinct entity, but was perceived as a component of the mother's body, just as the "hanging fruit" forms part of the tree. For them, the moment the newborn drew its first breath was equivalent to the commencement of human existence. The opposite view, that the embryo possessed ontological autonomy, was maintained by the adherents of Platonic philosophy.

The position of the Stoics dominated classical Roman thought. "The borne embryo forms part of the woman or the viscera before its birth," Ulpianus reveals in *Pandectes*. Papinianus is even more categorical in another passage of the same codifying work: "It is not right to refer as human to the borne embryo to which has not yet been given birth." This manner of contending with the embryo resulted in the apprehension under Roman law for many centuries that the interruption of gestation was not a penal act.

It was only in the late 2nd or early 3rd centuries A.D., during the co-sovereignty of Septimius Severus and Antoninus Caracalla (195-211 A.D.), that a resolution was adopted for the punishment of abortion. Even then, however, the act of abortion was not defined as homicide, and not even placed in the wider context of crimes against human life, but was deemed a deception of the male and a denial of his ambitions to acquire a successor. That is, if the relevant decision had been made by the male or, at least with his consent, the act was deemed not punishable. This is not to imply, however, that penally insignificant cases were met with unreserved and unopposing social acceptance. Indeed, it seems that judgements as to the ethical unworthiness of the deed were not rare.

III. The response of ecclesiastic authors of the first centuries A.D.

The response to these apprehensions of the Stoa, and primarily their legal ramifications, came from the Church. Conspicuously influenced by ancient Greek thought as to the evaluation of physical phenomena, Christian teaching aligned itself from very early on with the view that the embryo was ontologically autonomous. One could find the opinion of Tertullianus (p160-220 A.D.) on this point quite enlightening. This famous ecclesiastical author of the West, being a significant jurist as well, held that impeding birth constituted homicide, since "man is also a man-to-be." His concepts are further elucidated in another passage of his work, with the clarification: "The fruit inside the mother's body is a human being from the very moment that its shape is completely formed."

But even before Tertullianus, Athenagoras the Apologist (late 2nd century A.D.) touches upon the same subject, although indirectly and without specificity, but with explicit reference to practical matters. Refuting various accusations by the pagans, he states that Christians regard

as murderers any women that use means to induce abortion. From this assimilation of abortion to homicide it follows that the embryo being exterminated is endowed with human existence.

In his explication of his views on abortion, Tertullianus invokes, among others, a passage from the Pentateuch we deem advisable to examine before proceeding to the citation of other sources of the law of the Church.

IV. The provisions of the "Law"

The passage is 21.22-23 of Exodus, wherein the case of a woman's injury and ensuing miscarriage caused by a quarrel between two men is confronted. Here, however, a difference between the Hebrew text and the translation of the Seventy manifests itself. Both texts discern two cases, each one having different consequences as to the penalty. In the first case the perpetrator is fined, whereas in the second he is sentenced to death. The differentiation between these two formulations lies in the determination of the objective existence of crime in each case. According to the Hebrew text, the first case consists of simple abortion without further repercussions; the second, on the other hand, in the creation of a "continuous impairment". By "continuous impairment" the interpreters of the excerpt mean the woman's death—a view which is in perfect harmony with the juristic attitudes of the Babylonians and the Hittites, viz. of the neighbouring nations.

The excerpt was given a different interpretation by the Septuagint: "If two men are fighting and in the process hurt a pregnant woman so that she miscarries but lives, then the man who injured her shall be fined whatever amount the woman's husband shall demand, and as the judges approve. But if any harm comes to the woman and she dies, he shall be executed,(...)." We notice here that the whole matter is concentrated on the death of the embryo, and that the criterion for the distinction of the two cases is whether the embryo was completely figured, i.e. whether it had already acquired a human form.

It is obvious that this formulation depends directly on the philosophical as well as specific scientific (mostly medical) perceptions, prevailing during the 3rd century B.C. as to the development of the embryo in the mother's body, and drawing from the teachings of Aristotle. The Stagyrite, as is well known, held that the embryo begins to "live" when it acquires the ability to move, and that this happens about the 40th day after conception for males, and about the 90th day in the case of females. The effect of this Old Testament passage is felt in secular texts as well, such as those by Philon of Alexandria (15/10 B.C. to post-40 A.D.), who uses the word "formed" instead of "figured".

