

THE HAPPINESS AND THE RIGHT TO HEALTH

Literature
review

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Abstract

The right to happiness implies also the fact that the right to protection of health should be assured, as being a fundamental right stipulated in both the Romanian Constitution and the main international and European acts that Romania is part of. A form to guarantee this right at the level of each country is the one realized through the means of the criminal law. In this purpose, the analysis of the particularities of the infringements against life and of the ones against health is more than important. Having as a reference point the right to happiness, the present article focuses on some of the new infringements, which were introduced in the Romanian legislation by the New Criminal Code, entered into force on the 1st of February 2014, namely the ones that protect the social relations concerning the beginning and the end of life.

In the conditions of the rule of law, the right to happiness implies, among others, that the state should grant to its citizens the right to protection of health. This right is stipulated in different forms in the main international and European acts that Romania is part of. Thus the right to the protection of health is ruled at articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights, in the Preamble of the Constitution of the World Health Organization and at article 25 of the Universal Declaration of Human Rights. The same right is also stipulated at articles 11 and 13 of the Social European Charter, at article 35 of the Charter of the Fundamental Rights of the European Union, and at article 168 of the Treaty on the Functioning of the European Union (Muraru I., T n sescu E. S., 2008)

Therefore the protection of health appears as a debt, the states having the obligation to endeavor to grant this right according to their inner social, economic and politic conditions (Deleanu I. 2006).

The right to the protection of health is ruled in the Romanian Constitution at article 34, according to which this right is granted by the state and the state has the obligation to take the necessary measures to assure the public hygiene and health.

A form to assure this right at the national level is the one realized by the criminal law regulations. In the Romanian legislation, there are infringements that protect the social relations regarding the public health in both Criminal Code and special laws (Toader, 2014a)

Considering as landmark the right to happiness, of all these infringements I will refer in this article at two of the ones regarding the beginning and respectively the end of the physical person's life.

Thus the Romanian Criminal Code rules at article 202 the infringement of harming the fetus and at article 190 the infringement of killing at the victim's request. Both of these stipulations are somehow new in the Romanian criminal legislation, being introduced as criminal provisions by Law no.286/2009 regarding the Criminal Code, well-known in the Romanian society as The New Criminal Code, which entered into force at the 1st of February 2014 (Toader T., 2014b). If the second follows the tradition of the Romanian criminal law, being incriminated by article 468 of the Romanian Criminal Cod of 1936, as well (Cioclei V., 2012), the first is totally new in the Romanian legal architecture, having the aim to cover a long disputed gap of legislation (Cioclei V., 2012).

The first infringement protects, at paragraph (1) and (2) of article 202 of the Criminal Code, the fetus from the moment the process of nativity starts until the moment this process ends, a time interval whose length differs from case to case

and during which the baby depends on his mother (Toader T., 2013). For this reason, all the acts or facts of violence committed against the fetus between the two specified moments are incriminated, no matter if they are committed by the mother or by another person. As in Romania the most giving birth processes take place in the specialized hospitals or specialized departments of the usual hospitals and the same process legally may be fulfilled at home only with specialized medical assistance (see Law no. 307/2004), the active subject of this infringement will always be the doctor, another person who has the right to assist the bear act or the child's mother herself (Toader T., 2013).

The condition that the acts of violence or, on contrary, of passivity of the active subject who should take necessary measures to protect or to rescue the baby who is to be born, to be considered an infringement is, according to paragraph (1) of article 202 of the Criminal Code, that the extrauterine life of the fetus to be restrained, and according to paragraph (2) of this article that it has as result a subsequent body injury of the child or its death.

It is important to be noticed that while paragraph (7) of article 201 of the same Criminal Code excludes the criminal responsibility of the mother who interrupts her own pregnancy, no matter in which conditions of health, month of gravidity or social or economic conditions, legalizing in this way the abortion committed by mother, as a direct application of article 26 paragraph (2) of the Romanian Constitution (According to article 26 paragraph (2) of the Romanian Constitution, the person has the right to rule herself, if she doesn't violate the rights and the liberties of others, the public order and the morals), which stipulates the right of the person to rule on herself, article 202 of the Criminal Code respects and protects the rights of the person who is being born, punishing the mother who commits such acts with the same criminal penalty like any other possible active subject. Even so, according to paragraph (4) of the analyzed article 202, if the mother commits the acts incriminated by paragraph (1) and (2) of article 202, under psychological disorder, the penalties stipulated at these two paragraphs will be reduced at half. Although the legislator doesn't mention expressly, it is to be understood that the psychological disorder of the mother that paragraph (4) of article 202 talks about is occurred by the act of nativity; and anyhow this situation of psychological disorder must be ascertained by a medico-legal expertise, which is mandatory in this case, according to article 184 paragraph (1) of the Criminal procedure Code (Toader T., 2014c). And finally, going back to the right of the person to rule on herself, as part of the fundamental right to private and familial life, ruled

by article 26 of the Romanian Constitution, paragraph (7) of article 202 of the Criminal Code, absolves of criminal penalty the mother who injures her fetus during the pregnancy.

