Between the Right to Life of the Unborn Child and the Right to Dispose of the Pregnant Woman's Own Body

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Abstract: The dramatic evolution of genetics and medicine in the twentieth century has led to the recognition and defense of initially controversial rights from a medical, ethical, religious, and legal point of view. These rights, grouped under the general name of personality rights, are governed by the principle of the inviolability of the human being and the right to self-determination, which are, in fact, two sides of the same coin. The principle of inviolability presumes the absence of any harm or interference with the human being, regardless of who is its author, for example, the right to life of the fetus, and the right to self-determination refers to the possibility of refusing any physical or other harm such as and to decide on any procedure that involves or affects its body. The questions we will try to answer are the following: "Where does the right to dispose of the pregnant woman's own body begin and where does the right to life of the fetus end? Is the fetus a part of the pregnant woman's body or is it a human being? In the context of the development of these rights, the intervention of the legislator has become indispensable in order to establish the general conditions and the limits of their application.

Keywords: abortion; embryo; right to life; right to liberty; right to self-determination; fetus; human being

1. Introduction

For a long time, the law was not concerned with the human body, so the legal norms did not refer to it directly, but only indirectly, on the occasion of the birth and death of the natural person. But even in such situations what mattered was the acquisition or loss of legal personality, and not the legal content of the notion of body. However, the evolution of social life and especially the astonishing advances in biology and medicine have led to profound transformations, and the human body has begun to be appreciated as a source of personal and social utility that demands the attention of law. Advances in knowledge and technology lead to the right to witness "artificial human reproduction," to "human modification" through medicine, surgery, and genetics, or even "action on the human species itself" (Cercel, 2009, p. 7).

After the Romanian Constitution, in art.26 par. (2), stipulates that "The natural person has the right to dispose of himself, if he does not violate the rights and freedoms of others, public order or morals", the Romanian Civil Code took over the same text, with principle value regarding the rights of personality, in art. 60, which bears the marginal name "The right to self-determination".

The right to dispose of one's body or liberty is a fundamental right that falls within the category of civil rights, but it is not a first-generation right, such as the right to life and a number of political rights, but

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a progressive right. of the third generation, which, through its inclusion in the Constitution and the Civil Code, has gained official recognition.

Regarding the legal nature of the right that the natural person has over his own body, two opinions have been expressed in the legal literature. As a first opinion, it is said that the person has over his own body a power characteristic of the property right with all its attributes, *usus*, *fructus* and *abusus*, being able to dispose materially and legally of his body (Cercel, 2009, p. 8).

In another opinion, supported by most authors, it is considered that we cannot talk about the rights that the person would have over his own body, seen as an object, but about the rights of personality, in a narrow sense, which include the right of the person to his physical integrity. The body is the biological substratum of the person, so by its defense the subject of law himself is defended (Cercel, 2009, p. 8).

The Civil Code contains this right in Book I, entitled "On Persons". In Title II, concerning the natural person, Chapter II deals with "Respect due to the human being and his inherent rights" and includes art. 58 - 81.

Section 1, under the heading "Common provisions", groups three articles, respectively: art. 58, which includes an exemplary enumeration of personality rights; art. 59, with the identification attributes of the natural person, and art. 60, which regulates the right to dispose of oneself. The other three sections of the chapter refer to "Rights to Life, Health and Integrity of the Individual", "Respect for Privacy and Dignity of the Human Person" and "Respect for the Person and After the Death of the Person".

There are two observations that need to be made after analyzing this chapter of the Civil Code.

First of all, the legislator uses a double terminology referring to the rights of the personality: more precisely, he uses both the phrase "human being" and the notion of "person", which leads to the conclusion that the issue goes beyond the legal sphere(in the doctrine it was showed that the person represents a dimension of the human being, namely that of the plane of law, without exhausting all its meanings) (Hageanu & Dumitrache, 2017, p. 37).

