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The crime of the so-called prenatal injury and the issue of unpunishability of the mother of a conceived child

Przestępstwo tzw. uszkodzenia prenatalnego a zagadnienie niekaralności matki dziecka poczętego

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Abstract: The article considers the crime of the so-called prenatal injury, which is stipulated in Article 157a of the Polish Criminal Code. The question of the possibility of unpunished interference of the mother in the body of her unborn child is undoubtedly an important and controversial aspect of modern criminal law, especially in the context of the principles of protecting human life and health. The article also touches on philosophical and legal subjects, namely the moment when a person is created and subsequently protected by the state and law. Finally, the article answers the question whether the current legal status should be maintained and how it could possibly be revised.

Keywords: child, mother, life, health, transgression

Abstrakt: Artykuł dotyczy rozważań nad przestępstwem tzw. uszkodzenia prenatalnego, które zostało stypizowane w art. 157a k.k. Kwestia możliwości bezkarnej ingerencji matki w ciało swego nienarodzonego dziecka stanowi niewątpliwie istotny i kontrowersyjny aspekt współczesnego prawa karnego, zwłaszcza w kontekście zasad ochrony życia i zdrowia ludzkiego. Artykuł dotyka także tematów natury filozoficzno-prawnej, a mianowicie momentu, w którym powstaje człowiek i zostaje objęty opieką ze strony państwa i prawa. Wreszcie artykuł odpowiada na pytanie, czy aktualny stan prawny powinien zostać utrzymany i jakie są możliwości jego ewentualnej korekty.

Słowa kluczowe: dziecko, matka, życie, zdrowie, występek

1. Introduction

The purpose of this article is to analyse the subject of unpunishability of the mother of a conceived child, who commits the crime of the so-called prenatal injury, which is typified in Article 157a Para 1 of the Polish Criminal Code, which reads: "Whoever causes damage to the body of a conceived child or health disorder that threatens his life shall be subject to a fine, restriction of liberty or imprisonment for up to two years" (Act of 6 June 1997 – Polish Criminal Code, Journal of Laws No 88, item 553 – hereinafter CC). The regulation concerning the mother's unpunishability is included in Article 157a Para 3 of the CC, and it constitutes the second main area of interest here. The purpose of this paper is to prove that this standard is both controversial and imprecise. In order to support these theses, an appropriate analysis shall be conducted on the juridical-linguistic as well as purposive-functional level.

Another aim of the article is to analyse the legal and philosophical aspect of this issue, namely the question of how long the mother has the possibility to decide about the life and health of her child. Does she have the right to do so throughout the pregnancy, or only until the foetus is able to function independently outside her body? Or perhaps all crimes against the health and life of a conceived child should be treated as crimes against a natural born person?

2. The scope and nature of the crime of prenatal injury under Article 157a Para 1 of the Criminal Code

At the beginning, it is necessary to consider the nature and scope of the crime of causing injury to the body of a conceived child or causing a life-threatening impairment to its health. Looking at the linguistic and juridical side of the problem, it is undoubtedly a summary offence, prosecuted by public prosecution, which can be committed both by action and omission (through negligence), but only intentionally, with direct or possible intent.

It is worth referring here to the decision of the Court of Appeal in Gdańsk, which stated that: "Undoubtedly, the perpetrator's intent regarding the crime committed by him is determined by his mental attitude at the time of commencing the criminal act or while committing it. An intent is defined in Article 9 Para 1 of the CC as a process occurring in the perpetrator's psyche, expressed in the conscious will to commit a prohibited act, whereby the intent, both specific and indirect, pertains to the phenomenon of objective reality, the real course of mental processes, and therefore it is not a concept from the field of judgements or values" (Judgement of the Court of Appeal in Gdańsk of 27 April 2017, II AKa 95/17, LEX No 2372259).

The act does not provide for the possibility of inadvertent fulfilment of the constituent criteria of this crime. One should agree here with the theses of Rajnhard Kokot that the lack of symmetry in this respect leads to the weakening of the protection of a conceived child under the criminal law. The sanctions provided for in Article 157a Para 1 of the CC are most often applicable as a result of a deliberate or unintentional breach of the obligation to carefully address the legal right protected by the norm contained in this provision (Kokot 2015: 953).

However, one should take into consideration that rectifying this situation by introducing the possibility of unintentionally committing the crime stipulated in Article 157a of the CC would have to automatically lead to the creation of its mitigated form. This, in turn, would have to result in reducing the available penal sanctions for this crime, which are already relatively low. Most likely, therefore, unintentionally causing the so-called prenatal injury would be punishable by a fine, restriction of liberty or imprisonment for up to one year. Such a solution, as one of three postulated alternatives, is proposed by Marzena Czochra (2018: 41–42). The question is whether, in this configuration, the sanction would be in a rational proportion to the sanction for the same crime committed intentionally. Numerous doubts arise here, which will be discussed later in the text.

