

CRIME OF TRAFFICKING IN GAMETES OR EMBRYOS

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The Act of 25 June 2015 on treating infertility came into force on 1 November 2015.¹ The necessity of statutory regulation of in vitro fertilisation procedures resulted from the fact that Poland signed the Convention of 4 April 1997 for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.²

Chapter 12 of the Act lays down penal provisions (Articles 76–89 ATI) and administrative pecuniary penalties (Article 90 ATI).³ In the indicated provisions,⁴

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¹ Journal of Laws [Dz.U.] of 2017, item 865, uniform text (hereinafter: ATI).

² http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/ETS164Polish.pdf [accessed on 09.11.2017].

³ The provision of Article 90 ATI determines a pecuniary administrative penalty in case of: (1) failure to submit data necessary for the registry of medically-assisted reproduction institutions and banks of gametes and embryos to the Minister of Health; (2) failure to submit information about every case of occurrence or suspicion of occurrence of a significant undesired event or a significant undesired reaction to the Minister of Health.

⁴ Article 76 – publicising advertisements of sale, purchase or acting as a go-between in sale or purchase of a gamete or an embryo; Article 77 – disposal or acquisition of a gamete, acting as a go-between in this disposal or acquisition, or use of a gamete obtained in the way violating the provisions of the Act in order to obtain financial or personal benefits; Article 78 – dealing with gametes or embryos in the way violating Articles 18, 20–22 and 23(1) ATI; Article 79 – acquisition or disposal of an embryo, acting as a go-between in its acquisition or disposal, participation in the use of an embryo obtained in the way violating the provisions of the Act in order to obtain financial or personal benefits; Article 80 – performing an activity exclusively reserved for an institution of medically-assisted reproduction or a bank of gametes and embryos without the required permission or in the way violating the requirements determined in the permission; Article 81 – failure to submit information and data concerning donors and recipients of gametes provided by non-partners as well as donors and recipients of embryos to the registry of donors and recipients of gametes or embryos; Article 82 – application of pre-implantation genetic diagnosis in the medically-assisted reproduction procedure because of an indication other than medical, including e.g. such aims as the choice of gender of the future child, except a situation when the choice is made in order to avoid a serious incurable hereditary disease connected with gender; Article 83 – destruction of an embryo able to appropriately develop;

the legislator penalised acts consisting in the acquisition or disposal, acting as a go-between in acquisition or disposal, or taking part in the use of gametes or embryos obtained with the violation of the provisions of this Act (Article 77 and Article 79) and a crime consisting in export of gametes or embryos from the territory of the Republic of Poland to the territory of a country that is not the EU Member State and import of gametes and embryos to the territory of the Republic of Poland from the territory of a country that is not the European Union Member State without permission to do that (Article 88 ATI), which are especially important in the context of this article.

The provision of Article 77(1) ATI stipulates: “Whoever, in order to obtain financial or personal benefits, purchases or sells a gamete or acts as a go-between in its purchase or sale, or participates in the use of a gamete obtained with the violation of the provisions of the Act shall be subject to the penalty of deprivation of liberty for a period of up to three years”. According to Article 77(2), if a perpetrator commits the offence referred to in Article 77(1) in order to have a permanent source of income, he shall be subject to the penalty of deprivation of liberty for a period of six months to five years. Pursuant to Article 79(1), whoever, in order to obtain financial or personal benefits, purchases or sells an embryo, acts as a go-between in its purchase or sale, or participates in the use of an embryo obtained with the violation of the provisions of the Act, shall be subject to the penalty of deprivation of liberty for a period of three months to five years. The treatment of the offence referred to in Article 79(1) as a permanent source of income is an aggravating circumstance. In such a case, a perpetrator is subject to the penalty of deprivation of liberty for a period of one to ten years (Article 79(2) ATI).

The statutory features of both crimes are almost identical. The difference consists in the object of an act. In case of an offence under Article 77 ATI, the object of the act is a gamete,⁵ and in case of Article 79 ATI, it is an embryo.⁶ The penalty is also different in case of purchase, sale, acting as a go-between in purchase or sale, or participating in the use of an embryo from the same acts concerning a gamete. Due to this approach, it can be assumed that the provision of Article 79 ATI constitutes

Article 84 – extraction of gametes from human corpses in order to use them in medically-assisted reproduction; Article 85 – creation of an embryo for purposes other than medically-assisted reproduction; Article 86 – creation of chimaeras and hybrids with the use of the medically-assisted reproduction techniques and interference aimed at introducing hereditary changes in the human genome that may be transferred to future generations; Article 87 – creation of an embryo the genetic information of which in the cell nucleus is identical to the genetic information in the cell nucleus of another human embryo, foetus, being, corpse or remains; Article 88 – export of genomes or embryos from the territory of the Republic of Poland to the territory of a country that is not the EU Member State without the permission to do that; Article 89 – use of gametes or embryos in the medically-assisted reproduction procedure without the approval of the programme of using gametes or embryos or in the way violating the requirements determined in that programme.