Secondly, the inclusion of art. 60 and the right to self-determination in the first section, called the "Common Provisions", so apart from the rights of the personality contained in the other three sections, seems to indicate the intention of the legislator not to link this right-principle only to the human body or the living being, but also the totality of the personality rights and even the possibility to dispose of his body after death.

In conclusion, we consider that the person's right to self-determination is a principle of the rights of the personality and seeks to emphasize that, in this matter, the interest of the human being, seen as the sole subject of law, prevails, under certain conditions, over the social interest.

Perhaps the rule of law, including constitutional force, of the right to self-determination has made the interpretation of this right extensive, applied in many cases, such as euthanasia, the right to abortion, trans-sexualism, the right to donate organs or tissues for transplantation and to participate in medical experiments, refusal to take biological samples or to carry out medical treatments, including vaccination, sometimes to the point of absurdity, in order to justify the possession of dangerous drugs for own consumption (Hageanu & Dumitrache, 2017, p. 37-38).

With respect to abortion, in the case of R.R. v. Poland (judgment of 26 May 2011, application no. 27617/04)The Constitutional Court of Human Rights has again been called upon to rule on this extremely sensitive issue, a few months after a resounding ruling on this matter (A.B. and C.C. v. Ireland, 16 December 2010, no. 25579/05).

Poland was convicted of violating Articles 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to respect for the right to privacy and family life), the Court expressing a paradoxical jurisprudential position. Although the Court has expressed its position in granting Member States the freedom to recognize or not the right to abortion, it has also shown a growing desire to ensure this right when it is protected internally. The commendable desire to protect pregnant women who want to have an abortion, which results from the solution pronounced in 2011, contrasts sharply with the crystallized refusal at the end of 2010 to grant a conventional autonomous protection to the right to abortion.

With regard to the violation of Article 8 of the Convention, the European Court of Justice confirmed the applicability of this article to the facts of the case, recalling that "the decision of a pregnant woman whether or not to continue the pregnancy falls within the scope of privacy and will" (Cîrciumaru & Militaru, 2011).

Undoubtedly, the legislation governing abortion leads to privacy (Bruggeman and Scheuten v. Germany; Boso v. Italy, no. 50490/99; Vo v. France [MC], no. 53924/00; Tysiąc v. Poland; C.C. v. Ireland [GC] (No 25579/05, 16 December 2010) and the State has a wide margin of discretion to define the circumstances in which abortion is allowed, but once that decision is made, the legal framework designed for that purpose must be consistent and able to take into account the various legitimate interests at stake at an appropriate level and in accordance with the obligations under the Convention.

In fact, many states, including Romania, have considered that a woman's right to decide on her own body is superior to the embryo's right to protection during the period when it cannot survive independently, outside the mother's body; as a result, the Romanian Criminal Code no longer criminalizes abortion. Following the same line of jurisprudence, the European court has ruled that if the fetus were guaranteed the same rights as a newborn, this would abusively limit the rights of newborns, so the principle was expressed that the fetus enjoys a subordinate right to women's right to abortion.[1] The court went even further and ruled that parents have the right to dispose of their embryos obtained in vitro and to decide their fate, showing that they are a constituent part of the person and his biological identity.[2] The consideration of embryos as a constituent part of his parents was considered an error and a setback by the judges of the Court, who expressed partially dissenting views, arguing that embryos are human beings distinct from their parents.

However, where does the right to life of the embryo and the fetus begin and what can we say about it: is it a part of the pregnant woman's body or is it a human being?

The right to life is a supreme right of the human being, the observance of which is the very condition of the exercise of other rights, "the supreme value on the scale of human rights internationally" (Gheorghe, 2003, p. 111).

Thus, states have an obligation to actively intervene to guarantee the right to life, for example, in the fight against terrorism, the state must, on the one hand, punish those guilty and, on the other hand, take preventive measures corresponding to the general situation.

