

POLEMIC ISSUES REGARDING THE APPLICATION OF CRIMINAL LIABILITY FOR THE ILLEGAL PERFORMANCE OF ABORTION

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Abstract

In the following, we present some aspects of criminal law of the illegal performance of abortion misdemeanor as it is criminalized in the criminal law in force of the Republic of Moldova (RM) under art. 159 Penal Code (PC).

The illegal performance of abortion is undoubtedly one of the few crimes against the life and health of a person that has experienced a different approach during the whole human existence: from the most severe punishment to decriminalization.

The corollary of this article is to investigate the legal basis of criminal liability for the illegal performance of abortion, according to the scheme established in the science of national law. Thus, at the level of doctrinal exegesis, the constitutive elements, as well as the aggravating circumstances of the misdemeanor were addressed as in art. 159 PC of the RM¹.

Keywords: *misdemeanor, illegal performance of the abortion, criminal liability, reproductive health, pregnancy, termination of pregnancy.*

JEL Classification: [K 14]

1. Introduction

Starting from the subject matter of the present paper, we do not claim to carry out a detailed judicial and criminal investigation of illegal performance of abortion misdemeanor, but rather a summary one, necessary and at the same time sufficient to the knowledge of the criminal field of the crime and of the incriminating area.

The incriminating basis, with the marginal designation of the *Illegal performance of abortion*, is deployed at art. 159 PC of the Republic of Moldova, the typical variant of the crime involving *the termination of the pregnancy through any means committed*:

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- a) outside the medical institutions or medical offices authorized for this purpose;
- b) by a person who does not have a special medical specialization;
- c) in case of pregnancy exceeding 12 weeks, in the absence of medical indications, established by the Ministry of Health;
- d) in case of medical contraindications for such surgery;
- e) under unsanitary conditions.

In art. 159 para. (2) PC of the Republic of Moldova, the following aggravated forms of the offence are envisaged:

- a) *which has caused imprudently serious or average damage to the physical integrity or health;*
- b) *which caused the death of the victim imprudently.*

In its aggravated form, the offense is punished with imprisonment from 1 to 6 years with (or without) the deprivation of the right to occupy certain positions or to exercise certain activity for up to 5 years.

2. The matter of the crime investigation

A first problem we want to refer to is the title of art. 159 PC. In the marginal designation of art. 159 PC of the Republic of Moldova, the legislator uses the expression "illegal performance of abortion", and in the incriminating text the lexemus "Termination of pregnancy".

In the medical literature, abortion refers to the spontaneous or induced expulsion of the product of conception before week 28, with a weight under 1.000 g (after WHO). It is also stated that abortion is the termination of pregnancy before 180 days or the premature expulsion of a non-viable fetus (Pană, 1995: 225).

Another abortion approach involves spontaneous or induced expulsion of the embryo or fetus before the minimum viability limit. Classically, this limit is set at 180 days, but today there is a possibility to keep a fetus with a small gestational age alive (Rusu, 2001: 1632).

In the medical science, pregnancy is the name of women gestation; the duration calculated from the first day of the last normal menstrual period is 280 days, with a variation from 259 days (37 weeks) to 287 days (41 weeks); a child born before 37 weeks is considered premature and over 41 weeks post mature (Rusu, 2001: 827).

Pregnancy is also defined as the status and period of the woman in whose womb the product develops from the moment of fecundation to birth; the term is equivalent to the conception product itself (Simic, 1969: 747); a period of a woman that includes the time between fecundation and birth, which normally takes about 280 days (Pană, 1995: 160).

With reference to medical science, obstetricians and forensic experts define abortion differently. The obstetrical definition of abortion is the termination of the normal course of pregnancy in the first 6 months of pregnancy.

According to this criterion, abortion means only the expulsion of the fetus weighing up to 100 g and who is up to 28 weeks old. The progress made in the field of reanimation and intensive care has also allowed to cite cases of 600 g fetuses who have been kept alive. By observing this criterion, the termination of the normal course of pregnancy after 6 months, therefore when the fetus is viable, is considered a premature birth (Belis, 1995: 975).

Analyzing these dispositions, author A. Plop concludes that under the provisions of art. 159 PC, in terms of criminal law, the concept of "abortion" is narrower than in the medical sense, since it does not refer to the spontaneous termination of pregnancy (also referred to as pathological abortion), being determined exclusively and always by the existence of pathological factors and conditions, and on the other hand, it is wider, because it refrains to the entire term of gestation (Plop, 2015: 173).