⁵ In accordance with Article 2(1(14)) ATI, a gamete is a human male cell (a sperm) or a human female cell (an ovum) intended for use in the medically-assisted reproduction procedure.

⁶ An embryo is a group of cells created as a result of in vitro fusion of female and male gametes, from the moment of the final step in the process of fusing together two nuclei (karyogamy) until implantation of a fertilised ovum (Article 2(1(28)) ATI).

an aggravated form of Article 77 ATI. The legislator did not determine in a clear way what the legal status of an embryo is but assigns it a higher value in comparison to a gamete. As I mentioned earlier, the penalties for purchase and sale of a gamete and the same acts concerning an embryo as well as other provisions of the Act providing for its protection confirm this. One can indicate, *inter alia*, Article 83 ATI, which imposes a ban on destroying an embryo that came into being in the course of the medically-assisted reproduction procedure and that is capable of developing properly, or Article 85 ATI, which bans creating an embryo for purposes other than the procedure of medically-assisted reproduction. One cannot lose sight of Article 23 ATI, which determines the rules of conduct in relation to embryos that have not been implanted. In accordance with Article 23(1), embryos created with the use of gametes extracted in order to be donated to partners or non-partners, able to develop properly, which were not implanted in the medically-assisted reproduction procedure, are preserved in conditions ensuring their protection until they are implanted in a recipient's body. The content of Article 23(3) stipulates that it is inadmissible to destroy embryos created in the medically-assisted reproduction procedure that are capable of developing properly but have not been implanted. In accordance with Article 19 ATI, a donor of gametes that have not been used in the medically-assisted reproduction procedures may at any time demand that they be destroyed or used in medical research.

Coming back to the analysis of crimes, it is necessary to draw the attention to Article 28(1) ATI, which stipulates that it is inadmissible to sell, purchase or act as a go-between in purchasing or selling a gamete or an embryo. Therefore, the Act, similarly to Act of 1 July 2005 on extracting, preserving and implanting cells, tissues and organs,⁷ adopts the same assumption, i.e. the principle of complimentary donation and a ban on trading in gametes and embryos. Statutory features of the analysed crimes (Article 77, Article 79 and Article 88 ATI) correspond to some acts penalised in the Act on extracting, preserving and implanting cells, tissues and organs (AEPI).⁸

In the context of discussed offences, Article 76 ATI is also significant. It lays down a ban (under a penalty of a fine, limitation of liberty or deprivation of liberty) on publicising advertisements of the sale, purchase or acting as a go-between in

⁷ Journal of Laws [Dz.U.] of 2017, item 1000, uniform text, Article 3(1) stipulates: "No charge either payment, or any type of financial or personal benefit can be demanded or accepted for extracting a cell, tissues or an organ".

⁸ The provision of Article 77 ATI classifies a crime constituting an equivalent of an offence under Article 44 AEPI, in accordance with which, whoever acquires, disposes or acts as a go-between in acquisition or disposal of a cell, tissues or an organ, or takes part in extraction, implantation of cells, tissues or organs, use of cells or tissues for people, or the provision of cells, tissues or organs obtained in the way violating the provisions of the Act and originating from live donors or corpses is subject to a penalty of deprivation of liberty for a period of six months to five years. On the other hand, the equivalent of Article 88 ATI is Article 46 AEPI, which penalises export from the territory of the Republic of Poland or import to the territory of Poland of cells, tissues or organs without the required permission. For more, see V. Konarska-Wrzosek, [in:] M. Bojarski (ed.), *System prawa karnego. Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe* [Criminal law system. Special branches of criminal law. Military criminal law, fiscal penal law, and non-coded law], Vol. 11, Warsaw 2014, pp. 509–514.

selling or purchasing a gamete or an embryo.⁹ The provision aims to prevent activities assisting in trafficking in gametes or embryos and publicising adverts would lead to the sale, purchase or acting as a go-between in selling and purchasing gametes or embryos. As J. Kapelańska-Pręgowska and P. Chrzczonowicz rightly argue, in the context of illegal “trade in human organs”, the concept covers more than just a given organ sale-purchase transaction, that is also activities assisting in and supporting it,¹⁰ e.g. in relation to the offence under Article 76 ATI, also publicising advertisements of the sale, purchase or acting as a go-between in selling or purchasing of gametes or embryos.

