Defining elements of the Romanian legislation on abortion.
A historical perspective

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Abstract: In Romania, the legislation referring to abortion had known major fluctuations. In 1966, The Decree nr. 770 banned abortion in almost all circumstances. This has given rise to a large number of illegal abortions, which often lead to the death of the pregnant woman. The absolute liberalization of abortion, after the Revolution of 1989, lead to a dramatic decrease in population number. In 1966 abortion has been incriminated again, setting some limits which were meant to protect the health and life of the pregnant woman. The fact that abortion is permitted virtually by simple request in the first fourteen weeks of pregnancy, makes us question on the real interest of the law regarding the rights of the fetus. The New Penal Code brings up some new provisions which show some concern about the unborn child. Still, there are many aspects to be explained, including a clear definition of the rights of the fetus. We hope that the extreme forms of abortion legislation which Romania has had in the last decades make us choose the wisest solution.

Keywords: abortion; fetus; legal object; therapeutic purpose; the new Criminal Code.

Introduction

In this paper we will try to build up a general view of the Romanian legislation referring to the abortion issue. Our goal is neither to frame this legislation in the international context, nor to point out a certain pattern which our country should follow. We will mainly show the real regime of abortion, as it was in the past, as it is in the present and as it foreshadows to be in the future. We only hope that our approach on the abortion issue can help us find the best ideal way to legally regulate abortion.

Further, we will analyse each of the elements which, in our view, define the legal regime of abortion in Romania. We think that the defining features are the evolution, the hesitation and the perspectives of the legal regime of abortion in Romania. This is why we will present the historical evolution of the legal regime of abortion, the controversies surrounding the abortion issue, and the perspectives of the legal regime of abortion in Romania.

1. The evolution of the Romanian legislation relating to abortion

As concerns the evolution of the abortion legislation in Romania, we wanted to start up with the geto-dacian rules concerning abortion. Unfortunately, we didn’t find any historical source on this subject. So all we can do is to make speculations upon the elements that we know as sure information. Thus, many sources indicate that men had discretionary powers upon their families [1, p. 91]; this leads us to the conclusion that infanticide could have been allowed. If infanticide could have been allowed, maybe abortion had been largely permitted. Information on geto-dacians polygamy [1, pp. 81-86] also invites us to speculate about that period’s vision on abortion. Because they had many wives, maybe men had at least a neutral position towards the abortion realized by one of their wives, because they could have had another child, by another wife. But maybe for a woman an abortion could have meant a real tragedy, because she lacked the head of the family the thing she should have offered as her duty. So, maybe the women appreciated more than men did the value of an unborn child. We also know that geto-dacians used to cry when a child was born and they used to organize a feast when a person had died [1, pp. 98-100]. This custom, attested by many sources, could indicate that, when an abortion was performed, the geto-dacians did not suffer, thinking that the unborn child would go straight to Zamolxe’s heaven.

In the Dark Ages, Romanian view on abortion was ruled by Church. In The Improvement of the Law, from 1652, a Walahian legislative act of Matei Basarab [2, p. 9], there are some early legal provisions on abortion. Thus, a woman who using herbs in order to realize an abortion was assimilated to a killer. This means
that abortion was considered to be the equivalent of a murder. The penalty, set according to ecclesiastic rules, was the same as for murder [2, p. 350]. Similar provisions are found in other legislative acts of that time [3].

In the modern penal legislation, abortion has been incriminated since 1864 in the Penal Code. During the debates in the Parliament for the adoption of the new Penal Code in 1936, the criminalization of abortion was considered to be a way to fight against the demographic decrease of population. Also, it was believed that a hard regime of abortion could protect the health and also the life of the women willing to do an abortion [4].

In 1957, the Decree no. 463 relaxed the legal status of abortion. Now, abortion was available by simple request, in exchange of a small fee. The Decree did not request either the consent of the husband, or the consent of the parents (or of the tutor), when the woman was under the full age. The only procedural requirements were that abortion should have been performed by a specialized doctor, in a medical institution. This extreme liberalization of abortion has lead to a large number of abortions, and, consequently, to a significant decrease of population. In many cases, the abortion procedures have harmed the health of the women, often leading to sterility. Also, many women died because of the abortion [5, pp. 48-53].