In our view, legal-criminal regulations cannot create notions that would have other meanings than those offered by specialized fields. Taking into account the provisions of art. 2 para. (2) PC of the Republic of Moldova, according to which: "The criminal law defends the person, his rights and freedoms, the property, the environment, etc., against any offences.

"The purpose of the criminal law is not to create values and social relationships, but to protect them in the form they have already established in society. Consequently, the notion of abortion cannot have a legal-criminal concept differing from the one that the medical science adds to it.

At a closer examination of the concept, we can note that the juridical-criminal significance of abortion considered in the title of art. 159 PC. of the RM, is the same as that provided by the forensic science.

Thus, the forensic definition implies the termination of the normal course of pregnancy throughout its period, including whether the labor occurs during or during it (Belis, 1995: 975).

At the same time, we fully support the position of the author A. Plop, according to whom the marginal designation in the art. 159 PC should be changed from the "illegal performance of abortion", to "illegal termination of pregnancy".

Such a perspective can be justified from several points of view:

- a. **Legal-criminal** regulations cannot create notions that would have other meanings than those offered by the science in other areas. Taking into account the provisions of art. 2 para. (2) PC of the Republic of Moldova, according to which: "The Criminal Law protects the person, his rights and freedoms, the property, the

environment..., against any offences, "The purpose of the criminal law is not to create values and social relations, but to protect them in the form in which they already exist within society. Therefore, the notion of abortion cannot have a different legal-criminal designation than that accorded by medical science. Consequently, until the fetus does not have the necessary viability to lead an extra uterine life, the voluntary termination of pregnancy is called abortion, and after that is called birth. Respectively, between the notion of abortion and the termination of pregnancy there is a whole-part link;

- b. **The legislative technique and the way in which the criminal rules** are formulated must comply with the requirements of accessibility, predictability and clarity. According to the decision of the CC of the Republic of Moldova on the objection of unconstitutionality of the provisions of para. (6) of art. 63 of the Penal Procedure Code, no. 26 from 23.11.2010: "In order to meet the three quality criteria - accessibility, predictability and clarity - the rule of law must be formulated with sufficient precision so as to enable the person to decide on his conduct and to make the consequences of that conduct reasonable, depending on the circumstances of the case.

Otherwise, although the law contains a rule of law that apparently describes the person's conduct in the given situation; the person may claim to be unaware of his rights and obligations. In such an interpretation, the rule that does not meet the criteria of clarity that is contrary to art. 23 of the Constitution.

3. The legal matter of the offence

The incrimination stipulated in art. 159 PC of the Republic of Moldova is deployed in Chapter II of the Special Part with the marginal designation of "Offences against the life and health of the person".

The use of the term *person* in the title of Chapter II of the Special Part leads us to conclude that by introducing criminal liability for illegal performance of the abortion the legislator defends the pregnant woman's life and health of and not the integrity or life of the fetus or birth concept.

The fetus in the uterus of the pregnant woman may not be a person.

Such a solution derives first of all from the jurisprudence of the ECHR, according to which the life of the fetus is inseparably linked to the woman's life and cannot be considered as an independent one: *"if it were considered that art. 2 of the Convention is to be extended to the defense of the intrauterine fetus, then it would also be forbidden to terminate the pregnancy in cases where it also endangers the life of the woman."*

In this regard, we do not accept the view expressed by A. Popov, according to which the act of deliberate killing of the fetus in the womb having

a period of gestation less than 22 weeks must be qualified each time as murder offence (Popov, 2001: 645).

In addition, *de lege lata* the point of view promoted by some authors does not have a solid foundation, such as: A. Barbăneagră, R. Chirița, A.E. Franz, according to whom the special legal matter of the illegal performance of abortion misdemeanor can be formed by the relationships regarding the protection of the fetus (Barbăneagră, 2009: 311; Chirița, 2002: 131; Franț, 2012: 28-29), whether this is the main or secondary matter.

To justify this solution, we can invoke the inexistence in the national criminal law of a rule of criminality that would establish criminal liability for the act of traumatizing or killing an intrauterine fetus, as the criminal laws of other states. Thus, in the Spanish Penal Code in a distinct section (*De las lesiones al feto*), the offence of the fetus (art. 157) committed either intentionally or by fault (in addition to the offence of abortion referred to in art. 144, 145 and after the crime of murder referred to in art. 138-143) (Todan, 1999: 120).

A similar incrimination is also provided in the Penal Code of the State of New York in para. 125.00, according to which "it is considered murder and the death of the unborn child if the pregnancy exceeds 24 weeks..." (Boyarov, 2004: 13).

