

# THE CRIMINAL PROTECTION OF THE FETUS AND A NEWBORN CHILD IN THE ACTUAL AND NEW CRIMINAL CODE

LAVINIA MIHAELA VLĂDILĂ\*

## Abstract

*The article presents the way in which is achieved the criminal protection of the fetus and the newborn child, especially using the means of incriminating abortion and infanticide. The study emphasizes the lack of real protection for the intrauterine life, as a promise for life, which is trying to be remedied, in accordance with other European legislations, through the new Criminal Code.*

**Keywords:** *abortion, infanticide, fetus, newborn child, criminal protection.*

## 1. Introduction

In the actual Criminal Code a very important place is taken by the protection of the life of the person incriminating the offences against life. But this protection is available only for already born human beings, namely for a person. If the Civil Law offers protection to the child, when we are talking about his rights from the moment of his birth, in the Criminal Code this protection is partial. The wording and placement of the two offences which mainly insure the criminal protection of the fetus and the newborn child, namely abortion and infanticide, reveals an antiquated and limited vision of the Romanian legislator. The new Criminal Code, in line with other European legislations, has managed to expose social and legal reality which cannot be neglected: life begins and must be protected from the very moment of conception. Synchronizing, in terms of protection and rights, the civil and criminal legislations, a unique vision is created. We used a few bibliographic sources. There are not many comments about the new Criminal Code, while there are many analysis and interpretations. However, such a synthetic analysis on this subject has not yet been made, I allowed myself to bring an original contribution to the comparative study of the actual regulation in this area.

## 2. Criminal protection of the fetus and the newborn child in the actual Criminal Code

**2.1. The criminal protection of the newborn child.** Starting from the constitutional provision of Art 22, Para 1, we notice that the fundamental law protects the right to life of every person, as well as the person's right to physic and psychic integrity. In accordance with these provisions, the actual Criminal Code protects the person, and almost not at all the fetus. Distinguishing between person and fetus, it is proper to define the two terms. Thus, by *person* we understand, criminally, every human being, regardless of his/her age, since the moment of his/her birth and till the moment of his/her death. *Person* shall also include the newborns, babies, children, teenagers, young men, grownups or elders. Some differentiations of this term can criminally create differences of legal classification, as that of the newborn. The term of *fetus*<sup>1</sup> represents the result of conception between two human beings of opposite sex starting with the eight week of pregnancy,

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\* Lecturer, Ph.D., Faculty of Law and Political-Social Sciences, "Valahia" University, Târgoviște (e-mail: laviniavladila@yahoo.com).

<sup>1</sup> Medically, the stages of evolution of the result of conception are: immediately after fecundation it is formed the **zygote**, after the cell division the zygote transforms itself in **blastocoels**, beginning the cell differentiation process which creates the **embryo** which, in the final stage of evolution, starting in the eight month till birth, creates the **fetus**.

when the cell differentiation process has been completed and the result of conception begins to take a specific form of the human species.

A closely look over the criminal legislation at this moment reveals the fact that only the person, in his/her different stages of evolution is under protection.

Thus, starting from the baby, child and until the elder, regardless of sex, the person's life is protected against any direct aggression committed with purpose, firstly by incriminating murder, a complex incrimination stated by three provisions, from Art 174 to Art 176<sup>2</sup>. This crime was completed with other offences against life, whose perpetration affects this fundamental attribute, with the difference that in their case, the immediate consequence of the perpetration is the result of facts committed either involuntary, as the involuntary manslaughter – Art 179 Criminal Code – or with prater intention, as in the case of assault or other violence causing death – Art 183 Criminal Code. Also, the Romanian legislator decided to incriminate the offence of determining or easing suicide – Art 179 Criminal Code, thus creating a full protection of the ways in which the life could cease, either without the person's consent, or being encouraged, instigated or even supported by other persons to take his own life.

These offences are not the only ones attempting to human life. The Romanian legislator incriminated in the special part of the Code other offences whose immediate consequence is the victim's death, offences which mainly affects other social relations, such as the security of the state<sup>3</sup>, freedom of the person<sup>4</sup>, sexual freedom of choice<sup>5</sup>, patrimony<sup>6</sup>, justice<sup>7</sup>, safety on railroads<sup>8</sup>, the established regime for certain activities stated by the law<sup>9</sup>, public health<sup>10</sup>, other social cohabitation relations<sup>11</sup>, peace or humankind as the inheritance of humanity<sup>12</sup>.

