

THE LOWER LIMIT OF THE RIGHT TO LIFE OF THE PERSON IN THE LIGHT OF THE NEW CRIMINAL CODE

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Abstract

The right to life is one of the fundamental human rights both nationally and internationally, being provided and guaranteed by a series of legal acts. In the Romanian law, the right to life of the person as guaranteed by the article 22 paragraph (1) of the Constitution is also protected by criminal law. In judicial practice in this matter there was an important and interesting issue regarding the limits of the right to life of people or accurately determining the starting and ending of a person's life. On this aspect, there were several points of view in the law literature, each grounded on its own way. In the current criminal law, the two aspects that I have mentioned above are linked, on the one hand, for instance to the issue of the legal classification of the fetal injury during birth until the cut of the umbilical cord and, on the other hand, to the thesis of tissue and organs for transplantation. The new Criminal Code is inspired by the European legislation. In relation to the criminal offences against the person it brings news to us by introducing a new offence, namely fetal injury, referred to in the article 202. Analyzing the legal content of this offence it is impossible not to call into question the situation of the lower limit of the right to life of the person.

Keywords: right, life, person, offence, limit.

Introduction

1. The study deals with a very interesting criminal law issue relative to the right to life of the person in terms of its lower limit benefiting by legal protection.

2. In the criminal law literature many points of view have appeared over time regarding the starting point of life and hence the start of criminal protection of the individual right to life. The present study makes their analysis and, as a novelty, brings to the foreground the New Criminal Code provisions.

3. The study has a logical structure and the starting point of the analysis is represented by the provisions of the national and international legal acts in the protection of the right to life area.

Ab initio there have been analysed the provisions of the Romanian Constitution and those of the Universal Declaration of Human Rights and of the International Pact on Civil and Political Rights. Then there have been presented some opinions existing in the doctrine regarding the matter that is being studied. Finally, the new Criminal Code provisions are being analyzed in relation to the person's right to life, making reference to the Civil Code and the Decree no. 31/1954 regarding the physical and legal persons.

4. Based on points of view expressed in the criminal law literature over the years, the study brings to the foreground some opinions related to the individual right to life from the perspective of the New Criminal Code provisions.

1. The Purpose of Criminal Law

Although the New Criminal Code¹, in the general part, does no longer contain an article devoted to defining the aim of the criminal law², however we can say that criminal law protects by its

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¹ Represented by the Law no. 286/2009, published in the Official Gazette no. 510 of the 24th of July 2009.

² The article 1 of the Criminal Code in force provides that „criminal law protects against crime Romania, the sovereignty, the independence, the unity and the indivisibility of the state, individual rights and freedoms, property and the entire rule of law”. In the explanatory memorandum of the New Criminal Code, published on the website

own means a number of constitutional values, including those inherent to the person. It is about life, physical integrity, health, personal freedom and sexual freedom and its integrity.

In this study we will focus on analysing one of the values listed above, that of a person's life because we want to make some clarifications regarding the lower limit of the right to life.

In the article 22 paragraph (1) of the Constitution³ it is provided that „the right to life and the right to physical and mental integrity of the person are guaranteed”. These rights are also protected by the means of criminal law.

The special part of the Criminal Code in force contains Title II, entitled „Offences against the person”, title which comprises four chapters, as follows: chapter I, „Crimes against life, physical integrity and health”, chapter II, „Crimes against personal freedom”, chapter III, „Sexual offences”, and chapter IV, „Crimes against dignity”. This last chapter contained articles 205 to 207, relative to offences of insult and slander and the verity proof, items which were repealed by law⁴.

In the special part of the New Criminal Code, Title I is dedicated to the description of crimes against the person and contains nine chapters, as follows: chapter I, „Crimes against life”, chapter II, „Crimes against physical integrity or health”, chapter III, „Crimes committed against a family member”, chapter IV, „Attacks on the fetus”, chapter V, „Crimes against the persons in danger requiring assistance”, chapter VI, „Crimes against personal freedom”, chapter VII, „Trafficking and exploitation of vulnerable persons”, chapter VIII, „Crimes against sexual freedom and integrity” and chapter IX, „Crimes that affect home and private life”.

2. The Concept of „the Right to Life” and that of „Person”

The analysis of the limits of the right to life as guaranteed by the Constitution and protected by the rules of criminal law cannot be achieved by separating the two concepts, namely „the right to life” and „the person”.

