

The evolution of the regulations concerning the crime of illegal performing of the abortion

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Abstract

The opportunity of the analysis of how the offense of illegal performing of the abortion was regulated over time in terms of Romanian criminal law lies in the fact that the offense in question is found with another name in the new Criminal Code, whose entry into force is imminent, and in order to fully understand the evolution of the new provisions it is important to know how the fact in question was criminalized in various stages of social development.

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In the Romanian criminal law the description of the offense of illegal performing of the abortion is not a matter of novelty.

Since ancient times the legislator was constantly concerned about this aspect, but, of course, the legal text of the offense changed over time depending on the evolution of society.

Thus, the Criminal Code of 1865², also known as „The Cuza Code” contains in the title IV, called „Crimes and Offenses against Individuals”, chapter I, „Crimes and Offenses against Persons”, section II, „Injuries, Collisions and Other Crimes and Offenses Committed on Purpose”, the following regulatory in the Art. 246: „either who through things to eat, drink, drugs with violent effects, or by any other means, will willingly determine the interruption of the pregnancy of a pregnant woman, either she wants it or not, shall be punished with the minimum reclusion. The woman who interrupts she alone the pregnancy using her own means or the means who are given to her by another person shall be punished with imprisonment from six months to two years, if the pregnancy is terminated. Doctors, surgeons, health officers, apothecary chemists and midwives who will help to put an end to the pregnancy, or who will give or facilitate the means to do it, shall be punished by confinement if the expulsion occurs. If the action will cause the mother's death, the punishment shall be applied with a degree above”.

Analyzing the legal text we can make a first observation regarding the fact that the abortion was forbidden because there is no time limit set until which the interruption of the pregnancy to be allowed. Even if we can give a name for this crime, yet it is clearly showed that any performing of the abortion is illegal.

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² The document is available online at: <http://ro.scribd.com/doc/51980424/codul-penal-1864> (last access: June 23, 2012).

The way the legal text is formulated highlights the complex nature of this crime. Its legal object is represented mainly by all social relationships emerging and developing on protecting life in the making, life of the „baby" and, alternatively, the social relations relative to the protection of the pregnant woman's life.

We believe that the term „baby" is synonymous to the current term „fetus" because where the legislator has referred to a born child he has used the term „child". An example for this is the crime of infanticide referred to in Art. 230 of the Criminal Code.

It is interesting that a pregnant woman who will cause her own abortion will be punished only if her actions have as a result the expulsion of the fetus, regardless of his intrauterine age.

The same condition regarding the punishment is provided by the legislator even in the case when the active subject of the offense is a qualified one in the person of a physician, a surgeon, a health officer, an apothecary chemist or a midwife.

The crime can be committed only intentionally, an additional argument to this statement being the use of the term „willingly" by the legislator.

Throughout this article we also find another form of the crime in the last sentence of the legal text, regarding the result in mother's death subsequent to the abortion, in which case the first action is an intended one but the aggravated result is obtained by fault.

The Criminal Code of 1937³ came into force on the 1st of January 1937 and marked the evolution of the Romanian criminal law by applying throughout Romania as a result of achieving the Great Union of December 1st, 1918⁴.

In the Title XIII, named „Crimes and Offenses against Persons", chapter I, „Crimes and Offenses against Life", section III, „Abortion", we find Art. 482 of the Criminal Code which states that: „he who by any means causes the interruption of normal pregnancy commits the offense of abortion and will be punishable as follows: 1. when the offense is committed without the consent of the pregnant woman, with correctional imprisonment from 2 to 5 years. If the action has caused injury to the health or infirmity as those shown in Art. 473 to the pregnant woman, with correctional punishment of imprisonment from 3 to 6 years, and if it has caused her death, with correctional imprisonment from 7 to 10 years; 2. when the offense is committed by unmarried pregnant woman herself or someone else when she consented to perform it with correctional imprisonment from 3 to 6 months, and if the woman is married, with correctional imprisonment from 6 months to one year. The same penalty as the above distinctions will be applied to the one who commits the fact with the woman's consent. If the action has caused injury to the health or infirmity as those shown in Art. 473 to the pregnant woman, with correctional punishment of imprisonment from 1 to 3 years, and if it has caused her death, with correctional punishment of imprisonment from 3 to 5 years. In the

³ The document is available online at:

www.freelex.juridic.ro/DocumentView.aspx?DocumentId=33229 (last access: December 18, 2011).