But, as stated above, all these offences refer to the criminal protection of the person. Analyzing a subcategory of the person, the newborn child has a certain protection, for the moment insufficient in the actual Criminal Code. Thus, if it is about killing right after birth of a newborn child, namely still wearing the marks of birth, the offence is classified as infanticide<sup>13</sup> if it is committed by the mother being in a disorder caused by birth, and murder if it is committed by any other person, including by family (father, grandparents, brother, mother if the offence overcomes the previously mentioned conditions)<sup>14</sup>.

Regarding his health state or physical or psychical integrity, currently, the Criminal Code does not state any difference of criminal protection based on the age of the person. Though were

<sup>2</sup> Art 174 C Code incriminates the simple murder, Art 175 C Code incriminates the first degree murder and Art 176 C Code incriminates aggravated murder. The Romanian legislation did not keep the term of assassination, as in the case of other criminal legislations, for example the French one.

<sup>3</sup> Attempt threatening security of the state – Art 160 C Code, attempt against a collectivity – Art 161 C Code and offences against the representative of a foreign state – Art 171 C Code.

<sup>4</sup> Illegal deprivation of freedom – Art 189 Para 6 C Code.

<sup>5</sup> Rape – Art 197 Para 3 C Code, sexual act with an infant – Art 198 Para 6 C Code and sexual perversions – Art 201 Para 5 C Code.

<sup>6</sup> Theft – Art 211 Para 3 and piracy – Art 212 Para 3 of the C Code.

<sup>7</sup> Torture – Art 267<sup>1</sup> Para 3 of the Criminal Code.

<sup>8</sup> Failure to fulfill professional obligations or poor service of negligence – Art 273 Para 2 C Code, intentioned failure to fulfill professional obligations or poor services – Art 274 Para 2 C Code, leaving working post and presence at work being drunk – Art 275 Para 2 C Code, destruction and false signals – Art 276 Para 3-5 C Code.

<sup>9</sup> Non-compliance with the nuclear and other radioactive materials – Art 279<sup>1</sup> Para 5-7 C Code and non-compliance with the explosive materials regime – Art 280<sup>1</sup> Para 5-7 C Code.

<sup>10</sup> Food or other products forgery – Art 313, Para 3 and 5 C Code.

<sup>11</sup> Scuffle – Art 322 Para 3 C Code.

<sup>12</sup> Genocide – Art 357 C Code and inhuman treatments – Art 358 C Code.

<sup>13</sup> Infanticide is stated by Art 177 C Code.

<sup>14</sup> Aggravated murder – Art 175 Para 1 Point c) and d) C Code, against a relative and taking advantage of her helplessness condition to defend.

positively modified in 2000 by the Law 197/2000<sup>15</sup>, introducing the members of the family<sup>16</sup> as active and passive subjects of assault, other violence<sup>17</sup> or personal injury<sup>18</sup>, these offences does not state a qualified form whose main objective is the protection of the infant against physical or psychical abuses committed by persons other than his family or those who are in charged with his protection.

Criminal legislation in its whole states a partial and a very unsatisfactory protection of health or physical or psychical integrity based on the person's age. If, for instance, the age was considered in offences against freedom or sexual life<sup>19</sup> of the person, creating a special protection for infants, in the case of offences against body and health integrity the legislator did not manifested such a wish, which from our point of view represents a deficiency, which should be immediately corrected by a new modification of the Criminal Code. In fact, the Criminal Code in its special part only states two offences which indirectly protects the health and physical or psychical integrity of the infant, and, thus, of the newborn child. We are talking about the abandon of domicile<sup>20</sup> and the offence of bad treatments applied to infant<sup>21</sup>. The special legal object of these two offences is represented by family relations, whose normal development requires the protection of the normal development of the infant<sup>22</sup>, not the protection of infant or newborn child's health or physical or psychical integrity. If the newborn child, still wearing the marks of birth is hit by his mother being in a disorder caused by birth, right after this moment, with the intention to kill, but the result does not occur, her offence represents attempt of infanticide, not yet sanctioned, which could be re-qualified as hitting or other violence, body injury or serious body injury, the first two of them in qualified circumstances over a family member<sup>23</sup> or in simple circumstances, unless it is proven that the infant was living or household with his mother. The last circumstance can sometimes be less probable since the mother, right after birth intends to definitively get rid of the newborn, causing his death. The introduction of the active and passive subjects, namely the family members, about whom we know that are those relatives living and house holding with the offender, can create difficulties in the establishment of a real degree of the social danger of the offence. It is true that at the introduction of this term, the legislator wanted to separately incriminate family violence, but family relations are endangered regarding children even if the parent no longer live together with them, and not only in the limited circumstance of living and house holding together.

