Legal Abortion

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TO date legal abortion still remains a moot question in our jurisdiction. Our courts have not as yet been called upon to pass on the criminal liability of a physician who causes an abortion in order to save the life of a pregnant woman or to improve her health.

Carrara has defined abortion as the wilful killing of the fœtus in the uterus, or the violent expulsion of the fœtus from the maternal womb, which results in the death of the fœtus. Medical science establishes a clear-cut distinction between abortion and miscarriage; but for the purposes of this article, abortion as herein defined shall be deemed to include miscarriage. *Abortion* as used in judicial proceedings implies a crime committed on a woman with child, and is synonymous with *miscarriage*. (*Marmaduke vs. People, 45 Colo. 357; 101 Pac., 337, 1909*).

The legislative definition of *legal abortion* is less comprehensive than that of medical therapeutic abortion. Hence, a physician who, in accordance with medical ethics, is wholly justified, if not in duty bound to cause or assist in causing an abortion, may, under the law, be criminally liable for such an act. Apparently, a conflict arises between his medical duty on one hand, and his legal liability on the other, resulting in the anomaly that such physician, in causing an abortion, may be acting wholly within the limits of medical ethics and yet be liable to answer for the same act before the courts of law. He is faced with the dilemma of either violating the law or revealing himself as indifferent to the plight of those whose physical and mental health he is supposed to guard. How far, then, can a physician go in abortion cases without over-stepping the bounds of the law?

Our Revised Penal Code from Articles 256-259 penalizes abortion in all its possible forms whether it be intentional, unintentional, self-inflicted, or performed by a physician or a midwife. Article 259 specially imposes a penalty upon any physician who, taking advantage of his scientific knowledge or professional skill, shall cause an abortion or assist in causing the same. The abortion described in this article is qualified by abuse of scientific knowledge or professional skill.

It is submitted that legal abortion in its technical sense, i.e., if done to improve a pregnant woman's health or to save her life, is not comprehended within the scope of Article 259 of our Revised Penal Code and, hence, is not punishable.

It must be noted that Article 259 merely penalizes a physician who takes advantage of his scientific knowledge or professional skill to cause an abortion or assist in causing the same. Can it be said that a physician who causes an abortion in order to save a pregnant mother's life or to improve her health, abuses his scientific knowledge or skill?

Under the statutes of more than thirty states of the United States, including New York (*N. Y. Penal Law, Sec. 80*), a physician

may legally end pregnancy when its continuance jeopardizes the life of the mother—when to allow it to go to full term would mean the death of the pregnant woman at childbirth. The state of Colorado (*35 Col. L. R. 87, 89*), the District of *Columbia* (*D. C. Code* [*29*] *Tit. 6, Sec. 33*), Maryland, and New Mexico permit abortion to save the mother's health (*Tolnai, Abortion and the Law*); and in Florida, Louisiana, Massachusetts (*See Commonwealth vs. Sholes 95 Mass.* [*13 Allen*] *554, 558,* [*1866*], *New Hampshire, Pennsylvania* (*Pa. Stat. Ann.* (*Purdon 1930*) *tit. 18, Sec. 2071: See also Tolnai, Abortion and the Law, supra*), and New Jersey, though there is no express provision in their statutes for therapeutic abortion, yet since their laws penalize only unlawfully produced abortion, they have been construed to except therapeutic abortion (*Hines, Practical Birth-Control Methods* [*1938*] *74*). An Illinois statute makes it murder to kill incidental to abortion unless the abortion was necessary to the preservation of the mother's life (*Beasley vs. People, 89 Ill. 571, 1878*). Finally, the Revisers of the Mississippi Statutes in 1930 omitted "unless the same (abortion) has been necessary to preserve the life of the mother," and, therefore, it approves any abortion if performed on the advice of a doctor (*Miss. Code Ann.* [*1930*] *Sec. 993; Ladnier vs. State, 155 Miss. 1348*).

Jurisprudence in the Philippines with regards to abortion is hopelessly meager. Our legislators have seen fit to treat such an important subject with only four short, vague, and inadequate articles in the Revised Penal Code, which embody the whole law on abortion in the Philippines. The great number of the states of the American Union having laws on legal abortion reveal and emphasize the deplorable fact that the Philippines has no law which specifically exempts a physician performing a legal abortion from criminal liability. The explanation for this may be traced to the Spanish times when the Church reigned supreme and its credos and dogmas had more force and influence over the populace than actual laws. Then, as now, the Church considered abortion, whether performed for any purpose, in any manner, and at any time whatsoever, a mortal sin. "The embryonic child," declares a modern divine, Father C. Coppens, "has a human soul and, therefore, is a man from the time of its conception; therefore, it has an equal right to its life with its mother; therefore, neither the mother nor the medical practitioner nor any human being whatever can forcefully take that life away under any justification whatsoever." It is undeniable that such a doctrine is inhuman and cruel, and certainly unjust. Religious fanaticism should not be allowed to supersede reason and tolerance. We should not shut our eyes to what our hearts and minds tells us is right and blindly follow any doctrine without any discrimination whatever. It is regrettable that our Revised Penal Code, which is claimed to be as modern a piece of legislation as any, still embodies this unjust, fanatical and unreasonable sectarian dictum.

