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Human reproduction – selected aspects of criminal justice in Croatia

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Abstract:

Republic of Croatia has recorded great success in human reproduction and infertility treatment from the fifties of the last century. Significant steps in medicine were not though adequately followed by protection of law and more precisely protection of criminal law. The article aims to present promotion and improvement of normative protection of certain aspects concerning human reproduction in Croatian Criminal Code from 2011 based on four incriminations: trafficking in human body parts and human embryos, cloning and human genome changes, prohibition to mix human sex cells with animal sex cells, unauthorised removal and transplantation of parts of human body. All these offences are harmonized with relevant acts of European Union and their standards.

Keywords: *human reproduction, trafficking in human body parts and human embryos, cloning and human genome changes, unauthorised removal and transplantation of parts of human body.*

1. Introduction

History of human reproduction and infertility treatment is in Republic of Croatia closely related to the work of Institute of human reproduction at the Clinic of Obstetrics and Gynecology in Zagreb. In 1953, the Antisterilitetic Ambulance started with its work in Petrova hospital as the first organized activity for research and infertility treatment in Croatia, as well as in the broader region. Within the development of the profession, the title of the organisation has changed: from the Department of gynecological endocrinology and infertility (1962), Centre for gynecological endocrinology and fertility (1977), until the actual: Institute for human reproduction and gynecological endocrinology (1988).¹ The special achievement of the Croatian human reproduction is delivering first child conceived by *in vitro* fertilization in 1983, that made Croatia the seventh state in the world enrolled in the history of human reproduction.² Today, all

¹ Poliklinika IVF – History of human reproduction in Petrova and Croatia, available at: <http://www.ivf.hr/index.php/hr/neploznost-i-ivf/83-povijest-humane-reprodukcije>, 7.1.2016.

² As a result of the work of gynecologist Velimir Šimunić and biologist Ernest Suchanek. 10 years afterwards, all the others clinical centers in Croatia include in their services and work human reproduction and IVF. *Idem*.

forms of research, diagnosis and treatment of infertility are applied in Croatia. About 70% of all causes of infertility are treated with IVF or related methods.³ Advanced methods of diagnosis of the DNA damage of the sperm are used as well as the selection of competent gametes for fertilization. Treatment is prepared by identifying ovarian reserves, the risk of ovulation stimulation and other potential factors reducing fertility and success. The activities of family planning, contraception, gynecological endocrinology, pediatric and adolescent gynecology and menopausal medicine are improved.

Exercising of parenthood is wonderful and noble, but unfortunately, within the development of medicine, the genius of crime associated with human reproduction as specific field of medicine is developed. Criminal law seeks to adequately protect the appropriate legal good in accordance with its very nature: subsidiarity and fragmentation.⁴

2. Modern approach in Criminal Code 2011

Within the great changes of the Criminal Code in 2011,⁵ level and significance of the normative protection of certain aspects concerning human reproduction increased. First of all, in the ninth head: Crimes against humanity and human dignity; three offences in the field of biomedicine and bioethics with the aim to protect dignity and identity of human species are prescribed: trafficking in human body parts and human embryos (Art. 107), cloning and human genome changes (Art. 108) and prohibition to mix human sex cells with animal sex cells (Art. 109).⁶ In explaining reasons for including these offences in the head nine of the CC11, it is stated that the rapid development of medicine science and technology provides higher possibilities of high quality treatment, but also imposes a range of ethical issues important for the whole humanity and increases the risk of various abuses, that is why, the most serious violation of human dignity should be incriminated.⁷

2.1. Trafficking in Human Body Parts and Human Embryos

The Article was designed in order to be harmonized with the Convention for the protection of human rights and dignity of the human being with regard to the

³ *Idem*.

⁴ See Kurtović Mišić, A., Krstulović Dragičević, A., Kazneno pravo (Temeljni pojmovi i instituti), Udžbenici Sveučilišta u Splitu, Split, 2014, p. 95.

⁵ In the last two decades Croatian criminal law was dominated by the two criminal codes. Criminal Code from 1997 (Official journal or „NN” 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, 143/12) and Criminal Code from 2011 („NN” 125/11, 144/12, 56/15, 61/15). In the further text the abbreviations CC97 and CC11 will be used for these codes.

⁶ Munivrana Vajda, M. in Derenčinović, D. (ed.), Posebni dio kaznenog prava, Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 4.

