

Legality of abortion procedure in Romania

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Abstract

The legality of the abortion procedure has been a controversial issue over time in all states of the world. These specific controversies have existed, exist and will continue to exist because we do not have a solution that is unanimously accepted by the international community that is generally valid. The abortion procedure involves aspects of legal, medical, religious, moral, democratic and criminal law specific to each regime, some countries not incriminating the acts by which abortion is performed, while others incriminate the same acts, performed in different forms. In our legislation, abortion has been incriminated since the appearance of the Penal Code of Romania, in 1864, continued in the Penal Code in 1936, followed by that of 1969, starting, for a period (from December 1989 to 1996), to no longer be incriminated under any circumstances. In this paper, the focus is on the most relevant modalities of regulation for this procedure, namely the criminal law rules into force in the second half of the communist regime and those currently into force, highlighting the positive aspects brought by the new Penal Code.

Keywords: abortion, termination of pregnancy, legal regulation, criminal liability

Submission date:
15.12.2021
Acceptance date:
19.12.2021

Legalitatea procedurii avortului în România

Suggested citation for this article: Truichici A, Neagu L, Marian-Christian I, Bohilțea RE, Gheorghe CM, Mitran M, Mihai BM, Vlădăreanu R. Legality of abortion procedure in Romania. *Ginecologia.ro*. 2021;34(4):76-78.

Rezumat

Legalitatea procedurii avortului a fost o chestiune controversată de-a lungul timpului în toate statele lumii. Aceste controverse specifice au existat, există și vor continua să existe pentru că nu există o soluție unanim acceptată de către comunitatea internațională care să fie general valabilă. Procedura avortului implică aspecte de natură juridică, medicală, religioasă, morală, demoratică și de politică penală specifică fiecărui regim în parte, unele țări neincrimând faptele prin care se realizează avortul, în timp ce altele incriminează exact aceleași fapt sub diferite forme de săvârșire. În legislația noastră, avortul a fost incriminat începând cu Codul penal românesc din 1864, s-a continuat în Codul penal din 1936, urmat de cel din 1969, ajungându-se ca pentru o perioadă de timp (din decembrie 1989 și până în 1996) să nu mai fie incriminat avortul sub nicio variantă. În lucrarea de față ne vom concentra asupra celor mai relevante modalități de reglementare pentru această procedură, mai exact asupra normelor de drept penal aflate în vigoare în a doua jumătate a regimului comunist și cele aflate în vigoare în prezent, cu evidențierea aspectelor pozitive aduse de noul Cod penal.

Cuvinte-cheie: avort, întreruperea cursului sarcinii, reglementare legală, răspundere penală după intervenția chirurgicală pentru endometrioza

1. General aspects regarding the abortion procedure

The abortion procedure has undergone changes over time in terms of legal regulations. There was a period when the procedure was virtually prohibited by the communist regime, due to the very restrictive conditions imposed by Ordinance No. 771/1966.

In doctrine, the question has arisen as to whether the pregnant woman can dispose of the fruit of conception and terminate the pregnancy or should give birth to the conceived child⁽¹⁾.

As it happened in most states, the vision for this medical procedure has evolved and developed over time, the abortion now being legally allowed under certain conditions and with limits strictly provided by law, but much easier to fulfill and more centered on current realities than the old regulation.

If these limits are violated, the criminal liability of the person who is guilty of violating the relevant legal norms is reached.

In order to create a comprehensive vision on the contemporary evolution of the institution, we performed an

analysis of the existing regulations in the Penal Code of 1968, reported by Ordinance no. 771/1966, compared to the regulation in the current Penal Code, that came into force on February 1, 2014.

These penal sanction norms have a sad history in Romania, because the old regime wanted to artificially increase the birth rate and increase the balance between birth rate and mortality through criminal law measures⁽²⁾.