Theoretically, the crime stipulated in Article 157a Para 1 of the CC is universal in nature, because it can be perpetrated by anyone whose actions lead to the result specified in the disposition of this norm. On the other hand, if it is committed by omission, then it will constitute an individual crime (*delictum proprium*), as it will apply to a person who has a legal obligation to prevent the so-called prenatal injury. Michał Królikowski describes this entity as "the guarantor of the rights or the guardian against the source of danger" (Królikowski 2017: 326).

In the vast majority of cases, this entity will be the mother of a conceived child, who, however, is not included in the statutory description of the criteria of the crime, which is a condition for the occurrence of an individual crime. Ryszard Krajewski believes that in this case it should be considered that we are dealing with a common crime (*delictum commune*) (Krajewski 2007: 14).

The subject of the performance activity in this case is undoubtedly the body of a conceived child or its organism (Konarska-Wrzosek 2020: thesis 2). In its jurisprudence, the Supreme Court ruled that this term covers a child from conception to the onset of labour pains or the occurrence of medical indications for performing a caesarean section, and in the case of a surgical caesarean section terminating the pregnancy at the request of the pregnant woman – to the first medical procedure directly aimed at performing such an operation (Resolu-

tion of the Supreme Court of 26 October 2006, I KZP 18/06, PiP 2007, No 5, p. 144; Decision of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 2008, No 11, item 90; Judgement of the Supreme Court of 27 September 2010, V KK 34/10, OSNKW 2010, No 12, item 105). Królikowski correctly acknowledges that in the case of a surgical caesarean section, the first medical action directly aimed at performing such a procedure marks the moment of commencement (Królikowski 2017: 327). It is worth noting, as Rajnhard Kokot does, that the act does not differentiate the intensity of the protection of the health of the conceived child according to the stage of its development, as it does in the case of the crime of termination of pregnancy, where the criterion of the ability to live independently outside the mother's body is a condition determining the qualified mode of the crime under Article 152 Para 3 and Article 153 Para 2 of the CC (Kokot 2015: 952).

Ewa Plebanek approaches the matter somewhat differently, claiming that after the appearance of an additional circumstance in the form of the medical necessity to terminate pregnancy before the coming of natural childbirth, or after the commencement of preparatory activities for surgical caesarean section (preceding the commencement of natural childbirth), an unborn child who is able to live outside the body of the pregnant woman and at the same time is not in the phase of natural delivery should be considered to be a referent of the term "human" and not "conceived child," despite being in the "prenatal period of development" (Plebanek 2016: 11).

The above-mentioned issue was addressed by the Constitutional Tribunal in its judgement of 28 May 1997, which stated quite unequivocally: "The value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation. There are no sufficiently precise and justifiable criteria allowing for such a differentiation with respect to the stage of development of human life. Therefore, human life becomes a value protected under the Constitution from its outset. The same applies to the prenatal stage" (Judgement of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No 2, item 19).

On the other hand, the unborn child status is subject to far-reaching restrictions in the practice of a vast majority of European countries, primarily in connection with the legalisation of the so-called abortion on request, as well as the occurrence of specific medical indications for performing the procedure. This tendency is also sustained by the development of the liberal jurisprudence of the European Court of Human Rights. It is worth recalling here the widely commented and controversial judgement of the ECHR of 20 September 2018 in the case of *Annen v. Germany* (ECHR 309/2018). The adjudicating panel decided that the freedom of expression under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of

4 November 1950 (Journal of Laws 1993, No 61, item 284) does not give the right to label abortion performed by designated doctors as premeditated murder (cf. Wiak 2018: 52–53).

There is considerable controversy as to whether the concept of a "conceived child" includes those conceived as a result of in vitro fertilisation. Shall such a position be accepted, the subject of the performance activity would include a human embryo remaining outside the mother's body (*ex vivo*). A similar position is adopted by, among others, Andrzej Zoll (2017: 381) and Michał Królikowski (2017: 327). Magdalena Budyn-Kulik believes otherwise (2020: thesis 4). Jacek Postulski takes a middle position, claiming that the juridical regulation of Article 157a of the CC does not mean that a fertilised egg is not a human being, but only reflects a certain criminal policy or even, as the author describes it in the light of the analysed provision, "a legislative case" (Postulski 2007: 151). On the other hand, Krzysztof Wiak gives arguments in favour of the admissibility of liability of the perpetrator of killing a human embryo in vitro pursuant to Article 157a Para 1 of the CC. When interpreting this provision, the application of the *a minore ad maius* rule would lead to the conclusion that since the legislator prohibits causing negative effects to the health of a conceived child, it shall be all the more forbidden to cause an even more negative effect in the form of the conceived child's death (Wiak 2017: 841).