At the same time, due to the specific risks of the medical acts, according to paragraph (6) of article 202 of the Criminal Code, if the restraint of the extrauterine life, the physical prejudice or the death of the fetus is determined by the action committed by a doctor or by a person from the medical staff who is authorized to assist at the nativity process or to watch the pregnancy and if the facts were committed during the medical act and respecting the legal or the professional provisions, in the interest of the pregnant woman or of the fetus, these facts are not considered as an infringement.

Referring to article 190 of the Criminal Code that incriminates the voluntary euthanasia, no matter active or passive, it is to be observed that this legal norm excludes any possible future regulation in the Romanian legislation of the assisted death. Being an attenuate form of murder, the infringement was named by the legislator with a synonym of the Romanian word used for the other categories of offences referring to suppression of human life, in order that it should not be considered as an antecedent that could complete the content of the infringement stipulated at article 189 paragraph 1 letter e) of the Criminal Code, namely the qualified murder committed by a person who has done in the past another homicide or a tentative to homicide (Cioclei V., 2012).

Thus the constitutive content of the infringement of killing at the demand of the victim is fulfilled if the victim's request is express, serious, aware and repeated, in the conditions in which the victim is suffering from incurable diseases or from serious infirmity medically attested and this causes permanent hard bearable sufferings. As follows, the consent of the victim is not relevant in the perspective of the criminal responsibility (Toader T., 2013), and any crime against life committed in other circumstances will be murder or qualified murder, if it meets the conditions stipulated at art.188 and art.189 of the Criminal Code. The infringement can be committed by any person (Toader T., 2013), but if the active subject has a certain qualification, as doctor or medical assistant, the killing at the demand of the victim can enter in competition with other offences committed in this quality.

Another worthy of mention aspect is that the age of the victim of this infringement is not important, and actually the stipulation of such an age above which the facts incriminated at article 190 of the Criminal Code do not represent an offence, would be unconstitutional from the point of view of nondiscrimination principle stipulated at article 16 of the Romanian Fundamental Law and

article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Going back again to the ante referred article 26 paragraph 2 of the Romanian Constitution, which actually is considering the physical liberty, the right that anybody has to rule his own body (Muraru I., T n sescu E. S., 2008), it is to be understood that the Romanian legislator agreed, according to the actual stage of the moral evolution of the Romanian society, that any person may dispose of herself, but there are no circumstances in that she is entitled to dispose of somebody else's life.

As there is no practice in Romania in applying article 190 of the Criminal Code, which actually entered into force on the 1st of February 2014, looking forward the jurisprudence of the European Court of Human Rights, a case that is worthy to point to is *Lambert and Others versus France*, in which the victim, a teenager who suffered a head injury in a road-traffic accident, in 2008, is being kept alive by artificial nutrition and hydration. In this case, the European Court of Human Rights was applied to on the 23rd of June 2014 by some relatives of the victim, after the Administrative Tribunal of Chalons-en-Champagne, applying the "Leonetti" Act on the rights of patients and the ending of life (Law no.2005-370 on 22 April 2005), decided in the first instance, on the 11th of January 2014, that the doctor treating Vincent Lambert must discontinue the patient's nutrition and hydration, and the Conseil d'État, declared lawful this decision. What is interesting to mention is the fact that the Conseil d'État did not directly applied the law in order to take this decision, but based its reasoning on a medical expert's report, as it was necessary to settle if Vincent Lambert was at "the end of life" and if the artificial alimentation and hydration consist "a treatment that can be interrupted in the case it becomes unreasonable", in the understanding of the "Leontti" Law (Belrhomari N., 2014). In this situation the decision of the Conseil d'État was based on both medical and bioethical arguments. Anyhow the syntagm "end of life" in the "Leonetti" Law had been explained by the doctrine in connection to a certain age of the patient (Le Gac-Pech S., 2014), explanation that, in my opinion, enters in conflict with the principle of non-discrimination, as I have already mentioned above. Waiting for the decision of the European Court of Human Rights, the doctrine who has been analysing the French law from the view of Vincent Lambert Case has risen up the question if the "Leontti" Act actually rules the passive or the active euthanasia, according to the declared purpose of this law (Le Gac-Pech S., 2014), and if the euthanasia generally speaking is really moral and legal (Schooyans M., 2014).

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