V. Influences on anonymous codifying works of the 2nd-4th centuries A.D.

From the Christian sources, the first (as it is believed to have been completed in the early 2nd century) in which one can find a hint on the afore-mentioned matters is "The Lord's sermon to the nations through the twelve Apostles." The particular responds in two passages: "(...) is not abortion, nor killing an unborn child"(2.2) and "those that kill children are destroyers of a creation of God,...."(5.2) The ambiguity presented by the formulation of this text notwithstanding, it is accepted that the act of abortion implied here connects, by semantic contiguity, with the killing of a child after its birth.

These two excerpts are included, almost to a word, in the so-called Epistle to Barnabas, a contemporary of the Sermon. The first has also been included, with the same formulation, in two anonymous codifying works, namely the Ecclesiastic Canons of the Holy Apostles written in the early 4th century, and the Apostolic Directives, originating from Syria and going back to 380 A.D. In the latter of these texts, the relevant passage is completed by a phrase, in which we find the term "completely figured". This augmentation shows the immediate dependence of this directive on the Old Testament excerpt as formed by the Seventy and by perceptions regarding the nature of the foetus expressed therein.

VI. The human form and the soul: Clement the Alexandrian and Origenes

At this point the problem as to when the embryo has a human form arises. The answer to this is inseparably connected with the question of when the embryo becomes a living creature. Clement the Alexandrian, who lived in the 2nd century A.D., provides some information as to the perceptions prevailing in his age. According to the teaching of an older tutor, which he repeats to a word, the embryo acquires a soul from the moment of conception in the following manner: one of the angels charged with the observation of the process of human birth has prepared and introduced the soul into the sperm of the male. Knowing the time of conception beforehand, the angel incites the female to coition, so that the entry of the sperm into the uterus and the "implantation" of the soul take place simultaneously.

The problem doesn't end here, however, for certain questions immediately arise. How was the soul created? Did it pre-exist or was it created at a certain moment? When was this moment, long before conception or immediately before it?

From Clement's narration one does not learn whether the Christian intellectual, to whom he addresses himself and who surely adhered to Platonic philosophy, also adopted Plato's view on the pre-existence of the soul—a view also encountered in the works of Origenes—the famous Alexandrian philosopher and student of Clement. It is worthy of mention however, that parallel to the Platonic view the opinion was held that

the soul enters the embryo the moment it acquires a human form and begins to move, and not at the moment of conception. This, according to medical practice of that age, took place on the 40th day after conception in males and on the 80th day in females.

VII. Traducianismus vs. Creationismus

Let us return however to Tertullianus and his views on the "animation" of the embryo. According to these, as witnessed by an analysis of his works, the soul's entrance into the embryo is completed at conception and the soul is inherited from the parents. This theory, whose foundation was laid by Tertullianus, was named traducianismus or generationismus. This theory's opponents held that God creates a new soul for every human being (creationismus).

But although the embryo is already a living creature from the moment of conception, human existence commences with the appearance of the human form which, according to then prevailing theories in physiology-as mentioned above-takes place round by the 40th or 80th day.

This could seem contradictory at first sight. How could the property of being an "animated creature" in this interval be reconciled with the privation of human existence. It must be remembered that, according to Aristotelian doctrine, which in subsequent centuries appeared as the official position of the Church, the soul is discerned as "phytic", "emotional", and "logical". According to the same doctrine, the process of the embryo's growth and development into a "human" is slow and, although present during this process, the mind remains inert for a sufficiently long time. It is evident that Tertullianus labored under the influence of this view. It must also be stressed that this view was widely circulated and the circle of its opponents rather limited. Nevertheless, the most famous of the latter group was Gregorius of Nyssa, who held that the logical soul exists from the moment of conception.

VIII. The canonical prohibition of abortion

An explicit condemnation of abortion is already encountered in the canons of the first local synods which have been handed down to us. This is contained-although not without reservations as to whether abortion or the killing of an already born child is implied-in Canons 63 and 68 of the Synod of Elvira (ca. 306 A.D.). The former canon ordains that a woman who committed adultery during her husband's absence, conceived as a result of this intercourse, and proceeded to exterminate her fruit, was refused Holy Communion, even on her deathbed, for having committed a double crime. For the same case and under the condition that the crime was committed by a catechumen, the latter prescribes that the woman be baptised at the end of her life only.

What followed was Canon 21 of the Synod of Ankara (ca. 314 A.D.) where explicit mention of abortion is made. This provides for a milder-compared to the Canons of Elvira-penalty, namely a ten-year period of excommunication. A common characteristic of the above regulations is that they connect abortion to extra-marital relations.