Some doubts may arise in relation to the interpretation of the feature of “publicising advertisements”. According to the dictionary definition, “publicising” means: “making something known to the public”,¹¹ “making published material commonly available”.¹² On the other hand, “advertisement” means “information about something provided in a public place in the form of a written text or disseminated by mass media”.¹³ Thus, an advertisement may be an oral statement or a written message in which an advertiser provides information. In the judgement of 16 February 1987, the Supreme Court held that publicising means making some information commonly available, enabling an indefinite number of people to get acquainted with it.¹⁴ “Publicising advertisements” referred to in Article 76 ATI should be interpreted as providing information about the sale, purchase or acting as a go-between in selling or purchasing a gamete or an embryo to an indefinite number of people. The information may be publicised in any way, in writing or orally, e.g. on billboards, leaflets, in the press, on the Internet, on the radio or on television and even, according to E. Guzik-Makaruk, in a private conversation.¹⁵ The provision of Article 76 ATI literally indicates that to recognise liability, it is not enough to recognise an act of publicising one advertisement because the legislator uses a phrase “publicises advertisements” and not “publicises an advertisement”. According to J. Haberko, the linguistic interpretation inspires an assumption that publicising advertisements covers a few multiple or repeated activities consisting in their publishing. In that author’s opinion, however, it is hard to approve of such

⁹ The content of the provision is similar to Article 43 AEPI, which prohibits publicising advertisements of sale, purchase or acting as a go-between in sale or purchase of a cell, a tissue or an organ under the threat of a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year. See, V. Konańska-Wrzosek, [in:] M. Bojarski (ed.), *System prawa...* [Criminal law system...], pp. 508–509.

¹⁰ J. Kapelańska-Pręgowska, P. Chrzczonowicz, *Handel organami z perspektywy prawa międzynarodowego oraz polskiego prawa karnego* [Trade in human organs from the perspective of the international law and the Polish criminal law], *Przegląd Sejmowy* No. 6, 2015, p. 95.

¹¹ <http://sjp.pwn.pl/slowniki/rozpowszechnia%C4%87.html> [accessed on 09.11.2017].

¹² <https://sjp.pl/rozpowszechnia%C4%87> [accessed on 09.11.2017].

¹³ <http://sjp.pwn.pl/sjp/og%C5%82oszenie;2494306> [accessed on 09.11.2017].

¹⁴ Supreme Court judgement of 16 February 1987, WR 28/87, OSNKW 1987, No. 9–10, item 85. Also see the Supreme Court ruling of 1 September 2011, V KK 43/11, Lex No. 1099298.

¹⁵ E.M. Guzik-Makaruk, *Transplantacja organów, tkanek i komórek w ujęciu prawnym i kryminologicznym* [Organ, tissue and cell transplants from the legal and criminological point of view], Białystok 2008, p. 307; J. Kapelańska-Pręgowska and P. Chrzczonowicz also indicate that information may be publicised in a conversation. See, J. Kapelańska-Pręgowska, P. Chrzczonowicz, *Handel organami...* [Trade in human organs...], p. 96.

interpretation because, as she notes, even one advertisement on the Internet may be received by a large number of people.¹⁶ One cannot exclude a situation in which one advertisement placed in a public place (e.g. at a bus stop) will reach a wide audience. Therefore, it seems that it is necessary to assume that whoever publicises advertisements and does it repeatedly as well as publicises one advertisement many times, repeatedly, should face criminal liability.

Penalisation covers only the activity consisting in publicising advertisements of chargeable provision of gametes and embryos. "Chargeable" means "one that must be paid for".¹⁷ Thus, publicising advertisements of free provision, acquisition or acting as a go-between in the provision or acquisition of gametes or embryos does not result in criminal liability. J. Haberko questions this solution and says: "One can obviously understand the intention of the legislator, who aims to eliminate a temptation to trade in gametes and embryos and assumes inadmissibility of a chargeable activity. Nonetheless, analysing the issue in the context (...) of human dignity, respect for family life and privacy, it seems purposeful to emphasise that the legislator does not approve of those activities performed free of charge, either".¹⁸

The provisions of Article 77 and Article 79 ATI aim to prevent uncontrolled disposal, acquisition and acting as a go-between in the disposal or acquisition of gametes or embryos, or use of a gamete or an embryo obtained with the violation of the provisions of the Act, i.e. to prevent the creation of a black market¹⁹ and, as a result, organised crime connected with trading in gametes and embryos. Taking into consideration the dictionary definition of "trade", i.e. a transaction that is an organised exchange of goods or services consisting in the purchase or sale,²⁰ illegal trading (trafficking) in gametes or embryos (in accordance with Article 77(1) and (2) and Article 79(1) and (2) ATI) is the conduct in order to obtain financial or personal benefits consisting in the purchase or sale of a gamete or an embryo, acting as a go-between in selling or purchasing or use of a gamete or an embryo obtained with the violation of the provisions of the Act, as well as making these activities a permanent source of income.

The main object of protection in the discussed provisions is the appropriateness of medical procedures. The secondary object of protection, on the other hand, is human dignity (bodily integrity) of a donor or a person whose cells created an embryo and which may be the object of trafficking.

¹⁶ J. Haberko, *Ustawa o leczeniu niepłodności. Komentarz* [Act on treating infertility], Warsaw 2016, p. 378.

¹⁷ <http://sjp.pwn.pl/sjp/odplatny;2493476.html> [accessed on 09.11.2017].

¹⁸ J. Haberko, *Ustawa o leczeniu...* [Act on treating...], pp. 172 and 378.

