

SOME APPROACHES ON THE OFFENSE OF MURDER OR INJURY OF THE NEWBORN COMMITTED BY THE MOTHER, PROVIDED IN ARTICLE 200 OF THE NEW CRIMINAL CODE

MIHAELA ROTARU*

Abstract

In addition to the innovations included in the new Criminal Code, the legislator of this legal act makes a number of amendments to the existing institutions and offenses in the criminal law. Such a situation is encountered for the offense of murder or injury of the newborn committed by the mother provided in Art. 200 N.C.C., offense that partly corresponds to the offense of infanticide described in Art. 177 of the Criminal Code in force. The legislator considered it necessary to also criminalize in the new Criminal Code the act of injury of the newborn committed by the mother, along with the action of killing, a situation that rightly caused the change of the marginal name of the offense. Moreover, another interesting aspect that also constitutes the focus of our approach is represented by the two phrases which are different from those in the legal text in force, i.e. „immediately after birth but not later than 24 hours" and „state of mental disorder", which are designed to equalize the views expressed in the criminal literature regarding the analyzed crime and the practice in the field.

Keywords: killing, injury, newborn, mother, disorder.

Introduction

The objective of this study is to analyze two very important, even essential issues in order to characterize the offense of murder or injury of the newborn committed by the mother, referred to in Art. 200 of the new Criminal Code¹. The first aspect is related to the choice of the legislator to limit the situation of being newborn for the passive subject of the crime to the first 24 hours after his birth. The second aspect relevant in supporting our approach is related to the active subject this time, represented by the mother of the newborn child, which should be in „state of mental disorder" in order to apply to her an attenuated punitive treatment, according to the legal provisions of the Art. 200 N.C.C., if she kills or hurts her newborn child.

The starting point in this study is represented by the provisions of the new Criminal Code and the issues raised in the Explanatory Memorandum² to the new Criminal Code which determined the form in which the text of the offense was written in the new Criminal Code, on the one hand, and the provisions of the Criminal Code in force and the jurisprudence and doctrine, on the other hand.

1. Approaches Regarding the Content of Art. 200 N.C.C.

The offense of murder or injury of the newborn committed by the mother is provided in Art. 200 N.C.C., of the Chapter III, called „Crimes Committed against a Family Member", of the title I of the special part of the new Criminal Code, entitled „Crimes against the Person".

* Assistant Lecturer, Ph. D. candidate, Faculty of Law, "Alexandru Ioan Cuza" Police Academy, Bucharest (email: mihaela.rotaru@academiadepolitie.ro).

¹ Represented by Law no. 286/2009, published in „The Official Gazette of Romania" no. 510 of July 24, 2009 and most recently amended by Law no. 187/2012, published in „The Official Gazette of Romania" no. 757 of November 12, 2012. Further N.C.C.

² „Explanatory Memorandum to the new Criminal Code", accessed: August 4, 2009, <<http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf>>.

We will not continue the existing discussion³ in the doctrine whether it is appropriate or not to create this third chapter dedicated to the description of the offenses committed against a family member, which contains only two crimes, and which is not found in the Criminal Code in force, as it is not the object of this study.

Article 200 N.C.C. reads: „(1) killing the newborn immediately after birth, but no later than 24 hours, committed by the mother in a state of mental disorder shall be punished with imprisonment of one to five years. (2) If the facts set out in Art. 193-195 are committed to the newborn immediately after birth, but no later than 24 hours, by the mother being in a state of mental disorder, the special limits of the penalty shall be of one month and three years respectively”.

For a better understanding of the option of the legislator of the new Criminal Code to draft in this way the legal text we believe that it is important to know the provisions set out in the Criminal Code in force related to the topic taken under consideration.

Thus, we can say that the variant described in para. (1) of Art. 200 N.C.C. corresponds to Art. 177 Criminal Code in force, where the crime of infanticide is described as „killing the newborn immediately after his birth by the mother which is in a state of disorder caused by the birth is punished with imprisonment from 2 to 7 years”.