Chronologically, the next canonical ordination with reference to abortion following Canon 21 of Ankara is included in Canons 2 and 8 of Basil the Great. Both are contained in the canonical epistle to Amphilochius, Bishop of Iconion. It is more than likely that the first of the two rules is an answer to the question of whether the Church, in determining the canonical penalty, takes the Old Testament distinction between "figured" and "not figured" embryos into account. Basil's answer was categoric: "The intentional abortress is responsible for murder. For us there does not exist a distinction between formed and unfigured. For here is avenged not only that which is about to be born, but also who oversaw it, because women usually succumb during the course of these undertakings. In addition, there is also the destruction of the embryo, another murder under the oversight of those attempting these things. One should not extend the duration of penitence until the end of life, but rather adopt the duration of ten years, appraising not by the duration but by the manner of penitence." In the second canon, Canon 8, Basil the Great equates-with respect to penal responsibility-a woman who commits abortion to those who provide the means for such a purpose.

Several centuries after the first canonical regulations, the Penthecte Ecumenical Synod in Troullos (691/2 A.D.) reconsidered the question of abortion. It validated the rules of the local synods and those of the Fathers of the Church, including the aforementioned three rules-Canon 2 of Ankara and Canons 2 and 8 of Basil the Great-through its 2nd Canon, therefore grounding them in the Ecumenical Synod's authority. Nevertheless, this Synod, deemed the addressing of the whole matter or, more probably, the effectiveness of the pertinent regulation insufficient. Deeming the adoption of a new canon necessary, the Fathers of the Synod created Canon 91, explicating that both those women who provide as well as those who use various substances to induce abortion are subject to the penalties set for murder: "We impose the sentence of murder on those accepting abortion-inducing drugs as much as on those that supply the drugs." Evidently, positive law did not undergo any transformation since this canon differs only slightly in essence from the corresponding ordinance at the end of Basil the Great's 8th Canon.

IX. Abortion in secular law and collective works

The content of the Justinianian codification and that of the Nearae is rather devoid of regulations relative to abortion. New is the regulation in

chapter 17.36 of the Ecloga of the Isauri, which prescribes the penalty of fustigation and exile for any woman who "prostitutes, becomes pregnant and attempts to abort the fruit of her womb." It is interesting to note that the so-called Appendix to the Ecloga-an aggregation of different unions of texts-includes the Mosaic Command, a collection of 70 fragments from the Pentateuch, that repeats the well known passage 21.22-23 from Exodus in chapter 27,29 strongly indicating that the problem of the "figuration" or not of the embryo never ceased to be of practical significance.

The same regulation of the Ecloga is also found, with certain amendments, in the legislative opus of the Macedonians-i.e. the Esagoge and the Informal Law. The Basilicae repeated the primary regulations of Justinianian legislation on abortion, yet amending their text when necessary so as not to create any problems with their combined application. Secular collective and compiling works of the same period have contents related to the original work on which they are based.

Collective works exist in the field of the Canon Law as well, having mostly mixed contents, i.e. of both ecclesiastic and secular origin. These are the so-called Nomocanons, the most important of which is the Nomocanon in 14 Titles, the tenth Chapter of whose 13th Title is dedicated to abortion. This is where all the canons of the synods and of Basil the Great mentioned above are concentrated. This chapter bears the heading "Regarding those prostituting, killing the unborn or destroying." The reference to "prostitutes" in the heading reveals shows that, despite attempts attempt to dissociate abortion from extramarital relations, i.e. prostitution in byzantine terminology-an attempt resulting from the codification of the canons of Basil the Great and the Penthecte Synod-the editor of the nomocanon aligned himself with the initial perceptions (cf. Canon 21 of Ankara), possibly following the tendencies prevailing in practice.

X. The genesis of the soul and Arethas

These tendencies, however, did not also impede the theoretical investigations with respect to the problem of the soul and its creation which as we have see, is directly connected to the issue of abortion. A splendid sample of the orientation of these investigations is furnished by the great ecclesiastic author and philosopher of the 9th and 10th century Arethas, the Metropolitan of Kaesarea. In one of his epistles he refutes the Aristotelian doctrine on the pre-existence of the soul by asserting that it is specially created for each individual. However, Arethas' view as to the question of the timing of the logical soul's admittance into the human body is of separate interest, as it does not conform with the official doctrine of the Church, rather adhering to Gregorius of Nyssa, whose perceptions have been addressed above.

