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COMMENTS ON THE OFFENCE OF KILLING OR INJURING A NEWBORN CHILD BY A MOTHER

Cristina DOBRE [1]

Abstract

The paper examines the problem of in vitro fertilization of the female egg and the male sperm, after which the resulting substance is inseminated into the body of the wife or of a mother engaged for this purpose, and also raises theoretical and practical problems, especially when the couple has not otherwise succeeded in giving birth to a child.

Keywords:

birth mother, surrogate mother, criminal liability

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1. The offence of killing or injuring a newborn child committed by the mother is regulated in the current Penal Code compared to the previous different penal code, as well as to older penal codes (Antoniu & Toader, 2015, p. 233). Therefore, we will reproduce the text of the offences, as provided for in Chapter III, "Offences committed against a family member" in Article 200 of the Criminal Code adopted by the government's assumption of responsibility, which is also in line with the need for a definition of pre-murder among the provisions of the Criminal Code.

2. The legislator describes the criminal offence by indicating the elements that determine the existence of the criminal offence or the constituent conditions of the criminal offence; for example, the killing or injury of a newborn child by a mother is described as follows: "Killing or injury of a newborn child by a mother - para. (1) The killing of a newborn child immediately after birth, but not later than 24 hours, committed by its mother who is in a state of mental disorder, shall be punishable by imprisonment for a term of one to five years; and para. (2) provides that if the acts referred to in Articles 193-195 are committed against the newborn child immediately after birth, but not later than 24 hours, by the mother who is mentally disturbed, the special limits of punishment are one month and 3 years respectively.

The above wording of the incriminating provision shows that the legislature can only describe the offence in question by referring to certain facts in relation to which the incriminating conditions are grouped. These realities are also the logical and mandatory requirements of any incrimination.

The offence described in the criminal provision involves a socially dangerous act or inaction and its consequences. The act is also described both in terms of its outward, objective manifestation (objective aspect) and in terms of the offender's mental position (subjective aspect).

Next, any criminal act implies the existence of a person who commits the act and likewise implies a person who suffers the consequences of the act. In the case of the offence under consideration, the active subject is explicitly indicated, namely the mother of the child, and, moreover, the offence also stipulates that the mother must have been in a state of distress caused by the birth. The passive subject is also explicitly indicated, namely the newborn child. The legislator felt the need to specify explicitly who the subjects are in order to emphasise that not every person, but only the subject having a certain quality, both as active subject (the mother) and as passive subject (the newborn child) can be the subject of the offence of killing or harming the newborn child.

In essence, what distinguishes this offence from the other variants of murder is the fact that, firstly, the offence is committed by the mother of the newborn child; secondly, the offence is committed immediately after birth, but not later than 24 hours; and thirdly, the active subject of the offence of murder (the mother) is in a state of mental disorder. As such, as regards the active subject of the offence, he is qualified, individualised by the legislator.

More delicate problems arise when, in the process of fertilisation and formation of the human embryo, the husband dies after preserving the sperm. Can fertilisation and insemination continue even in these circumstances? But if the fertilisation process has not started, would it be possible for the wife to request that the fertilisation and insemination process be started even in this situation if her husband has died in the meantime (Krüger, 2011)? The German courts have answered both questions in the negative on the grounds that it is not permissible to give birth to a child if its father was not alive at the time of birth.

Surprisingly, on 7 May 2010, a German higher court upheld the claimant's action to have the cells fertilised after her husband's death, which were stored in a specialised bank, transferred to her for insemination, on the grounds that the claimant had exercised her right of ownership over these cells, a right enshrined in paragraph 985 of the German Civil Code (rei vindicatio). The applicant's claims were upheld and on 1 October 2010 she took possession of the cells and then applied to a Polish clinic for implantation (Krüger, 2011).

A similar case happened in France. (Krüger, 2011, p. 43). A woman asked her husband's sperm to be returned to her sperm bank, even though her husband had since died and she would like to fertilise her husband's sperm cells. The bank refused and the plaintiff brought an action against the bank. The action was dismissed at first and second instance on the grounds that the husband had died before the in vitro fertilisation process was set in motion and French law does not allow the use of sperm deposited with a bank to be fertilised "if part of the couple has died". This solution was contrary to a ruling 25 years ago by the Creteil High Court, which on 1 August 1984 ruled that sperm in in vitro preservation could be returned to the widow after the death of the husband, a solution based on Article 1915 of the French Civil Code. The French civil law in force since 2004 has rejected this solution by explicitly prohibiting post-mortem fertilisation on the grounds that the contrary solution would not be in the interests of children.

However, it is argued in the literature that the prohibition of post-mortem fertilisation after the death of the husband could be accepted if the fertilisation process began during the life of the husband, i.e. during the 9-12

months that the fertilisation process usually lasts. In this view, the prohibition of post-mortem fertilisation would only apply in cases where the husband's death occurred before fertilisation began, either because the egg and sperm cells were isolated or because the union took place without fertilisation having begun.