The European Court of Human Rights, in its jurisprudence, gives pre-eminence to Article 2, as it protects the right to life, without which the exercise of any of the other rights and freedoms guaranteed by the Convention would be illusory. The procedural obligation of states in matters of the right to life is particularly complex. Thus, states under Articles 1 and 2 of the Convention have a positive obligation

[1] See Cause *Boso vs Italia* the decision of 5 september 2002, application nr. 50490/99.
[2] See Cause *Parillo vs Italia*, the decision of 27 august 2015, application nr. 46470/11.

to conduct effective investigations against those who have harmed the person's life and to establish an effective judicial system that allows for the establishment of liability and the prosecution of the guilty.

The Convention protects the right to life, but does not define life; therefore, in practice, problems have arisen in determining the holders of the right to life.

The organs of the Convention have not yet debated the question of the beginning of the right of "every person to life", nor whether the "child to be born" is the holder of such a right, leaving the solution to the discretion of the Contracting States. The problems with which the European Commission was notified concerned the legislation that allowed the voluntary termination of pregnancy.

As a first step, the Commission refused to examine the compatibility of abortion laws with Art. 2 of the Convention,[1] denying the status of "direct victims" of the applicants. An important problem faced by the criminal doctrine is the establishment of the limits of life, because the criminal law protects only the living person. Life, according to the current Penal Code, is protected from birth. It marks the beginning of a person's life, but it is not marked by a clear moment, but does include various physiological phases that take place over a period of time.

That is why discussions have arisen about establishing the moment when one can talk about a physiologically or fetally independent person. In this sense, several opinions were formulated, which took as a starting point either the moment of physical separation or the moment of the beginning of the physiological process of birth. Finally, it was agreed that the fetus acquires the status of a person, whose existence is protected criminally by criminalizing crimes against life, only from the moment of expulsion, the acquisition of independent physiological existence, on the one hand, and from the moment of ectopic breathing, on the other. This is the front that separates the crimes of homicide or manslaughter, for example, from that of unlawfully provoking abortion (Pușcă, 2011, pp. 172-173).

One of the main issues regarding the discussions regarding the right of the pregnant woman over her own body and in this case, the right to abortion, is the one regarding the right to life of the fetus. Because once the right to life of the embryo and the fetus is established, pro-abortion opinions would be in a big dilemma.

Throughout history, various answers have been given to the question of the beginning of human life. The fundamental choice is made between "immediate" and "delayed" or humanization; in other words, can the zygote itself be considered a human individual (and not just an amorphous piece of human tissue) or does the individuality actually begin later, during or after the gestation period?

Those who defend the second point of view suggest a variety of possibilities. Strictly speaking, some claim that human life begins with the implantation of the fertilized egg in the uterine wall; others claim that it begins shortly afterwards, when the primitive body or *primitive body axis* is outlined, leading to the initial development of the spinal cord and central nervous system.

Others - we must point out that often in order to maintain the right to abortion - identify the first stage of real human life with the moment when the mother feels in her womb the first movement of the baby or at birth, when the baby takes the first breath or begins to breathe alone. Moreover, others deny the newborn the right to recognition and legal protection until it is proven that he or she does not suffer from serious genetic abnormalities, mental deficiencies, or other defects. From this point of view, human life

[1] European Court of Human Rights, cause nr.867/60, *X. vs Norway*, The decision of 29 may 1961; cause nr.7045/75, X. vs Austria, the decision of 10 december 1976.

begins only when society says it begins and when it gives the newborn baby the status of a human being or person (Breck, 2012).

A second key issue in determining the moral or immoral nature of abortion is determining the right of the pregnant woman to decide whether or not to remove the embryo or fetus from her body. In order for such a right to be established, it must first be determined whether or not the fetus has a right to life. Because if the fetus is considered to have no right to life, a woman's right to an abortion would be a natural consequence of this view. On the other hand, if we accept that the fetus has or could have a right to life, then the question arises whether the woman's decision to have an abortion is not a deed with many ethical, moral and even criminal implications.

Of course, the law, with the help of medicine, biology, genetics and other sciences, must determine whether the embryo or fetus is a part of a woman's body that could give her the right to decide about her own body, or is a separate entity, and then the woman cannot dispose of another being as with her own body (Franț, 2016, pp. 492-493).