⁷ *Idem*. Not all legislation in the region differ these types of crime, so in the Criminal Code of Montenegro (“Official Gazette of the Republic of Montenegro” 70 /03, 13/04) criminal offense of trafficking in human body parts (Art. 295a) is situated in the same head, directly behind the criminal offenses of illegal transplantation of parts of the body (čl.294.) and unlawful taking of body parts for transplantation purposes (Art. 295). The same is with the Slovenian Criminal Code: Art. 181, para. 6 (Official Gazette of RS, 50/2012), while in the Serbian Law on Organ Transplantation, crime of trafficking in human body parts is placed in the head of penal provisions (Chapter X, Art. 79 of the “Official Gazette of the Republic of Serbia”, 72/2009).

application of biology and medicine and the Additional Protocol to the Convention on human rights and biomedicine concerning transplantation of organs and tissues of human origin,⁸ The declaration of Istanbul on organ trafficking and transplant tourism from 2008, Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells,⁹ COMMISSION DIRECTIVE 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells,¹⁰ COMMISSION DIRECTIVE 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells.¹¹

In absence of internationally accepted definition of human organs and tissues trafficking, Croatian legislator followed example of some European legislations, mostly Article 17 of the German Transplant Act¹² and French CC (Articles 511-2, 4, 9, 15).¹³

The crime of the trafficking in human body parts and human embryos from the Article 107 Para 1 is committed by whoever procures, possesses, transports, transfers, stores, receives or transplants a human organ, tissue, cell, embryo or foetus, provided he/she knows or should and could have known that they originated from a person who was a victim of trafficking in persons for the purpose of removing body parts referred to in Article 106. The prescribed sentence is imprisonment for a term of between one and ten years. This form of the crime is withal the most severe form of it due the fact that organ trafficking is punishable when they are removed from the person who was a victim of trafficking with the special aim for removing body parts.

Imprisonment for a term of between one and eight years is provided for the one whoever, by means of the use of force or threat, of deception, of fraud, of abduction, of abuse of authority or of a situation of hardship or dependence, procures, possesses, transports, transfers, stores or receives a human organ, tissue, cell, embryo, foetus or dead body for the purpose of removing body parts. So, in this form of the crime besides organ trafficking, trafficking of dead bodies, tissues, cells (including male and female sex cells and the stem cells), trafficking of embryo and foetus is incriminated. It is modelled upon the definition of the organ trafficking from the Declaration of Istanbul. In preparing this article, the legislator has been consulting Croatian Act on Removal and Transplantation of Human Body Parts for treatment that encompasses only transplantation of organs and tissues, wherein tissues include stem cells.¹⁴ In 2012, Act

⁸ NN MU 13/03.

⁹ OJ L 102, 07/04/2004 p. 0048-0058.

¹⁰ OJ L 38, 9/12/2006, p. 40-52.

¹¹ OJ L 294, 25/10/2006.

¹² Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (Transplantationsgesetz - TPG), available at: <https://www.gesetze-im-internet.de/bundesrecht/tpg/gesamt.pdf>, 4.4.2016.

¹³ Turković, K. *et al.*, Komentar Kaznenog zakona, Narodne Novine, Zagreb, 2013, p. 159.

¹⁴ NN 177/04, 45/09.

on transplantation of human organs for therapeutic purposes and Act on application of human tissues and cells were adopted.¹⁵

Paragraph 3 incriminates providing human body parts for financial benefit. It is harmonized with the Art 21 of the Protocol on transplantation of the Convention on human rights and biomedicine of the Council of Europe. The crime is committed when someone procures a human organ, tissue, cell, embryo, foetus or dead body by means of the giving of payments or other comparable benefits.¹⁶

The sentence of imprisonment for a term of between six months and five years shall be imposed on whoever, with a view to financial gain, induces or helps another to give his/her organ, tissue, cell, embryo or foetus in exchange for payment or another benefit. In this way, special incrimination of inducing and helping a person who gives away part of his/her body for financial gain or some other material benefit. This was necessary because otherwise punishment for inducing and helping would be left out for the accessory principle, since the person who is selling part of her/his body is not punishable.

Paragraph 5 is the new one, prescribing punishment for a term of up to three years for whoever removes or transplants a human organ, tissue, cell, embryo or foetus, where he/she knew or should and could have known that in exchange for it the donor had received payment or another benefit. Concerning the possible consequence, this crime can be in concurrence with the bodily injuries or unlawful termination of pregnancy.¹⁷ Instead of imprisonment, a fine, community service and conditional sentence can be imposed.