¹⁹ There is also a term "red market" used in the literature to refer to the market of human organs. See, S. Carney, *Czerwony rynek. Na tropie handlarzy organów, złodziei kości, producentów krwi i porywaczy dzieci* [The red market: On the trail of the world's organ brokers, bone thieves, blood farmers, and child traffickers], Wołowiec 2014; the author, in Chapter 5 *Niepokalane poczęcie* [Immaculate conception], writes about illegal trade in human egg cells. For more, *ibid.*

²⁰ E. Sobol (ed.), *Nowy słownik języka polskiego* [New dictionary of the Polish language], Warsaw 2003, p. 252.

The acts within the category of discussed crimes are enlisted alternatively and may consist in:

- 1) acquisition or disposal of a gamete or an embryo,
- 2) acting as a go-between in acquisition or disposal of a gamete or an embryo, or
- 3) taking part in the use of a gamete or an embryo obtained with the violation of the provisions of the Act.

However, a perpetrator of each of the above-listed acts must act in order to obtain a financial or personal benefit. Although, in case of the last act, the legislator used an alternative conjunction “or”, a different interpretation might result in the lack of liability of a person who takes part in the use of a gamete or an embryo but not in order to obtain the benefit indicated.²¹

The features of financial or personal benefit should be interpreted in accordance with the definition laid down in Article 115 §4 CC, i.e. as a benefit for oneself as well as for someone else. The feature of any benefits is the possibility of satisfying needs with their use. A financial benefit means an increase in assets or a decrease in liabilities, but all rights that have value in terms of money constitute property.²² Financial benefits make it possible to satisfy material needs.²³ On the other hand, the characteristic feature of a personal benefit is the lack of economic value, i.e. the fact that it does not constitute a pecuniary value.²⁴ As M. Kulik rightly states, it is necessary to agree with the opinion that the criterion of economic value is not sufficiently justified for the division into financial and personal benefits. The criterion should consist in the ability to satisfy material and non-material needs.²⁵ Recognition of a financial or personal benefit should be based on which need is satisfied to a greater extent. If it satisfies mainly a material need, it is a financial benefit, if the need is non-material, it is a personal benefit.²⁶ According to a different opinion, every benefit that can be expressed in terms of money is material and a benefit that cannot be expressed in terms of money is non-material.²⁷

Interpreting the features of the disposal and acquisition, it is useful to adopt their interpretation established in the criminal law doctrine in relation to the crime of dealing with stolen property (Article 291 §1 CC). Disposal means an activity undertaken by an owner of a thing in order to transfer this ownership to another person or other persons for a charge or free of charge.²⁸ Acquisition, on the other

²¹ See, J. Haberko, *Ustawa o leczeniu...* [Act on treating...], p. 380.

²² Compare, the Supreme Court resolution of 30 January 1980, VII KZP 41/78, OSNKW 1980, No. 3, item 24.

²³ Thus, T. Oczkowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2016, p. 579.

²⁴ M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2017, p. 361.

²⁵ *Ibid.* Also see, P. Daniluk, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2015, p. 676.

²⁶ A. Spotowski, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego, T. 4, cz. 2, O przestępstwach w szczególności* [Criminal Law system. Vol. 4, Part 2: On crime in detail], Wrocław 1989, p. 594.

²⁷ M. Gałazka, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2015, p. 734.

²⁸ M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny...* [Criminal...], p. 894.

hand, consists in taking a thing in order to become its owner.²⁹ It does not matter whether acquisition is paid for or not.

In case of acting as a go-between in disposal or acquisition of a gamete or an embryo, it must be emphasised, it cannot be identified with acting as an intermediary (mediation). Acting as an intermediary (linguistically) means an activity of a given entity consisting in the performance of some activities (usually performed professionally and regularly).³⁰ On the other hand, acting as a go-between (in the meaning of Article 77 and Article 79 ATI) may be a single act performed by anybody, regardless of the fact whether he does it as a professional or only once. The person undertakes some activities (acts) to arrange contact and an agreement between the interested parties, i.e. someone who wants to acquire a gamete or an embryo with someone who wants to dispose of it (or vice versa) with the violation of the provisions of the Act. Acting as a go-between may consist, e.g. in looking for persons interested in, collecting enquiries and next contacting them with an entity involved in acquisition and disposal of gametes or embryos, of course illegally. Collecting enquiries or offers without referring them to another party may only be treated as an attempt to commit a crime under Article 77 or Article 79 ATI.