Outside infanticide, if the newborn child is physically harmed by the father or other relatives<sup>24</sup>, the incriminatory solution chosen by the legislator is pretty devious. We shall have, according to the Decision No 37/2008<sup>25</sup> of the High Court of Cassation and Justice, an ideal contest

<sup>15</sup> Law No 197/amending and supplementing some provisions of the Criminal Code was published in the Official Gazette No 568/15.11.2000.

<sup>16</sup> For the definition of the term of *family member* see Art 149<sup>1</sup> C Code .

<sup>17</sup> Hitting and other violence – Art 180 C Code.

<sup>18</sup> Personal injury – Art 181 C Code.

<sup>19</sup> We refer here to the offence of aggravated illegal deprivation of freedom – Art 189 Para 2 C Code, to aggravated rape – Art 197 Para 2, Point b, b<sup>1</sup>, Para 3, the offence of sexual intercourse with a minor – Art 198 C Code, the offence of seducing – Art 199 C Code, to the offence of aggravated sexual perversion – Art 201 Para 2-5 C Code, sexual corruption – Art 202 C Code.

<sup>20</sup> Abandonment of domicile – Art 305 Para 1 Point a) C Code.

<sup>21</sup> Bad treatment of the infant – Art 306 C Code.

<sup>22</sup> Tudorel Toader, *Drept penal român. Partea specială*, 4th Edition, Hamangiu Publishing-house, Bucharest, 2009, pp. 392-393 and 398. Alexandru Boroî, *Drept penal. Partea specială*, C.H. Beck Publishing-house, Bucharest, 2006, pp. 582 and 586.

<sup>23</sup> The offence of aggravated hitting and other violence – Art 180 Para 1<sup>1</sup> and Para 2<sup>1</sup> C Code, qualified body injury offence – Art 181 Para 1<sup>1</sup> C Code and aggravated body injury offence – Art 182 C Code.

<sup>24</sup> The term *close relative*, in its criminal sense, is defined by Art 149 C Code.

<sup>25</sup> Decision No 27/2008 stated in an appeal for the law by the High Court of Cassation and Justice, published in the Official Gazette No 177/23.03.2009.

of offences between hitting and other violence, body injury or serious body injury and bad treatments of children. But the offence of bad treatments supposes a repetition to realize that was seriously endangered the physical, intellectual or moral development of the child<sup>26</sup>. As well as infanticide, the application framework of this offence is limited because of the active subjects, who can only be the parents, legal guardians or the educators of the child. But if the infant or the newborn child is injured by the medical staff at birth or subsequent, as result of their negligence or by any other person not related with his education or who does not have a legal obligation of maintenance, then the newborn child is not properly protected, nor the infant is completely protected against abuses<sup>27</sup>. Let us not forget about the situations emphasized by the mass-media showing the lack of interest and illegal negligence of the medical staff regarding the protection of newborns in maternity right after birth.

This leads to the conclusion that infants, as well as newborns can be and are harmed beyond the family or educational relations' framework, for which situation the Criminal Code did not inserted a proper protection.

Actually, what we are suggesting is either the creation of a new text of law which must join the regulations regarding offences against physical or psychical integrity or the creation of a separate title or chapter which must criminally and legally completely protect the newborns and the infants, from the view of this fundamental value, namely health and physical and psychical integrity.

The noted issues were not completely remedied by the new Criminal Code<sup>28</sup>.

Looking for solutions to such a protection of the child we noticed that not even the Law entirely dedicated to him, Law No 272/2004<sup>29</sup>, does not state any kind of offences which criminalize hitting or body injuring the newborn child or the infant, this law stating only civil penalties. Though it states in its Art 2 the principle of the superior interest of the child, and though it states in Art 90 that "*physical penalties of any kind are forbidden, as well as the deprivation of the child of his rights protecting life, physical, mental, spiritual, moral or social development, body integrity, physical or psychical integrity both in family or in any institution charged with the protection, care and education of children*", Law No 272/2002 does not also state the precise and criminal mechanisms to insure the compliance with this legal obligation. This law is a civil one focused on the family protection of the child, on finding solutions to solve the situations in which the infant is unprotected, or when he has committed different criminal offences, not being liable, because is under aged.

