

ACTIVE SUBJECT OF THE FETUS BODILY HARM OFFENSE STIPULATED IN ARTICLE 202 OF THE NEW CRIMINAL CODE

Mihaela Rotaru, Assistant, PhD, "Alexandru Ioan Cuza" Police Academy, Bucharest

Abstract: Whether it is considered a new offense¹ or partly a special form of the offense of bodily harm of the Criminal Code in force², one thing is certain that the offense of harm of the fetus has the role to complete the legal frame for the protection of the fetus and the analysis of the active subject of this offense is important from the perspective of knowing from whom the fetus is being protected by the means of the criminal law.

Keywords: active subject, offense, bodily harm, fetus, protection, participation.

Introduction

This study aims to address the issue of the active subject of the fetus bodily harm offense, considering, on the one hand, the aspect relative to who can actually commit the offense in question, and, on the other hand, that relative to criminal participation.

On this latter point, there were over time, many controversies in the criminal literature about the mother as a possible active subject of this crime, in the sense of whether she is punished or not and under what conditions.

The new Criminal Code, that came into force recently³, harmonizes the Romanian criminal law with that from the European level, sources of inspiration for the enactment in question being different articles of the criminal codes of some European countries.

The basis of this study is represented by the existing work in this area in the literature, but more than what has been written so far, the study contains detailed analysis of some hypotheses for the proper and improper criminal participation, and for the situation when the active subject of the offense is the mother of the fetus.

Persons who can be the active subject of the offense

Based on the method of description of the act in the indictment rule, the active subject of the offense under consideration may be any person, only if it fulfills all general conditions of third party liability or on the contrary, it may be circumstanced, in the person of the pregnant woman herself. Therefore, in cases described in paragraphs (1), (2) and (3) of art. 202 in the new Criminal Code⁴, the active subject is not circumstanced, it may be any person, taking into account the aforementioned reasons. The active subject of the offense of the fetus bodily harm may even be a doctor specialized in obstetrics-gynecology or a person specialized in monitoring and assisting the birth, if these persons do not comply with the profession standards, as the surrounding reality⁵ proves, having in view that in the timeframe

¹ Valerian Cioclei, „Necessity of indictment of the fetus bodily harm in the New Criminal Code”, Curentul Judiciar Magazine no. 7-8/2011, 406-410, available at <<http://curieruljudiciar.ro/2011/11/18/necesitatea-incriminarii-faptei-de-vatamare-a-fatului-prin-noul-cod-penal/>> (last access: 28 March 2013).

² Petre Dungan, Tiberiu Medeanu, Viorel Pasca, *Criminal Law Manual. Special Part. Crimes against persons. Crimes against persons*, (“Universul Juridic” Publishing Company, Bucharest, 2010), 119.

³ February 1st, 2014 is the date when this legal act came into force.

⁴ Represented by Law no. 286/2009, published in the Official Gazette of Romania no. 510 on July 24th 2009 and amended lastly by Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code. Follow-up: the New Criminal Code

⁵ „Criminal suit in the case of the child with femur fracture” available at <<http://stirileprotv.ro/stiri/eveniment/plangere-penala-impotriva-medicilor-in-cazul-copilului-cu-fractura-de->

between the moment of birth initiation and its completion may offenses affecting the fetus may take place, either due to medical fault or deliberate⁶.

In the case outlined in paragraph (4) of art. 202 of the New Criminal Code, the active subject is circumstanced and it may not be anyone else but the mother, in a state of mental disorder, the fetus bodily harm being generated during the birth.

The participation in a criminal offense is possible in any of its forms, namely co-authored, instigation and complicity, for all cases described by the law giver in art. 202 of the New Criminal Code, with one exception. It is the matter of paragraph (4) of art. 202 of the New Criminal Code, where it is expressly provided that the active subject of the offense can only be the mother in a state of mental disorder. This hypothesis relating to the participation in a criminal offense excludes the coauthor deed since the active subject is aggravated and no other person but the author has the ability required by law regarding the active subject of the offense because where the legal text provides a specific ability of the active subject, in case of a coauthor deed, the coauthor must also possess this ability but in the above-mentioned hypothesis this is impossible.