As can be seen, the issue in question is controversial. It is currently unclear how criminal law, doctrine and case law will develop further in this area, i.e. whether the interests of the child would be better protected by having a father who died before conception or, on the contrary, whether they would be better protected by further prohibiting post-mortem fertilization.

3. In addition, the existence of the offence of pre-murder as a separate offence has given rise to numerous controversies and inconsistent solutions in the area of criminal participation. In the case of participation in the offence of pre-murder as instigator or accomplice to the act of the mother killing her newborn child, they will be liable for the offence of aggravated murder. As a result, we can never have instigation or complicity in the crime of child murder, the instigator and accomplice will never be in a state of mental disturbance caused by the birth, so we cannot speak of instigation and complicity in child murder.

The Supreme Court also ruled on participation in the offence of child murder in its decision No 2/1976, in which it established, firstly, that both the mother's status as a mother and her state of disorder are personal circumstances and not real circumstances, and therefore do not affect the participants.

The incriminating conditions relating to the subjects could include references to the active subject described in the incriminating rule, i.e. the person likely to commit the act described in the incriminating rule (hypothetical, indeterminate addressee of the incriminating rule). As a rule, the active subject does not appear in the content of the incrimination although he is implicitly present as the perpetrator of the act described, but the active subject appears when the law requires a certain (mother) quality of the perpetrator of the act described; in this case the quality of the subject becomes a condition of the content of the incrimination. Offences in which there is such a condition are called proper or qualified subject offences.

4. As noted in the Penal Code, the definition includes in the text the essential requirement "immediately after birth, but not later than 24 hours". We note that the legislator has expressly provided that the requirement "immediately after birth, but not later than 24 hours" could emphasise the initial moment when the foetus has completed explusion and has acquired an extra-uterine life, i.e. from the moment the umbilical cord is cut, from

which moment it becomes a child and leads a life independent of the mother, but not later than 24 hours. Therefore, up to this point we can speak of the offence under consideration, in the case of exceeding this, we are in the presence of another offence. Because the provisions of Article 200 of the Criminal Code refer to the killing of a newborn child after birth, which implies an action of the mother on the child who has become independent of the mother, but not later than 24 hours.

In the current Criminal Code the expression "immediately after birth" has given rise to several controversies (Antoniu, 2008, p. 11). The legislator of the new Penal Code could have adopted the German and Italian solution in the sense (extension) that it exists both in the case of the killing of the foetus in the process of birth and of the newborn child committed after birth.

5. In order for the offence of killing or injuring a newborn child to exist, therefore, it is not sufficient merely for there to be an act, an outward objective manifestation which presents a social danger, it is also necessary for the act to be committed with a certain mental process relevant to the subject's guilt, reflecting a certain mental attitude of the subject. This mental attitude constitutes the internal side of the offence and comprises all the mental processes which precede and accompany the outward manifestation. In general, the mental activity that precedes and accompanies any external manifestation involves the participation of all the mental processes that form consciousness, namely cognitive (intellectual), volitional and affective processes. All these factors (or psychic processes) make up consciousness, which is an integrative synthesising psychic process of all individual psychic processes. There is also a restricted meaning of the notion of conscience when we refer only to intellectual processes; this latter meaning of the notion of conscience is also found in works on criminal law (Dongoroz, 1939, p. 230). Although the mental processes underlying human action are intellectual, volitional and affective, most often only the intellectual and volitional processes are used in criminal guilt. Affective processes are included as autonomous processes in the legislator's assessment in exceptional cases (e.g. when references are made in the description of guilt to the motive for the action or the purpose of the action, either as constituent elements or as elements of circumstance); as a rule, these processes are not taken into account independently of the volitional and intellectual processes, but are associated with them as processes likely to give a stronger impetus to the volitional and intellectual processes.

Intellective or cognitive processes are those by which the person becomes aware of his or her wants and needs, of how they should be satisfied, of the means he or she might use to achieve a result. It is within

these processes of consciousness that the idea of committing the act arises, the subject deliberates on the advantages and disadvantages of the action and decides whether to act or refrain from the unlawful act. Once the decision has been taken, the subject mobilises his or her energy and triggers volitional processes in order to carry out the decision. Once this process has been triggered, cognitive, intellectual activity does not cease because throughout the course of the act the subject follows and controls the way in which the decision taken is carried out, as well as any obstacles encountered; these data evaluated in the subject's consciousness may lead to the transmission of new corrective impulses or the decision to cease the activity begun may be transmitted. This underlines the decisive role of intellectual processes in regulating human activity, including that directed towards illicit results. The intellectual factor is relevant to the mental attitude of the perpetrator to his act and to the consequences of his act. Since intellectual processes vary because the prediction and representation of the result may vary in degree and intensity (the subject may clearly or erroneously predict the result or not predict it at all), there may be different forms and modalities of guilt.