The epistle's text-only a small part of which has unfortunately survived- contains still something else which is of significance. Namely, it is the refutation of the position "that the law governing abortions is futile for the damage does not accord to a human being." This demonstrates that, even at the time of Arethas it was held that the ordinances prohibiting and punishing abortion were useless, because no human is put to death. On a theoretical level that is, it was questionable whether the life of the embryo should constitute a protected legal entity.

A passage by the well-known 11th-century philosopher and politician Michael Psellos is significant to the transmission of the doctrine of Gregorius of Nyssa, and also includes a brief critique of the respective views of that other Gregorius, the Nazianzene. "At what time does the soul unite with the body of the unborn? Gregorius (the Nazianzene) is unclear as to this point, and it isn't easy to discern whether he aligns himself with one view or another. Gregory of Nyssa and Maximus the Confessor place the soul as neither preceding nor coming after, but consider the introduction of the sperm to occur simultaneously with the acceptance of the soul. According to the pre-eminent of the Greek philosophers, following the formation of the natural form, the soul is deposited in the body-the natural soul while it is in the womb, the logical soul as it exits the womd, and the `cognizant' soul in the early stages of life."

Arethas' views did not prevail in ecclesiastic theological thought. This is proved by the corresponding passages of two erudite 15th-century ecclesiasts, Georgios Scolarios and Theophanes of Medeia, according to which the received view was that God creates the soul-always meaning the logical soul-installing it in the predetermined body which has been created for this purpose.

XI. Views on the development of the embryo

The distinction by which the appearance of the human form depends on the gender of the embryo has already been mentioned-determined as the 40th day of gestation for male and the 80th for female children. Over time, however, popular conscience united and assimilated these limits to the 40th day, possibly because of the special significance accorded the number forty in the philosophy of numbers. This generalisation emerges from the Neara 17 of Leon Sophos, governing the time of baptising infants: "(...) For, consequently, it [the unborn] enjoys forty entire days to form in the maternal house [the womb], and therefore the same number of days is required for the new-born into the house of divine glory [the world]."

The same is repeated by Symeon, the Metropolitan of Salonica (14th-15th century) in the form of dialogue in chapter 371 of his renowned work. Contained therein is much interesting information about the prevailing perceptions with regard to the successive phases of the embryo's development within the maternal body: "They say that with respect to how the human being is born that, once the sperm attaches to the womb, the offspring is formed on the third day, becomes a mass on the ninth day, and obtains life and is completed on the fortieth day. It is also

understood that it moves in the third month, is a complete being by the sixth, and is born in the ninth."

In their commentary on Canon 2 of Basil the Great, the canonologists of the 12th century Ioannis Zonaras and Theodoros Balsamon described these stages much more generally: "For the sperm, having attached itself to the womb, primarily `assumes the form of blood', then becomes an amorphous mass, and then gets a figure"

XII. Baptism and pregnancy

The other major theme mentioned above, i.e. the effect of pregnancy on the time of women's baptism, occupied the Church as early as the issue of abortion. The problem consisted of whether it was permissible for a pregnant woman to be baptised before parturition, in view of the uncertainty as to whether the embryo was cobaptised with its mother. This uncertainty spawned the danger that the child be baptised twice should it have been enlightened during gestation, or remain unbaptised should the mother's baptism have left it unaffected. According to canon law, the parents' responsibility in either case was great.

Debate on this issue was further complicated by the formulation of the opinion that there was no danger should the mother be baptised before the embryo acquired human form. On the other hand, should baptism have occurred after the embryo had been "figured", there was real peril, for the unborn at this stage were equated with newborn infants. To realise the gravity of the problem one need only remember the magnitude of the mortality rate of women during labor. Consequently, the deferral of a pregnant woman's baptism could not be decided light-heartedly, for she risked dying unbaptised.

The problem was addressed at the local Synod of Neokaesareia (314-325 A.D.), where it was determined that the baptism of a pregnant woman, in whatever stage of gestation, did not include the embryo which, in principle, possessed ontological autonomy: "The child-bearing woman must be enlightened [baptised] whenever she wills it. For in this respect the bearing woman has nothing in common with that which is born, because each of the two expresses its will through the affirmation of faith"(can. 6).