The same punishment shall be imposed on whoever advertises the need for or availability of a human organ, tissue, cell, embryo, foetus or dead body for the purpose of offering or requesting payment or another benefit. This was also a new crime that required elimination of the misdemeanour from the Art 56 of the Act on the medically assisted fertilization.¹⁸

Existence of the donors consent has no influence on the existence of the crime. Considering the fact that the crime is mostly committed for the personal gain, along with imprisonment, a fine can be imposed.¹⁹

¹⁵ NN 144/12. Within the judgement of the Court (third Chamber) of 11 June 2015 in Case C-29/14, *European Commission v. Republic of Poland*, the Republic of Poland failed to fulfil obligations under Article 31 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells under Articles 3(b), 4(2) and 7 of, and Annex III to, Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells, and under Article 11 of Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells, by excluding reproductive cells and foetal and embryonic tissue from the scope of the provisions of national law transposing those directives.

¹⁶ Prescribed sentence is imprisonment for a term of between six months and five years.

¹⁷ Turković, K. *et al.*, *op. cit.*, p. 159.

¹⁸ *Idem.*

¹⁹ See Art 40 Para 5 CC11.

2.2. Cloning and Human Genome Changes

The same offence existed in the CC97. But, as the cloning aims to protect dignity and identity of human beings and presents no crime against life and limb, it was removed into this head. The title and content of the crime have been taken from the Art. 1 of the Additional Protocol to the Convention on human rights and biomedicine whereby Croatia fulfilled international obligation from the Protocol to incriminate reproductive cloning. Cloning and human genome changes from the Article 108 Para 1 is committed by whoever acts with the aim of creating a human being that shares with another live or dead human being the same set of genes from the nucleus of a cell. The prescribed sentence is imprisonment for a term of between one and ten years.²⁰

The novelty is new paragraph 2 incriminating interventions in the human genome: whoever carries out an intervention seeking to modify the human genome for purposes other than preventive, diagnostic or therapeutic, or does so for preventive, diagnostic or therapeutic purposes with the aim of introducing modifications in the genome of a patient's descendent shall be sentenced to imprisonment for a term of between six months and five years. Performing tests that indicate genetic disease or serve to identification of the patient, as holder of the genes responsible for the disease or detection of the genetic disposition or susceptibility to disease, if not performed for the medical purposes or for the scientific research for the medical purposes and by the appropriate genetic consultation, should be further incriminated as the misdemeanour.²¹ In that sense, here should be pointed to the Article 7 of the Codex of the medical ethics and deontology that closely state obligations of the doctors when applying procedure directed to the modification of the human genome.²²

2.3. Prohibition to Mix Human Sex Cells with Animal Sex Cells

Prohibition to mix human sex cells with animal sex cells from Article 109 is committed by whoever fertilises a woman's egg cell with a sperm cell of any species other than the sperm cell of a man or an animal egg cell with a human sperm cell, modifies the human embryo by transplanting animal embryos or introduces human sex cells or the human embryo into an animal, or animal sex cells or the animal embryo into a woman. Prescribed sentence is imprisonment for a term of between one and ten years. The offence criminalizes creation of human-animal hybrids or "himer" and it was taken over from the Article 49 of the Act on medical fertilization.²³

2.4. Unauthorised Removal and Transplantation of Parts of Human Body

Unauthorised removal and transplantation of parts of human body from the Article 182 Para 1 is accomplished when a doctor of medicine, doctor of dental medicine or other health worker who without the prescribed consent or for no justified medical reason removes an organ, tissue, cell, embryo or foetus from a live donor, or transplants

²⁰ Contrary, „procreation via cloning is a fundamental right guaranteed by the Constitution, and there is no compelling state interest to restrict this right, legislation is undesirable and would be unworkable.“ Tall, S., Legal and Ethical Implications of Human Procreative Cloning, 3 J. L. & Soc. Challenges 25 1999, p. 56. Available at <http://heinonline.org>, Apr 30 07:22:55 2016.

²¹ Turković, K. *et al.*, *op. cit.*, p. 161.

²² Codex of the medical ethics and deontology, NN 55/08, 139/15.

²³ Act on medical fertilization NN 88/09, 137/09, 124/11.

them to a recipient, or uses them for the medical fertilisation procedure.²⁴ The prescribed sentence is imprisonment for a term of between one and ten years. The crime is *delictum proprium*, but if it is committed by someone else, it can be regarded as the crime of serious or especially serious bodily injuries and even, in some special conditions crime of the trafficking in human body parts and human embryos from the Article 107.