Ryszard Krajewski is of the opinion that the above interpretation cannot be used since it would violate the *nullum crimen sine lege* principle, because it is not possible to create new types of prohibited acts, not specified explicitly in the penal act, by way of interpretation. Moreover, it would contradict the systemic interpretation of the acts against a conceived child included in Chapter XIX of the Criminal Code (Krajewski 2007: 13). Michał Królikowski shares these reservations, believing that the perpetrator causing the death of an embryo in vitro should be responsible to the same extent as in the case of causing "less grave" damage, i.e. an injury to the body or impairment of health that preceded the death (Królikowski 2017: 328).

Either way, this kind of argumentation can only obtain partial, conditional approval with the proviso that we consider an embryo in vitro as a human being. This question seems contentious for a reason, as it concerns issues of definition that have not been actually regulated and are subject to various interpretations, to a large extent depending on the philosophical and religious attitude.

Under the analysed provision, the subject of protection is the health and life of a conceived child as a legal good independent of legal rights relating to other persons, including the pregnant woman (Zoll 2017: 380). It is the direct subject of protection. It can also be concluded that this provision indirectly protects to some extent the right of the mother of the conceived child, or the parents, to

the proper development of the child (Szwarczyk 2016: 426; Krajewski 2007: 13). On the other hand, by applying a linguistic interpretation, it follows that the condition of liability under Article 157a Para 1 of the CC is not any injury to the unborn child or impairment of health, but only such that leads to a threat to the child's life. This is also what Violetta Konarska-Wrzosek believes, adding that there must be a real risk of death of the conceived child (2020: thesis 3).

Krzysztof Wiak is of the opinion that the subject matter of this crime covers bodily injury to a conceived child, regardless of the gravity of the damage caused; it can therefore even be a minor injury. This thesis should be accepted, because the legislator specifies neither the effects of the injury nor the seriousness of such harm. It is also the case in the other of the aforementioned effects, namely the impairment of health, which is punishable only when it poses a threat to the life of the conceived child (Wiak 2017: 841).

Violetta Konarska-Wrzosek approaches this issue similarly, defining injury to the body of a conceived child as "causing external or internal injuries of a permanent nature to the anatomy of a conceived child, which negatively impacts on the structure of tissues, organs or larger parts of the body of the conceived child" (Konarska Wrzosek 2020: thesis 3).

Undoubtedly, the crime under Article 157a Para 1 of the CC is an offence with criminal consequences, as there must be at least one of the two features of a prohibited act specified in the legal norm disposition. Magdalena Budyn-Kulik points out that the features of this crime do not necessarily include the result in the form of the death of the conceived child (Budyn-Kulik 2020: thesis 2). This conclusion seems obvious, since this feature of a prohibited act goes beyond those included in Article 157a Para 1 of the CC. In the latter case, we would consider it to be the crime of termination of pregnancy, depending on the existence or non-existence of the woman's consent, pursuant to Article 152 or 153 of the CC.

The provision of Article 157a Para 1 of the CC clearly indicates that this crime has no aggravated or mitigated form. Article 157a Par 2 of the CC, which concerns the activities of a physician, provides for a clause of impunity that is similar to a state of higher necessity, as its features of a prohibited act are medical actions taken by a physician, necessary to remove the danger threatening the life and health of the pregnant woman or conceived child (Zoll 2017: 382). This opinion is shared by Michał Królikowski, who takes the position that in order to apply this clause of impunity, additional conditions must be met: 1. the woman's consent to perform a medical activity (especially a medical procedure); 2. the physician's lack of intent to cause the feature of a prohibited act described in the act; 3. the physician's behaviour consisting in performing a medical activity that is necessary in a given circumstance, provided the choice and man-

ner of performing the activity complies with the medical science (Królikowski 2017: 328). Leon Tyszkiewicz adds that these actually include two reasons for a clause of impunity – a state of higher necessity and performing the necessary medical activities (Tyszkiewicz 2016: 953). Subsequent Article 157a Para 3 of the CC concerns the mother's clause of impunity, which will be developed in the next part of the article.