By criminalizing and the wording manner of the illegal performance of the abortion in national criminal law, it was not intended to protect the concept of the birth or of the fetus but the pregnant woman against committing delinquent offences, which would endanger their life or health. As a victim of this crime, therefore, only the pregnant woman other whom abortifacient maneuvers are exercised in order to terminate the pregnancy can be considered.

This solution also derives from the fact that the subject of the analyzed offence may be another person than the pregnant woman (Cojocaru, 2007: 98).

In the same context, it is also noted that the absence of a similar norm in the national criminal law does not justify the qualification of the killing of the fetus in accordance with the rules on homicide.

The promotion of a contrary solution would contradict, on the one hand, the judicial practice of the European Court and, on the other, the principle enshrined in art. 3 para. (2) PC of the RM, according to which, "the extensive unfavorable and analogous application of the criminal law is forbidden."

The opinion of the author A. Plop is relevant and appropriate to the purpose of incrimination as in art. 159 PC, according to which, from a victimological point of view, the offence as in art. 159 of the Penal Code is an unprecedented and unrepeatable one in the field of criminal law, since the victim of the offence can be only a pregnant woman, a quality she acquires from his own desire and, most of the time, manifests an active behavior in the sense that she is a true conscious "instigator" (Plop, 2015: 41).

Therefore, we support the opinion of the authors of S. Tarasov and A. Şumilov, who believe that in case of the illegal performance of abortion, the direct matter of the offence is formed by the social relations conditioned by the protection of the health and life of the pregnant woman (Tarasov, 2004: 67).

As a result of this, we can conclude that *the special legal matter of the crime illegal performance of abortion is composed of the social relations regarding the protection of the life and health of the pregnant woman, whose normal existence and development is conditioned by the termination of pregnancy in safety by fulfilling the established legal procedures.*

Another issue that we intend to focus on is whether the gestation period until which the termination of pregnancy can take place is of any importance for the legal classification of the offence described in art. 159 PC.

Pursuant to point 37 of the Voluntary Termination of the Pregnancy Regulation, approved by the Order of the Ministry of Health of the Republic of Moldova of 12.09.2010, the voluntary termination of the pregnancy after the first 12 weeks and until the end of the 21st week of pregnancy are performed under medical (Annex nr. 1 to the Regulation) and social (Annex no. 2 to the Regulation) indications.

Thus, depending on the gestation term, criminal abortion is classified as follows:

- termination of pregnancy up to 12 weeks by violation of the conditions set out in Section 2 of the *Voluntary Termination of the Pregnancy Regulation* entitled *Voluntary termination of pregnancy during the first 12 weeks of pregnancy*;
- termination of pregnancy from 12 to 21 weeks in violation of the conditions set out in Section 3 of the *Voluntary Termination of the Pregnancy Regulation* entitled *Voluntary termination of pregnancy after the first 12 weeks of pregnancy*;
- termination of pregnancy over 21 weeks. The termination of pregnancy beyond 21 weeks is not regulated by the above Regulation.
- In connection with this, the author, A. Plop, claims that the damaging offense criminalised in art. 159 PC manifested in the termination of the pregnancy may occur at any stage of gestation until the beginning of the physiological process of the natural birth.
- For these reasons, any termination of the pregnancy with the consent of the pregnant woman after the 21st week of pregnancy, even in the presence of medical indications, whether committed by a gynecologist-obstetrician or not, will constitute elements of the offence of the illegal performance of abortion (Art.159 PC RM) (Plop, 2014: 74).

We accept this opinion, but with some reservations. The tenet that any termination of pregnancy after the 21st week is an illegal performance of abortion cannot be absolutized.

In this regard, it is possible to invoke the point 20 of the *Voluntary Termination of the Pregnancy Regulation*, approved by the Order of the Ministry of Health of the Republic of Moldova of 12.09.2010, according to which *in case of a medical emergency intervention necessary to save the pregnant woman's life, when she cannot express her will and the consent of her legal representative cannot be obtained in time, the medical staff, empowered in the manner established by the law, has the right to make that decision in the interest of the woman.*

In such a situation the extreme necessity regulated by art. 14 from PC can be identified as a cause which removes the criminal nature of the act. Respectively, the termination of the pregnancy in the presence of such justifiable causes is pertinent because it is oriented towards the saving of the woman's life and the person who does it cannot be prosecuted.

Otherwise, we share the idea that the illegal termination of pregnancy after the 21st week of gestation falls entirely under all normative ways of committing the incriminated offence as in art. 159 PC of the RM.

In our opinion, for a more equitable legal individualization and for the clarification of the legal text, we propose the introduction of a new aggravated form by fulfilling the text of the law with para. (1) with the following legally binding wording:

(1) 1 The actions referred to in paragraph (1) committed:

a) after the expiry of 21 weeks of gestation;

In order to highlight this position, we can put forward the following arguments.