XIII. Anomalies of parturition and miscarriage of the foetus

Despite the fact that abortion was categorically prohibited by the Church as well as the State, the Church Fathers did not discountenance the putting to death of a foetus when such action constituted-according to the medical practice of the time-a necessary means to save the life of the mother. This issue is mentioned by Tertullian who wrote that if the position of the foetus in the womb rendered parturition impossible, the child, should it not be put to death, will be considered a matricide.

It is impressive that this view is not repeated in any of the texts of canon law of the middle and later years. On the contrary, with the passage of centuries it appears that a certain confusion began to exist between the abortion and inadvertent miscarriage of a foetus. That much, at least, is revealed in a response of the Patriarch of Constantinople Nicholas III Grammatikos (1084-1111 A.D.) from which emerges that women were accountable for murder in case of accidental miscarriage. Nevertheless, in this particular case, reference is made to women in the fifth month of gestation. The sense of ambivalence in the distinction between abortion and accidental miscarriage-easily explained when one considers that, for obvious reasons, many abortions would be presented as miscarriages by the interested parties-is further sustained by a prayer contained in the Great Euchologion in which a woman "who advertently or inadvertently miscarried, making herself guilty of homicide" is requested to have her sins forgiven.

XIV. Perceptions concerning eugony

The observation that many new-born children displayed genetic anomalies or a sensitivity to various afflictions led the Byzantines to a variety of formulations as to the cause of such phenomena. The relevant medical theories of Byzantine doctors will not occupy us here, only the pateric or canonical texts that touch upon these issues.

The Church Fathers attributed the production of defective offspring primarily to their conception at an inappropriate time, specifically during menstruation. Clement of Alexandria is accountable for this view, tracing it back to mosaic law: "Moses himself forbids men from approaching their menstruating women. It is not recommended that the body's discharge should contaminate the fertile spermöa human being after a short time (...)"

The same thoughts are expressed three centuries later by Isidore Peloussiot: "(...Nature is concerned with the amplification of the living organism, or with cleansing); it often happened that the man's sperm mixed with the unclean blood of the woman, leading to the birth of a body neither strong nor clean, but susceptible to many afflictions (...)"

At about the same time as Isidore lived Theodoretos Kyrou, who discloses his opinion even more categorically. To the query as to why women

who miscarry "the redundant, by nature, quantity of blood" are called "unclean" he replies: "So that no-one will come in contact with them," and goes on explaining "that the matter discharged infect the bodies that are born."

Four centuries later, Leon Sophos transposes Theodoretos' opinions almost word for word in his *Neara* 17: "(...) And in my opinion, the ancient law has excluded them, and the law of grace has recaptured this tradition, not as much because of the special impurity of the woman, but for another hidden reason hidden in the depth of this legislation. I do believe that the religious law in reprimand of the unrestrained passion of those who cannot control themselves has imposed this regulation as many cases as different measures in order to resolve them, (...) so that the immoderate desire and without retention towards women be stopped by brake. And even better is the design of providence when by establishing this law the children be pure of any stain, since in essence, everything that is superfluous in nature is harmful and useless, and this blood is superfluous. The law establishes that women that are found in this situation stay, during this entire period, in a state of impurity; in order to avoid that the name itself leading to the constraint of free passion so that the living being does not draw its substance from useless and corrupt matter."

Besides the aforementioned eponymous works, the same or similar views appear in anonymous works, either collected or compiled, as well as singular, smaller texts, reflecting the dimensions of the problem of eugenics in the common conscience of social strata. The following is written about menstruating women in the synoptic formulation Canonical pseudepigraphically attributed to Ioannis IV Nестeutes, Patriarch of Constantinople: "The Old Testament does not permit women to come in contact with men during menstruation. For this causes the offspring to become weak and sickly. It is for this reason that Moses decried the father of the sickly offspring for not awaiting the cleanliness of the woman."

The pernicious effects on children conceived during sexual intercourse unsanctioned on natural or religious grounds are presented by another, equally simplistic text traduced with the rejoinders of Ioasaf, Metropolitan of Ephessus. In this text, it is interesting to note that the effects on children's health are associated to coition, not only during menstruation but also during puerperium—a notion indirectly implicit in some of the aforementioned eponymous works as well—and also on days when coition of the spouses is deprecated by the Church for reasons of respect for the specific day. Such days are Saturdays, Sundays and the major feasts. In these cases, genetic abnormalities don't appear in the offspring as a consequence of trespassing the natural laws but as punishment for disobeying the divine commands. Thus, the threat of bearing defective children became an additional means of psychological coercion aimed at betokening the erotic conduct of people.

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