

THE ILLEGAL ABORTION INDUCTION – THEORY AND PRACTICE

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This doctoral thesis approaches one of the most controversial matters of all time: abortion and its implications in people's lives.

The first chapter of our paper tries to establish the place of abortion in the social context. People have practiced abortion since the beginning of human civilization. This is shown by some of the early texts, such as The Hammurabi Code. It is somehow surprising that, through the years, abortion has been a practice rather tolerated by the society, despite the official rules, which often harshly punished abortion.

The most severe view on abortion has risen due to the influence of the Catholic Church, which, since the 19th century, has declared abortion as an absolutely intolerable practice. In Catholicism, abortion is forbidden even when the life of the pregnant woman is in jeopardy.

The other major religions have a less rigid opinion regarding abortion. Although they generally have a ban on abortion, they accept abortion practices in some cases, mainly when the life of the pregnant woman is endangered by pregnancy.

In the process of understanding the overall view on abortion, we have tried to establish, at an idealistic level, the women's point of view towards abortion. Despite our research, for a long historical period, we could not find a distinctive display of women's thoughts and feelings about abortion. Only the rise of the feminist movement (in the latter half of the 19th century) has brought us an image of how women perceived abortion. Nevertheless, we have taken into account that not all women have been, are and will be feminists; still, we found out that the feminist view on abortion is the closest approach we could get to an abstract image of how women might think about abortion. Analysing the feminist view on abortion, we discovered that feminism has changed several times its view on this matter. In the beginning, the feminism had considered that abortion should have been rather avoided; yet, when a woman was facing an unwanted pregnancy, early feminism allowed abortion, as a mean to save the woman's opportunity to have an accomplished life. Through the middle of the 20th century, feminist view on abortion suffered a dramatic shift; those days, feminists believed that abortion was a proof of women's emancipation. Present-day feminism has again changed its view on abortion, as women are encouraged to assume maternity as a way to fully express their womanhood; it results that abortion remains only a second option, only when it proves to be absolutely necessary. We notice how feminists have changed their opinion on abortion, in accordance with the historical and social context. This emphasizes the idea that women have been constantly under the pressure of adapting themselves to the structure of a society whose rules have been generally set by men.

The second chapter of the paper treats the legal regime of abortion in Romania. Here, the legal regulation of abortion has known extreme forms. Thus, we had a severe legislation on abortion (due to the Decree nr. 770/1966), but also an absolute decriminalization of abortion (due to the Decree-Law nr. 1/1989). This brings us the advantage of the historical experience, but also this makes us responsible for any future mistake in the legal approach on abortion. This is because we no longer have the excuse of not knowing what consequences should have a certain type of legislation on abortion.

The present-day legal regime of abortion in Romania seems to respect the historical lessons. Thus, abortion is legal, up to fourteen weeks of pregnancy, when performed in a medical institution, by a specialized physician. If the pregnancy exceeds fourteen weeks,

abortion is generally illegal, unless a *therapeutic purpose* occurs, or the life of the pregnant woman is in danger. It follows that the legal regime of abortion in Romania is a tolerant one.

However, the legal texts that regulate abortion have some inaccurate wording, and this leads to major theoretical debates.

A first issue is whether the criminalization of abortion protects the fetus, the pregnant woman or both of them. Because the legislator allows abortion by simple request in the first fourteen weeks of pregnancy, we think it is likely that the real object of legislative protection is the pregnant woman. Still, we believe that protecting the pregnant woman implicitly leads to at least a minimum interest for the fetus.

Another disputed issue is whether the legislator criminalized also the abortion performed by the pregnant woman herself. We notice that, unlike the previous communist regulation, now the Penal Code doesn't expressly refer to this situation. The rigors of penal law force us to conclude that the criminalization of abortion must also apply to the pregnant woman who induces her own abortion.

Another unclear aspect related to abortion refers to the meaning of the phrase *therapeutic purpose*. Abortion performed for therapeutic reasons is seen by the legislator as a circumstance that removes the criminal nature of the act. The problem is that there is no official definition of this *therapeutic purpose*, and this could be a premise for abuse.

We are convinced that the controversies surrounding the abortion issue are caused by the complexity of this matter. Also, we must take into account that pregnancy is a very special state, although a common one. This leads to unique problems, which have unique solutions.