As far as the feature “takes part” is concerned, it is necessary to refer to the common meaning of the phrase first. According to the dictionary of the Polish language, “take part” means to participate, be actively involved, cooperate in an activity,³¹ and “part” means participation in something together with others.³² The term is used in a few cases in the Criminal Code (Article 159 CC: “whoever takes part in a fight or battery (...)”; Article 254 CC: “Whoever takes active part in a gathering (...)”; Article 258 CC: “Whoever takes part in an organised group or association intended to commit crime or fiscal crime (...)”), but its interpretation based on the provisions indicated may be helpful in the analysis of the features of offences under Article 77 and Article 79 ATI to a limited extent. The concept of taking part in the meaning of these provisions should be interpreted as participation in the use of an illegally obtained (with the violation of the provisions of the Act) gamete or

²⁹ E. Guzik-Makaruk, E. Pływaczewski, [in:] R. Zawłocki (ed.), *Przestępstwa przeciwko mieniu i gospodarcze* [Crimes against property and economic offences], Vol. 9, Warsaw 2011, p. 257

³⁰ The concept of an intermediary is used, inter alia, in the Civil Code (agency agreement – Article 758 Civil Code), or Act of 22 May 2003 on mediation in insurance (Article 2(1): “Acting as an intermediary in insurance consists in performing factual or legal transactions connected with conclusion or performance of insurance contracts”). In accordance with Article 2(3) Directive 2002/92/EC of 9 December 2002 on insurance mediation, “insurance mediation” means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. With the exception of Chapter III of the Directive, these activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking are not considered insurance mediation. The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims are not considered insurance mediation, either.

³¹ <http://sjp.pwn.pl/slowniki/uczestniczy%C4%87.html> [accessed on 09.11.2017].

³² <http://sjp.pwn.pl/slowniki/udzia%C5%82.html> [accessed on 09.11.2017].

embryo. In the broad meaning, it does not only refer to the active participation (e.g. a physician or a nurse) but also to the passive participation (a recipient). In case of a recipient who takes passive part in the use of a gamete or an embryo, in order to prove that she committed an act under Article 77 or Article 79 ATI, it is necessary to prove that she was aware of the fact that she takes part (participates) in the use of a gamete or an embryo obtained illegally. If a recipient taking part in the procedure is not aware of the fact that a gamete or an embryo was obtained illegally, she is in error as to a circumstance constituting the statutory feature of a prohibited act (in the meaning of Article 28 CC).

The analysed crimes can only be committed by acting. All the already mentioned types of conduct are active forms of an act. No one can acquire, dispose of, be a go-between or take part in the form of omission. However, one can consider the issue of liability for assistance in an offence by omission. Depending on an act, an offence can sometimes be consecutive, and sometimes non-consecutive in nature. In case an act consists in the acquisition of a gamete or an embryo, it is material in nature. As a result, a perpetrator becomes an owner of a thing. In other cases, i.e. disposal, acting as a go-between in disposal or acquisition, taking part in the use of illegally obtained gamete or an embryo, the offence is formal in nature.

As far as the subject of the crime is concerned, there is no doubt that acquiring, disposing of or acting as a go-between in the transactions are common crimes. However, taking part in the use of a gamete or an embryo obtained illegally, at first sight, seems to be an individual crime the subject of which may be a physician or other members of medical personnel, e.g. nurses, taking part in the application of a gamete or an embryo, thus persons competent (authorised) to perform such activities. One cannot exclude a situation, however, in which a person who is not a physician or a nurse performs an activity (e.g. a physician deprived of the right to perform the job). This interpretation is strengthened by the linguistic interpretation of the provision, in which the legislator uses a pronoun "whoever" and does not individualise it anywhere further in the Act by indicating its features or character. Therefore, it should be assumed that any person who takes part in the application of a gamete or an embryo obtained with the violation of the provisions of the Act can be the subject of the offence under Article 77(1) and Article 79(1) ATI.

Of course, one cannot forget that the subject taking part in the application of a gamete or an embryo obtained illegally is also the recipient because she takes part in the operation. Her participation is necessary to perform the act (application). In case of a recipient, the benefit referred to in the provisions must be treated as personal. A donor must be excluded from the circle of subjects because the present act is connected with the application of a gamete or an embryo obtained formerly. In some cases, it can be taken into consideration that a donor may be treated as a facilitator in the meaning of Article 18 §3 CC.

The subjective aspect of the discussed crimes is always connected with direct intent with a specific purpose (*dolus directus coloratus*). The purpose is to obtain financial or personal benefits.

It seems that the provisions of Article 77(1) and Article 79(1) ATI may be in cumulative concurrence with the provisions of Article 156 §1 CC, Article 157 §1

and §2 CC and Article 160 §1 CC. The possibility exists in the event of taking part in the application of a gamete or an embryo obtained illegally. Taking part means participation in an operation in an active way (a physician, a nurse) as well as in a passive way as a recipient. There may be a situation when, due to the failure to comply with the basic rules concerning, e.g. sterility during an operation, a person performing it causes jaundice infection or another infectious disease of the recipient.