The hypothesis in paragraph (4) of art. 202 of the New Criminal Code, relating to the participation in a criminal offense, neither the instigation, nor the complicity are possible because, as the high court decided⁷, the quality of being the natural mother of the active subject and the mental disorder state are personal circumstances, which do not affect the participants in a criminal offense, according to art. 50 paragraph (1) of the New Criminal Code and the persons determining, facilitating or helping in any way the mother being in a mental disorder state to commit the fetus bodily harm offense mentioned in the paragraph (4) of art. 202 of the New Criminal Code will be held liable in criminal proceedings for the fetus bodily harm offense outlined in any of the cases in paragraphs (1), (2), (3) or (5) of the art. 202 of the New Criminal Code, based on the form of guilt of their actions, namely intention or fault.

Moreover, if the forensic medicine expertise proves that the mother of the fetus, while she committed the offense during birth was not in a mental disorder state, the extenuated case in paragraph (4) no longer applies in her case and she will be held accountant for having committed the fetus bodily harm offense described in any of the situations presented in paragraphs (1)-(3) or (5) of art. 202 of the New Criminal Code, according to the guilt form of her action, meaning intention or fault.

The case stipulated in paragraph (5), art. 202 of the New Criminal Code, namely the fetus bodily harm offense committed by fault, the coauthor deed is possible, except of the active subject is a mother in a mental disorder state, having committed the offense by fault.

[femur.html](#)> (last access: 02 April 2013); the same opinion, Ionuț Andrei Barbu, *The Person – Subject of International Crimes*, Pro Patria Lex no. 5/2004, p. 42.

⁶ „New offense in the Criminal Code: fetus bodily harm during birth” available at <<http://www.mediafax.ro/social/infractiune-noua-in-codul-penal-vatamarea-fatului-in-timpul-nasterii-4046856>> (last access: 02 April 2013); the same opinion, Gianina Anemona Cudrițescu, *Criminological Perspective Regarding the Evolution of the Criminal Phenomenon which Involves Women*, European Integration – Realities and Perspectives International Conference, Didactic and Pedagogic Publishing House, Bucharest, 2006, p. 125.

⁷ High Court, Guidance Judgement no. 2/1976, in C.D. 1976, 46, cited by Ilie Pascu & Mirela Gorunescu, *Criminal Law. Special Part, 2nd edition* (Hamangiu Publishing Company, Bucharest, 2009), 114-115. In the same sense, please consult also Vasile Dobrinioiu & Norel Neagu, *Criminal Law. Special Part. Legal Theory and Practice according to the New Criminal Code*, („Universul Juridic” Publishing Company, Bucharest, 2011), 84; Ionuț Andrei Barbu, *Some Discussions Regarding the Criminal Protection of the Life of the Person*, Pro Patria Lex no. 1(22)/2013, p. 87.

As regards the existence of the coauthor deed in case of offenses committed by fault, the theory includes two points of view. Therefore, one of them⁸ provides that „in case of unintentional offenses, the committers collaborating to carry out the offense by fault of the same result are considered authors of autonomous crimes” (C. Bulai & B. Bulai, p. 466).

The other point of view⁹ that we accept stipulates that the coauthor deed is possible in case of offenses committed by fault, if the result is dangerous from a social point of view, in this case the blocking of extrauterine life coming into being or the child’s bodily harm or subsequent death as a result of the fetus bodily harm took place by the common fault of more persons.

The proper criminal participation

If we are to discuss the personal participation in a criminal offense, the instigation described in the case mentioned in paragraph (5) of art. 202 of the New Criminal Code is impossible since the definition of the instigator, as per art. 47 of the New Criminal Code, namely: „the person determining deliberately another person to commit an offense stipulated in the criminal law” absolutely stipulates the impossibility to instigate by fault.

The same legal reasoning is valid for complicity. According to art. 48 paragraph (1) of the New Criminal Code, the accessory is „the person who facilitates or helps deliberately and in any way another person to commit a crime provided in the criminal law”. Or, as a consequence, the complicity by fault cannot exist in the case provided in art. 202 paragraph (5) of the New Criminal Code.