⁴ The document is available online at: www.e-juridic.manager.ro/dictionar-juridic/codul-penal-din-1939/929.html (last access: December 18, 2011).

cases referred to in paragraph 2 if that was committed in order to obtain a material benefit, the penalty increases to the above distinctions with a plus of 2 years".

According to Art. 483 of the Criminal Code, the attempt to commit the offense provided in Art. 482 paragraph 1 is punishable.

In Art. 484 of the Criminal Code it is provided that „it is not considered an abortion the interruption of the normal course of a pregnancy if it is done by a doctor: 1. when the woman's life is in danger or the pregnancy exacerbates a disease suffered by the woman, putting her life in danger, which could not be removed by any other means and it is clear that the intervention was the only way to save the woman's life; 2. when one parent is reached by derangement and it is certain that the child will carry serious mental problems. In case of imminent danger, the doctor is obliged to confidentially inform in writing the prosecution about the abortion within 48 hours after surgery. In other cases, the doctor can not intervene unless authorized by the prosecutor, having as an argument the medical certificate given by a hospital bearing the opinions after a consultation between the physician who will intervene and at least one leading specialist in the disease that demands the intervention. The prosecutor, in all cases under this article, shall be obliged to maintain the confidentiality of all communications or authorizations until the intervention of any eventual complaints".

Art. 485 of the Criminal Code, the last of this section, provides that regarding the offenses specified in this section, there will be applied a correctional prohibition from 1 to 3 years to physicians, health officers, pharmacists, midwives or chemists who commit the illegal facts".

We believe that the crime of abortion has a complex legal object, in the sense that it protects, on the one hand, life in the making, the conception product, and, on the other hand, the life and the health of the pregnant woman.

Protecting the right to life of the conception product is sustained even in the provisions of the section 2 of Art. 482 of the Criminal Code, because the active subject in this case is qualified in the person of the pregnant woman.

The importance given by the legislator to the becoming life, to the potential person is shown by punishing even the attempt of committing an abortion without the consent of the pregnant woman.

Unlike the provisions of the Criminal Code of 1865, this time the legislator considered it necessary to provide the situations when the interruption of normal pregnancy is not the crime of abortion, and it is allowed under certain precise conditions defined in Art. 484 of the Criminal Code.

Thus, not every interruption of the normal course of pregnancy is illegal. It is noted that while the right to life of the person who is born is absolute, the right to life of the conception product is not opposable *erga omnes*, but it is protected only to the extent it do not get in conflict, it is not opposed to the right to life of the pregnant woman, in which case therapeutic abortion is necessary, being the only way to save the life of the pregnant woman.

The Criminal Code of 1969⁵, in force today, protects the person and her attributes because they are extremely important for the society.

Regarding the protection of the intrauterine life the Criminal Code contains the offense of illegal performing of the abortion, provided in Art. 185 of the Criminal Code. The analysis of the legal text helps us understand that the abortion committed after the age of 14 weeks of the pregnancy is an offense, if all the conditions imposed by the legislator are accomplished.

In characterizing the legal object of the offense of illegal performing of the abortion specialized authors⁶ say this is represented by the social relationships defending the child's intrauterine life, the social relationships that provide natality and the social relations that ensure protection of life and health of the pregnant woman".