Given this situation, abortion had been outlawed again. The Decree no. 770/1966 expressly prohibited the voluntary interruption of pregnancy. Abortion was allowed only in certain circumstances, clearly defined. Thus, abortion was permitted on medical grounds, for eugenic, social or ethical reasons, and only in the first three month of pregnancy [6]. Exceptionally, abortion was allowed between three and six month of pregnancy, but only when the life of the mother was endangered, and abortion was the only way to save her life [5, p. 63].

As regards the medical grounds, they consisted in the following circumstances: when the life (not the health) of the mother had been endangered and when the viability of the fetus was questioned. The reason why abortion was allowed only when the life (and not the health) of the woman was endangered was the opinion that, due to the progress of the medicine, there were no situations in which the health of the women could be saved only by undergoing an abortion; in any circumstance in which the health was in danger, there was believed to be a suitable medical treatment. We noticed that the sphere of medical grounds had been extended through the Instructions no. 819/1966, that have been adopted in order to help the application of the Decree no. 770/1966. These Instructions contained a list of the diseases which could affect the health of the fetus; in these cases, abortion was also allowed [5, pp. 55-57].

The eugenic grounds existed when at least one of the parents suffered from a severe illness, which was hereditary transmissible or determined severe fetal impairment. There is the opinion that allowing abortion when the woman was over forty five years old was also an eugenic ground. The reason for such an approach is the increased risk of fetal abnormalities when the mother is more than forty five years old [5, pp. 57-59].

The social grounds on which abortion was allowed were also precisely defined: when the pregnant woman had a severe infirmity, physical, psychical or sensorial; when the woman had already given birth to four children and had them under care. Abortion was permitted in these situations because it was presumed that the women could not have properly taken care of the child, if he had been born [5, p. 61]. Also, abortion was permitted when the woman was over forty five years old (as we have already mentioned above), and this ground was considered to have also a social reason, along with its eugenic component. We notice that the category of the social reasons did not comprise economic reasons. This was a consequence of that time’s ideology, which affirmed that, in the socialist society, all people lived in welfare, hence the justification of abortion on economic grounds was no longer necessary.

The ethical reasons (also known as judicial reasons) existed when the pregnancy was the result of a rape or incest [5, pp. 61-62]. Allowing abortion when the pregnancy was the result of an incest also had an eugenic explanation, because children originating from consanguineous relations have an increased risk of health problems.

The Penal Code from 1968 drastically incriminated abortion. The article 185 provided that abortion was prohibited in all circumstances, except in those very few situations we have presented above. Abortion was sanctioned when it was done with or without the woman’s consent. As aggravating forms, the Penal Code provided the situations in which the woman had died or had suffered from severe health problems, as a result of the abortion procedure. Also an aggravated form was the situation in which abortion was performed for pecuniary benefits. Article 186 referred to the sanction applied to the pregnant woman, when she caused herself an abortion. Article 187 penalized preparation acts, which consisted in possessing instruments and substances used in abortion procedures. Article 188 criminalized the doctor’s omission to denounced an abortion which had been performed in emergency situations. Overall, the Penal Code’s provisions referring to abortion established a really severe regime [7].

In spite of the drastic restrictions that Decree no. 770/1966 had made, the goal set by the legislative body was not achieved. It is true that, for a short period of time, there has been an increase in the birth rate; this was not necessarily a direct consequence of the legal restrictions on abortion. The main problem was that the
economic status of the population did not improve, so people were not stimulated in their desire to have children. This resulted in a large number of illegal abortions. The abortion procedures were usually performed in unsanitary conditions, by unspecialized persons. Therefore, women who resorted to abortion were put under great risk. Often, their health was irreversible damaged, especially their reproductive health. Many women actually died as a result of abortion procedures. All these factors contributed to an overall decrease in birth rate [8, pp. 239-242].

The Decree no. 441/1985 deepened the restrictions on abortion. Thus, now it was required that the mother had already given birth to five (instead of four) children and had all her children under care, in order to have a legal abortion [9].