Although the international documents provide the protection of the right to life of the person, none of them gives the definition of the terms. The same situation can be found in our legislation.

In the article 1 of the Universal Declaration of Human Rights⁵ it is provided that „all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience...”. Then, in the article 3 of the same document it is stated that „any human being has the right to life...”.

In the absence of legal definitions of „life” or „the right to life” in the criminal literature and the judicial practice, there has emerged an issue that has received different solutions depending on the steps of evolution the society has crossed, that of the legal limits of the person's right to life.

3. The Legal Limits of the Right to Life. Opinions Existing Prior the Adoption of the Law no. 286/2009 and Points of View Expressed after this Moment

By „the legal limits of the person's right to life we understand the starting point of life, id est the lower limit, and the ending of life, id est the upper limit.

The Criminal Code in force, as well as the New Criminal Code, contains in a specific title the offences against the person. These incriminations protect the life, the physical integrity and the health

<http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf> (last accessed on the 4th of August 2009), it is stated that, having as a model the European criminal codes, in a democracy there is no longer place to define the aim of criminal law.

³ Published in the Official Gazette no. 767 of the 31st of October 2003.

⁴ It concerns the Decision no. 8 of the 18th of October 2010, issued by the High Court of Cassation and Justice, in the United Sections on appeal in the interest of law, published in the Official Gazette no. 416 of the 14th of June 2011, it reads that „the criminal rules contained in the article 205 to 207 of the Criminal Code regarding the insult, the slander and the verity proof, repealed by the provisions of the article I, section 56 of the Law no. 278/2006, provisions declared unconstitutional by the Decision no. 62 of the 18th of January 2007 of the Constitutional Court, are not in force”.

⁵ Adopted by the United Nation General Assembly on the 10th of December 1948 as it is stated on the website http://www.unuinfo.ro/documente_fundamentale/declaratia_drepturilor_omului/ (last accessed on the 10th of December 2011).

of the person since that person is born until its death occurs in a natural way, and also freedom and sexual life.

Regarding the relevant moment marking the beginning of criminal protection⁶ of the life of a person, there are two points of view in current doctrine.

In the first opinion⁷, the lower limit of the right to life is the moment of the beginning of the birth process. According to the second opinion⁸, the majority in theory, the lower limit of the right to life is represented by the cutting of the umbilical cord, when the birth process is complete and when the fetus becomes a child.

Given the New Criminal Code provisions dealing with the criminalization of acts affecting individuals, certain aspects are new and have a particular interest.

First, in Title I of the special part of the New Criminal Code, relative to the offences against the person, a chapter entitled „attacks on the fetus” is found, which consists of two crimes, namely the crime of interruption of pregnancy, provided in the article 201, and the offence of injury to the fetus as provided in the article 202.

The offence referred to in the article 201 New Criminal Code⁹ has a counterpart in the Criminal Code in force in the article 185, that of the crime of illegal performing abortion.

The offence referred to in the article 202 N.C.C. has no counterpart in the Criminal Code in force and it has Spanish influence¹⁰.

In the Criminal Code in force it is found the term „person”, although undefined, but not that of „fetus”. We state this because the above-mentioned legal act includes „crimes against the person”, the crime of murder is defined as „killing a person” and so on. There is made no reference about „the fetus”.

In the analysis of the crime of illegal performing of the abortion, provided in the article 185 Criminal Code in force, the experts¹¹ have ruled on its complexity, stating that the legal subject of the crime is the set of social values that appear and develop in order to protect the mother and the conceiving product, that *spes homini* (life expectancy).

The New Criminal Code contains the notion of „fetus” but without giving any definition to it. According to medical science „fetus” means the conceiving product from the end of the eighth week of pregnancy until birth¹². The offspring will bear this name until the end of pregnancy, id est until the cutting of the umbilical cord and the total separation of the mother’s body, gaining the status of child.

In recent criminal doctrine¹³, given the absence of a definition of the „fetus” in the Criminal Code, it has been stated that the „fetus” means „the product of conception in the period between the conception and the moment of birth”.