It is true that the variant described in para. (2) of Art. 200 N.C.C. has no counterpart in the Criminal Code in force. We consider appropriate to create this legal text because if the legislator chose to apply a lower sentence for the mother who, in a state of disorder caused by birth, kills her newborn baby, she is also entitled to a reduced penalty if, in the same conditions relative to her mental health, the mother causes harm to her newborn immediately after birth.

We agree with what it was stated in the Explanatory Memorandum to the new Criminal Code on this issue, that the desire was to „eliminate the gaps and the inconsistencies caused by the successive amendments of the criminal code in force”.

Moreover, we believe the legislator made an inspired option to change the marginal name of the offense from “infanticide”, as described in Art. 177 Criminal Code in force, to “murder or injury of the newborn committed by the mother” because the marginal name has to be consistent with the legal text in question.

Relative to the provisions of Art. 200 N.C.C. we believe that the legislator opted for the inclusion in the same article of the Criminal Code of two distinct offenses, namely: the offense of killing the newborn committed by the mother in para. (1) of Art. 200 and the offense of injury of the newborn committed by the mother in para. (2) of Art. 200.

An argument in issuing this hypothesis is the existing legal text of Art. 266 Criminal Code in force, which is called „Illegal Arrest and Abusive Investigation” and that, in fact, comprises two distinct offenses individually described in paragraphs (1) and (2) of the article in question.

Another argument in supporting the thesis is the very presence of the conjunction “or” in the marginal name of Art. 200 N.C.C. If the legislator used in the existing Criminal Code the conjunction “and” in stating the marginal name of Art. 266 Criminal Code in force, thus showing that in practice there may be a situation in which the offense of illegal arrest, contained in para. (1) of Art. 266, and the offense of abusive investigation, referred to in para. (2) of Art. 266, may be withheld in contest, the usage of the conjunction “or” in the marginal name of Art. 200 N.C.C. was required for reasons of logical order. Thus, in practice there cannot be a situation in which the provisions of para. (1) and those of para. (2) of Art. 200 to be withheld in contest as the legal classification of the offense is based on the immediate consequence of the action or inaction which is the material element of the

³ Petre Dungan, Tiberiu Medeanu & Viorel Pasca, *Handbook of Criminal Law. The Special Part. The Offenses against the Person. Crimes against Property*, (Bucharest: Legal Universe Publishing House, 2010), 103-105. The authors believe that „the intention of the legislator to build a section with only two offenses is not very inspired” because „the concern of the legislator to create a separate legal framework will not lead to reducing domestic violence and especially to eradicate it”.

offense, taken also into consideration the other requirements imposed by law. In that case the immediate consequence of the offense of killing the newborn committed by the mother, referred to in Art. 200 para. (1) N.C.C. is the death of the baby who was born alive, and the immediate consequence of the offense of injury of the newborn committed by the mother, referred to in Art. 200 para. (2) N.C.C., is the harm of the newborn. We can never withheld in contest the two offenses if we have the same passive subject, although it is true that killing a person inevitably involves producing injury and suffering to the passive subject in question, but they are inherent in the action of killing, which immediate results in the death of the passive subject.

2. Approaches regarding the phrase “immediately after birth but not later than 24 hours”

Another aspect that we intend to analyze is relative to the legislator’s option on fixing two extremely precise time limits in characterizing the quality of newborn of the passive subject, namely the period between the end of the birth, because it is stated that the offense must be committed “immediately after birth”, and the end of the first 24 hours following that moment.

Although medical opinions⁴ about the condition of the newborn are not unitary, in the criminal literature⁵ it is said that this state lasts a relatively short period, id est from the moment of the completion of birth by cutting the umbilical cord to 10-14 days, while the child's body still preserves the signs of birth⁶.

In another opinion⁷ it is stated that legally speaking “immediately after birth” has the meaning of the period in which the recent signs of the birth still remain on the baby's body and it can last up to three days after birth, although medically speaking the state of newborn is kept in the first 28 days of extra-uterine life of the child.