The first Decree adopted after the Romanian Revolution of 1989 repealed all the provisions of the Penal Code which criminalized abortion. Thus, an important domain of human existence remained virtually out of legal regulations. Many people interpreted the new legislative situation as an absolute permission of abortion; they thought that abortion could be performed anywhere, by anyone. This is why many abortions were performed in inadequate conditions, often causing injuries to the woman’s health. The risk of death due to abortion procedures was still high. An important problem was that the persons who caused the injury of the health or the death of the pregnant woman could not be properly punished, because abortion had been decriminalized. Courts faced with such cases were forced to include the unwanted results of abortion in the existing penal legislation. Thus, the abortion procedures were qualified as injury by negligence or as manslaughter [10, p. 139].

In this legislative context, Law no. 140/1996 (published in the Official Gazette no. 289 of 14th of November 1996) has recriminalized abortion. In the Penal Code, article 185 has been reintroduced, but in a radically different form than before. This new article, named *Illegal Abortion Induction*, provided that abortion was illegal in the following circumstances: outside medical institutions or medical offices authorized for the purpose of performing abortions; if the abortion were not performed by a specialized doctor; if the pregnancy exceeded fourteen weeks. Abortion was also criminalized when performed without woman’s consent, no matter the circumstances. Aggravated forms consisted of producing a severe injury or the death of the pregnant woman due to abortion. The law also provided some special cases in which the abortion performed outside legal conditions was not punished, when the abortion was performed by a doctor, because: the procedure was necessary for saving the life or the health of the woman from an imminent and severe danger which could not have been removed otherwise; when the pregnancy was over fourteen weeks old, but the abortion was necessary for therapeutic reasons; when the pregnant woman was unable to give her consent, and the abortion procedure was necessary for therapeutic reasons [10, pp. 139-144]. These were actually reasons that excluded the offence.

2. Hesitations in conceptualizing and regulating abortion in Romania

2.1. General view on the controversies concerning abortion in legislation, judicial practice and juridical literature. The second objective of this paper is, as we have shown above, the identification of the *hesitations* of the Romanian legal system in refer to abortion. By hesitations we designate the unclear and controversial aspects related to the abortion issue. In the following lines we will analyze the elements that have generated controversies, and the solutions that have been adopted to address some of these controversies. To highlight the solutions proposed to clarify the elements that have generated discussions we will consider the new Criminal Code (Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 510 of 24th of July 2009) [11], [12]. We will also highlight some issues that are still unclear and that are waiting for solutions.

2.2. Controversies on the legal object of the offence that criminalizes abortion. A first issue is whether the criminalization of abortion protects the fetus, the pregnant woman or both of them. Related to this issue is the question of the rights involved in the abortion matter. Thus, we should establish whether the fetus has the right to life or and the mother has the right to do an abortion. In what concerns the unborn child, we must notice that, in the current Romanian legislation, but also in the Criminal Code of 1968, in the first fourteen weeks of pregnancy, the fetus has no rights. In this stage of pregnancy, abortion can be performed by simple request of the pregnant woman. In these circumstances, we wonder whether, after fourteen weeks of pregnancy, the object of the legal protection is actually the fetus or, rather, the pregnant woman. It would be hard to explain a sudden change in the status of the fetus, as soon as the pregnancy reaches fourteen weeks. On the other hand, the risks for the woman increase as the pregnancy gets older. This is why it is likely that the real object of legislative protection in criminalizing abortion is the pregnant woman [13]. On the other hand, we admit that it is hard to legally establish a permissive regime of abortion, while giving a full recognition of the fetus’s rights.
Under these circumstances, we note that the legislator of the new Criminal Code has tried, using specific methods, to emphasize the idea that the legal object of the offence of Interruption of pregnancy includes also the fetus’s interest, along with the interest of the pregnant woman. The legislator's concern to protect the fetus results from: the manner in which the offence of Interruption of pregnancy is included in the structure of the new Criminal Code; the penal regime when abortion is committed by the pregnant woman; the way the legislator conceived the notion of therapeutic purpose, that may justify abortion outside the basic legal framework. In the following lines, we will analyse these three items which prove that the fetus’s interest is among the elements that make up the legal subject of the crime of Interruption of pregnancy.