Soon, in Romania, a New Penal Code will come into force. The New Penal Code already contains some substantial changes. One of them is that the New Code provides a distinct chapter, titled *Aggressions Against the Fetus*, which includes two offences : *The Illegal Interruption of Pregnancy* and *Injuring the Fetus* . As novelty elements, we remark that the offence regulating abortion is no longer titled *The Illegal Abortion Induction* . The reason for renouncing to the use of the word *abortion* in the title is due to the fact that the expression *interruption of pregnancy* has a wider sense than the word *abortion* has. Another change is the correct qualification as reasons to exclude the criminal liability of the action for the situations which are now provided as situations which exclude the punishment. Also, the New Penal Code expressly provides that the woman causing herself an abortion shall not be punished. This establishes that, when performed by the pregnant woman herself, abortion is a crime, but the woman is not punished. The offence titled *Injuring the Fetus* criminalizes the actions which harm the fetus, leading to health problems after birth or to the death of the child. We notice that this new offence exists only if the consequences reflect on the child after birth. An injury to the fetus which has no consequences after birth is no longer the domain of the Penal Law.

Beyond the improvements clearly brought in by the New Penal Code, we notice that some aspects have not been clarified. For instance, the New Penal Code doesn't explain the meaning of the phrase *therapeutic purpose*, although it keeps this purpose as a cause that excludes the criminal nature of the offence. So, we suggest that the legislator should focus attention on removing unclear aspects surrounding the meaning of the phrase mentioned above.

The third chapter analyses the legal regime of abortion in different countries. Through our research, we have found out that the legislative status of abortion knows a wide range of forms. Despite this great variety, we have managed to highlight some classification criteria. This enables us to shape a clear image of the legal status of abortion around the world. As criteria, we have chosen to use the degree of tolerance shown towards abortion in different countries, as it offers the most pragmatic results. And we think that pragmatic aspects are very important in the abortion issue, because the legal regime of abortion has very important effects in peoples' everyday lives.

Using the criteria mentioned above, we have discovered that, depending on how they regulate abortion, we can classify countries in three main categories.

One of these categories includes the countries which have no regulations on abortion. As far as we could find out, only Canada has such a regime.

The second category contains the countries which ban abortion in all circumstances (this is the situation in Chile, Nicaragua, El Salvador, Malta).

The third category is the widest one. It includes all countries which allow abortion under specific circumstances. Still, the degree of permissibility knows great variations from country to country.

Thus, some countries allow abortion by simple request, up to a certain age of pregnancy (for example, Germany, France, Italy, Russia, South Africa, Tunisia). Other countries, although they actually widely allow abortion, require the fulfillment of some conditions; still, in many cases, these conditions can be widely interpreted, so they include almost every conceivable situation (for example, Great Britain, Hungary, Israel, Australia, Japan). In some states, although abortion is allowed in some circumstances, these circumstances are strictly defined. Usually, these cases are limited to the situation when the life of the mother is endangered by pregnancy or when the fetus has severe abnormalities (for example, Ireland, Poland, Brazil, Egypt).

The last chapter of the paper analyses the moral implications of abortion. Our research revealed that both the opponents and the sustainers of abortion have brought strong arguments in favor of their opinions. As far as we are concerned, in shaping a personal view on abortion, we think it is better to let our intuition guide us; this is because the abortion issue is connected with our instinct of procreation, which is one of the features that make us human. Through this reasoning, we conclude that abortion brings an end to what could have been a human being, and this goes beyond the debate over the status of the fetus. Though, in some situations, we believe that abortion becomes necessary, when it comes to choosing the least worst of two evils.

The moral aspects of the abortion issue exceed their theoretical meaning and have important practical implications.

One of them refers to the legal regime of abortion, which, more or less, reflects a certain moral perception of abortion.

Another implication becomes obvious when the abortion issue is faced with the doctors' right to freedom of conscience. Some countries have managed to find viable solutions, such as to include among the requirements of employment as an obstetrician the willingness to perform abortions.

As a conclusion, we strongly believe that legislators must use rational thinking in finding the best legal regime of abortion. They must also pay attention to problems connected to abortion, such as the prevention of an unwanted pregnancy, the possibility to give the child for adoption, or the social assistance for parents. Only in this way women can really achieve help in order to surpass the problem of an unwanted pregnancy, whether or not they choose to have an abortion.