The crime under Article 157a Para 1 of the CC is punishable with the already mentioned alternative sanction in the form of a fine, restriction of liberty or imprisonment for up to 2 years. It is worth noting that, due to the low penalty for this crime, Article 58 Para 1 of the CC is applicable here, which recognises the primacy of non-custodial penalties ("If the law provides for an option of the type of penalty, the court shall impose the penalty of deprivation of liberty without suspending execution thereof, only when no other penalty or penal measure would serve the purpose thereof") as well as Article 59 of the CC, which admits the possibility of waiving the penalty ("If the offence is subject only to a penalty of a deprivation of liberty not exceeding 3 years, or to a lesser penalty, and the social consequences of the act are not great, the court may renounce the imposition of the penalty if it decides to impose a penal measure at the same time, and the purpose of such a penalty is thus served by the measure"). Due to the low penalties provided for in the act, the court may also conditionally discontinue the criminal proceedings under Article 66 Para 1 of the CC ("The court may conditionally discontinue the criminal proceedings if the guilt and social consequences of the act are not significant, there are no doubts about the circumstances under which it was committed, and the attitude of the offender, who has not previously been penalised for an intentional offence, as well as his or her personal characteristics and way of life to date, provide reasonable grounds to assume that even if the proceedings are discontinued, he or she will observe the legal order, and particularly that he or she will not commit an offence").

The court also has the option, and – at the request of the injured party or the entitled person (in this case, it is logical that it will be primarily the child's mother) – an obligation to award compensation for the harm suffered (Article 46 Para 1 of the CC). If there exist serious impediments, the court may instead order an excess of up to PLN 200,000 for the aggrieved person or, in the event of this person's death, for the closest person (Article 46 Para 2 of the CC). On the other hand, if the perpetrator is convicted of an intentional crime against life and health, e.g. the crime under Article 157a Para 1 of the CC, the court may order an extra payment for the Victims and Post-release Assistance Fund at the amount of up to PLN 100,000 (Article 47 Para 1 of the CC in connection with Article 48 of the CC).

3. The child's mother non-punishability clause in the crime of prenatal injury

At the beginning of these considerations, it should be emphasised that releasing the mother of a conceived child from criminal liability does not contradict the criminal nature of the act she performs, as it is undoubtedly reprehensible; especially since it is clearly visible that it meets the legal criteria for a prohibited act (Krajewski 2007: 18). Barring prosecution in this situation seems highly controversial, even if the mother's engagement in risky behaviour during pregnancy is inadvertent, without her anticipating the possibility of certain consequences, let alone when she does it intentionally, being aware of the negative consequences for the life or health of her child. On the other hand, it is worth noting that not persecuting the mother makes sense if the conceived child is refused personhood; in other words, if his murder becomes a kind of mitigated crime.

In addition to these considerations, this section will raise other issues connected with Article 157a Para 2 of the CC, namely those related to medical activities aimed at saving the health and life of a child. Of interest shall be the very behaviour of the mother that may be situated at the intersection of activities described in Article 157a Para 2 and 3 of the CC, i.e. in a situation where she refuses her consent to a medical procedure performed in order to save the health and life of a child, but this is a matter of a separate issue, undoubtedly extensive.

At the beginning, attention should be drawn to certain controversies connected with the substantive side of the subject of unpunishability of the mother of a conceived child. First, there is no doubt that it is primarily the biological mother in whose case the so-called non-punishability clause will be applied. Taking into account the linguistic and systemic interpretation, in provisions pertaining to pregnancy, conceived children or childbirth (Articles 149, 152–154, 157a of the CC), the legislator uses the term "mother" to denote a person in whose body the conceived child (foetus) develops, because it is with this person's body that the biological (physical) aspect of motherhood is connected (Budyn-Kulik 2020: thesis 8). However, significant doubts are raised by the subject of surrogate motherhood. Taking into consideration the linguistic interpretation that it is (only) the mother of a conceived child who shall not be punished, all other "secondary" variants should be left outside the scope of this regulation (for more on this subject, cf. Górowski 2011: 5–24).

Konarska-Wrzosek recognises the non-punishability clause to be a compatible solution, according to which the mother of a conceived child "shall never be held liable in any form" (2020: thesis 5). This thesis seems highly controversial, as it is difficult to assume in advance that the mother did not contribute to the

occurrence of specific health damage in the child or subsequent developmental defects resulting from it. Moreover, Konarska-Wrzosek perceives the non-punishability clause as a pragmatic solution, because many factors may occur in the prenatal phase that will lead to bodily harm or impairment of health of the conceived child, which would make it difficult to determine which of them would be decisive (Konarska-Wrzosek 2020: thesis 5).