The birth problems faced by the former communist states of Eastern Europe, including our country, are particularly well known. However, this should not scare us ab initio. There are also so-called developed, modern, Western states that face similar problems. For example, France had a real problem with the balance between births and deaths at the end of the last century.

The main effect produced by Ordinance No. 771/1966 led to the loss of hundreds, maybe even thousands of lives of women who tried to have abortions in primitive, improvised ways, because the medical ones could not be used⁽²⁾, but these serious irregularities were corrected with the change of the political regime that has led to

changes in the field of law, in the criminal law of the state regarding abortion.

2. Regulation of the medical procedure in the penal code

2.1. The provisions of the old Penal Code

In the old Penal Code, the regulation was called illegal provoked abortion and was included in the provisions of art. 185, which laid down certain prohibitive conditions, described in the following.

At letter a) of paragraph (1) of art. 185, abortion performed outside the medical institutions or medical cabinets authorized for this purpose is incriminated. This norm, being one of criminal law, must be interpreted restrictively and should not be extended to other similar situations. The purpose of this condition was to ensure a medical procedure in a safe environment, prepared and equipped to respond promptly and effectively to any complications that may arise, inherently, in such a complex medical procedure as abortion.

In the same paragraph, at letter b), abortion performed by a person who is not a specialized doctor is incriminated. These two rules complement each other and it is not enough for an abortion to be performed in a specialized medical institution, it must be performed by a doctor specialized in such procedures and who knows how to react and how to use the medical equipment at his disposal.

Finally, at letter c), abortion is incriminated when the age of pregnancy exceeded fourteen weeks. This time also, the legal norm must be interpreted in the light of the aforementioned, in the sense that it is not enough for a specialist doctor to proceed to provoke abortion in a specialized institution. In addition to these two *sine qua non* conditions, the pregnancy must not be very advanced, as this circumstance would almost inevitably lead to complications that would endanger the mother's life. Therefore, it can be noted that paragraph (1) considers the protection and preservation of the life, health and bodily integrity of the mother, but also of the fetus.

Paragraph (2) of the article set out a less common situation in legal practice, that of abortion performed without the consent of the pregnant woman. It is difficult to imagine such a hypothesis, but the law must be as comprehensive as possible and regulate as many hypotheses as possible that may arise in everyday reality, in order to avoid the undesirable situation of legislative gap. For example, in one case in 2002, when the woman became pregnant and her husband wanted to divorce and marry another woman, he forced his wife to terminate the pregnancy⁽²⁾.

In paragraph (3), increased penalties were provided in the event of either serious bodily injury to the pregnant woman, or the death of the pregnant woman. It goes without saying that, although the result is culpable homicide, the punishment must be appropriate to the seriousness of the violation of the law.

Next, paragraph (4) provided the obligation of the judicial body to apply, as a complementary punishment, the prohibition to continue practicing medicine.

Paragraph (5) is the one according to which the prosecution must be held accountable even though the criminal act has not been committed, this remaining at the attempt stage.

Paragraph (6), which is also the last, provides certain cases of impunity for the crime of illegal provoked abortion. In these situations, although the act exists and the specific consequence has occurred, there are legal medically justified provisions, which justify the action taken.

These cases are when:

- the aim was to preserve the life, health or integrity of the pregnant woman from a serious and imminent danger and which could not be removed otherwise (letter a) of this paragraph);
- the termination of pregnancy was imposed for therapeutic reasons (letter b) of this paragraph);
- the pregnant woman was unable to express her will, and the termination of the pregnancy was required for therapeutic reasons (letter c of this paragraph).

Of course, these causes of impunity must be corroborated with the previous regulations provided in paragraph (1), respectively paragraph (2), accordingly.

2.2. The provisions of the current Penal Code

Currently, the "marginal" crime has been changed from *illegal provoked abortion* to *termination of pregnancy*⁽³⁾. Also, the position that this crime occupies in all the crimes provided in the Penal Code has been modified, being included at the beginning of the special part, in Title I. Crimes against the person, Chapter IV. Assaults of the unborn child, in article 201.