Therefore, we have one more reason, not to leave such an area as sensitive to chance and to take attitude towards the violence against infants and the situations in which newborn children are physical or psychical injured, either by negligence, by intention or by prater intention.

**2.2. Regarding the criminal protection of the fetus,** in the actual form, the Criminal Code states even fewer elements for his protection. Promoting a simple thinking, tributary to some philosophical and too materialistic views, the actual Code excluded or did not even questioned the

<sup>26</sup> Tudorel Toader, *quoted work*, p. 399. Alexandru Boroi, *quoted work*, p. 587.

<sup>27</sup> Of course that the actual Criminal Code did not left unprotected such a situation. The actions of some medical staff, as a consequence of professional negligence, have lead, or precisely has as immediate result the death of the newborn child or his body injury, are qualified as murder by negligence in aggravated form – Art 178 Para 2 C Code, and in the second hypothesis have as result the body injury by negligence, with the condition that this offence to have resulted in an injury requiring medical care for more than 10 days – Art 184 Para 1-4<sup>1</sup> C Code. But in this latter case, now we are thinking about the newborn children injured by medical staff, of whom some have remained with lifelong after-effects, if it is sufficient the penalty of imprisonment for 3 months up to 2 years of fine – Art 184 Para 1-3, or even imprisonment for 6 months up to 3 years? Let us not forget that these newborn children are the future and it is the way we raise, protect and care them that will make them grownups. On the other hand, the failures of the medical system are not negligible, being here in a vicious circle.

<sup>28</sup> The new Criminal Code – Art 286/2009, published in the Official Gazette No 510/24.07.2009.

<sup>29</sup> Law No 272/2004 on the protection and promotion of the rights of children, published in the Official Gazette No 557/23.06.2004.

issue of intrauterine life and the way in which the development of the fetus could later influence life and physical and psychical development of the future child.

The fetus, or precisely the result of the conception in its various stages of development, does not explicitly appear as the subject of criminal protection in any text of the Criminal Code. There are, though, some regulations which indirectly protect it. First is the incrimination of abortion<sup>30</sup>. Except the fact that the *special legal object* of the typical offence of abortion is represented by the social relations regarding the protection of the health and body integrity of the woman against illegal termination of pregnancy, and not the protection of intrauterine life of the fetus. In other words, what the offence of abortion protects are not those social relations who protect the result of conception, for it to benefit of a normal development insuring his birth and the manifestation as a newborn child, but those social relations allowing a pregnant woman to have a normal physical and psychical health subsequent to an improper abortion which could have endangered her health, procreation capacity or even her life. Such a view places in foreground an already existing life, that of a pregnant woman, towards that of the fetus, which is considered to be a promised life, thus placed in the background. Although the protection of life, physical and psychical integrity and health of a pregnant woman is undoubtedly important, same is the criminal legal protection of the fetus, situation remedied by the regulations of the new Criminal Code.

The other criminal provisions, which indirectly protects the fetus are those related to the aggravation of murder if the victim is a pregnant woman<sup>31</sup> and those related to the aggravated form of body injury, committed with intention or prater intention and has as result the abortion of the pregnant woman<sup>32</sup>. That is about all that the actual Criminal Code states in this matter. Unsatisfactory.

### 3. The criminal protection of the fetus and the newborn child in the new Criminal Code

The new Criminal Code brings important changes of view, writing and regulations. Its study from the perspective of the analyzed area offers the satisfaction of a wealth of texts and the belief that a modern view shines through its provisions, view which could not leave outside life, and thus outside its criminal protection, the result of conception. Actually, the new code brings to the fore what the actual regulation fatally ignores – the fetus. If regarding the newborn child the new code amends the regulations on body injuring him, the fetus is for the first time protected in the Romania legislation, partially, when it is a sure hope of life, thus being made important steps for recognizing it some rights.

#### 3.1. The criminal protection of the newborn child.

As we have mentioned in the preamble of this paper, the newborn child is not totally ignored. One of our previous observations, considered by the legislator, regards harming the newborn by the mother, right after birth, without the offence being considered as infanticide, eventually as a simple, or qualified, form of general offences resulting in the body and health injury of the newborn.