In this context, one should agree with the theses of Krzysztof Kurosz, who rationally recognises that the mother's behaviour that does not exceed the normal risk for the conceived child, such as poor nutrition or exposure to stress, should not be taken into account here (Kurosz 2017: 109). Although the woman should exercise greater care during pregnancy, behaviour that does not meet the criteria for deliberate and harmful action against the foetus should go unpunished.

On the other hand, one should be very cautious about the subject of the mother's risky sexual contacts, e.g. prostitution. Kurosz takes the position that this matter is delicate and although he is undoubtedly right here, it should not follow that the conceived child should not enjoy any form of protection (Kurosz 2017: 109). In this situation, if the above criteria were used, the mother could be liable for her actions, as she should be aware that by engaging in risky sexual behaviour she may do harm to the life or health of her child. Of course, in order to be able to use the category of wilful misconduct here, an indispensable premise would need to be the awareness of being pregnant.

A form of behaviour that commonly leads to the so-called prenatal injury is the use of alcohol or other intoxicants by the mother of a conceived child. Especially in the former case, the extent of the damage caused may be very significant, often irreversible, even fatal (for more on the statistics and consequences of alcohol abuse by pregnant women, cf. Bernfeld, Mazurkiewicz 2017: 36–74). Therefore, it is necessary to consider how to treat the behaviour of a mother who accepts the possibility of the emergence of such consequences in her child, the state of her insanity being left aside for now. Therefore, one cannot agree with Konarska-Wrzosek's thesis that it would not be justifiable to punish with a criminal penalty the mother of a conceived child who intentionally harms it during pregnancy (e.g. by trying to terminate an undesirable pregnancy on her own, by drinking alcohol or taking drugs), because it is mostly she who will bear the burden of the fact that the child will be born sick or disabled and, as a consequence, she will be responsible for caring for it (Konarska-Wrzosek 2020: thesis 5).

An example of a case that is closely connected with these deliberations is the case of a mother of a conceived child who consumed large doses of alcohol for three days despite being in the 38th week of pregnancy. She was aware of

the negative consequences of her actions. As a result, she caused an impairment to unborn child's health in the form of a severe withdrawal syndrome with apnea and convulsions, which is a life-threatening disease. In the judgement of 20 January 2015, the District Court in Słupsk acquitted the defendant of the charge of committing a crime under Article 156 Para 1 point 2 of the CC (in this case, it was a crime punishable by imprisonment for at least 3 years), recognising that, on the basis of this provision, human health is protected only from the moment of birth or the commencement of activities aimed at performing caesarean section (Judgement of the District Court in Słupsk of 20 January 2015, VI AKa 624/14, LEX No 1839629). By adopting the unlimited formula of the clause of the mother of a conceived child, she could not be held liable under Article 157a Para 3 of the CC. In practice, therefore, despite committing a seemingly serious and intentional crime against her child, the mother remained unpunished.

However, Mikołaj Małecki is critical of the above ruling, arguing that this kind of the mother's behaviour should not result in her impunity. If a child who has already been born suffers from impairment of health, then it is no longer the so-called prenatal injury according to Article 157a of the CC, but the violation of bodily activities or causing an impairment of human health as defined in Articles 156 or 157 of the CC. Therefore, Małecki concludes that "The Criminal Code does not exclude the criminal liability of a conceived child's mother whose impact on the foetus disrupted the normal functioning of the child after birth due to health disorders" (Małecki 2016).

However, such theses deserve only partial recognition. On the one hand, it seems irrational to treat the mother of a conceived child, who does not take into account the health and life of her child, as a person who is not subject to punishment. On the other hand, following the interpretation above, one could conclude that the mother will not be responsible for the death of an unborn child as a result of alcohol intoxication, but if she fails to kill him, she will be liable after the childbirth.

4. Conclusions

It is hard to suspect that the legislator's intention was to achieve such a state of affairs in which one could use *ad absurdum* argumentation; therefore, taking into account all the considerations above, a simple legislative solution should be adopted that would remove Article 157a Para 3 of the CC from the Polish legal system. As a result, anyone who would commit the crime of the so-called prenatal injury, with the exception of a doctor undertaking medical activities under Article 157a Para 2 of the CC, would be punishable under Article 157a Para 1 of the CC.

An alternative would be the possibility of introducing the already mentioned mitigated form of the crime of the so-called prenatal injury, but with the proviso that this could only apply to the mother. The provision of Article 157a Para 3 of the CC could have the following wording: "The mother of a conceived child who commits the act set out in Para 1 shall be subject to a fine, restriction of liberty or imprisonment for up to 2 years." Such a solution could, however, lead to the situation in which the legal good in the form of the protection of the life and health of a conceived child, which already seems to be insufficiently protected anyway, would suffer even further damage.

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