Notwithstanding this fact, however, it is argued that legal abortion is impliedly excepted from the provisions of Article 259 of the Revised Penal Code for in performing a legal abor-

tion, a physician does not take advantage of his scientific knowledge or professional skill. "Taking advantage of" or "abuse" connotes the undue use of a quality or a privilege possessed by a person; whereas in this case, a physician does not abuse his knowledge but instead, he practices and applies what he has learned in the course of his studies and performs that which he considers himself in duty bound to do. It is admitted that in performing legal abortion, he puts an end to a fœtus which, otherwise, has all the chances of living. But in destroying such a fœtus, he saves a human being who is not only bound to live, but is already living. He destroys one fœtus, as yet not endowed with the status of a human being, to save the life of the mother who is already wholly and completely a human being. When the question is between an unborn infant's life and a mother's, the mother is to be preferred (*Wharton's Treatise on Criminal Law, Vol. I, Sec. 641*). It is a defense to the crime of abortion that the destruction of the child's life was necessary to save the mother (*Wharton, Vol. II, Sec. 791*). Necessity has been frequently spoken of as a right against another right, though, according to the more recent opinion in Germany, it is more properly a privilege against another privilege. When two privileges, equally protected by the law collide, the question arises which is to yield. And the answer is, the lesser must yield to the greater. The greater is that which includes and conditions the other; the present and immediate is greater than the future and possible; thus, though there may be an invasion of privileges, there is no invasion of law. (*Merkel, in Holtz i.e., 137*).

There is no decided case in the Philippines to support our contention that a physician who performs a legal abortion is free from criminal liability. So, we have to go once again to foreign jurisdictions for adjudicated cases favoring our contention.

The latest, not to say the most important and revolutionary case on the subject is (*Rex vs. Bourne 3 A. E. R. 615; 156 L. T 87, 1938*) decided in Great Britain in 1938. The facts are briefly as follows: The defendant, a distinguished surgeon in obstetrics performed an abortion on a 14-year old girl, who had been raped. The operation was done openly in a public hospital and without any charge. He was indicted under the English Person Act of 1861 with unlawfully procuring abortion. The defendant did not contend that the continuance of the girl's pregnancy immediately endangered her life, but that the brutal circumstances of the case created a strain on the girl's nervous system such that to permit the pregnancy to go on to full term, and for the girl to bear the child, would subject her to neurosis for the rest of her life. The jury was charged that the abortion would be legal if the prosecution does not prove beyond reasonable doubt that the operation was not done in good faith for preserving the life of the girl; and to save her from becoming a physical or a mental wreck, was said to be within that exception.

The jury brought in a verdict of "not guilty." In his decision, the presiding judge defined an abortion "to preserve the mother's life," which is the usual statutory exception in the United States, as a privilege covering cases

where abortion is necessary to prevent immediate death, impairment of health which may lead to death, and serious damage to the nervous system which may be reasonably expected to shorten life.

The case just cited is a step farther from all previous cases on abortion decided in both the United States and Great Britain. Whereas the other cases simply sanction abortion for the purpose of saving the mother's life, this case goes a step farther and holds that the abortion was necessary to relieve the girl from mental anguish and thus prevent her from becoming a physical or mental wreck, without finding as a fact that in the absence of such abortion the girl would, in fact, become a wreck, physically and mentally. It also declares that an abortion to improve the health of the pregnant mother, the impairment of which may lead to death, is impliedly included within the statutory provision that an abortion is lawful when performed "to save the life of the mother." Hence, a wider range and a more liberal interpretation has been given to the latter clause by this notable case.

A Philippine decision which seems to lend itself, by analogy, in support of our contention is that rendered by Justice Trent in the case of *U. S. vs. Borromeo, 23 Phil. 390*: "Pain, physical or mental, should be measured by its permanent effect upon the sufferer. In the case of severe physical injuries, temporary physical pain may be extreme and yet the person may fully recover, after which his injuries become nothing more than a memory
But in the case of a young innocent girl, ruthlessly torn from the side of her mother in the dead of the night, overpowered by superior strength, her cries for help stifled and rushed to an unknown house and there defiled, there is something more to be endured by her than mere physical pain, although that may not be inconsiderable. When such occurrence ceases to be a reality to her and becomes a memory, if it ever does, she may derive no comfort, pride or satisfaction by recalling it. Shame, misery, mortification are her lot. Nor can she, if she would, banish the dreadful occurrence from her thoughts. Pitying looks, pointing fingers, and morbid stares remind her everywhere she goes of her terrible experience. The effects of such a brutal act upon the girl are permanent and far-reaching. Time may lessen but can never annul her sufferings." From this excerpt we can see that the mere fact that a girl has been defiled is considered by our Supreme Court as productive of mental anguish and permanent sufferings. With more reason, then, should we maintain that a girl who has been defiled and who, subsequently, becomes impregnated by her defiler is subject to such torture of mind and body that she will, eventually, become a physical and a mental wreck. When a physician thus performs an abortion in order to preserve or improve the health of a pregnant mother, his act is perfectly justified and, under all the principles of humanity and justice, should never be penalized nor be deemed included within the scope of any penal legislation on abortion.