However, under the new Criminal Code, the literature⁸ stated that the condition of the newborn remains only in the first 24 hours following birth. This time interval is in fact a condition to characterize the offense.

It is true that the expression „immediately after birth” of Art. 177 Criminal Code in force is ambiguous and has over time generated non-unitary solutions in the judicial practice, but we consider that the time condition required to be fulfilled in order to be in the presence of the offenses described in art. 200 N.C.C. is extremely limited, respecting of course the other requirements imposed by the legal text. Therefore we propose replacing for the future regulation the term „immediately after birth but not later than 24 hours” with the phrase „immediately after birth, but not later than 14 days”, taking also into account the existence of a state of mental disorder for the mother.

However, the essence of the offense of killing or injury of the newborn is represented by the quality of newborn for the passive subject and by the condition of mental disorder of the active

⁴ „Newborn” is the name for the baby from birth until the age of 28 days; accessed: December 23, 2012, <http://www.romedic.ro/nou-nascutul-prima-luna-de-viata-0C429>. In another opinion it is stated that „the newborn is the name given to the baby born alive in the first 30 days of life”; Dungan, Medeanu & Pasca, *Handbook of Criminal Law*, 110.

⁵ Ioana VasIU, *Criminal Law. Special Part*, volume I, (Cluj-Napoca: Blue Publishing House, 1997), 122, cited by Ilie Pascu & Mirela Gorunescu, *Criminal Law. The Special Part*, 2nd edition, (Bucharest: Hamangiu Publishing House, 2009), 115.

⁶ In medical science it is stated that “the skin of the newborn may present edema which may resolve spontaneously within the first week with kidney involvement, (...) staining pink skin gradually becomes yellowish, physiological jaundice starting in the third day and gradually disappearing in 10 - 14 days, (...) umbilical stump to mummify and detach within 2 weeks (...) on the forehead, shoulders and back we can see very fine hair that falls in about 2 weeks (...)”. “Signs of birth”, accessed: February 10, 2013, <http://www.nou-nascuti.ro/neonatalogie/nou-nascutul-normal.html>.

⁷ “Forensic course”, accessed: February 10, 2013, <http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala>.

⁸ Vasile Dobrinou & Norel Neagu, *Criminal Law. Special Part. Theory and Legal Practice under the New Criminal Code*, (Bucharest: Legal Universe Publishing House, 2011), 73.

subject. However, as described in Art. 200 N.C.C., given the maximum time limit of 24 hours after birth, if the mother being in a state of mental disorder kills her newborn baby within 30 hours after birth, the act would comply with the provisions of Art. 199 N.C.C., relative to the description of the offense of domestic violence, and the punishment would be more severe than that provided in Art. 200 N.C.C. In the judicial practice⁹, it has been established that there was not committed the offense of infanticide, according to Art. 177 Penal Code in force, but the offense of murder under the Art. 174 and Art. 175 letters a), c), d) and i) Penal Code in force, in the case of a newborn killed 4 days after his birth by his mother, and this situation was not due to the lack of quality of the passive subject, but to not complying with the condition of the state of mental disorder of the active subject.

The existence of the state of mental disorder of the active subject is established by forensic means in each case held before the Court because it will be appreciated from person to person depending on certain factual data and this state may exceed the 24 hours following the child's birth.

It was stated in the criminal literature¹⁰ that the introduction of this time condition „not later than 24 hours" will lead to „a more precise and uniform judicial practice".

This statement is correct, but at the same time, it seems unacceptable the situation where, the fact of murdering a newborn by his mother being in a state of mental disorder, according to Art. 200 N.C.C., at, say 30 hours after birth, to be assigned to the offense of domestic violence provided in Art. 199 N.C.C., and not to those of Art. 200 N.C.C., and applying a more severe punishment because the condition of time was not respected.

3. Approaches regarding the phrase „state of mental disorder"

Another important aspect that we want to analyze is that relative to the phrase „state of mental disorder", which is prerequisite for the active subject in order to find the hypothesis of the offenses described in Art. 200 N.C.C.

