

**To:** The Romanian Parliament

**To the attention of:** Mr. Daniel Buda, President of the Special Joint Commission for the Debate on the Merits, in the Emergency Procedure, of the Criminal Code, Criminal Procedure Code, Civil Code, and the Civil Procedure Code

Mr. Victor Ponta, President of the Sub-commission on the Criminal Code and the Criminal Procedure Code

**CC:** Mr. Mircea Geoană, President of the Romanian Senate

Ms. Roberta Anastase, President of the Romanian Chamber of Representatives

Mr. Constantin Traian Igaş and Mr. Mircea-Nicu Toader, Leaders of the Parliamentary Group of the Liberal Democratic Party

Mr. Ion Toma and Mr. Viorel Hrebenciuc, Leaders of the Parliamentary Group of the Political Alliance between the Social Democratic Party and the Conservative Party

Mr. Puiu Haşotti and Mr. Călin Popescu Tăriceanu, Leaders of the Parliamentary Group of the National Liberal Party

Mr. Béla Markó and Mr. Árpád-Francisc Márton, Leaders of the Parliamentary Group of the Democratic Union of Hungarians in Romania

Mr. Pambuccian Varujan, Leader of the Parliamentary Group of the National Minorities

**Re:** Proposals to modify the criminal legislation in the field of abortion within the debate on the Draft of the New Criminal Code

**Date:** 5 May 2009

The undersigned national, regional and international organizations and networks express their concern with regards to the negative impact the adoption of the proposals for the amendments related to abortion under debate in the Romanian Parliament will have on women in Romania, particularly the limitation of therapeutic abortion conducted after the 24<sup>th</sup> week from conception (Article 199 of the Draft of the New Criminal Code and the proposed definition of the person in the context of the Draft of the New Criminal Code as including the fetus after the 24<sup>th</sup> week from conception). The adoption of such provisions will lead to Romania being the only Member State of the European Union that prohibits abortion in situations when the life of the pregnant woman is endangered.<sup>1</sup> Such a legislative measure would represent a regress in ensuring fundamental rights such as the right to life, the right to health, the right not to be subjected to inhuman and degrading treatment and the right not to be subjected to discrimination on the ground of sex.

### **1. Impact on medical standards and practices and on women's rights**

Therapeutic abortion is conducted when the life or the physical or mental health of the pregnant woman is endangered by continuing the pregnancy. The necessity for a therapeutic abortion after the 24<sup>th</sup> week is a rare medical situation which is determined on a case by case basis by the medical provider and her or his patient. While naturally, during the pregnancy, doctors are concerned about the development of the fetus, they should take into account that the fetus is intrinsically connected with the pregnant woman, as recognized by the European Court of Human Rights in the case of *Paton v. UK*,<sup>2</sup> and cannot and should not be separated from the pregnant woman's concerns. Consequently, health care providers should give priority to the health and life of the pregnant woman. In addition, the pregnant woman is the providers' patient and hence has the obligation towards his patient to preserve her life and health.

According to Romania's current legislation, abortion conducted to save the life or health of the pregnant woman is allowed irrespective of the term of the pregnancy (Article 185 of the Criminal Code). Imposing a 24 week limit after which a therapeutic abortion is prohibited, as well as defining the "person" to include the fetus after the 24<sup>th</sup> week from conception will have a chilling effect on doctors in providing medical care, even in cases where such an intervention would be necessary to save the life or health of the pregnant woman. According to the proposed amendments, the fetus after the 24<sup>th</sup> week from conception is a "person" in the context of the criminal law and consequently any criminal offence can be inflicted on the fetus as in the case of any 'born' person, from the criminal offence of murder to inflicting bodily harm, to not assisting a person in need or impeding other persons to provide help. Consequently, under the amendment, pregnant women whose conduct results in their miscarriage could lead to their criminal prosecution. In addition, medical personnel or other individuals who negligently cause a woman's miscarriage or cause bodily harm of the fetus could also lead to their criminal prosecution. Recently, the European Court of Human Rights has recognized the negative "chilling effect" on doctors when confronted with the possibility of being the subject of a criminal investigation or prosecution. In the case of *Tysiack v. Poland*, the Court recommended the adoption of legislation that is formulated in such a way as to alleviate this effect.<sup>3</sup> The prohibition of therapeutic abortion after the 24<sup>th</sup> week from conception and the inclusion of the fetus after this gestational period as persons protected by the criminal code are unnecessary and potentially harmful in preventing the provision of care based on sound medical decisions between the doctors and their patients. The proposed provisions could place the doctor in the position of refusing to provide a necessary termination of pregnancy.