Specifically, the new Criminal Code by its Art 200, Murder or body injury of the newborn child committed by the mother, incriminates both the situation in which the mother intentionally or prater intentionally causes the death of her child, and when, after birth she causes him a body or health injury.

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<sup>30</sup> The offence of illegally inducing abortion – Art 185 C Code.

<sup>31</sup> Art 176 Para 1 point e) C Code states that the murder of a pregnant woman is first degree murder.

<sup>32</sup> See Art 182 Para 2 C Code.

However, the innovations brought by this text are not neglected. Thus, the actual offence of infanticide disappears, the Code using a more complex phrase designed to cover also the extenuating version of the offence (*murder or injury caused to the newborn child by the mother*).

In terms of the already existing conditions, modifications appear regarding the special legal object. If in the actual regulation infanticide is an offence against life, it becomes in the new Code an offence against a family member, its legal object becoming complex, injuring both family relationships, as main legal object, as well as relations of life, in the simple form, or life, health and body integrity in the extenuated form, as secondary legal object.

Regarding the offenders, they are the same, mentioning that from the very name of the offence the active subject, namely *the mother*, is emphasized, fact that makes us believe that such an offence is considered by the legislator to be less aggravated only from the perspective of the active subject and his condition when committing the offence.

From the material element's point of view, the new text has significant differences. Thus, it is precisely delimited the time in which the offence may occur for it to be qualified according to Art 200; this time, exactly, this period, is an interval of 24 hours, starting from the moment of birth, comparable to the actual situation in which the phrase "*immediate after birth*" had to be amended by the interpretation of the doctrine and the jurisprudence, in the meaning that the newborn child is considered murdered immediate after birth if he still carries the marks of birth. Of course that in the case of a suspicious death of the newborn child is the responsibility of the forensic expert to determine the exact date and time of birth, where possible, the doubt must benefit to the offender. Likewise, if in the current regulation the mother must be in a disorder mandatory caused by birth, for her offence to be infanticide, the new Code removes this wording, preferring one with a larger content, namely "*physical disorder condition*". We notice that this *physical disorder condition* refers to all kinds of disorders, regardless of the cause, allowing a broader specification of this offence. The disorder can be caused by birth, obviously, but it can be also caused by an unstable psychological condition of the mother, who, for instance, being abandoned by the husband or lover, living in harsh conditions or subjected to public opprobrium, could resort to such a thoughtless gesture. The new regulation also includes, as we can see, those past and present situations when the mother, though she is disordered, her condition was not the result of birth, but of other causes, as the above-mentioned, situations determining the qualification of first degree murder<sup>33</sup>. The mental disorder must be established by medical documents after a psychiatric examination.

From the subjective point of view, the offence is intended, in both its ways, the intellectual factor being affected, in the meaning of the existence of a reduced capacity of discernment than the normal one of the mother, caused by her disorder condition. We believe that there may be some legal qualification issues when the offence is committed with indirect intention, because it could be easily mistaken with prater intention, guilt specific to the mitigated form of the offence.

Regarding the applicable sanction it is still prison, but with lower limits, from 2-7 years in the actual Code to 1-5 years in the new one.

The offence is mitigated, having in its turn several means of committing, an absolute novelty in the area. Among the first means of committing is hitting, other violence or body injury<sup>34</sup> of the newborn child by the mother, in the same conditions as the classic form, namely right after birth, but no longer than 24 hours, the mother being in a psychological disorder condition. The text including a standard reference is amended by Art 193-194 of the new Criminal Code, which incriminates hitting, other violence and body injury, texts which are different from the actual one. If the immediate result of the offence is health or body injury of the newborn child, then the offence is intentioned, as well as in the previous regulation.

<sup>33</sup> According to Art 175 Para 1 Line c) and d) of the Criminal Code.

<sup>34</sup> The new Criminal Code reduces the offences of injuring committed with intention from 3 to 2, aggravated body injury being incriminated both in the aggravated form of the offence of injuring and other violence – Art 193 Para 2 C Code, as well as in the body injuring offence – Art 194 Para 1 Point b) C Code.

The second mean of committing refers to the situation in which the result of the injuries caused by the mother, in the previously shown situations, is the death of the newborn child<sup>35</sup>. We notice that as well as in the previous phrase, the immediate consequence is the death of the victim, but the essential difference is in the form of guilt that the act is committed, talking here about prater intention.