After the 21st week of gestation, the fetus becomes viable in the sense that it can lead an independent extrauterine life. The perpetrator is aware of suppressing a being with a high probability of human existence that, although at the moment it leads an intrauterine life, but the level of development allows it to lead an extrauterine life, even artificially maintained, to a complete development.

Besides these, the abortifacient maneuvers performed at a more advanced gestational age pose a greater danger to the life and health of the woman, which is also perceived by the perpetrator.

At the beginning of the perinatal period the gestation is considered from 22-23 weeks (fetus weight 500 g), because from the respective age of birth the fetus is able to survive under appropriate therapeutic conditions (Ştemberg, 2004: 4). Also, the World Health Organization in the *International Statistical*

Classification of Diseases and Related Health Problems recommends this lower limit to 22 weeks of amenorrhea and 500 gr. for weight.

This, without difficulty, *de lege ferenda* will lead to an extension of the social relations forming the legal matter of the offence incriminated in art. 159 PC of the Republic of Moldova and the social relations conditioned by the protection of the integrity of the fetus, who can lead an own extrauterine life.

4. The objective side of the offence of illegal performance of the abortion

From the aspect of the objective side, the offence stipulated in art. 159 PC of the Republic of Moldova is a committing act because they are performed in violation of a prohibitive provision of the criminal law, which is a rule prohibiting the performance of abortions under conditions of unlawfulness.

This results from the usual expression used in the text for the description of criminal behavior "*termination of pregnancy*".

For the existence of the offence composition, the means by which the termination of the pregnancy is performed are of no importance. For this purpose, the legislator uses the phrase "any means".

In general, the means of pregnancy termination can be of classified in two types:

a. Legal means, namely the means or methods recognized as medical standards when performing a termination of pregnancy. These methods are predetermined by the standards elaborated by the Ministry of Health, being consolidated in two normative acts: the Voluntary Termination of the Pregnancy Regulation, approved by the Order of the Ministry of Health of the Republic of Moldova of 12.09.2010 and the Order of the Ministry of Health regarding the approval of the Standards for the safe termination of the pregnancy nr. 482 of June 14, 2011.

In the Order of the Ministry of Health regarding the approval of the Standards for the safe termination of the pregnancy nr. 482 of June 14, 2011 it is said that, in accordance with the WHO, abortion is a safe medical procedure when performed by qualified medical personnel, with appropriate equipment, by the correct method and in compliance with health standards (WHO, 2003). The World Health Organization recommends the following methods of pregnancy termination:

1. Manual or electrical vacuum aspiration for the 1st term;
2. Medication abortion with mifepristone and misoprostol, which can be used up to 9 weeks of pregnancy;
3. The suitable method after the 12th week of pregnancy is the drug which consists of administering mifepristone followed by repeated doses of prostaglandins-misoprostol or gemeprost and the suitable

surgical procedure is dilation of the cervix and evacuation of the conception product using vacuum - sucking and forceps after the preparation of the uterine cervix with misoprostol.

Also, according to the normative act to methods not recommended by WHO refers to dilation and curettage (scraping) in the first trimester and intra or extra-amniotic instillation of the hypertonic solution or prostaglandins in the second trimester. Cervical dilation and scraping are a more dangerous procedure than vacuum-aspiration and more painful for women. In most industrialized countries, but also in other countries, the procedure for cervical dilation and scraping was replaced by vacuum-suction. The incidence of severe complications following curettage exceeds 2-3 times the incidence of complications caused by vacuum-aspiration.

b. Illegal means are medically unrecognized means performed by people who do not have proper medical training.

Forensic science classifies these means in three categories: chemical, mechanical and physical.

c. The chemical means include drugs, hormones, vaccines, various organic or inorganic combinations, plant extracts, with local or general administration (Groza, 2007: 135). The author, D. Dermengiu, distinguishes the following chemical substances whose administration can cause abortion: quinine; corn rye; strychnine (may also kill the pregnant woman); lohimbrina; phosphorus; plants containing etheric oils: parsley, wormwood; tobacco; laurel (administered locally or generally as decoction, infusion); drastic purgatives (aloe, rhubarb) etc (Dermenjiu, 2011: 119). Many of the chemicals produce toxic hepato-renal insufficiency after generalized administration. By direct introduction into the uterus (iodine, oxygen, caustic) they may cause infarctions (Belis, 1992: 155).