Legal permission for late term abortions is necessary for the protection of woman's life and her physical and mental health. Restricting late term abortion can contribute to high rates of mortality and morbidity as women may seek illegal and hence, unsafe abortions if they are unable to undergo legal terminations. Studies have shown that women who experience unsafe abortion are much more likely to experience severe complications from abortions in the second trimester.<sup>4</sup> In addition, many severe fetal abnormalities are not detected until late in the pregnancy because of the nature of the condition or a lack of access to advanced medical facilities and equipment. It is impossible to diagnose many fetal abnormalities before 21-22<sup>nd</sup> week of pregnancy.<sup>5</sup> Therefore, the Romanian Parliament should take into account its obligations to respect, protect and fulfill women's rights and allow for therapeutic abortion throughout the pregnancy.

## **2. Comparative law standards and international law standards**

Legal standards of Member States of the European Union and international law in the field of human rights protection recognize that providing legal access to therapeutic abortion is necessary to protect women's right to life, health and non-discrimination and to prevent inhumane and degrading treatment.

Member States of the European Union allow abortion throughout pregnancy when the life of the pregnant woman is endangered.<sup>6</sup> In addition, constitutional courts from Member States of the European Union have consistently recognized the lawfulness of abortion to save the pregnant woman's life or health in accordance with women's rights to physical and mental health and personal autonomy.<sup>7</sup> The recognition in legislation and jurisprudence of Member States of the European Union to protect the health and life of the pregnant woman reflects the emphasis placed on protecting women's human rights above any interest the state may have in protecting the fetus.

The United Nations Human Rights Treaty Monitoring Bodies interpret the human rights to life, health and non-discrimination, and the freedom from cruel, inhuman and degrading treatment or punishment, as requiring state parties to lawfully permit abortion where necessary to protect the woman's health. These

bodies have consistently advised state parties to amend national laws on abortion to permit abortion where necessary to protect the woman’s life or health.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR), which monitors state compliance with the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, has expressly advised state parties to permit or consider permitting abortion for therapeutic reasons.<sup>8</sup> The United Nations Human Rights Committee (HRC), which monitors state compliance with the *International Covenant on Civil and Political Rights (ICCPR)*, has expressed concern that national laws prohibit abortion in all cases, except where necessary to save the woman’s life. In *K.L. v. Peru*, the HRC reasoned that state failure to enable the complainant to benefit from a therapeutic abortion caused the depression and emotional distress she experienced, and thus constituted a violation of Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment).<sup>9</sup> According to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women and the Committee on Economic, Social and Cultural Rights, the refusal of a state party “to provide legally for the performance of certain reproductive health services for women” is discrimination on the ground of sex.<sup>10</sup>

The Romanian State through its competent authorities should ensure its laws are in compliance with international and regional human rights standards and should consider the laws of other EU Member States when reviewing its abortion-related legislation and adopting any amendments.

**3. Civil society’s proposal with regards Art. 199 (Abortion) and the proposed definition of person from the Draft of the New Criminal Code, under debate in the Parliament**

In view of the comments and standards mentioned above and in support of the Parliamentary Commissions’ work on the Draft of the New Criminal Code, we would like to provide the following proposals with regards to the text of the draft law:

<b>Draft law (proposed by the Government)</b>	<b>Amendments proposed by the special Parliamentary Subcommission</b>	<b>Civil society’s proposal</b>
<p><b>CHAP. IV AGGRESSION ON THE FETUS</b>  <b>Art. 199 Abortion</b>            (1) The termination of pregnancy conducted in any of the circumstances:            a) outside medical units or medical private practices authorized for this aim;            b) by a person who is not an OB-GYN medical doctor with a right to practice this medical specialty;            c) if the term of the pregnancy is more than fourteen weeks,            is punishable with imprisonment from 6 months to 3 years or a fine and the interdiction of certain rights.</p>	- not modified	<p><b>Modify the title of the chapter:</b>  <b>CHAPTER IV</b>  <b>ABORTION</b></p> <p><b>- The text of the first paragraph: not modified</b></p>
<p><b>Art. 199 Abortion</b>            (2) The abortion conducted in any circumstances, without the consent of the pregnant woman, is punishable with imprisonment from 2 to 7 years and the interdiction of certain</p>	- not modified	- not modified