The life of the newborn child is under criminal protection because it represents a fundamental value, and is incriminating by a new offence, *domestic violence* – Art 199 of the new Criminal Code, offence consisting of intentioned murder committed by any member of the family, including relatives or the mother, but committed outside the conditions stated by Art 200 of the new regulation. It is in fact the first degree murder of the husband or any relative, but which received a special regulation, in a new chapter including all kind of violence against family members<sup>36</sup>. It is also considered violence against family members when the death of a member is the result of the prater intentioned offence, namely an aggravated form of the offence of injuries causing death, inserted in this article for humanitarian provisions, as well as in the case of the previously debated Art 200.

From the perspective of the protection of health and body integrity of the newborn child, it is again achieved by a special criminal protection, the future Criminal Code stating in the same Art 197 the hypothesis in which hitting, other violence and body injuries are intentionally committed against a family member.

Otherwise, Art 199 Para 1 refers to five previous legal texts, namely Art 188, 189, 193-195, stating family violence as their aggravated form<sup>37</sup>, with the notable difference that the subjects of this offence must be family members.

We can notice that in the case of *family violence*, as well as in the case of *murder or injury against the newborn child committed by the mother*, the legislator did not understood to separately regulate the situation in which the murder or health or body injury is the result of guilt, thus applying the common law text. The special mention is the fact that in the case of intentionally committing body injury against a family member, the criminal proceedings are started ex officio, not only based on a filled complaint<sup>38</sup>.

**3.2. The criminal protection of the fetus.** Remarkable for the new Criminal Code is the fact that it introduces as a possible passive subject of some offences, the *fetus* itself. The term is explicitly used in the naming of Chapter IV *Offences against the fetus*, as well as in the marginal text of Art 202, *injuring the fetus*. The idea of offering to the fetus a special regulation was borrowed from the Spanish Criminal Code; with the difference that in the Spanish regulation, the offence of abortion is stated in a separate title, Title II – *Abortion*<sup>39</sup>, while the injuries against the fetus are found in Title IV, consisting of two articles<sup>40</sup>. But the Spanish criminal legal provisions protecting the fetus are different from the ones incriminated by the Romanian legislator. If the Spanish Criminal Code protects the fetus during the entire period of the pregnancy against any injuries against it, committed either by intention, or guilt, including medical guilt, offences which may endanger it normal development during the pregnancy and becoming a vivid and viable newborn child, the Romanian Criminal Code especially protects the fetus when it is about to be born, and only in certain circumstances during the pregnancy.

<sup>35</sup> We believe that is indirectly created a mitigated form of the offence of hitting and injuries causing death.

<sup>36</sup> The term of *family member* is broader in the new Criminal Code. The new term includes the wife/husband, ascendants, descendants, brothers and sisters and their children, as well as the persons adopted by the family, according to the law, without including the condition that they all must live and household themselves together with the offender, but also the persons who have established similar relationships to those between husbands (concubines) or between parents and children, if they cohabit.

<sup>37</sup> The special maximum of the penalty stated for each offence is increased by a quarter.

<sup>38</sup> According to Art 199 Para 2 of the new Criminal Code.

<sup>39</sup> According to Art 144-146 of the Spanish Criminal Code.

<sup>40</sup> Art 157 and 158 of the Spanish Criminal Code.

Chapter IV states two incriminatory texts: Art 201 regulating *abortion*, and Art 202 regulating *injuries against the fetus*.

The first one, *the abortion*, represents the text of the actual Art 195, which incriminates it. It is easily seen that the legislator enjoyed changing the articles' names!

Analyzing the new offence from the perspectives of the differences with the new regulation, we notice that its legal special object is totally opposite to the present one. Firstly, we appreciate that in this case, for all forms of the offence (Art 201 Para 1-3 new Criminal Code) the legal object becomes more complex. For the specific form, the main legal object is the protection of the life of the fetus and its normal development, while the secondary legal object is represented by the possible injury caused to the pregnant woman. Regarding the aggravated form stated by Para 2, the secondary legal object is represented by the social relations on the freedom to decide of the pregnant woman, and in Para 3 the secondary legal object is represented by the social relations which protect the health of the pregnant woman against a body injury or an offence against her life.

In terms of the material element, in the context of the simple form a single modification occurs, stating even more clearly the conditions for committing the offence. We are talking about Art 201 Para 1 Line b), which states that the abortion is an offence if it committed by *a doctor not specialist in obstetrics and gynecology, but has the right to practice it*, a new condition towards the regulation in force.