Regarding the crime of injury to the fetus, referred to in the article 202 N.C.C., in the explanatory memorandum of the New Criminal Code it is indicated that it serves to cover the legal void relative to the ensuring of protection of the person between the moment of beginning of the birth

⁶ George Antoniu, „Criminal Protection of Human Life”, Criminal Law Journal no. 1/2002 (2002), 13.

⁷ Titus Popescu, „Defining the Person in the Criminal Code”, Criminal Law Journal no. 3/1998 (1998), 40.

⁸ Octavian Loghin and Tudorel Toader quoted by Popescu, „Defining the Person”, 13; Antoniu, „Criminal Protection”, 13.

⁹ Next N.C.C.

¹⁰ In the explanatory memorandum to the New Criminal Code it is stated that the source of inspiration for writing the text were the provisions of articles 157 and 158 of the Spanish Criminal Code as it is stated on the website <http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf> (last accessed on the 4th of August 2009).

¹¹ Vasile Dobrinioiu, „The Interruption of Pregnancy in the Characterization of the Crime of Abortion”, Romanian Journal of Law no. 2/1970 (1970), 111.

¹² The definition is found in Webster’s New World Medical Dictionary, third edition, as it is stated on the website <http://www.medterms.com/script/main/art.asp?articlekey=3424> (last accessed on the 10th of December 2011).

¹³ Petre Dungan, Tiberiu Medeanu and Viorel Pașca, *Handbook of Criminal Law. Special Part*, volume I, (Bucharest: Legal Publishing House, 2010), 120.

process, at which point we cannot discuss about abortion as a crime because it is no longer possible to be committed due to its conditions, and the moment of ending of the birth process which means that from that point on we can talk about a person that can be a passive subject, a victim of one of the crimes provided in the previous chapters¹⁴ of Title I. This idea is also supported by the very formulation of paragraphs (1) and (2) of the article 202 N.C.C. Thus, in the article 202 paragraph (1) N.C.C. it is provided as follows: „fetal injury during birth, which prevented the installation of extrauterine life, is punishable (...)”. And the paragraph (2) of the same article stipulates that „the harm of the fetus during birth, causing the child an injury afterwards, is punishable (...)”.

A new element is the paragraph (3) of the article 202 N.C.C. which provides that „the harm of the fetus during pregnancy, which subsequently caused the child an injury, is punishable (...)”.

On expressions „during pregnancy” and „during birth”, which are found in the article 202 N.C.C., the recent criminal doctrine¹⁵ offered some highly detailed and well documented explanations related to their meaning. Thus, having as arguments forensic knowledge on the four phases of the uterine changes in the birth process, it has been stated that „during pregnancy” means the phase zero and the phase one of birth, that period of time after conception and up to 36-38 weeks, in the last days of gestation taking place the preparation of the uterus for the installation of labour.

The same authors state that „during birth” characterises „the first two stages of labour of the second phase of birth, from its beginning until the expulsion of the fetus”.

Analyzing the law so far, one can say that the offence of injury of the fetus is a complex one. The legal object of this crime is complex, as represented by all social relationships emerging and developing in relation to protecting the right to life and the physical integrity of the fetus, on the one hand, and to protecting the physical integrity of the pregnant woman, on the other hand. We say this because if the legislator had wanted to protect mainly the mother’s rights he would have introduced this crime in the chapter regarding the crimes against the life, the physical integrity or the health of the person. The phrase „during pregnancy”, which is found in the article 202 paragraph (3) N.C.C., leads us to analyze life and the right to life of the person in a double perspective. We will talk about the right to life in the womb and the right to life outside the womb after birth.

The installation of the extrauterine life has as a criteria of recognizing the occurrence of pulmonary respiration with macro and microscopic changes characteristic at this level¹⁶.

We state that the life within the womb occurs at conception, but it enjoys the protection of criminal law only since the embryo becomes a fetus that is in the eighth week of pregnancy.

It is interesting to note, however, that during pregnancy the harm of the fetus by the pregnant woman is not punished as well as the pregnant woman is not punished if she alone interrupts her pregnancy. Such acts are still criminal but those persons shall not be subject to a penalty. Given the consistency of the legislator, we conclude that whenever the right to life of the fetus is in contrast to the pregnant woman’s right to dispose of her body, the law is in favor of the latter, but only if the pregnant woman acts alone and voluntary.

4. Proposals for future regulations

Given the above, it will be better for the future that the age of pregnancy to be reduced from 14 weeks to 8 weeks in characterizing the crime of interruption of pregnancy provided in the article 201 N.C.C.