In Art. 177 Criminal Code in force, we find the phrase „state of disorder caused by birth". As shown in the criminal literature¹¹, this condition, which has to be established in the concrete conditions of each case brought before the Court, excluded the situations in which the state of disorder was pre-existing or has appeared after the birth by reasons such as fear of parental reaction, the public stigma, lack of subsistence, separation of the mother and father of the newborn and so on. For these reasons the legal practice was uneven.

In one case¹² the defendant was charged with the offense of murder referred to in Art. 174 and Art. 175 letters c) (of a close relative) and d) (taking advantage of the helplessness of the victim to defend herself) and not with the crime of infanticide, provided in Art. 177 Criminal Code in force, for the fact of hiding her pregnancy and giving birth alone in her parent's home, unattended by a physician, and killing the baby immediately after birth in order his cry not to be heard by the defendant's parents and hiding the body in a bag held under her pillow for 4 days until she got sick and, presenting herself to the doctor, the offense was discovered. When brought before the court the offense of infanticide could not be retained as the forensic examination established that the defendant did not show postpartum psychiatric disorders, and the offense was committed with discernment. The conflicts prior and with no connection to the birth such as the fear of parental reaction, the public

⁹ „The Supreme Court of Justice, Criminal Section, Decision no. 4457/2003", available online at: <http://legeaz.net/spete-penal-csj-2003/decizia-4457-2003> (accessed: December 29, 2012).

¹⁰ Dungan, Medeanu & Pasca, *Handbook of Criminal Law*, 109.

¹¹ Dobrinou & Neagu, *Criminal Law*, 74-76, Pascu & Gorunescu, *Criminal Law*, 116.

¹² S.C.J., Criminal Section, Decision no. 4956 of October 9, 2004, cited by Lia Savonea & Daniel Grădinaru in *Crimes against Life, Bodily Integrity and Health. Jurisprudence*, (Bucharest: Hamangiu Publishing House, 2011), 51-56. The court noted that „the state of disorder caused by birth" within the meaning of Art. 177 Criminal Code „is due to labor, to the physical act of birth, and not to a general concern, due to educational deficiencies, the circumstances accompanying physiological process of birth, which leads naturally to the idea of concealing an act considered as illegal".

stigma, affecting the psyche of the defendant have the value of motives of the crime and not the meaning of a state of disorder caused by birth.

In another case¹³, the defendant was acquitted because the attempted infanticide is not punishable. It was established that, at night, the defendant gave birth to a baby at home, unassisted, and immediately after that she introduced the newborn in a plastic bag and threw him through the garbage collection piping where he was found alive the next morning by the maid, who also alerted the authorities. The conclusions of the forensic report showed that the defendant was at the time of the offense in a state of disorder caused by birth, which affected her judgment. The evidence in the case showed that the defendant had decided to keep the pregnancy despite being in conflict with her concubine and she even was registered in the medical records of a specialist for monitoring her pregnancy and the fact she had not announced the birth was due to the lack of means of communication.

Bound to the state of disorder caused by birth to the mother the phrase „puerperal fever” is used, and it represents all the „mental disorders during pregnancy, childbirth and lactation”¹⁴.

In an opinion¹⁵ the psychiatric disorders caused by birth, may be in the form of „confusional states, anxiety, delirium” leading to denial of motherhood and the commission of the crime, and this states characterize the post-partum period lasting up to 42 days .

All these aspects found in the legal practice caused the legislator to choose for the new Criminal Code the phrase „state of mental disorder”.

We believe that the scope of this concept is too broad because one can say that every mental disorder of the mother, even of pathological nature, which only diminishes her judgment, may be considered as part of the concept introduced by the legislator in the new Criminal Code. Assuming that at the time of the offense, the person could not realize the meaning of her actions or inactions or could not control them either because of mental illness or for other reasons, then the irresponsibility operates according to art. 28 N.C.C., which is a question of non-imputation.