The aggravating feature resulting in a more severe penal liability of perpetrators of offences referred to in Article 77(1) and Article 79(1) is the commission of a crime in order to have a permanent source of income (Article 77(2) and Article 79(2) ATI). In accordance with the already established interpretation in literature and case law (based on Article 65 §1 CC and Article 37 §1(2) FPC), the term of permanent source of income means a situation when a criminal activity is the only source of a perpetrator's income as well as when it is an additional but a regular source of income.³³ It concerns obtaining income continually but it does not have to be the only way of earning a living by a perpetrator.³⁴ In the judgement of 7 May 1976, the Supreme Court rightly held that "the permanent source of income should not be identified with the only source of income." It may be co-existing income but must be permanent in nature.³⁵ In another judgement, the Supreme Court assumed that: "Permanent source of income (...) must be connected with multiplicity, regularity of illegal activity aimed at obtaining income. Thus, it cannot 'materialise' in a perpetrator's single act".³⁶

It is also necessary to refer to another problem occurring in the context of making an offence a permanent source of income as a feature of aggravated crime laid down in the criminal law (as e.g. in Article 77(2) ATI or Article 79(2) ATI). It concerns the possibility of imposing a more severe penalty on such perpetrators in accordance with Article 65 §1 CC ("The provisions regarding the level of the penalty, penal measures and the measures connected with placing a perpetrator under probation envisaged with respect to a perpetrator referred to in Article 64 §2, shall also be applied to a perpetrator who made the commission of offences his permanent source of income (...)"). Despite diverse opinions in this matter, it is necessary to agree with J. Majewski, who says that it is inadmissible to apply a stricter penalty envisaged in Article 65 §1 in conjunction with Article 64 §2 CC towards a perpetrator of such an offence because it carries a statutory stricter penalty connected with this type

³³ M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2017, p. 238.

³⁴ E.M. Guzik-Makaruk, *Transplantacja...* [Organ, tissue and cell transplants...], p. 314. Also see, the Supreme Court judgement of 12 February 1974, I KR 329/73, OSNPG 1974, No. 11, item 137; the Supreme Court judgement of 7 May 1976, II KR 69/76, OSNPG 1976, No. 11, item 95. Also compare, inter alia, the Supreme Court ruling of 8 January 2015, V KK 165/14, OSNKW 2015, No. 6, item 49; the judgement of the Appellate Court in Gdańsk of 25 October 2016, II AKA 140/16, LEX No. 2201316; the judgement of the Appellate Court in Łódź of 10 April 2014, II AKA 45/14, LEX No. 1461100 ("The permanent source of income (...) is illegal practice performed by a perpetrator regularly and providing a perpetrator with permanent income, similar to income obtained for work and ensuring that a perpetrator has main or additional but constant income").

³⁵ Supreme Court judgement of 7 May 1976, II KR 69/76, OSNPG 1976, No. 11, item 95.

³⁶ Supreme Court judgement of 20 April 2005, III K 27/05, Lex No. 149637.

of aggravated classification.³⁷ A different interpretation would lead to a conclusion that the same circumstance might constitute grounds for twofold stricter liability.³⁸

Aggravation of a penalty in case of Article 79 ATI in comparison to Article 77 ATI will translate into a possibility of modifying its size. And thus, taking into account the statutory penalty under Article 77(1) ATI, which is deprivation of liberty for a period of up to three years, and Article 77(2), which is deprivation of liberty for a period of six months to five years, the two types of offences are crimes. There is a possibility of applying the “substitute sanction” in accordance with Article 37a CC (i.e. a penalty of limitation of liberty or a fine instead of a penalty of deprivation of liberty of up to eight years) and the “mixed penalty” under Article 37b CC, i.e. a penalty of short-term deprivation of liberty and a penalty of limitation of liberty of up to two years. In case of the commission of a basic type of crime, it is possible to renounce from inflicting the punishment in accordance with Article 59 §1 CC because the statutory sanction does not exceed three years of deprivation of liberty, of course provided that social harmfulness of an act is not high. In such a case, a court shall rule a penal measure, forfeiture or a compensatory measure (provided that the aims of punishment are met this way). Due to maximum limits on the penalty of deprivation of liberty envisaged in Article 77(1) and (2) ATI (not exceeding five years), in both cases it is possible to conditionally discontinue criminal proceedings (in accordance with Article 66 § CC), of course provided that all indicated requirements are met, as well as to conditionally suspend the penalty execution if the sentence does not exceed one year and the requirements referred to in Article 69 §1 CC are fulfilled. However, taking into consideration the statutory penalty in case of Article 79(1), the penalty of deprivation of liberty for a period of three months to five years, and in case of Article 79(2), the penalty of deprivation of liberty for a period of one year to ten years, there is a possibility of applying the substitute penalty in accordance with Article 37a CC and a mixed penalty under Article 37b CC. Unlike in case of Article 77(1) ATI, the commission of a basic type of crime under Article 79(1) ATI eliminates the possibility of renouncing from inflicting the punishment in accordance with Article 59 §1 CC. Moreover, only in case of the basic type under Article 79(1) ATI, it is possible to apply the conditional discontinuance of proceedings (Article 66 CC). On the other hand, in case of both types, there is a possibility of conditional suspension of punishment execution if a sentence does not exceed one year and other requirements indicated in Article 69 §1 CC are fulfilled.