Arguments against abortion are based on the distinction between the body of the mother and the fetus. In a suggestive statement, it was stated that "a Chinese zygote in the womb of a Swede remains Chinese forever" (Franț, 2016, pp. 493).

At the same time, it was stated that the distinction between the mother's body and the fetus is proven by the fact that it is possible for the fetus to die and the pregnant woman to live, just as the reverse situation is possible (Franț, 2016, pp. 494).

From a Christian point of view, it is clear that the embryo and the fetus are human beings, and regardless of the moment of its life, what is carried in the mother's womb can only be suppressed when, in certain cases, it is necessary to "take it out of the womb." an embryo or fetus, which would endanger its mother (Congourdeau, 2014, p. 433).

Other authors consider that the fetus is only a part of the pregnant woman's body in the same way that a person's hand or foot is a stain on her body. In this case, a person's decision to have his hand amputated is a personal decision. A person is free to do what he wants with his own body, as long as it does not harm others or public order (Franț, 2016, pp. 495).

Other advocates of women's right to abortion argue that if a woman does not have the right to decide on the life of the fetus, then she has the right to decide how her own body is used. Thus, the woman has the right not to give to another person (the fetus), her own body to be used. And this right is superior to a possible right of the fetus to be born (Franț, 2016, pp. 495).

In this dispute, the objective role must be assumed by the legislator who is called not to resolve the dispute but to find a fair solution beneficial to both the pregnant woman and the fetus or embryo.

While European and even international law on women's own rights has been fairly clear (see Article 8 on the ECHR's right to privacy and family life), with regard to the right to life of the fetus, a sharp official position has been adopted in a few states. Even when they allow the right to abortion, many states avoid commenting, even circumstantially, on the fetus' right to life.

The German Constitutional Court ruled in 1975 that everyone, including the fetus, had a right to life (Franț, 2016, p. 504), and in Ireland, the Constitution, revised in 1983, following a referendum, provided that the fetus had the right to life (Franț, 2016, p. 505).

The Spanish Constitutional Court, in a 1983 decision, stated that at that time the laws did not protect in the true sense of the word the right to life of the fetus before birth, showing that they did not concretely

regulate the conditions that must be met for to be suppressed by abortion. It is clear that this decision officially recognized a right to life of the fetus before birth, even if some conditions were established that had to be met to suppress its life (Franț, 2016, p. 505).

In the Philippines, the Constitution affirms that the state protects both the life of the pregnant woman and the life of the fetus equally. However, this expression only increases the state of confusion and does not clarify what needs to be done in the event that the rights of the pregnant woman conflict with the rights of the unborn child. However, in the absence of total silence, as in other states, even this expression gives us the possibility of a certain interpretation, in the sense that, within certain limits, established by law, women's rights prevail, abortion being allowed, beyond these limits, the rights of the child become more important, therefore abortion being no longer allowed.

On the other hand, contrary to the above, there are states that completely exclude the right to life of the fetus, the rights of the pregnant woman having full priority. Thus, the Australian High Court ruled in 1983, in the case of Queensland v. T., that the fetus has no rights (hence the right to life) until the moment of birth (Franț, 2016, p. 505).

Currently, looking closely at European abortion laws, we see that EU countries are divided into three groups.

In the first group are Malta, Ireland and, in practice, Poland, to which is added Northern Ireland, which is part of the United Kingdom.

Malta is stopping abortion altogether, despite huge pressure from the UN and the EU to change the law. In Ireland, abortion is stopped unless the life of the pregnant woman is in danger, but even so we encounter an atypical situation, because she has the right to have an abortion but in another country, because in Ireland this is forbidden.

In Poland and Northern Ireland, abortion can theoretically be used if the pregnancy is due to rape, incest, if the fetus has serious malformations or if the mother's life and health are endangered; In practice, however, both the specific regulations and the support given by the state in assisting women who intend to resort to abortions reduce to almost insignificant the number of abortions. For example. In the case of Poland, the abortion rate is very low (in 2002 there were 3 abortions / 10,000 births).