For the next paragraphs the text closely follows the actual regulation of Art 185 Criminal Code. A modification occurs regarding the attempt. The new text states<sup>41</sup> that the attempt is punishable only in the case of the simple form and of the qualified form stated by Para 2, namely when the abortion was produced without the pregnant woman's consent, without including here Para 3. The logical conclusion regarding this regulation is that the offence stated by Para 3 is committed with prater intention, attempt not being allowed.

Also was made a new clarification of the text regarding the punishments. In the actual code are stated as grounds for impunity the cases in which the abortion was caused to save the life, health or body integrity of the pregnant woman from a serious and imminent danger which could not be eliminated in any other way, or when the abortion is required for therapeutic reasons, even if the pregnancy exceeds 14 weeks, or when the abortion is made without the consent of the pregnant woman, being impossible for her to express her will *and* this action being required for therapeutic reasons. Stating it as situations for impunity the legislator created for the offender a delicate situation, because even if he wants to make a good deed to the pregnant woman, will not be acquitted and considered not guilty, but his action will be an offence, without being punished, ceasing only the criminal proceedings. Moreover, the first of these three situations is actually a situation for removing the penalty, namely the criminal liability<sup>42</sup>. Reverting to the new Criminal Code, it states that the action is not an offence, namely it removes the criminal liability when *the abortion is therapeutic, being made by an obstetrics and gynecology specialist, up to 24 weeks of pregnancy, or the subsequent interruption of pregnancy for therapeutic reasons, in the best interest of the mother or the fetus*. Differences are very important. The new text regulates that the action is not an offence only when it is about an abortion in any other circumstances that the ones already shown for therapeutic reasons, when the action is committed in these circumstances by the obstetrics and gynecology specialist, establishing a maximum limit of 24 weeks of the pregnancy (almost 6 month), the exceeding of this term being possible also for therapeutic reasons, considered in the interest of the mother, as well as of the fetus.

<sup>41</sup> Art 201 Para 5 in the new Criminal Code.

<sup>42</sup> Matei Basarab et al., Codul Penal comentat, 3<sup>rd</sup> Volume, Special Part, Hamangiu Publishing-house, Bucharest, 2008, p.203.



Finally, another innovation of the regulation refers to the express statement of the fact that the abortion committed by the pregnant woman is not punishable, this becoming a new reason for impunity in the future code.

*Injuring the fetus* is a new offence stated by the Romanian Criminal Code. It has a simple form<sup>43</sup>, two aggravated forms<sup>44</sup> and four mitigated forms<sup>45</sup>, as well as a clause for removing the criminal liability for the offence<sup>46</sup> and a clause for impunity<sup>47</sup>.

The special legal object of this offence exclusively refers to the criminal protection of the fetus during pregnancy against any injuries which could affect its normal development towards the superior phase as a newborn child or could even lead to its death during pregnancy or after the birth.

Though are not express stated, in our opinion the active subjects of the simple and the first aggravated form of the offence – Art 202 Para 1 and 2 of the new Criminal Code, can only be the medical staff assisting the birth, because it seems hard to believe that today, the birth could occur without medical assistance. In the aggravated form stated by Art 202 Para 3, the offence can be committed by any other person, because as well as in the case of the mitigated form stated by Art 202 Para 4, the offence can only be committed by the mother. Regarding the passive subject, it is obviously the fetus, being a qualified passive subject.

We objectively notice that for all four forms the legislator added to the material element a certain period for the offence, conditioning the existence of the offence by it being committed in that time.

The simple form of the offence consists of the injury against the fetus *during birth* with the condition that it encumbers the manifestation of the extra uterine life. This assumes that, as a result of the injuries against the fetus during birth, it is born dead, not leading to a normal life, that of a newborn child.

The second form of the offence consists of injuring the fetus during birth, but in this case the child will be born, but as a result of the injuries he suffers a body injury (this is the mitigated form), or may subsequently die (the aggravated form). The difference in this latter case is that in the first case the child is not born, the fetus dying during birth, while in the second case the fetus is born, it becomes a newborn child, but subsequently dies. The legislator does not state a specific time for the child to live, he could live for from a few minutes, days, weeks or even months, but the immediate consequence, his death, occurs as result of the injuries caused during birth.