The other exception is where an abortion is caused in order to save the mother's life, specific instances of which occur when the mother is suffering from chronic inflammation of the kidney (chronic nephritis), tuberculosis, severe diabetes, arterial disease

with high blood pressure and a definitely enlarged heart (*British Med. Assn., Committee on Medical Aspects of Abortion, July, 1936*) or from the threat of unnatural childbirth due to malformation or extreme contraction of the pelvis, or to extra-uterine pregnancy necessitating a cesarean operation if the case be allowed to go to term. The conclusion is obvious that an abortion performed in order to relieve such disorders of or during pregnancy with the ultimate end in view of saving the mother's life, can not be anything else but lawful under both medical ethics and legal jurisprudence. Necessity to save the woman's life, though a defense, can only be resorted to after medical advice. (*Jackson vs. State, 55 Tex. Crim. Rep. 79; 131 Am. St. Rep. 1059; 100 Pac. 681*). The fact that the defendant who is charged with the act, had had illicit intercourse with her are not inconsistent with the necessity of the act in order to save the woman's life. (*State vs. Wills, 35 Utah. 400; 136 Am. St. Rep. 1059; 100 Pac. 68*). Under a statute providing that it shall be an offense to produce an abortion unless necessary to preserve the life of the mother or unless it shall have been advised by a physician, the existence of the necessity, or the fact that it was so advised by the physician each is an adequate defense, and it is not essential that the necessity and the advising that it was necessary, should both exist. (*State vs. Fitzporter, 93 Mo. 390; 6 S. W. 223*).

It is only just and proper, then, that a legal abortion performed to preserve the mother's life or to improve her health, should be deemed excepted from the purview of Art. 259 of the Revised Penal Code, though it be merely by implication. A law is presumed to be just and for the public interest; and as between two conflicting interpretations of a statute, that which is liberal and more in consonance with law and justice should prevail. But conceding that legal abortion is not and can not be so excepted, then Art. 259 of the Revised Penal Code should be amended to that effect. The world is ever-changing. Conditions which were inexistent five decades ago are now commonplace. The legal mechanism of the State is slow of adjustment; the pace of the community is rapid. Hence, laws which legislated on all conditions, then, would be hopelessly out-of-date today; and to keep pace with progress, they should be constantly revised and modified, if not completely changed by subsequent legislation. No Legislature has attempted to draw up a catalogue of cases where abortion is legal; to do so would be open to the objection that it only comprehends those cases approved by medical science today. The law would be out of step as soon as new knowledge in therapeutics is acquired. But it is, indeed, regrettable that the law does not give a more definite protection and guidance to the physician, for his opinion with regards to the necessity for abortion may not be shared by the courts of law (*1938, 86 L. J., 76 & 154; Lord Horder in the Spectator, July 26, 1928*). The best solution to this dilemma is to make the law more elastic and for the judge to consider the particular merits of each case (*2 Mod. Liv. Rev. 236, 238*). It is desirable that the laws on abortion should be in harmony with the general medical opinion and permit abortion at least where such is necessary to preserve the

life or the health of the mother—that is, therapeutic abortion in its fullest medical sense. It is further suggested that the scope of legal abortion be enlarged as to include abortion for eugenic and other social reasons (*Ellis on Abortion, ff. 200*). An intelligent code of laws will then give its sanction to the performance of abortions under circumstances justified by the health of the patient, her economic condition, the danger of its social stigma, or any one of a number of valid reasons (*Rongy, Abortion Legal or Illegal? 98*).

Tragedies result from a strict and uncompromising prohibition of abortion in all its forms. Such law does not put a stop to abortion nor even succeed in attaching odium to the act; on the other hand, it has added to the sum total of corruption and deceit used in "getting away with the law," not to mention the great number of women who have become physical wrecks because of complications following abortion, nor the scores of deaths from ceptic poisoning, hemorrhage or other fatal effects of hasty, ignorant and severe "butchering" by many unscrupulous and unskilled midwives and practitioners which desperate women accept as therapeutic abortion. Surely, our legislators could do no more than liberalize our law on abortion as to exempt from criminal liability a physician who performs an abortion which is justifiable under the circumstances.