The subject's will is manifested not only in the case of committing acts but also when the subject refrains from acting (uses his will to restrain physical energies) although he was obliged to act. In these situations, the subject also translates into life a decision taken within the framework of intellectual processes not to act and as such the act belongs to him and may form the basis of his criminal liability.

There is a close link between the two categories of proceedings.

We specify that the mother's state of mental disorder is established by medical, psychological and psychological examination (Dobrinescu, 1987, p. 120). Mental disorders arising during or immediately after childbirth may also be caused by psycho-emotional disorders. This state of psychological disturbance can be established all the more accurately the closer to the time of birth. The woman's behaviour can be assessed through research into her pathological history, the course of pregnancy, her somatic-psychic constitution and the conditions in which the birth took place. Even if the fact that the mother is mentally disturbed requires a forensic examination, the establishment of these conditions does not exclude the use of other means of evidence. For example, the theoretical basis of psychological expertise is supplemented by clinical research, paraclinical examinations, bioenergetic investigations, neurophysiological interpretation and sociological research.

If it is considered on the basis of the medical examination that there was a mental disorder of the mother caused by the birth, the act will be

considered as pre-murder; otherwise the court will have to consider the act as aggravated murder.

The subjective aspect therefore refers to the mental processes which take place in connection with the subject's conduct and which are common to all human action, namely the volitional, intellectual and affective processes. Any external act usually expresses a specific decision by the perpetrator to act, which, once communicated to the organs responsible for carrying it out, becomes an act of will; it proceeds in the direction intended by the perpetrator with the participation of the intellectual processes (knowledge of the conditions in which the action or inaction is to take place, foreseeing the consequences) which accompany the act of will until the proposed end is achieved. Having such a complex role, the intellectual processes are also referred to as processes of consciousness (without identifying this expression with the proper meaning of the notion of consciousness as a synthesising psychic process comprising all the individual psychic processes (intellect, will, affectivity)(Dongoroz, 1939, pp. 230-232).

Both volitional and intellective processes are carried out on the basis of a motive or purpose, i.e. on the basis of affective processes which stimulate them and contribute to their orientation. Any incriminating rule therefore includes a set of conditions not only with regard to the act in question but also to the subject's mental position, processes which precede (by the criminal decision) and accompany the external activity. The subjective side includes both requirements relating to the subjective (or internal, moral, psychological, material) element, i.e. the mental processes mentioned and which precede and accompany the physical activity, but may also include some specific conditions likely to give it a specific colour.

6. A similar regulation is found in the Italian Criminal Code, for example, Article 578 criminalises the act of a mother who causes the death of her own newborn child immediately after birth or of the foetus during birth, when she is in a state of material and moral distress during or immediately after birth. For example, Italian case law, in its rulings on the matter, refers to states of mental distress, loneliness, marginalisation, the economic and social situation and the lack of affection felt by the mother at the time of or during the birth.

Article 106 of the Russian Criminal Code criminalises pre-natal murder as "the killing of a newborn child by the mother during or immediately after birth in conditions of mental trauma or in a state of mental disorder which does not exclude responsibility (Deplino, 1996, p. 649).

It should be noted that, in the current criminal code, the state of disturbance caused by the birth is today only used in the offence of pre-

murder, not in the case of other offences of violence which a mother in such a state might commit against a child (e.g. grievous bodily harm).

7. In the light of the foregoing, it could be said that the offence in question is a mitigated form of murder, committed under specific conditions which justify the mitigation of the criminal penalty provided for by law. Such mitigation is also provided for in other criminal legislation. In addition, it was Cesare Beccaria who promoted the idea of a more lenient punishment for the birth mother if she gives birth to a child because of rape or special circumstances. Mitigating the punishment is also justified by the fact that the birth mother finds herself in a particularly difficult situation after the birth, either because of economic deprivation, lack of support from the child's father and the help given by society (Dongoroz, 1971, p. 202).

References

Antoniu, G., & Toader, T. (coord.). (2015). *Explicațiile noului cod penal* vol. III [Explanations of the new penal code vol. III]. Editura Universul Juridic.

Antoniu, G. (2008). Observații cu privire la anteproiectul unui al doilea nou Cod penal [Comments on the preliminary draft of a second new Criminal Code] (II). *Revista de Drept Penal*, *1*, 9-37.

Deplino, L. (1996*). Diritto penale, parte speciale* [Criminal law, special part]. Edizione Simone.

Dobrinescu, I. (1987). *Infracțiuni contra vieții persoanei* [Crimes against the person's life.]. Editura Academia Română.

Dongoroz, V. (1939). *Tratat de drept penal* [Criminal law treaty]. Editura Universității din București.

Dongoroz, V. (1971). *Explicații teoretice ale Codului Penal român vol. III* [Theoretical explanations of the Romanian criminal code vol. III]. Editura Academiei.

Krüger, M. (2011). The prohibition of post mortem- fertilization, legal situation in Germany and European Convention on human rights. *Revue internationale de droit penal*, *82*(1-2), 41-64. https://www.cairn.info/revue-internationale-de-droit-penal-2011-1-page-41.htm