With this legislative solution, the difference between medically unjustified removal and transplantation with donors or recipients consent and without consent has been removed. Namely, consent is in the case of medically unjustified removal invalid and, as such should not be specially emphasized, but in some circumstances its existences should be regarded as mitigating circumstance.²⁵ The issue is no more limited to removal of human body parts for transplantation, but includes every medically unjustified removal of the human body parts.²⁶ Medically unjustified removal or transplantation implies removal or transplantation not undertaken for the treatment of the recipient, if there's appropriate organ or tissue of the dead person or there's other, approximately equal method of treatment or if there's great risk for the life of the donor or significantly impairment of the donors health.²⁷ Procedures related to the organ transplantation are prescribed by the Directive 2010/45/EU of the European parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.²⁸

Valid consent has to fulfil some requirements: it has to be explicit, free (not obtained by fraud, coercion or threat), informed and written.²⁹ In daily clinical practice, the concept of informed consent is presented with its clinical, ethical and legal dimension.³⁰ Patient has a right to be in comprehensible way informed about suggested medical intervention and upon that information to accept or refuse it. Attending physician introduces the patient with the appropriate information about the nature, purpose, procedure of intervention, probability of the success and usual risks, so that the patient has free choice to except or refuse the specific treatment.³¹ Informed consent is regulated in Art 6 "Right to co-decision" of the Act on the protection of the patient's rights³² with its origins on the international level in Art 6 of the General declaration on bioethics and human rights that respects the will of an individual to decide by himself whether some intervention will be performed on him and for which purposes.³³ The

²⁴ This crime is a part of nineteenth head CC11: Crimes against human health.

²⁵ Turković, K. *et al.*, *op. cit.*, p. 242.

²⁶ *Idem.*

²⁷ *Idem.* See Art. 2, 12, 14 Act on the removal and transplantation human body parts for treatment, NN 177/04, 45/09.

²⁸ OJ L 207, 6.8.2010, p 14-16.

²⁹ Turković, K. in Novoselec, P. (ed), *Posebni dio kaznenog prava*, Zagreb, 2007, p. 261. For informed consent in the process of organ transplantation see Parturkar, D., *Legal and ethical issues in human organ transplantation*, 25 Med. & L. 389 2006, available at: <http://heinonline.org>, Sun May 1 04:21:07 2016

³⁰ Kurtović Mišić, A., *Osnove kaznenopravne odgovornosti zdravstvenih radnika*, Zbornik radova s međunarodnog simpozija: „Medicinsko pravo u sustavu zdravstvene djelatnosti“, Pravni fakultet Sveučilišta u Splitu, 2015, p. 199.

³¹ *Idem.*

³² Act on the protection of the patient's rights, NN 169/04, 37/08.

³³ Art 6: Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The

right to co-decision includes the right of the patient to be informed and to accept or refuse any diagnostic or therapeutic medical intervention.

If a person dies as a result of the criminal offence referred to in paragraph 1, the perpetrator shall be sentenced to imprisonment for a term of between three and fifteen years.

Special form of the crime is prescribed in paragraph 3: a doctor of medicine, doctor of dental medicine or other health worker who for the purpose of transplantation removes a part of a deceased person's body although he/she knows that this person, or his/her statutory representative or guardian, gave during his/her life a written statement declining to donate organs, or whoever without the prescribed consent removes for the purpose of transplantation a part of the body of a deceased child or a deceased person of age unable to exercise his/her judgment shall be sentenced to imprisonment for a term of up to one year.

3. What about practice?

No data about prosecution and conviction of the crimes related to human reproduction provides *European Sourcebook of Crime and Criminal Justice Statistics* for the period 2007-2011.³⁴

In 2015, 2014 and 2013 no adult person was reported, prosecuted nor convicted in Croatia for none of these crimes.³⁵ Does it mean that Croatia is safe country concerning organ trafficking and irregularities in human reproduction or can we only speculate about the *dark number* in these crimes?³⁶

There is though, one judgment that attracted formerly great public and professional attention. In case I KO-1146/07 of the Municipal Criminal Court in Zagreb, three respected doctors gynaecologists and one biochemist were as employees of a private polyclinic at the end of strong negative media monitored criminal proceeding deliberated from all charges with judgement dated 26 January 2009. Namely, they were charged in seven counts for the criminal offence of unauthorised transplantation of human body parts from the Art 242 Para 2 and 7 CC97, more specifically for the application the method of *in vitro* fertilization cells of other women "using the fact that this method was not regulated in Croatia".³⁷ The factual state was in all counts the same: gynecologist would with assistance of embryologist perform embryo transfer with prepared laboratory embryos as result of using ovum of other woman presented in the treatment program of the polyclinic for personal problems in conception, without her prior knowledge and consent.

consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

³⁴ European Sourcebook of Crime and Criminal Justice Statistics 2014, fifth edition, Helsinki 2014. Presented data concern major traffic offences, homicide, assaults, rape, sexual assaults, robbery, theft, fraud, money laundering, corruption, drug trafficking.