Regarding the structure of the new Criminal Code, it is noted that the legislator has included a separate chapter, titled Attacks on the fetus (Chapter IV of Title I), which comprises two offenses: Interruption of pregnancy (article 201 of the new Criminal Code) and Injury of the fetus (article 202 of the new Criminal Code). Thus, the fact that it constitutes a separate chapter that lists acts committed against the unborn child wanted to emphasize the idea that the legislator wants to protect the fetus.

Finding the legal qualification for the abortion committed by the pregnant woman herself was what we call a hesitation in defining the correct meaning of the offence of illegal abortion induction. This is due to the fact that, in absence of a legal stipulation, it was easy for controversies to appear on this matter. Because Law no. 140/1996 did not revive the provisions of the former art. 186, which provided that the pregnant woman is punished for having an abortion, some authors concluded that the self-abortion act was not criminalized. Other authors argued that Law no. 140/1996 must be perceived independently from the old provisions, and that, in order to understand the meaning of the new law, we must not simply compare the old and the new legislation. Thus, the fact that Law no. 140/1996 did not expressly provided that the pregnant woman is punished for committing a self-induced abortion did not mean that the pregnant woman should not be the author of the offence, as the law criminalized the abortion performed by any person, therefore including the pregnant woman. And it would have been an atypical situation to exclude a category of persons from penal repression without expressly providing this. On this background rose also the problem whether the pregnant woman should be the punished for having an abortion, if it was accepted that the abortion committed by the pregnant woman was criminalized. Because the act of self-induced abortion could have lead to an injury of woman’s health, could the women be punished for self-injury? The new Criminal Code brings light to this matter and expressly provides that the pregnant woman who performs a self-induced abortion is not punished (article 201, paragraph 7 from the new Criminal Code). This means that the abortion performed by the pregnant woman is criminalized, but the legislator decided that the pregnant woman must not be punished. We believe that this solution was chosen by the legislator to highlight the fact that the criminalization of abortion protects also the fetus, and not only the pregnant woman.

Another argument which favors the idea that the legislator protects the fetus through the criminalization of abortion is the fact that, among the reasons that can justify an abortion outside the legal framework is when the abortion is performed because of a therapeutic reason for fetus’s interest (article 201, paragraph 6 from the new Criminal Code).

Through the three elements presented above, the legislator emphasizes the idea that the criminalization of abortion protects the pregnant woman and also the fetus.

2.3. Controversy regarding the meaning of the concept of “therapeutic purpose”. Another element which constitutes a hesitation of the legislator in shaping the form of the criminalization of abortion is related to the meaning of the term “therapeutic purpose”. The article 185 of Criminal Code from 1968 (as introduced through Law no. 140/1996) provided that therapeutic reasons were circumstance which excluded the sanction, although, in fact, they were circumstances which excluded the criminal nature of the act. The new Criminal Code correctly provides that, when such therapeutic purposes exist, the performance of an abortion is not criminalized (article 201, paragraph 6 from the new Criminal Code).

Beyond the useful specifications on the juridical nature of the abortion performed for therapeutic purpose, the new Criminal Code does not explain the meaning of the term “therapeutic purpose”. In our view, this is a hesitation of the legislation, because the lack of an official definition of these therapeutic purposes could be a premise for abuse.

The article 201, paragraph 6 from the new Criminal Code provides that the abortion is not criminalized if it is performed for therapeutic purpose, by a physician specialized in obstetrics and gynecology, until the pregnancy reaches twenty-four weeks, or interrupting the pregnancy after this moment, for the interest of the mother or for the interest of the fetus.

Within the text of the law, certain issues are clear, while others are confusing.
Thus, it is clear that, when it is performed outside legal conditions, by a physician specialized in obstetrics and gynecology, for therapeutic purpose, the abortion is not criminalized. Also, it is clear that the legislator wants to make a difference between abortion performed for therapeutic purpose until the pregnancy reaches twenty-four weeks, respectively abortion performed after this age of pregnancy.