d. The mechanical means can be used by qualified persons or not. Among these methods we quote: the *strong abdominal massage in hypogastrium*, usually by intramuscular or intravenous injection of various drugs, or by the local or oral administration of some of the above-cited toxic substances; *mechanical punching of membranes* with various bodies, from gynecological instruments and medical probes to pencils, wire, bicycle or umbrella spikes, spindles, knitting needles, plant roots, etc.; *intrauterine administration* through a syringe or chamomile tea, soapy water, vinegar, decoctions and infusions of the above mentioned substances probe; transabdominal or intravaginal intraamniotic injection of many substances (sodium chloride solution, alcohol, disinfectants, other chemicals), all of these lead to the death of the fetus, but not to its expulsion (Belis, 1992: 357).

e. The physical means are rarely used exclusively. Among these local hot baths associated with boiling ingested wine or some quinine tablets intended to

cause congestion in the small basin and especially the uterus when the menstrual cycle is to be installed are known. Among some means we can mention the ultrasounds, the electric current (the anode being placed in the coccygeal region and the cathode being placed on the cervix) (Beliş, 1992: 366).

For the existence of this offence provided in art. 159 PC no abortifacient means are relevant.

The illegal nature of the act is determined by the alternative circumstances described in the provision of the law, in the presence of which the termination of pregnancy is performed, namely:

- a) outside medical establishments or medical offices authorized for that purpose;
- b) by a person who does not have special medical specialization;
- c) in case of pregnancy exceeding 12 weeks, in the absence of medical indications, established by the Ministry of Health;
- d) in the case of medical contraindications for such surgery;
- e) in unsanitary conditions.

These circumstances refer to:

1. the place where the offence was committed - *outside medical institutions or cabinets authorized for this purpose*;
2. the subject of the offense - *by a person who does not have medical specialization*;
3. the time when offence was committed - *in case of a pregnancy exceeding 12 weeks* plus the special circumstance - *in the absence of medical contacts*;
4. the circumstances of the offense - *in case of medical contraindications for such an operation and in unsanitary conditions*.

According to the structure of the signs that form the content of the objective side, the offense of illegal performance of abortion has a material composition.

Abortifacient maneuvers are resultative actions that lead to injurious consequences under the form of termination of pregnancy.

In this respect, we support the assertion of the authors S. Brînza and V. Stati, according to which the offense is considered consumed from the moment of the harmful consequences in the form of termination of the pregnancy, regardless of the moment when it is performed, but not later than the beginning of the process of birth, because after this moment the life of the newborn is protected by the criminalization of murder, but not by the illegal performance of abortion (Brânză, 2015: 398).

The illegal performance of abortion outside authorized for this purpose medical institutions.

The termination of pregnancy in safe conditions for the life and health of women can only be carried out by medical institutions authorized for this purpose, which are laid down in the *Voluntary Termination of the Pregnancy Regulation*. The setting up of the medical institution where pregnancy is to be terminated is subject to several criteria: pregnancy duration, method of termination of pregnancy, woman's will.

According to the aforementioned normative act, the voluntary termination of the pregnancy is carried out in the sanitary institution providing this kind of services at the choice of the pregnant woman, regardless the place of residence or the residence visa (item 8).

Also, in accordance with paragraph 13, the healthcare institution carries out the voluntary termination of pregnancy by the method chosen by the pregnant woman or refers to another medical institution that provides pregnancy termination services by the method chosen by the pregnant woman.

Taking into account the provisions of the *Voluntary Termination of the Pregnancy Regulation*, the following medical instructions can be identified by which the termination of the pregnancy can be accomplished²:

1. The voluntary termination of pregnancy through the drug method during the first 9 weeks without associated pathology is performed by obstetricians-gynecologists who have the necessary training in the medical abortion method, Territorial Medical Associations, Women's Health Centers, Consultative Departments of the Perinatalogical Centers, Reproductive Health Department of the National Center of Reproductive Health and Medical Genetics (point 30);

2. The voluntary termination of pregnancy by manual vacuum or electrical vacuum aspiration methods during the first 10 weeks without associated pathology is performed by obstetricians-gynecologists who have the necessary training in manual vacuum or electric vacuum aspiration, in the Territorial Medical Associations, Women's Health Centers, Consultative Departments of the Perinatalogical Centers, Reproductive Health Department of the National Center of Reproductive Health and Medical Genetics (point 31);

3. The voluntary termination of pregnancy between 10-12 weeks of pregnancy is performed in the sanitary institutions providing specialized hospital care (gynecology or obstetrics-gynecology departments) by the manual vacuum / electric vacuum aspiration method or scraping, if the aspiration-vacuum methods are not available (point 32);

² Regulation on voluntary interruption of pregnancy approved by the Order of the Ministry of Health with a view to making a voluntary interruption of the task of safe pregnancy. No. 647 of 21.09.2010. In: Official Gazette of the Republic of Moldova, 2010, no. 241-246.