In Art. 185 para. (6) of the Criminal Code it is provided that: „There will be no punishment for the abortion performed by a doctor if: a) the abortion was necessary to save the life, health or bodily integrity of the pregnant woman from grave and imminent danger that could not be removed otherwise or b) as provided in par. (1) letter c) (our note: if pregnancy has exceeded 14 weeks), when abortion was necessary for therapeutic reasons, according to the law, c) in the case provided in par. (2) (our note: the abortion committed without the consent of the pregnant woman in any circumstances), when the pregnant woman was unable to express her will, and abortion was necessary for therapeutic reasons, according to the law".

In relation with these situations in which the abortion is not punished we can conclude that whenever the right to life of the fetus competes with the right to life or health or physical integrity of the pregnant woman the latter prevails.

Analyzing the provisions of the Criminal Code of 2009⁷ in terms of protection of intrauterine life, we see that the legislator inserted Chapter IV, entitled „Attacks on the fetus”, in Title I of the Special Part of the Code.

This chapter contains two offenses, namely the crime of interruption of pregnancy (Art. 201) and the offense of injury to the fetus (Art. 202).

The offense provided in Art. 201 has as a match in the Criminal Code in force the Art. 185 which describes the offense of illegal performing of the abortion. As it happens in the Criminal Code in force, the starting point of the criminal protection of intrauterine life is the attainment for the pregnancy of the age of 14 weeks, at which time his interruption is a crime if we are not in a situation where abortion is necessary for therapeutic reasons, this aspect removing the criminal nature of the act.

Thus, in Art. 201 para. (6) of the Criminal Code of 2009 it is provided that: „It is not an offense the abortion performed for therapeutic reasons by a specialist

⁵ Most recently amended and completed by Law no. 63/2012, published in the Official Gazette no. 258 of April 19, 2012. The document is available online at: <http://www.anp-just.ro/interna/Codul%20Penal.pdf> (last accessed: February 18, 2012).

⁶ Vasile Dobrinou, *Interruption of Pregnancy in Characterizing the Crime of Abortion*, in the „Romanian Journal of Law" no. 2/1970, p. 110.

⁷ Represented by Law no. 286/2009, published in the Official Gazette no. 510 of July 24, 2009, most recently amended by Law no. 63/2012, published in the Official Gazette no. 258 of April 19, 2012.

physician in obstetrics and gynecology, until the pregnancy reaches up to twenty-four weeks, or the subsequent termination of pregnancy, for therapeutic purposes in the interest of the mother or the fetus".

Analyzing these provisions there can be established some periods during pregnancy which, under certain circumstances, have criminal relevance or not. Thus, from the moment of conception and until 14 weeks of pregnancy, it is irrelevant from the criminal point of view if the pregnancy is interrupted unless the fact was done without the consent of the pregnant woman. Between 14 weeks and the beginning of the birth process the abortion, even performed by an expert physician in obstetrics-gynecology, is an offense if the action was not necessary for therapeutic reasons.

If for therapeutic reasons, an expert physician in obstetrics-gynecology interrupted pregnancy aged between 14 and 24 weeks, his act is not an offense. Just as in the Criminal Code in force, if the right to life of the unborn child is in conflict with the right to life or the right to health or physical integrity of the pregnant woman, the latter prevails.

An interesting aspect is represented by the second sentence of para. (6) of Art. 201 of the Criminal Code of 2009 as it states that it is not an offense the abortion performed for therapeutic reasons, after pregnancy reached the age of 24 weeks, the termination being done in the interest of the mother or the fetus.

Mother's interest in this case is easy to understand, regardless of the age of the pregnancy. However, we believe that we must explain why the legislator provided that it is in the interest of the fetus to terminate a pregnancy who is 24 weeks or more for therapeutic reasons. In medical science⁸ in obstetrics and gynecology it is stated that if born a fetus of 24 weeks is able to live on his own, to live outside the womb. This could be a possible explanation for the legislator's option regarding the above-mentioned provisions.

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⁸ If the baby is born at 24 weeks or more, the fetus has a chance of survival if taken to intensive care. The document is available online at: http://www.sfatulmedicului.ro/Evolutia-sarcinii/dezvoltarea-fatului-un-miracol_1126 (last accessed: February 18, 2012).