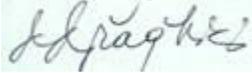
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<p align="center"><b>Art. 199 Abortion</b></p> <p>(3) If the acts prescribed by paragraphs (1) and (2) caused to the pregnant woman a bodily harm, the punishment is imprisonment from 3 to 10 years and the interdiction of certain rights and if the act had as a consequence the death of the pregnant woman, the punishment is imprisonment from 6 to 12 years and the interdiction of certain rights.</p>	<b>- not modified</b>	<b>- not modified</b>
<p align="center"><b>Art. 199 Abortion</b></p> <p>(4) When the facts have been committed by a medical doctor, the punishment consisting in the interdiction of the exercise of the medical profession will apply in addition to the punishment of imprisonment.</p>	<b>- not modified</b>	<b>- not modified</b>
<p align="center"><b>Art. 199 Abortion</b></p> <p>(5) The attempt to commit the criminal offences prescribed by paragraphs (1) and (2) is punishable.</p>	<b>- not modified</b>	<b>- not modified</b>
<p align="center"><b>Art. 199 Abortion</b></p> <p>(6) Conducting a therapeutic abortion by an OB-GYN medical doctor is not a criminal offence.</p>	(6) Conducting a therapeutic abortion by an OB-GYN medical doctor <b>up until the term of pregnancy is 24 weeks</b> is not a criminal offence.	<b>- Maintain the Government's version:</b> (6) Conducting a therapeutic abortion by an OB-GYN medical doctor is not a criminal offence.
<p align="center"><b>Art. 199 Abortion</b></p> <p>(7) The pregnant woman who terminates the pregnancy is not held criminally liable.</p>	<b>- not modified</b>	<b>- not modified</b>
<p align="center"><b>Art. 200 Harming the fetus</b></p> <p>(1) Harming the fetus during birth, which prevented the installation of the life outside the uterus, is punishable with imprisonment from 3 to 7 years.</p> <p>(2) Harming the fetus during birth, which subsequently caused a bodily harm of the child, is punishable with imprisonment from 1 to 5 years, and, if it caused the death of the child, is punishable with imprisonment from 2 to 7 years.</p> <p>(3) Harming the fetus during the pregnancy, which subsequently caused a bodily harm of the child, is punishable with imprisonment from 3 months to 2 years, and, if it caused the death of the child, is punishable with imprisonment from 6 months to 3 years.</p>	<b>- Art.200 will be removed. We will introduce an article having the following text, in the final part of the Criminal Code about definition of terms:</b> <i>„After 24 weeks, the fetus is considered a person in the context of the criminal law.”</i>	<b>Remove Article 200.</b> <b>Rejecting the amendment proposed by the Parliamentary Subcommittee aiming to include in the definition of a person the fetus after the 24th week from conception.</b>

<p>(4) Harming the fetus during birth perpetrated by the mother who is in a state of psychical disorder is punishable with the same punishment prescribed by paragraphs (1) and (2), reduced by half.</p> <p>(5) If the facts prescribed in paragraphs (1) - (4) have been committed by negligence the limits of the punishment are reduced by half.</p> <p>(6) When the facts prescribed by paragraphs (1) - (3) and (5) have been committed by a medical doctor, the punishment consisting in the interdiction of the exercise of the medical profession will apply in addition to the punishment of imprisonment.</p> <p>(7) Harming the fetus during the pregnancy by the pregnant woman is not punishable.</p>		
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We offer our appreciation for the time you devote to considering these comments and reflections on the proposed legal provisions. We offer them in the spirit of hope that Romania will continue its efforts to ensure women's health and rights.

Respectfully,

  
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Asociația ACCEPT, Romania

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Centrul pentru Politici si Servicii de Sanatate (CPSS)  
Centrul FILIA, Romania  
Fundatia Proiectul de Educatie Civica si Dezvoltare Academica (FPECDA)  
Galați EU-RO Consult, Romania  
GRADO, Romania  
Population Service International (PSI), România

International, regional organizations and networks supporting this letter:

Abortion-information, Zollikofen / Switzerland  
Article 42 of the Constitution, Georgia  
Asian-Pacific Resource and Research Centre for Women (ARROW)  
Association for Equal Opportunities, Tg Jiu, Romania  
ASTRA - CEE Women's Network for Sexual and Reproductive Health and Rights  
Bulgarian Gender Research Foundation  
Catholics for Choice, USA and Europe  
Center for Population and Development, Albania  
Citizen and Democracy, Slovakia  
Eastern European Alliance for Reproductive Choice  
Family Federation of Finland  
Family Planning Association, Portugal  
Family Planning and Sexual Health Association, Lithuania  
Federation for Women and Family Planning, Poland  
French Family Planning Movement  
Grupo de Interes Espanol en Población, Desarrollo y Salud Reproductiva, Spain  
Gynuity Health Projects, Georgia  
International Planned Parenthood Federation European Network (IPPFEN)  
Ipas, USA  
Irish Family Planning Association  
Marie Stopes International (MSI), UK  
Metropolitan Community Churches (MCC), USA  
Network of East-West Women, Poland  
Population Action International (PAI), USA  
Pro Choice Slovakia  
“Pro Familia” German Association for Family Planning, Sexuality Education and Sexual  
Counselling  
Reconstruction Women's Fund, Serbia  
Regional Centre for Minorities, Serbia  
Reproductive Health Training Center, Moldova  
Safe and Legal in Ireland Abortion Rights Campaign  
Slovak-Czech Women’s Fund  
Slovak Family Planning Association  
The Sexuality Information and Education Council of the United States (SIECUS), USA  
The Swedish Association for Sexuality Education (RFSU)  
Voice of Difference, Serbia  
Women's association "Refleksione", Albania  
Women's Center, Georgia