It is observed that the current criminal law of Romania emphasizes the protection of life, health and bodily integrity more than it did in the past, when the emphasis was on the protection of the state and its interests. The special legal object in the case of this crime is represented by the social relations of defense of the life, health and bodily integrity of the woman, against the acts of illegal termination of pregnancy, intrauterine development of the product of conception and birth insurance⁽¹⁾.

This crime protects a form of intrauterine life, the fetus cannot be protected through crimes against life, in which the passive subject must be a living person⁽⁴⁾.

At first glance, the crime of termination of pregnancy is practically the crime of illegally provoked abortion in the previous Penal Code, but if we look in depth at both the crimes themselves and the way the two penal codes were conceived, we notice particularities specific to the political regimes in which the legal texts have been adopted and entered into force.

In the following, only the novelty aspects introduced by the current incrimination will be highlighted, without insisting on the elements taken from the old regulation.

From our point of view, the current text brings improvements, in the sense that it defines the specialty of the doctor who can resort to performing this procedure, in the sense that only a doctor specializing in obstetrics-gynecology is protected from possible criminal repercussions. Moreover, it was added that the doctor should have the right to practice his medical specialty, which

did not exist in the old regulation, but so necessary to be clarified by the legislator.

Another change is that all cases of impunity have been brought together in a single hypothesis, which has become a cause for exclusion from the crime⁽⁴⁾. It is not clear whether this change was necessary, but this was the option that the regulation was aimed at and should be treated as such. The law has not been, is not and will never be perfect, but the legislator must always strive to achieve this goal.

Finally, a new improvement consists in the introduction of a new paragraph – (7), which expressly provides that a pregnant woman who is terminating her pregnancy shall not be punished. The new regulation definitively resolved certain contrary doctrinal opinions regarding the active subject of the crime by including a new special cause of impunity. In this way, the possibility of different solutions in practice at the level of judicial bodies was also removed.

Moreover, a preliminary conclusion that can be drawn from the current regulation is that the procedure of abortion can be performed in a specialized unit, by a specialist doctor, only when the pregnancy has less than 14 weeks, and that there are also exceptional situations, based on medical reasons (in this sense being article 201, paragraph (6) sentence I of the Penal Code), in which the legal reference period is extended to 24 weeks or more, when a superior interest of the pregnant woman or the fetus is taken into account (in this sense being article 201, paragraph (6), sentence II of the Penal Code), in which case the term is no longer provided.

Conclusions

In this paper we aimed to highlight the evolution of criminal law in the medical abortion procedure, an objective that, in our opinion, we have highlighted in a way that is easy to understand for the general public.

In judicial practice, it has been concluded that the abortion procedure is imperative to be provided by legal

norms, as the decriminalization of all the specific facts of this medical procedure may lead to the phenomenon we have referred to here before, that of legislative gap.

In order to fill this legislative gap, the judicial body has been forced to sanction acts of abortion performed in noncompliant conditions, for example outside the approved medical institutions, and/or by persons who do not have specialized training to perform a complex medical procedure such as abortion, between 1989 and 1996, by classifying these acts as other crimes. Thus, people were found guilty of bodily injury or even the death of pregnant women for crimes such as bodily injury or culpable homicide, crimes punished by much more lenient punishments compared to those provided by the crime of termination of pregnancy.

Romania has experienced both extremes, since Ordinance No. 770/1966 that forbade abortions (indeed, this situation was corrected immediately by Ordinance No. 771/1966) to the total decriminalization of abortions by Ordinance No. 1 of December 26, 1989, a situation that persisted until the adoption of Law No. 140/1996 that again criminalized abortion.

We believe that, at present, the regulations into force are largely in line with current realities in society and that they establish a clear and unambiguous regulatory framework for all persons involved in this medical procedure. ■

Conflicts of interests: The authors declare no conflict of interests.

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