We agree with the view expressed in the criminal literature¹⁶ that the concept in question is „closely related to the pregnancy and the birth process and the implications they have on the pregnant woman psychologically and socially”.

Criminal law is strictly interpreted and applied and in order to eliminate ambiguity of expression and support doctrinal explanations about the meaning of the term in question, we propose for the future legislation the addition of the phrase as follows „state of mental disorder generated by the pregnancy as a whole”.

4. Approaches on the Comparative Law

4.1. Costa Rica

In the Second Book, „About Crimes”, title I, „Crimes against Life”, section I, „Homicide”, of the Costa Rican Criminal Code we find Art. 113 para. (3), which reads: „the mother who by reasons of hiding the shame and maintaining her good reputation kills her newborn within maximum 3 days after birth is punished with imprisonment from 1 to 6 years”.

As in the Romanian criminal law both the active subject and passive subject are qualified in the person of the mother or the newborn child. Although there is no indication on the mental state of the active subject at the time of the offense, it is interesting to note that the legal text refers to the mobile of the crime, the mother acting „to hide the shame and keep good reputation”.

¹³ S.C.J., Criminal Section, Decision no. 1948 of March 22, 2007, not published, cited by Savonea & Grădinaru, *Crimes against Life*, 131-133.

¹⁴ „Puerperal fever”, accessed: February 10, 2013, <http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala>.

¹⁵ „Mental disorder caused by birth”, accessed: February 10, 2013, <http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala>.

¹⁶ Dobrinoiu & Neagu, *Criminal Law*, 74-75.

If the Romanian Criminal Code in force provides the temporal condition of the offense „immediately after birth" and the new Criminal Code narrowly defines this condition between the limit „immediately after birth" and the first 24 hours of life of the newborn, the Criminal Code under review provides a distinct temporal condition, id est, „within a maximum of 3 days after birth".

The minimum special limit of the penalty is the same in both criminal laws, namely one year, and only the maximum special limit varies, which is higher in the Costa Rican Criminal Code, namely 6 years, comparative to the Romanian Criminal Code and to 5 years in the new Criminal Code.

Compared with the existing Criminal Code, which provides the penalty of imprisonment from 2 to 7 years, in the new Criminal Code and the Criminal Code of Costa Rica there are lower limits, id est the minimum special limit is of 1 year and the maximum special limit is of five, respectively 6 years.

4.2. Dominican Republic

The Article 300 of the Dominican Criminal Code provides that „the one who kills a newborn baby is guilty of infanticide" and in Art. 302 of the same Criminal Code it is stipulated that „it is punishable by 30 years in prison the one guilty of murder, parricide, infanticide and poisoning".

In the Dominican Criminal Code we find the offense of infanticide and, as can be seen from the legal text, the active subject is not circumstantial, as in the Romanian criminal law, but it can be any person who meets the general conditions of criminal liability.

The passive subject, as in our law, is a newborn baby, but the Dominican legislator provided no time condition relative to the commission of the crime.

The Dominican legislator has a different perspective on this crime from the Romanian legislator, fact proven by the situation that the penalty imposed is 30 years in prison, also applicable for murder or for other crimes against the person. Thus, infanticide is not perceived as an attenuated version of the offense of murder.

4.3. Tunisia

In Article 211 of the Tunisian Criminal Code it is provided that „it is punishable by 10 years in prison the mother for killing her child at birth or soon after".

Unlike the Romanian criminal law existing or future, the Tunisian Criminal Code provides a bigger punishment for the analyzed offense, that of 10 years in prison.

As the Romanian Criminal Code, the active subject and the passive subject are circumstantial, in the person of the mother and the newborn. The Tunisian legislator makes no statement about the condition of the mother at the time of the offense, but he is only interested the act to be committed „at birth or soon after".

4.4. Canada

In Article 233 of the Canadian Criminal Code it is provided that „a woman commits infanticide when by a willful act or omission causes the death of her newborn child, if at the time of the action or inaction she may still feel the effects of child birth or those of early lactation and therefore her judgment is diminished".