Moreover, in the spirit of better understanding the legal text, we also propose to modify for the future the provisions of the New Criminal Code by inserting therein a definition of the „fetus”.

¹⁴ The explanatory memorandum of the New Criminal Code, published on the website <http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf> (last accessed on the 4th of August 2009).

¹⁵ Vasile Dobrinoiu and Norel Neagu, *Criminal Law. Special Part. Theory and Practice*, (Bucharest: Legal Universe Publishing House, 2011), 84-85.

¹⁶ Dan Dermengian et al. quoted by Antoniu, „Criminal Protection”, 14.

Knowing that the right to life is inherent to the person¹⁷, can we conclude that the fetus acquires the status of a person, in the light of the New Criminal Code as it happens in civil law?

In the article 1 of the Decree no. 31/1954¹⁸ it is stated that „the civil rights of the individuals are recognized in order to satisfy personal interests and education, according to the public interest and the rules of law for a socialist coexistence”. And in the article 7 of the same legal document it is stipulated that „the ability for a person to hold rights begins from birth and ends when that person dies. Children’s rights are recognized from conception but only if they are born alive”.

Moreover, we find the article 36 in the Civil Code¹⁹, entitled „the rights of conceived children”, which reads as follows: „children’s rights are recognized from conception but only if they are born alive”. Although a fetus becomes a child only after cutting the umbilical cord, thus starting his life outside the womb, however, we find in the civil law the expression „conceived child” when the fetus has an interest for his rights to be protected.

Although the criminal law does not confer protection of the right to life from conception, we can still say that the fetus is a becoming person. According to the legal terms dictionary²⁰, a „person” is a human being who is able to be recognized as a subject of law or holder of rights and obligations. An additional argument is the insertion of chapter IV „Attacks on the fetus”, in the Title I of the New Criminal Code, next to the chapters devoted to the description of crimes committed towards family members, towards those in danger requiring assistance and next to the offences related to trafficking and exploitation of vulnerable persons. Family members, those at risk and vulnerable people are persons, no doubt. Then why would not a fetus be one?

Because the right to life is inherent to the person, we can say that its lower limit is not marked either by the triggering of the birth process, either by the cutting of the umbilical cord, but by the moment the embryo becomes a fetus, with the condition that he must be born alive, even if not viable.

Conclusions

1. Analyzing the national and international documents which provide the guarantee and protection of individual’s right to life, I noticed and pointed out the absence of legal definitions for the terms used in this documents, namely „person” and „fetus”. For this reason, I have proposed for the future, to modify these regulations by inserting the definition of these terms so everyone can better understand their aim and in order to end the controversy existing in the criminal literature.

Given the definition of the „fetus” and analyzing the legal content of the offence of interrupting of pregnancy, provided in the article 201 N.C.C., I have proposed lowering the limit to which abortion is not an offence from 14 weeks to 8 weeks, adding, of course, other arguments for the purpose of supporting this point of view.

Another interesting aspect throughout the study is the presentation of some opinions relative to the lower limit of the right to life of the person, id est the time at which the life of the person benefits of criminal protection.

2. This study adds to the already existing papers regarding this issue in the criminal literature with a new point of view.

¹⁷ The article 6 paragraph (1) of the International Pact on Civil and Political Rights, adopted by the United Nations General Assembly on the 16th of December 1966, provides that „the right to life is inherent to the human being. This right shall be protected by the law. No one shall be deprived of his life in an arbitrary manner as it is stated on the website http://www.dri.gov.ro/documents/pactul_cu_privire_la_drepturile_civile_si_politice.pdf (last accessed on the 24th of December 2011).

¹⁸ Regarding natural and legal persons, published in the Official Gazette no. 8 of the 30th of January 1954.

¹⁹ Represented by the Law no. 287/2009, republished in the Official Gazette no. 505 of the 15th of July 2011, and entered into force at the 1st of October 2011.

²⁰ As it is stated on the website <http://e-juridic.manager.ro/dictionar-juridic/persoana/3214.html> (last accessed on the 9th of December 2011).

3. The dynamics of criminal protection of the individual right to life is directly proportional to the way this right benefits of legal recognition being provided both in national and international documents. We should always analyze the changes in this field.

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