³⁵ Croatian Bureau of Statistics, Statistical Reports 1551/2015 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2014“, Zagreb, 2015, Croatian Bureau of Statistics, Statistical Reports 1528/2014 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2013“, Zagreb, 2014, Croatian Bureau of Statistics, Statistical Reports 1504/2013 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2012“, Zagreb, 2013.

³⁶ For the *dark number* see, Derenčinović, D., Getoš, A-M., Uvod u kriminologiju s osnovama kaznenog prava, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2008, p. 6, 7.

³⁷ Judgement I KO 1146/07 p. 2-6.

During the proceeding, one of the court experts stated in his expertise that ovum is not an organ, but a cell that has to be treated with special attention. It can't be an object of transplantation.³⁸ The expert further stated that ovum is product of the organ ovarium so that terms organ and human body part can't be equalized.³⁹

In the judgement, Court emphasized that there is no evidence at all in the whole criminal procedure that would confirm that embryo transfer created from the ovum of some other woman was performed in the uterus of the patients.⁴⁰ This procedure would require harmonizing the cycles of the donor and recipient by hormonal therapy. The proof of this procedure was not exercised and identity of "donors" was not even indicated.⁴¹

So, the judgement was primarily based on deficiency of any evidence confirming that the defendants have committed the crimes. But not only that, the Court considered the very possibility of application of the specific incrimination on the concrete factual state. Namely, the main legal and factual question was: is an ovum part of human body that can be implemented? After transplantation DNA of the donors organ reliefs different comparing to the recipient, while ovum has partly number of the chromosomes and DNA content and within successful fertilization it changes DNA content. Act on removal and transplantation human body parts for treatment purposes from 2004 in its first article highlights that transplantation of human body parts can't be applied on organs and tissues for reproduction, organs and tissues of embryo or foetus and on blood and blood derivatives. The concrete incrimination refers the period before this Act, when Act on transplantation of human body parts for treatment purposes from 1980 was in force.

The second legal question is in line with donors consent. Namely, state attorney, nor the court could determine identity of the possible "donor". Without this determination, existence or absence of the consent could not be established at all.

The third legal question relates the qualification of the fourth defendant. By his education, he is doctor of veterinary medicine and biochemist, more precisely specialist of laboratory medicine with PhD in medicine endocrinology. The scope of his work is human medicine indeed. He was charged for the qualified form of the offence in Art 242 Para 7 committed by doctor of medicine or doctor of dental medicine. Due to Act on Medical Practice, a doctor is health care worker with medical degree and acquired title doctor of medicine.⁴² So, application of the concrete incrimination is very questionable because work in the field of human reproduction should not be sufficient without medical degree and acquired title doctor of medicine.

4. Conclusion

Great success in human reproduction and infertility treatment as a part of medicine from the fifties of the last century was not adequately followed by protection of criminal law in Croatia. CC97 was a proper base for the changes, but only within CC11, level and significance of the normative protection of certain aspects concerning human

³⁸ *Idem.*, p. 41. There are two acts in European Union that protect organs; first protecting organ transplantation and the second focused on gametes and embryos.

³⁹ *Ibid.*

⁴⁰ Judgement I KO 1146/07 p. 48.

⁴¹ *Ibid.*

⁴² Art 2 Act on Medical Practice, NN 121/03, 117/08.

reproduction increased. This result was achieved through three offences in the field of biomedicine and bioethics with an aim to protect dignity and identity of human species: trafficking in human body parts and human embryos, cloning and human genome changes and prohibition to mix human sex cells with animal sex cells. The last, but not least offence in this connection, as presented by the analysed judgement is unauthorised removal and transplantation of parts of human body.

The legislative changes have removed some important legal problems through prompt harmonisation with EU standards, but efficiency of the supervision of the work of private and state clinics and complex procedure of proving together with existence and absence of medicine documents challenge successful fight against the “genius” of crime and greed in this field.

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