In case of conviction for any of the crimes referred to in Article 77 ATI or Article 79 ATI, a court may rule such penal measures as a prohibition of holding a particular type of post or practicing a given profession (Article 41 CC), pecuniary compensation

³⁷ J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz. T. I. Komentarz do art. 1–116 k.k.* [Criminal Code. General part. Commentary on Articles 1–116 CC], Warsaw 2007, p. 819.

³⁸ Compare, G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General part. Commentary], Warsaw 2012, p. 465. The author holds that “(...) aggravation of a penalty in statute based on the fact that a perpetrator makes an activity a permanent source of income does not constitute an obstacle to aggravating the penalty under Article 65 §1 CC”, *ibid.*

(Article 43a §1 CC), or publishing the sentence (Article 43b CC). It is also possible to rule forfeiture of items (Article 4 CC) or forfeiture of material gains (Article 45 §1 CC).³⁹

The last type of the offence determined in the Act on treating infertility, which consists in illegal trade in gametes and embryos, is laid down in Article 88 ATI, which protects proper organisational procedures serving medically-assisted reproduction conducted in a legally determined scope concerning export of gametes or embryos from the territory of the Republic of Poland to the territory of a country other than the EU Member State or import of gametes or embryos to the territory of the Republic of Poland from the territory of a country other than the EU Member State without a permission to perform those activities.

The features of the objective aspect: export or import of gametes or embryos from/ to the territory of the Republic of Poland without the necessary permission require, in the process of proper interpretation, taking into consideration the content of Article 57 ATI, which determines the rules of obtaining permission to perform the activities. The provision results from the adoption of the solutions proposed in the EU directives.⁴⁰

In accordance with Article 57(1) ATI, only a bank of gametes and embryos that has the permission to perform these activities can export gametes or embryos from the territory of the Republic of Poland to the territory of a country other than the EU Member State or import gametes or embryos to the territory of the Republic of Poland from the territory of a country other than the EU Member State. The lack of the permission referred to in Article 57 ATI does not limit the bank in other activities referred to in Article 45 ATI, of course also after obtaining the adequate permission to perform them (Article 48 ATI).

The Minister of Health, on the motion filed by the bank of gametes and embryos, grants the permission referred to in para. (1) of the provision, provided that the following requirements are met:

- 1) safeguarding monitoring of the state of exported and imported gametes or embryos on the way from a donor to a recipient;
- 2) guaranteeing the quality and safety of exported and imported gametes or embryos that are to be used in the medically-assisted reproduction procedure (Article 57(2) ATI).

³⁹ If it is a company, provided that the requirements laid down in Article 44a CC are met, forfeiture of it may be considered.

⁴⁰ The justification of the Bill indicates that: "Export and import of human tissues and cells, thus also gametes and embryos, was regulated at the EU level in Article 9 Directive 2004/23/EC. In accordance with the provision, Member States shall take all necessary measures to ensure that all imports of tissues and cells from third countries are undertaken by tissue establishments accredited, designated, authorised or licensed for the purpose of those activities, and that imported tissues and cells can be traced from the donor to the recipient and vice versa in accordance with the procedures referred to in Article 8. Member States and tissue establishments that receive such imports from third countries shall ensure that they meet standards of quality and safety equivalent to the ones laid down in this Directive. Member States shall take all necessary measures to ensure that all exports of tissues and cells to third countries are undertaken by tissue establishments accredited, designated, authorised or licensed for the purpose of those activities. Those Member States that send such exports to third countries shall ensure that the exports comply with the requirements of this Directive". Justification for the Bill, p. 22. <https://legislacja.rcl.gov.pl/docs//2/230033/230067/230068/dokument147770.pdf> [accessed on 09.11.2017].

The permission is granted for a fixed period (for not longer than the expiry date referred to in Article 48(1) ATI). It concerns the permission granted to a bank of gametes and embryos in accordance with Article 45 ATI authorising to use gametes and embryos for the needs of medically-assisted reproduction consisting in the retention, preservation and distribution of gametes and embryos that are to be used in the medically-assisted reproduction of people. The permission is granted for a period of five years (Article 48(3) ATI).

A solution that deserves approval is the withdrawal of the permission to export and import gametes and embryos by the Minister of Health, based on Article 57(5) ATI, in case a bank of gametes and embryos fails to meet the requirements of the permission referred to in Article 48(1) ATI granted in conjunction with Article 45 ATI.

The Minister of Health may grant the permission referred to in Article 57(1) ATI, may refuse to grant it or withdraw it in the course of an administrative decision. The decision to withdraw the permission is subject to immediate execution *ex officio* on the day of its serving (Article 57(6) ATI).

The crime discussed is formal in nature and may be committed only in action. The subject may be anybody who exports gametes or embryos from the territory of the Republic of Poland to the territory of a country other than the EU Member State or imports gametes or embryos to the territory of the Republic of Poland from the territory of a country other than the EU Member State. Due to the fact that the provision stipulates that permission of the Minister of Health is obligatory to perform the activities and only a bank of gametes and embryos can perform those activities, most often, because of the specificity and the nature of the activities, the perpetrators are persons working for a bank of gametes and embryos but not having the necessary permission. It cannot be excluded, however, that a person that is not involved in the activity regulated by statute and working for a bank of gametes and embryos will be a perpetrator of this crime.