4. The voluntary termination of pregnancy during the first 12 weeks with associated pathology (with major risk for the patient) and with patients under 16 years of age (regardless of whether or not the associated pathology is present) is performed only in the health care institution providing specialized medical hospital assistance (gynecology or obstetrics-gynecology departments (point 33);

5. The voluntary termination of pregnancy after the first 12 weeks of pregnancy is performed only in public health care institutions (section 36).

The illegal performance of abortion by a person who does not have medical specialization.

In this case the damaging degree of the deed is determined by the performance of abortifacient maneuvers by unqualified persons.

According to the mandatory rules stipulated in sections 9 and 10 of the *Voluntary Termination of the Pregnancy Regulation*, the voluntary termination of pregnancy is performed only by specialists in obstetrics and gynecology trained in the provision of this kind of services.

Resident physicians in obstetrics and gynecology may perform a termination of pregnancy only under the supervision of those responsible for their training and education.

In addition, specialists in obstetrics and gynecology must have a special training regarding the abortion method they apply, which emerge from the following provisions:

- the voluntary termination of the pregnancy through the medical method (...) is performed by obstetricians-gynecologists who have the necessary training in the medical abortion method (point 30 of the *Voluntary Termination of the Pregnancy Regulation*);

- the voluntary termination of the course of pregnancy by electrical or manual vacuum aspiration method (...) is performed by obstetricians-gynecologists who have the necessary training for electrical or manual vacuum aspiration method (point 30 of the *Voluntary Termination of the Pregnancy Regulation*).

Termination of pregnancy exceeding 12 weeks without medical contraindications.

The voluntary termination of the pregnancy after the first 12 weeks of pregnancy is only performed in public health care institutions. The voluntary termination of the pregnancy after the first 12 weeks and until the end of the 21st week of pregnancy is performed under medical prescriptions (Annex nr. 1 to the Regulation) and social (Annex nr. 2 to the Regulation).

According to Annex nr. 1 of the *Voluntary Termination of the Pregnancy Regulation*, the medical indications for the voluntary termination of pregnancy after 12 weeks and until the end of the 21st week of pregnancy are stipulated as following:

- fetal malformations incompatible with life / incurable;
- conditions following surgical treatment with removal of an important vital organ;
- diseases or pathological conditions endangering the health and life of the pregnant woman.

The following is an exhaustive list of diseases or pathological conditions that may justify the recourse to medical abortion.

By comparing the provisions of the *Voluntary Termination of the Pregnancy Regulation*, there is also a normative way of committing the illegal performance of abortion from letter c) and art. 159 PC, there can be noticed a collision of the norms of law in the way that the legal norms belonging to different branches of law solve differently the same legal situation.

Thus, the *Voluntary Termination of the Pregnancy Regulation* allows the termination of the pregnancy from 12 to 21 weeks on the basis of the social directions, while the imperative provisions of art. 159 PC forbid such action. Respectively, the question arises: whose provisions are to give priority to the perpetrator of the criminal law? The provisions of the Regulation for *Voluntary Termination of the Pregnancy Regulation* or Art. 159 letter c) PC.

It is well known that taking into account the hierarchy of normative acts, the Penal Code, compared to the *Voluntary Termination of the Pregnancy Regulation*, has a net priority to apply. But since the normative acts in the medical field recognize women's right to abortion from 12 to 21 weeks for social reasons, how correct would the Penal Code be to prohibit such intervention?

In our view, the legal-criminal provisions are not intended to establish standards in the field of medicine, but to protect standards established in the specialized fields, as is medical science.

We therefore propose the reformulation of art. 59 letter c) PC by supplementing and extending the incriminating provision as well to social abortion. Thus, the described way will have the following normative content: *termination of the pregnancy over 12 weeks, in absence of medical or social contraindications.*

In Annex no. 2 of the *Voluntary Termination of the Pregnancy Regulation*, the following are listed as social abortions: divorce during pregnancy; death of the husband during pregnancy; imprisonment or deprivation of parental rights of one or both spouses; pregnant women in the process of migration; pregnant women with 5 and more children; pregnant women who have a child under 2 years of age or one or more family members in the first degree of disability who require care, in accordance with the Council of Medical Expertise on Vitality; the association of at least 2 circumstances - lack of domicile, lack of financial sources of existence, alcohol and / or drug abuse, domestic violence, vagrancy.

In our view, however, it is necessary to re-evaluate the aforementioned situations in order to see the extent to which they justify the termination of the pregnancy arising from the realities.