But it is unclear what does “therapeutic purpose” mean. In the same manner as the Criminal Code from 1968 did, the new Criminal Code offers no explanations or clues on what this term might mean, despite the importance of a precise definition of this term. Implicitly, reference is made to the medical regulations, which, at least at present, are also not very clear on the meaning of this “therapeutic purpose” [5, pp. 22-23], [8, p. 244], [14], [15]. Also, it is not clear why the new regulation does not expressly provide that abortion is not criminalized when it is performed in order to save the life, health or bodily integrity of the pregnant woman from a serious and imminent danger which cannot be removed otherwise. In this regard, there are two possible explanations: either this is considered a case of necessity (article 201, paragraph 6 from the new Criminal Code), or it is included in the notion of “therapeutic purpose”. However, we believe it is hard to consider the “therapeutic purpose” as a case of necessity, because usually the requirement of the immediate danger, in the strict sense of the word, is missing. Still, we appreciate that the particular condition of pregnancy allows a broad interpretation of the term "state of necessity". Due to specific biological condition, any delay in making an abortion can lead to worsening of an existing problem. Even if the threat was not strictly temporal immediate, yet it can be interpreted as immediate, as concerns abortion.

The new Criminal Code is confusing regarding the two intervals covered by the hypothesis of the therapeutic abortion: the period up to twenty-four weeks of pregnancy, and the period after twenty-four weeks of pregnancy.

Thus, it is unclear whether a specialized physician in obstetrics and gynecology must operate in both periods. Literally, the new Criminal Code refers to a specialized physician only for the period up to twenty-four weeks of pregnancy. For the subsequent period, the law no longer refers to the quality of the person performing the abortion. Thus, it is understood that medical specialization is required when abortion is performed at a younger stage of pregnancy, but it is no longer required in an advanced stage of pregnancy. We doubt that this was the intention of the legislator, since the risks of an abortion performed in an advanced stage of pregnancy are much higher, so such an abortion requires specialized knowledge. Perhaps the legislator considered that, when the gestational age is greater than twenty-four weeks, abortion can be performed also by a non-specialist doctor, because any delay can have serious effects. However, interpreting the overall statutory provisions of paragraph 6 of article 201 of the new Criminal Code, we believe that the legislature considers that therapeutic abortion must be performed only by a qualified doctor, regardless of the age of pregnancy. We believe, however, that the legislator should also allow a doctor who is not specialized in obstetrics and gynecology to perform a therapeutic abortion, when needed. In this respect, the provisions of the new Criminal Code are a setback compared to the Criminal Code of 1968, which, when referring to the performance of an abortion for therapeutic reasons, provided that abortion could have been achieved also by a doctor who was not specialized in obstetrics and gynecology. In addition, it would be useful to be made a statement also on the treatment applicable to the auxiliary medical personnel, who help the doctor to perform a therapeutic abortion.

But perhaps, as we stated above, the legislator has limited the scope of the paragraph 6 of article 201 of the new Criminal Code only to cases when a therapeutic abortion is necessary, but there is no immediate danger. If there is an immediate danger in the sense of a state of necessity, perhaps the legislator intended to leave room for the application of general rules on state of necessity. If so, then performing an abortion in a state of emergency even by a person who is not a doctor (for example a midwife), could have the effect of excluding the criminal character of the act.

