

# **The material element of the offense of injury of the fetus, provided in article 202 of the new Criminal Code**

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## ***Abstract***

*Taking into consideration the impending entry into force of the new Criminal Code, we have thought the analysis of the material element of the offense of injury to the fetus to be necessary because the Criminal Code in force does not contain a similar regulation, whose passive subject to be the fetus. Because we do not have rules of the Court in this field yet we have tried to give possible examples in order to explain the theoretical aspects presented in the study.*

**Keywords:** *injury, fetus, offense, material element.*

**JEL Classification:** K14

## **Introduction**

Given that the Criminal Code in force does not contain a regulation on fetal injury, we have considered necessary the analysis of the material element of the crime mentioned above, as part of the *actus reus* of the offense, especially since we have no judicial practice.

The provision of this act in the new Criminal Code was generated, as described in the Explanatory Memorandum to the new Criminal Code, by the frequency of committing harm to the fetus either during pregnancy or during birth by doctors specialized in obstetrics and gynecology or by the personnel charged with the supervision of pregnancy and the assistance of birth or by any other person, which led either to the blocking of the installation of the extra-uterine life or to the production of the subsequent bodily injury to the child or to the death of the latter.

This study is based on previously published works on the new Criminal code, but it is not limited to the ideas presented by renowned authors in the penal literature, but it explains in detail the aspects of the material element of the offense, and, moreover, it provides examples to illustrate theoretical concepts with practical cases based on the existing case law from states where the offense of injury to the fetus is already covered under criminal law.

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## I. The Material Element of the Offense of Injury of the Fetus

The offense of injury to the fetus, provided in art. 202 of the new Criminal Code<sup>2</sup> is contained, along with the crime of interruption of pregnancy, referred to in art. 201 N.C.C., in Chapter IV „Aggressions against the Fetus”, of title I of the special part of the above-mentioned legal act, dedicated to the crimes committed against the person.

The material element of this offense is represented by the activity of injury of the fetus and this activity can be achieved both by action or by omission.

The actions by which a person may commit the offense of injury to the fetus are the most diverse and can be violent, as kicks, thoraco-abdominal compression etc., or non-violent, such as the use of forceps and the rapid extraction of the fetus during birth, if the person, by doing so, has not complied with the specific regulations of the profession.

The offense of injury to the fetus through action was committed, for example, by the doctor who, during birth, in order to unblock the baby whose shoulders were blocked in the mother's pubic bone, grabbed the baby's head with great force with the forceps, and this affected the nerves of the arm of the fetus, which subsequently resulted in bodily injury by a permanent loss of the child's arm mobility<sup>3</sup>.

The offense of injury of the fetus through action was also committed by the doctor who performed with an unreasonable delay the caesarean section although it was urgent because the analyzes showed signs of suffering and premature detachment of the placenta, and the delayed intervention was the cause of neurological injury suffered by the fetus and subsequently by the child, the injury being translated by the inability to walk without orthopedic appliances, the inability to hear without hearing aids and speech problems<sup>4</sup>.

The offense can also be committed through inaction, if the fetus should be given help and this does not happen.

The offense of injury of the fetus through inaction is represented by the fact that the doctor who has had to perform the caesarean section, although it was necessary, waited for the birth to happen in a natural way although the analyzes performed during delivery and during pregnancy showed that the fetus had suffered a brain hemorrhage when he was in the womb and at birth he could not breathe, a situation which subsequently led to the child's injury, because he was unable to walk and talk and he was fed through a tube<sup>5</sup>.

In art. 17 N.C.C. it is provided that an offense may be committed by omission as follows: „a crime committed in a way involving the production of a

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<sup>2</sup> Represented by the Law no. 286/2009, published in the Official Gazette of Romania no. 510 of July 24, 2009 and most recently amended by the Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code. Hereinafter N.C.C.

<sup>3</sup> „Fetal injury by the physician”; documented in Spanish using the site: <http://www.ronvil.com/espanol/case-results/> (last accessed: April 2, 2013).

<sup>4</sup> „Fetal injury” <http://www.ronvil.com/espanol/case-results/> (last accessed: April 2, 2013).

<sup>5</sup> „Fetal injury” <http://www.ronvil.com/espanol/case-results/> (last accessed: April 2, 2013).

result is considered committed through omission, when: a) there is a statutory or contractual obligation to act, b) the author of the omission, by a previous action or inaction, has created a danger for the protected social value who has led to the described result”.

Or, as a part of the *actus reus* of the offense in question, and having as a starting point the art. 202 N.C.C., the offense of injury to the fetus is one that has to have a result which can be represented either by the blocking of the installation of the extra-uterine life, according to par. (1) of the art. 202 N.C.C., or by further causing the child a bodily injury or even death, according to par. (2) or (3), for which the offense can also be committed through inaction<sup>6</sup>.

In describing the material element of the offense the legislator used the word „injury”, without giving any definition, nor in the article, nor in the title dedicated to the explanation of certain words or phrases in the end of the general part of the Penal Code in question.

The phrase „fetal injury” means any kicking action or any other violent action that has an impact on the physical integrity or health of the fetus, and also a failure to act in the good way which has the same result mentioned above.

In our approach we do not propose to analyze the notions of „child”, „during birth” and „during pregnancy” as they ought to be studied in terms of their meaning in the section dedicated to the passive subject of the crime or to the time conditions related to the offense.