The second group includes countries where abortions can be performed under certain, more relaxed conditions: Cyprus, the Feroe Islands (Danish territory), Finland, Luxembourg, Spain, Portugal and the United Kingdom.

Abortion due to the difficult social and material situation is practically only allowed in the United Kingdom (which should rather be included in the third group) and Finland. In Luxembourg, the woman should be advised about alternatives and should wait 7 days before the abortion. Here, too, "conscientious objections," generally for religious reasons, are common.

The third group includes the rest of the EU, where abortion is available "on request". This includes former communist countries with the exception of Poland (the Baltic countries, Bulgaria, the Czech Republic, Slovakia, Slovenia, Hungary) which had such legislation since the "Iron Curtain" (as the first country in the world to legalize abortionwas the USSR, in 1922) or countries with an old democratic and liberal tradition in which the so-called "individual freedoms" are fundamental - Belgium, the Netherlands (in which "euthanasia" was legalized), Germany, France, Sweden, Denmark. Italy is also included here.

A part of this group are also Greece, where legislation has recently been relaxed, and Romania, our country being a special case (the only country in which the communist regime banned abortion, from 1967 to 1989) and tragically at the same time (it now has the most high rate of abortions in the EU, almost total lack of any restrictions, lack of counseling, etc.).[1]

In countries where abortion is available "on request", the age limit of pregnancy until which interventions can be performed is generally the 12th week, except for Slovenia (week 10) of Romania (week 14) and of Sweden (week 18).

Therefore, the final conclusion is that the desire of the pregnant woman must be sovereign in all cases. In reality, the moral problems related to the beginning of life derive not only from the maternal-fetal relationship (as it is accepted or, on the contrary, rejected), but especially as the pregnancy is perceived by the mother, doctor, society. I mention doctor and society as the fetus becomes a patient from the moment the pregnant woman has addressed the medical system.

For Immanuel Kant, only the rational person is autonomous, able to express his desire. Embryos, fetuses, children, the mentally retarded have no reasoning, so they are not people. Therefore, the difference occurs depending on when the product of conception is transformed into a person: at the beginning of the differentiation process (when the egg has divided into two cells); about four weeks after conception, when the first fetal beats appear, or at six weeks when the first signs of brain function can be detected. Hence the sophistry: If the embryo is not a person and has no moral status, its destruction is allowed and acceptable.

Does the embryo and fetus have rights? The legal answer to this question (in most countries) is negative. Only after birth is it said that the viable newborn has rights. It should be noted that this legal decision contradicts those moral considerations according to which the fetus must have rights in order to be protected. In fact, the recommendations of international ethics bodies (WMA, Council of Europe, Codes of Ethics, etc.) talk about the rights of the embryo and the obligation to respect them. If we grant rights to the embryo and the fetus, we must decide whether and under what conditions it conflicts with the mother's.

Proponents of the "pro-life" claim the rights of the fetus, who must be defended, because of his innocence and helplessness. On the other hand, proponents of the "right to choose" believe that absolute respect for the rights of the fetus would place him in a superior position to the mother, which is unjustifiable and unrealistic. Others do not recognize embryos and fetuses as people, but rather organisms. From this perspective, they are only potential people, but because they have no reason or memory, they cannot have the same status as human beings who are people. From this multitude of options, everyone can choose according to the moral values to which they adhere (Astărăstoae, 2018).

As for me, I agree with the opinion of Dr. Vasile Astărăstoae who said: "*I am among those who defend the right to life of embryos and fetuses without placing myself among those who judge and condemn a woman who refuses motherhood. What I would like to express is that, when choosing, the woman must be informed of the consequences of her own decision, to receive counseling so that she will not regret it later. I claim that it is necessary to give back value and respect to the* ***notion of mother***" (Astărăstoae, 2018).

[1] *Reglementările privind avortul în țările Uninunii Europene*, on https://www.crestinortodox.ro/morala/reglementarile-privind-avortul-tarile-uniunii-europene-70848.html, accessed on 11.05.2022.

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