In the Canadian Criminal Code we find the offense of infanticide, that can be committed by action as well as by omission, like in the Romanian criminal law, by the mother to her newborn child.

Although there is no time condition provided for the commission of the offense, the Canadian legislator is extremely precise about the causes that are likely to diminish the discernment of the active subject, causes that are related either to the birth process or to the physiological changes in the mother's body onset of lactation.

We believe that Canadian legislator's option to specify the exact causes that may diminish the discernment of the active subject of the analyzed crime is necessary because it leaves no room for ambiguity and it creates no problems in interpreting the legal text and in applying it to the concrete cases that have to be judged.

Conclusions

By criminalizing an act we protect certain specific social relations that emerge and develop on certain social values including the person with her attributes. The legislator considered it appropriate in the new criminal code to criminalize the injury of a newborn along with the infanticide, which is also found in the penal code in force in view of the fact that if the mother will receive a low sentence for killing her newborn child, much more she must have the same kind of punishment if she only harms him. The legislator of the new Criminal Code used an already known legal arrangement from the Art. 266 penal code in force, and he included two distinct offenses in the same article, describing in the first paragraph of Art. 200 the offense of killing the newborn committed by the mother, and in the second paragraph, the offense of injury of the newborn committed by the mother.

With regard to the second issue which is the subject of our study, we believe that the legislator provided an excessively limited time condition in characterizing the offenses described in Art. 200 N.C.C., as in the first 24 hours of life of the newborn, and we have proposed for the future legislation that the final limit of this time condition to be represented by the first 14 days of life of the newborn.

Considering that the term „state of mental disorder" that characterize the active subject of the crime is considered a concept with a broader range of coverage, we have proposed to improve the legislation by completing this formulation as follows „state of mental disorder generated by the pregnancy as a whole".

Since the Law no. 286/2009 for the new criminal code was amended in a single year, 2012, by three acts, although it is not yet in force, we should continue to observe this aspect and also how the regulations of the offenses listed in Art. 200 N.C.C. develop.

References

- Law no. 286/2009 on the Criminal Code, published in the „Official Gazette of Romania" no. 510 of July 24, 2009 and most recently amended by Law no. 187/2012, published in „The Official Gazette of Romania" no. 757 of November 12, 2012.
- Dobrinou, Vasile & Neagu, Norel, *Criminal Law. Special Part. Theory and Legal Practice under the New Criminal Code*, Bucharest: Legal Universe Publishing House, 2011.
- Dungan, Petre, Medeanu, Tiberiu & Pașca, Viorel, *Handbook of Criminal Law. The Special Part. Offences against the Person. Crimes against Property*, Bucharest: Legal Universe Publishing House, 2010.
- Pascu, Ilie & Gorunescu, Mirela, *Criminal Law. The Special Part., second edition*, Bucharest: Hamangiu Publishing House, 2009.
- Savonea, Lia & Grădinaru, Daniel, *Crimes against Life, Bodily Integrity and Health. Jurisprudence*, Bucharest: Hamangiu Publishing House, 2011.
- „Explanatory Memorandum to the new Criminal Code", accessed: August 4, 2009, <http://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf>.
- „The Supreme Court of Justice, Criminal Section, Decision no. 4457/2003", accessed: December 29, 2012, <http://legeaz.net/spete-penal-csj-2003/decizia-4457-2003>.
- „Signs of birth", accessed: February 10, 2013, <http://www.nou-nascuti.ro/neonatologie/nou-nascutul-normal.html>.
- „Newborn" accessed: December 23, 2012, <http://www.romedic.ro/nou-nascutul-prima-luna-de-viata-0C429>.
- "Forensic course", accessed: February 10, 2013, <http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala>.
- "Mental disorder caused by birth", accessed: February 10, 2013, <http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala>.
- "Puerperal fever", accessed: February 10, 2013, <http://ro.scribd.com/doc/24915001/Curs-9-Medicina-Legala>.