Besides the time conditions for committing the crime, in the case described in par. (4) of the art. 202 N.C.C., which is an attenuated version of the offense in question, there is an additional condition related, this time, to the person of the active subject, which is circumstantial, i.e. the mother of the fetus who suffers the injury during birth. This condition has a personal nature and it refers to the existence of a „state of mental disorder” for the mother who, during birth, commits the offense of injury of the fetus, a condition which, if satisfied, and with other requirements imposed by law, determines the application for the active subject of a more gentle punishment treatment, given her delicate condition.

In the recent doctrine<sup>7</sup> it was stated that “(...) although it appears to be justified (...) it will create serious discussions in the criminal literature when the „state of mental disorder” will be examined, given that the same state will have different legal effects whether we are in the presence of this crime (o.n. fetal injury) or in the presence of the crime of killing or injury of the newborn, referred to in art. 200 N.C.C.”.

We disagree with this opinion because we believe that the provision of this condition on the state of mental disorder of the mother in the case of the two

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<sup>6</sup> In an contrary opinion it states that „the material element of the analyzed offense is represented by the commission of any actions that resulted in the harm to the unborn child”. Petre Dungan, Tiberiu Medeanu, Viorel Pașca, *Manual de drept penal. Partea specială. Infracțiuni contra persoanei, (Handbook of Criminal Law. The Special Part. Crimes against the Person)*, Universul Juridic Publishing House, Bucharest, 2010, p. 121.

<sup>7</sup> P. Dungan, T. Medeanu, V. Pașca, *cited work*, p. 122.

offenses in question has as a legal effect in both cases a milder punishment treatment.

The notion of „legal effect” represents „the given generic name of the consequences produced in the relationship between the legal facts (in the narrow sense) and the legal acts within the limits and under the conditions provided by law, enjoying effectiveness”<sup>8</sup>.

It is true that if we analyze the penalties applicable to the qualified active subject in the two offenses, we see that while the applicable minimum punishment for the offense of injury of the fetus committed by the mother, according to art. 202 par. (4) N.C.C. is greater than that required for the crime of murder or injury of the newborn, according to art. 200 N.C.C., i.e. 1.5 years, 6 months or 1 year, depending on the immediate consequence of the offense, compared to 1 year or 1 month in the case of the second offense in question, the maximum penalty provided in art. 202 par. (4) N.C.C. is lower compared to the amount specified in art. 200 N.C.C., respectively 3.5 years and 2.5 years, depending on the immediate consequence of the offense, compared to 5 years or 3 years.

In this regard, it is important to note that a different amount of penalties applicable to the offenses suggests distinct or different degrees of social danger that the legislator has assigned to the alleged misconduct. This is not however synonymous with the producing of distinct legal effects in the case of committing of one or the other of the offenses in question.

However, it is worthy of notice a potential problem that may arise in the future practice of the courts. This problem is represented by the correct legal classification of a fact as the offense of injury to the fetus, according to art. 202 par. (4) N.C.C., or as an offense of murder or injury of the newborn committed by the mother, according to art. 200 N.C.C.

We claim this given several reasons.

First, in both cases we are dealing with a qualified active subject, namely, the mother of the fetus or of the newborn.

Secondly, in both cases, the legislator has provided the condition of the existence of the „state of mental disorder” for the active subject of the offense.

Thirdly, in both cases, the immediate consequence is either death or the personal injury of the passive subject.

Despite these similarities, the difference between the two offenses is made, inter alia, by the time of the offense. Thus, if the offense of injury to the fetus is committed „during birth”, the crime of killing or injury of the newborn committed by the mother the offense must have been committed „immediately after birth, but no later than 24 hours”<sup>9</sup>.

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<sup>8</sup> „Legal effect” [http://www.euroavocatura.ro/dictionar/4066/Efect\\_juridic#](http://www.euroavocatura.ro/dictionar/4066/Efect_juridic#) (last accessed: April 7, 2013).

<sup>9</sup> For a detailed explanation of the distinction between the expressions „during birth” and „immediately after birth, but no later than 24 hours” see Vasile Dobrinioiu, Norel Neagu, *Drept penal. Partea specială. Teorie și practică judiciară conform noului Cod penal* (Criminal Law. The Special Part. Theory and Practice under the New Criminal Code), Universul Juridic Publishing House, Bucharest, 2011, p. 85.

## Conclusions

The material element of the offense of injury to the fetus can be represented both by an action or by an omission.

Analyzing the legal text we found out that the legislator used the term „harm” without giving any definition to it, and therefore, we stated that the „fetal injury” refers to any act of hitting or other violent action which affects the integrity of the body or health of the fetus, and also to a failure to act having the same result mentioned above.

Relative to „the state of mental disorder” of the mother of the fetus we argued that we do not agree with the point of view expressed in the criminal literature regarding the fact that the expression mentioned above both in the provisions of the offense of injury to the fetus, and in those of the crime of murder or injury of newborn committed by the mother has different legal effects.

Furthermore, we noted a possible problem that may arise in judicial practice regarding the correct legal classification of an act as the offense referred in Art. 202 N.C.C., or as that provided in art. 200 N.C.C. and we also offered an argued solution about the differentiation of the two offenses in question.

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