If the pregnant woman is the one who determines or facilitates in any manner another person to commit the fetus bodily harm, there are more hypotheses. If it is proved that she was in a mental disorder state during the birth, she will be held liable in criminal proceedings for instigation or complicity to the fetus bodily harm offense provided in paragraph (4), receiving a reduced sanction.

If it is proved that the mother was not in a mental disorder state during birth, the provisions of paragraph (4), art. 202 of the New Criminal Code will not be applied in this case, but those of paragraphs (1) or (2), as an instigator or accessory to the aforementioned crime.

In both cases above, the person who committed a crime deliberately, as a result of his/her conditioning by the pregnant woman or who received her help in any way to commit the offense will be held liable for having committed the fetus bodily harm offense pursuant to paragraphs (1) or (2), art. 202 of the New Criminal Code, based on the consequence of the action, namely the blocking of extrauterine life of coming into being, the bodily harm or subsequent death of the child.

Paragraph (7) of art. 202 of the New Criminal Code expressly provides the non-sanction of the pregnant woman harming the fetus during birth. This non-sanction cause is valid only in the case of the pregnant woman, the fact remaining a crime, with all its meaning in the plan of participation in a criminal offense, the law giver renouncing to sanction her.

Therefore, if during the birth, the pregnant woman is determined or helped deliberately to harm the fetus and she may action deliberately or by fault, will receive the non-sanction

⁸ Vasile Papadopol, *R.S.R. Criminal Code, Commented and annotated I: General Part., Scientific Publishing Company*, (R.S.R. Academy Publishing Company, Bucharest, 1972), 164, cited by Costica Bulai & Bogdan Bulai, *Criminal Law Manual. General Part*, (, Universul Juridic” Publishing Company, Bucharest, 2007), 466.

⁹ Vintila Dongoroz, Siegfired Kahane, Ion Oancea, Ilie Fodor, Nicoleta Iliescu, Costica Bulai, Rodica Stănoiu, Viorel Roșca, *Theoretical explanations of the Romanian Criminal Code*, vol. I, *General Part*, (R.S.R. Academy Publishing Company, Bucharest, 1969), 194, cited by Iie Pascu & Mirela Gorunescu, ‘*op. cit.*’, 118; Vasile Dobrinouiu & Norel Neagu, ‘*op. cit.*’, 84; Ana Călin, Dragu Crețu, Livia Doina Stanciu, Gianina Cudrițescu, *General Criminal Law, volume I*, Pax Aura Mundi Publishing House, Galați, 2004, p. 95.

cause, but the person who determined her or helped her will be held liable in criminal proceedings as an instigator or accessory to the fetus bodily harm offense pursuant to paragraph (3), art. 202 of the New Criminal Code.

If during the birth, the pregnant woman deliberately determines, facilitates or helps in any way another person to commit the willful offense of bodily harm of the fetus, her deed, although a crime, she being considered an instigator or accessory to the offense made by the second person, as author of the fetus bodily harm, as per art. 202 paragraph (3) of the New Criminal Code will not be sanctioned because 202 paragraph (7) of the New Criminal Code also apply in this case.

This happens because art. 174 of the New Criminal Code stipulates that „by making a crime or committing an offense one understands the performance of any facts punished by law as consumed crime or attempt and the participation in those criminal offenses as coauthor, instigator or accessory”. Or, if we corroborate art. 174 of the New Criminal Code with art. 202 paragraph (7) of the New Criminal Code, we draw the conclusion that although the fact is always a crime, the pregnant woman benefits from impunity irrespective of her contribution to committing that offense since where the law cannot make a difference, we ourselves cannot make a difference.

The improper criminal participation

The improper participation in a criminal offense, according to art. 52 of the New Criminal Code is possible in case of the fetus bodily harm offense.

Therefore, if pursuant to art. 52 paragraph (1) of the New Criminal Code, a person fulfilling the general conditions of the criminal liability performs the deliberate and direct offense of the fetus bodily harm, in which, by fault, another person participates, the first person will be punished with the sanction stipulated by law for the deliberate action, in this case with the sanction provided in one of the paragraphs (1), (2) or (3) of art. 202 of the New Criminal Code, based on the result, and the second person will be punished for having committed the offense by fault, as per dispositions of paragraph (5), the special limits of the sanction being reduced by half.