Women`s Safe House, Montenegro

Also supporting this letter:

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<sup>1</sup> In the case of Malta, there is no statutory exception for the access to abortion. It is unclear whether an abortion could be legally performed to save the life of a pregnant woman under the general criminal law principles of necessity. See Criminal Code of Malta (Chapter 9 of the Laws of Malta), arts. 241-43 [hereinafter *Criminal Code of Malta*].

<sup>2</sup> See *Paton v. UK (X v. UK)* (1980) 19 DR 244; (1981) 3 EHRR 48, paras. 7-9, 19. In addition, despite the new-born and the woman, the fetus is not covered by the protection of human rights. In this sense, Article 3 of the Universal Declaration on Human Rights specifically limits that right to those who have been ‘born’. The UN General Assembly that adopted the text of the declaration rejected an amendment proposing the elimination of the term “new-born” and the protection of the right to life from the moment of conception; see GA OR 3rd Comm., A/PV/99 (1948), pp. 110-124. The history of negotiation of the International Covenant on Civil and Political Rights shows that a similar amendment was also proposed and rejected; see GA OR Annex, 12th session (1957), Agenda Item 33 at 96, A/C.3/L.654, para. 113. The Commission on Human Rights adopted by a vote of 55 to nil, with 17 abstentions Article 6 that does not make any reference to conception; see GAOR, 12th Session, Agenda Item 33, A/3764 (1957), para. 119(q). In a similar way, the *travaux préparatoires* and the interpretation given to the International Covenant on Civil and Political Rights confirms that the convention protects life from birth; see Commission on Human Rights, Question of a Convention on the Rights of a Child: Report of the Working Group, 10 March 1980, E/CN.4/L/1542.

<sup>3</sup> See *Tysiac v. Poland* (2007), ECtHR, Nr. 5410/03, para. 116.

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<sup>4</sup> See Berer, M. 2008. A Critical Appraisal of Laws on Second Trimester Abortion. *Reproductive Health Matters*.

<sup>5</sup> See Christian Fiala. 2005. Abortion in Europe: Are the laws and practices patient centered? *Entre Nous*.

<sup>6</sup> See Criminal Code of Malta, *supra* note 1.

<sup>7</sup> See the decision of the Constitutional Court of the Federal Republic of Germany, *Entscheidungen des Bundesverfassungsgerichts [BverfGE] [Fed. Constitutional Court] 39, 1* translated in Robert E. Jonas & John D. Gorby, trans., *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *John Marshall J. Prac. & Proc.* 605, 624 (1976); see also the decision of the Constitutional Court of Italy, *Corte Costituzionale, Repubblica Italiana*, n.27, 1975 and the decision of the Constitutional Court of Portugal, *Constitutional Court, Art. 47*, 1985.

<sup>8</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Chile*, para. 53, E/C.12/1/Add.105 (2004); *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Malta*, para. 41, E/C.12/1/Add.101 (2004); *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Monaco*, para. 23, E/C.12/MCO/CO/1 (2006).

<sup>9</sup> Human Rights Committee, Communication No. 1153/2003, *K.L. v Peru*, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) [hereinafter *K.L. v Peru*].

<sup>10</sup> Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation 24: Women and Health*, para. 11, U.N. Doc. A/54/38 (1999) [hereinafter CEDAW Gen. Rec. 24], Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000) the right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 21. See also, the *Protocol on the Rights of Women in Africa* under the *African Charter on Human and Peoples' Rights 1981* explicitly provides that State Parties shall take all appropriate measures to protect the reproductive rights of women through the legalization of the medical abortion in cases where the continued pregnancy endangers the mental and physical health of the mother. See *African Charter on Human and Peoples' Rights, adopted June 27 1981*, OAU Doc. CAB/LEG/67/3, rev. 5, 21 I.L.M.58 (1982) (*entered into force Oct. 21, 1986*), Art. 14.2(c).