This is what we are dealing with in a different framework of the writing, namely the one dedicated to special measures to prevent illegal abortions.

The illegal performance of abortion in case of medical contraindications to perform such an operation

In accordance with pt. 17 *Voluntary Termination of the Pregnancy Regulation*, in case of detection of acute and sub-acute inflammatory processes with various locations and infectious diseases, the intervention of voluntary performance of pregnancy is performed after their treatment, taking into account implicitly the term of pregnancy.

We are in solidarity with the opinion expressed by A. Plop that the lack of medical contraindications is a *sine qua non* condition for the termination of pregnancy, the termination of pregnancy in case of medical contraindications to perform such interventions acts regardless the term of gestation even in case of a pregnancies exceeding 12 weeks of amenorrhea the criminal liability is required for the illegal performance of abortion if abortifacient maneuvers were performed in the presence of acute and sub-acute infectious diseases of various localizations or in presence of acute infectious diseases ie in the presence of medical contraindications (Plop, 2015: 104).

The illegal performance of abortion in unsanitary conditions.

As mentioned by the authors S. Brânză and V. Stati, in the context of this circumstance, the most relevant example of the disease that the woman who aborts in unsanitary conditions can contact is septicemia - a generalized blood infection that can cause the death of the woman (Cheese, 2015: 398).

In the case of art. 159 para. (1) letter e) the provision of art. 159 is just conventional, as the legislator refers to the normative acts that regulate the rules that ensure compliance with sanitary conditions in case of interruption of pregnancy. The nomenclature of these normative acts contains:

The Law on Public Health Surveillance no. 10 from 03.02.2009³; The sanitary regulation on the hygiene conditions for sanitary institutions, approved

³ Law on Public Health Surveillance. No. 10 of 03.02.2009. In: Official Gazette of the Republic of Moldova, 2009, no. 67.

by Government Decision no. 663 of 23.07.2010⁴; Methodical instructions on processing tools for abortion through electric or manual vacuum aspiration⁵.

5. The subjective side of the offense of illegal performance of abortion

From the subjective point of view, the majority of authors acknowledge that the offense of illegal performance of abortion takes the form of direct intent.

Although some authors claim that the offense incriminated in art. 159 PC can take the form of indirect intent (Bogdan, 2014: 122; Braunștein, 1959: 175), we adhere, however, to the first opinion that the form of guilt in case of illegal performance abortion is direct intention.

The elucidation of the content of intent regarding the offense of illegal performance of abortion must be made in the light of the intellectual and voluntary factor, which are required by the criminal law under Article 17 of the Penal Code of the Republic of Moldova as the psychological processes underlying the formation of guilt in general and of the direct intent in particular.

From the interpretation of this defining rule it follows that the offense is committed with direct intent if the person who committed it was aware of the harmful nature of its action or inaction, anticipated its harmful consequences (the intellectual factor) and wanted it to occur (the voluntary factor).

The intellectual factor compresses three psychic processes, namely:

1. perception of the social relations, meant to be injured by committing the offense;
2. perception of the material activity accomplished by the perpetrator and the prejudicial its inherent dimensions;
3. anticipation of damaging harm which is a result of the damaging action.

By perceiving the social relations injured by committing the offense, the intellectual factor is manifested in relation to the social relations protected by the criminal law, in terms of the subject's awareness of the significance they pose to the society. In the present case, it is about perceiving the social relations related to the life and health of the woman who is endangered by the abortifacient maneuvers made by the subject.

The perception of the material activity performed by the perpetrator and the harmless its inherent dimensions, consists in the awareness of the social danger of the act of terminating the pregnancy. In this respect, the intellectual

⁴ The sanitary regulation regarding hygiene conditions for the medical-sanitary institutions, approved by the Government Decision no. 663 of 23.07.2010. In: Official Gazette of the Republic of Moldova. In: Official Gazette of the Republic of Moldova, 2010, no. 131-134.

⁵ Instructions for Instrumental Vacuum or Manual Vacuum Processing, developed by the National Center for Preventive Medicine, approved by the Ministry of Health. Nr. 09.-3/1338 of 3.10.2002. www.ms.gov.md (visited on 12.05.2018).

factor is expressed in relation to the material deed (the material element of the offense), which consists in the knowledge of those states, situations or circumstances, which attribute the deed to an antisocial character.

In case of the act described in art. 159 these states refer to the circumstances referred to letter a)-e) that determine the unlawful and prejudicial nature of the deed.