Also, it is unclear whether the interest of the mother and of the fetus should be taken into account until and after twenty-four weeks of pregnancy. Literally, we can interpret that only after twenty-four weeks of pregnancy we may consider alternatively the interest of the mother or of the fetus; otherwise, it is hard to explain why the legislator refers to two periods in which abortion is performed, according to paragraph 6 of article 201 of the new Criminal Code. We believe that the distinction is based on the fact that an abortion may be in fetus’s interest only when the fetus is viable, meaning it can survive outside the mother's body, even with medical help. Generally, it is considered that, starting from twenty-four weeks of pregnancy, the fetus can have this ability to survive outside mother’s womb. Still, medical practice has shown that fetuses survived even at a younger stage of pregnancy, for example at twenty-one weeks of pregnancy. Therefore, we believe that the legislator should not provide an age limit at which an abortion may be in the interest of the fetus, because, in particular cases, abortion may be in the interest of the fetus even if the pregnancy is less than twenty-four weeks old. However, we note that it is the first time that in our legislation is given effect to the concept of viability of the fetus, although the word viability is not expressly used. We believe this is a beginning to a better
understanding of other issues related to pregnancy and abortion, for example in understanding the sense of the concept of birth process (which can be useful in revealing all the implications of article 202 of the new Criminal Code, entitled Injury of the fetus). However, we believe that it is the sense of the law, when it provides that after twenty-four weeks of pregnancy an abortion can be performed in the interest of the mother or the fetus; until this age of pregnancy, usually fetuses cannot survive outside the mother's body, so an abortion cannot be in their interest. It follows that therapeutic abortion performed before twenty-four weeks of pregnancy is more in the interests of the pregnant woman.

We note that, unlike the Criminal Code of 1968, the new Criminal Code does not refer to the situation when therapeutic abortion is done without the consent of the pregnant woman, because she was unable to express their will. We believe that the legislator considered that such a provision would be superfluous, since it is provided without any distinction that abortion is not a crime when performed for therapeutic reasons. We believe that paragraph 6 of article 201 of the new Criminal Code refers to the assumption that there is at least one circumstance that would attract the illegality of abortion, including the lack of woman's consent. In addition, we believe that when abortion is required for the interest of the fetus, the will of the mother who oppose abortion will no longer have any meaning; otherwise, the right of the mother to decide keeping the pregnancy would harm the interest of the fetus and could even lead to a result opposite to that which motivates the mother to keep the pregnancy.

In our opinion, the existence of so many controversies about abortion stems from the fact that pregnancy is a situation that is not found in any other field of human existence. The failure in using the criterion of analogy, as well as the inability to intellectually cleave the entity represented by the mother and fetus, all make that, in what concerns abortion, there are more questions than answers.

Conclusions

In this context, we appreciate that the new Criminal Code has attempted to resolve and in some respects even has managed to clarify issues that have caused long debates in the theory and practice on abortion.

Thus, we believe that the expectations on abortion in Romania are under good auspices, since the legislator has expressed interest to solve the problems which have long been unsolved. In addition to the issues that we have highlighted previously, we emphasize that the new Criminal Code includes an offence completely new for our law, the offense of Injury of the fetus (art. 202 of the new Criminal Code), which criminalises the acts which affect the fetus, when, as a result of those acts, it results bodily injuries or even the death of the child. The offense of Injury of the fetus refers both to acts committed during pregnancy and to acts committed during birth, thus providing a juridical meaning to the acts committed whilst the fetus is not completely separated from the mother's body. We appreciate the innovations of the new Criminal Code, but, at the same time, we notice that there are problems in interpreting the meaning of law provisions. For example, it is hard to determine the meaning of the phrase "during birth", at which the article 202 of the new Criminal Code refers. Also, we notice that the existence of the offense of Injury of the fetus depends, essentially, on the effects on the child after birth. If the fetus is injured, but after birth the consequences of the injuries can no longer be observed, the violent actions committed towards the fetus are not considered offences. Therefore, the offense of Injuring Injury of the fetus does not offer protection to the fetus itself, since the existence of the offence depends on the existence of consequences after birth. Beyond these problems, which still persist in the regulation of abortion, we believe it is auspicious that legislation has finally clarified certain issues concerning abortion. We are confident that, in future, doctrine and legislation will improve the way abortion is conceptualized and legalized.

We hope that Romania will learn from its legislative evolution, will go beyond its hesitations and will create an optimum legal regime for issues related to abortion.

References


[13] For further references, see Ancuța Elena Franț, „Obiectul juridic al infracțiunii de provocare ilegală a avortului”, in *Analele Științifice ale Universității „Alexandru Ioan Cuza” din Iași, Științe Juridice series*, nr. 1/2012, pp. 21-37.


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