For the third aggravated form, a body injury of the fetus is produced, but this time *during birth*, namely starting from the 8<sup>th</sup> week of pregnancy until the beginning of birth, when the result of the conception is called a fetus, and as a consequence of this injury the future newborn child is harmed or dies, subsequent to the birth because of these injuries. If the fetus dies because of the body injuries occurred during birth, the offence will legally be considered as the offence of body injury if intentional – Art 194 Para 1 Point d) of the new Criminal Code, and as negligent injury – Art 196 Para 2 of the new Criminal Code.

The last of the forms refers to the situation in which the mother injures the fetus during birth, for this situation, the text adding a second condition regarding the mother, namely that she must be in a psychical disorder. This new regulation shall end the doctrinal dispute, according to which the murder of the fetus<sup>48</sup> during birth by the mother psychically disordered because of the birth is not considered to be infanticide, but it is qualified by certain doctrinaires as abortion (a more realistic

<sup>43</sup> Art 202 Para 1 of the new Criminal Code.

<sup>44</sup> Art 202 Para 2 and 3 of the new Criminal Code, when the death of the child occurred.

<sup>45</sup> Art 202 Para 2, 3, 4 and 5 of the new Criminal Code, when the physical injury of the child was caused by any person, when the physical injury was caused by the mother or when the previous actions were committed by misconduct.

<sup>46</sup> Art 202 Para 6 of the new Criminal Code.

<sup>47</sup> Art 202 Para 7 of the new Criminal Code.

<sup>48</sup> For the moment, the injury of the fetus during birth is not punished.

solution, because we are talking about a fetus, not a child-person)<sup>49</sup>, while others legally consider the action as first degree murder<sup>50</sup>.

Regarding the subjective side, the offence is committed with all its elements of guilt. Thus, mainly it is intentioned. According to Art 202 Para 5 of the new Criminal Code, the offences stated in the previous paragraphs can also be committed of negligence, then the limits of punishment being halved. The perpetration of this offence of negligence is very possible during the medical act or in the case of some accidents to which the pregnant woman is a victim. The offence is committed with prater intention when as a result of the injuries against the fetus, either during pregnancy, or during birth the child dies.

As stated at the beginning, the new regulation introduces a new clause of removing the criminal liability of the offence. According to Art 202 Para 6, the offences stated by Para 1-3, so when are intentionally committed are not an offence if are committed by *a doctor or a person authorized to participate at the birth* (midwife or nurse) *or to monitor the pregnancy, it was committed during the medical act, following medical specific procedures made in the interest of the pregnant woman or of the fetus, as a consequence of the risk inherent to the practice of medicine*. We consider that the wording of this removing clause of the criminal liability of the offence can raise contradictory solutions, remaining to the judge to decide situations as *compliance with the procedures specific to the profession, the interest of the pregnant woman or the fetus or the risk inherent to the medical act*.

The last element is represented by the fact that if the pregnant woman injures her fetus during pregnancy, the offence is not punishable, the situation being impunity<sup>51</sup>.

#### 4. Conclusions

The actual Criminal Code has served the society for over 40 years and continues to do it with syncope and lacks inherent to a more rapid human evolution than the legislative one. In the area of offences against life, health and body integrity, except tightening or changing penalties, among the most important modifications, and that only after 1989, were those regarding the introduction of new qualified active or passive subjects, as well as the introduction of the aggravated forms of *family violence*. Criminological proven as a widespread plague, not only in our country, but even at the European and world level, family violence has found in the new Code a more faire incrimination, though it could be easily improved. The existence of a separate chapter called *Offences against family members* is an example that the Romanian legislator has begun to consider and adapt to the situations generated in society by this offence. Moreover, it understood that in order to create a healthy society, from all perspectives, an important aspect is the protection of the fetus against any injuries or hurting, regarding which numerous psychiatric and infantile psychology studies which have emphasized that it depends the normal psychic development and health of the future child. For that it was inserted in the new Criminal Code a chapter called *Aggressions against the fetus*, incriminating offences in order to protect this hope of life, especially at birth, and in special conditions, during pregnancy. Such regulations can only enjoy us and give us hopes that the entire society and the medical act of bringing a child to the world shall be unfolded with a greater responsibility and kindness, both for the pregnant woman, who represents the archetype of motherhood, and for the fetus.

<sup>49</sup> Alexandru Boroi, quoted work, p.106.

<sup>50</sup> Art 202 Para 7 of the new Criminal Code.

<sup>51</sup> Art 202 Para 7 of the new Criminal Code.

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