According to art. 52 paragraph (2) of the New Criminal Code, if a person determines, facilitates or helps in any manner and deliberately the performance by fault of another person of a deed stipulated by criminal law is punished with the sanction stipulated by law for the deliberately committed crime, in our case with the sanction provided by law in paragraphs (1), (2) or (3), art. 202 of the New Criminal Code, based on the quality of instigator or accessory to the offense performance and the instigated or helped person will be punished pursuant to paragraph (5), art. 202 of the New Criminal Code for the deliberate offense by fault.

Conclusions

The mother of the fetus can be held criminally liable if the act is committed during birth, intentionally or negligently, but only if it is proved by forensic expertise that at the time of the offense she was in the state of mental disorder.

The lack of this state of mind, hence the personal nature of this condition, attracts failure to apply the provisions of art. 202 of the new Criminal Code, but she may possibly be held criminally liable for another crime against the person, depending on the facts of each case.

However, if the mother of the fetus commits the crime during pregnancy, she will not be punished because of the express provision with this effect from the art. 202 of the new Criminal Code.

The proper or improper criminal participation is possible in the case of the offense of fetus bodily harm, with certain exceptions generated either by an active subject specific qualification or by the guilt form in committing the crime.

The analysis of the new Criminal Code offenses has to continue in order to see to what extent the legal texts correspond to social reality that they are designed to protect by criminalizing certain acts.

References

- Ionuț Andrei Barbu, *The Person – Subject of International Crimes*, Pro Patria Lex no. 5/2004
- Ionuț Andrei Barbu, *Some Discussions Regarding the Criminal Protection of the Life of the Person*, Pro Patria Lex no. 1(22)/2013
- Costica Bulai & Bogdan Bulai, *Criminal Law Manual. General Part*, „Universul Juridic” Publishing Company, Bucharest, 2007
- Valerian Cioclei, „Necessity of indictment of the fetus bodily harm offense in the New Criminal Code”, „Curentul Judiciar” Magazine no. 7-8/2011
- Ana Călin, Dragu Crețu, Livia Doina Stanciu, Gianina Cudrițescu, *General Criminal Law, volume I*, Pax Aura Mundi Publishing House, Galați, 2004
- Gianina Anemona Cudrițescu, *Criminological Perspective Regarding the Evolution of the Criminal Phenomenon which Involves Women*, European Integration – Realities and Perspectives International Conference, Didactic and Pedagogic Publishing House, Bucharest, 2006
- Vasile Dobrinou & Norel Neagu, *Criminal Law. Special Part. Legal Theory and Practice according to the New Criminal Code*, „Universul Juridic” Publishing Company, Bucharest, 2011
- Vintila Dongoroz, Siegfried Kahane, Ion Oancea, Ilie Fodor, Nicoleta Iliescu, Costica Bulai, Rodica Stănoiu, Viorel Roșca, *Theoretical explanations of the Romanian Criminal Code*, vol. I, *General Part*, R.S.R. Academy Publishing Company, Bucharest, 1969
- Petre Dungan, Tiberiu Medeanu, Viorel Pasca, *Criminal Law Manual. Special Part. Crimes against persons. Crimes against persons*, „Universul Juridic” Publishing Company, Bucharest, 2010
- Vasile Papadopol, *R.S.R. Criminal Code, Commented and Annotated I: General Part*, Scientific Publishing Company, Bucharest, 1972
- Ilie Pascu & Mirela Gorunescu, *Criminal Law. Special Part, 2nd edition*, Hamangiu Publishing Company, Bucharest, 2009
- Law no. 286/2009, published in the Official Gazette of Romania no. 510 on July 24th 2009 and amended lastly by Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code
- „New offense in the Criminal Code: fetus bodily harm during birth” available at <<http://www.mediafax.ro/social/infractiune-noua-in-codul-penal-vatamarea-fatului-in-timpul-nasterii-4046856>> (last access: 02 April 2013)
- „Criminal suit in case of the child with femur fracture” available at <<http://stirileprotv.ro/stiri/eveniment/plangere-penala-impotriva-medicilor-in-cazul-copilului-cu-fractura-de-femur.html>> (last access: 02 April 2013)