Therefore, regarding the offense of abortion, the perception of the material activity conducted by the perpetrator seen as a dimension of the intellectual factor consists in the awareness of the illegitimacy of the abortifacient maneuvers. In this context, the perpetrator must understand that committing such illegal actions, by their very nature, is a source of danger regarding the relationship of protection of life and health.

The prediction of injurious consequences related to the illegal performance of abortion requires the representation of the changes that will take place in the object of the attack and the awareness of their social danger and, on the other hand, the awareness of the inevitability of the occurrence of these changes.

The changes we are talking about concern the termination of the pregnancy. These changes are inherent and causal to the abortifacient maneuvers.

The volitional factor of the illegal performance of abortion compresses in itself the psychic processes by which the perpetrator wishes to observe the prejudicial effect under the form of the pregnancy termination.

We cannot rely on the possibility of admitting the harmful consequences under the form of the illegal termination of pregnancy to the offense of illegal abortion. It is well known in the literature that the consent of the woman to the interruption of pregnancy basically eclipses the possibility that the perpetrator, in a volitional aspect, admits the occurrence of the harmful effect manifested alternately in: the suppression of the product of conception in utero (fetal intrauterine death), even without expulsion; the expulsion or elimination of the product of conception as the effect of abortifacient maneuvers, regardless of whether it survives and is born alive or whether death has occurred before, during or after the expulsion (Plop, 2015: 125).

In the case of the aggravating forms provided in art. 159 para. (2) letter a) and b), the subjective side of the offense is carried out with two forms of guilt under the conditions provided by art. 19 PC of the Republic of Moldova: direct intent to the deed committed in typical varieties and imprudence towards the aggravations described in art. 159 para. (2).

According to art. 19 PC of the Republic of Moldova if, *as a result of intentional committing of the offense, there are more serious consequences which, according to the law, attract the penal penalty and which were not covered by the intention of the perpetrator, criminal liability for such consequences occurs only if the person foresaw the harmful consequences, but*

thought he could avoid them or if the person did not foresee the possibility of these consequences, although he should have been able to foresee them. Consequently, the offense is considered intentional.

Under the art. PC of the Republic of Moldova there isn't any reference to the reason and purpose of committing the offense, ie these signs do not involve binding connotations for the legal-criminal framing of the crime.

However, the study of judicial practice reveals that in the most frequent cases the reason for committing the illegal performance of abortion is the material interference, ie the desire for enrichment by the one who illegally performs the termination of the pregnancy.

Therefore, we consider that for a fairer individualization of the criminal law and for the dosing of its preventive effect, *lege ferenda* makes it necessary to supplement the incriminating text with form: committing the act because of material interest.

6. Subject of the offense

The subject of the crime of illegal performance of abortion is general and may be the individual responsible above the age of 16. Given the specific study object of this paper, we will refer in more detail to the signs that characterize the subject of the offense when dealing with the personality of the offender.

Conclusion and recommendations:

Generalizing on the aspects and issues addressed in this article, we draw the following conclusions and recommendations:

1. The marginal title of art. 159 PC should be changed from the "Illegal Performance of Abortion" into "Illegal Performance of the Termination of the Pregnancy".
2. The special legal object of the offense of illegal performance of the abortion is the social relations regarding the protection of the life and health of the pregnant woman, whose normal existence and development is conditioned by the termination of the pregnancy in safety by respecting the established legal procedures.
3. The introduction of a new aggravated form under the art. 159 Penal Code, by fulfilling the text of the law with par. (1), with the following legally binding wording:
 - i: (1) The actions referred to in paragraph (1) committed:
4. after the expiry of 21 weeks of gestation;
 - a. In order to highlight this position, we can forward the following argument.
 - b. After the 21st week of gestation, the fetus becomes viable in the sense that it can lead an independent extrauterine life. The

perpetrator is aware of suppressing a being with a high probability of human existence that, although at the moment it leads an intrauterine life, but the level of development allows it to lead an extrauterine life, even artificially maintained, to a complete development. Besides these, the abortifacient maneuvers performed at a more advanced gestational age pose a greater danger to the life and health of the woman, which is also perceived by the perpetrator.

5. Reformulation of art. 59 letter c) PC by supplementing and extending the incriminating provision and to social abortion. Thus, the described way will have the following normative content: *termination of the pregnancy over 12 weeks, in the absence of medical or social contacts.*
6. The study of judicial practice reveals that in the most frequent cases the reason for committing the illegal performance of abortion is the material interference, ie the desire for enrichment by the one who illegally performs the termination of the pregnancy. Therefore, we consider that for a fairer individualization of the criminal law and for the dosing of its preventive effect, *lege ferenda* makes it necessary to supplement the incriminating text with form: committing the act because of material interest.

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