The crime discussed may be committed only intentionally,⁴¹ with both types of intent. Most often, it is direct intent but oblique intent cannot be excluded, e.g. when the activities determined in the provision are performed in the period when the permission expired and the perpetrator predicting such a situation agrees to it.

Penalisation of crimes under Article 88 ATI is reflected in the alternatively constructed sanction allowing adjudication of a fine, a penalty of limitation of liberty or a penalty of deprivation of liberty for up to three years. A fine, in accordance with Article 33 §1 CC, may account for 10-540 daily rates (the amount of one daily rate is PLN 10 to 2,000 – Article 33 §3 CC). Thus, the lowest amount of a fine for a crime under Article 88 ATI may be PLN 100, and the highest: PLN 1,080,000. A court may impose a penalty of limitation of liberty on a perpetrator (from one month to two years). If a court decides that non-custodial penalties (i.e. a fine or a penalty of limitation of liberty) will not fulfil the aim of punishment, it may sentence a perpetrator to imprisonment (a penalty of deprivation of liberty for a period of one month to one year) in accordance with Article 58 §1 CC. The execution of the penalty of deprivation of liberty (for one year) may be conditionally

⁴¹ Compare, J. Haberko, *Ustawa o leczeniu...* [Act on treating...], p. 399.

suspended. Due to the maximum limit of the penalty of deprivation of liberty in accordance with Article 88 ATI (not exceeding five years), it is possible to conditionally discontinue criminal proceedings in accordance with Article 66 §1 CC, of course provided that all requirements indicated are met (guilt and social harmfulness of an act are not significant, circumstances of an act commission do not raise any doubts, a perpetrator has never been convicted for an intended offence and criminological prospects are positive). It is also possible to refrain from imposing a penalty based on Article 59 CC due to the fact that an offence does not carry a penalty exceeding three years of deprivation of liberty, of course provided that social harmfulness of an act is not significant. In such an event, a court rules a penal measure, forfeiture or a compensatory measure (provided the aims of punishment are met this way).

As far as penal measures are concerned, they can include: the prohibition of holding given posts or exercising a given profession (Article 41 CC), ruling pecuniary compensation (Article 43a §1 CC) and publishing a sentence (Article 43b CC). It is also possible to rule forfeiture of items (Article 44 CC).

Finally, it must be pointed out that, penalising acquisition, disposal and other activities connected with illegal trade in gametes or embryos, the legislator leaves theft or appropriation of a gamete or an embryo outside the scope of penalties. While in case of a gamete it cannot be assumed that it is a thing, in case of an embryo it is not so unambiguous. In this context, it should be pointed out that in German literature it was assumed that preserved human sperm constitutes a thing, although preservation lets it maintain the features of live matter.⁴² In the Polish doctrine of civil law, the classification of a human body part as a thing remains a disputable issue. Neither a man nor any part of a live human being is a thing.⁴³ However, human organs (parts of body) after extraction from the body become things, they are *res extra commercium*, but are not tradable and do not have the value of property. It is assumed in the doctrine that they are a special sort of things and can be neither owned nor traded in.⁴⁴ Applying the opinion to the field of the discussed Act, one can approve of it only partially. If we recognise that a gamete is a special type of thing, we cannot agree with the statement that it is not tradable (because of the content of Article 77 ATI). The legislator intended to exclude gametes from trade by criminalising disposal or acquisition of them. However, the legislator also acknowledges that they can become the object of such trade. Thus, it seems that if it is possible to dispose of or acquire a gamete, it is also possible to steal or appropriate it. *De lege ferenda*, it would be necessary to consider penalisation of such acts. Such behaviour may occur in practice and in the light of the present legal state, the theft or appropriation of a gamete remains unpunished. The same situation will take place in case of the theft or appropriation of an embryo, although in such a case it cannot be treated as such offences because an embryo is not a thing (even this special type of thing).

⁴² W. Küper, *Strafrecht. Besonderer Teil. Definitionen mit Erläuterungen*, Heidelberg 2000, p. 237; quoted after M. Kulik, *Przestępstwo i wykroczenie niszczenia rzeczy* [Crime and misdemeanour of destroying things], Lublin 2005, p. 102.

⁴³ *Ibid.* and literature referred to therein.

⁴⁴ *Ibid.*

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CRIME OF TRAFFICKING IN GAMETES OR EMBRYOS

Summary

The Act of 25 June 2015 on treating infertility came into force on 1 November 2015. The necessity of statutory regulation of *in vitro* fertilisation procedures resulted from the fact that Poland signed the Convention of 4 April 1997 for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. In fourteen provisions (Articles 76–89 ATI), the legislator penalised acts consisting in such significant offences as acquisition or disposal of, acting as a go-between in acquisition or disposal of and taking part in the application of a gamete or an embryo obtained in an illegal way (Article 77 and Article 79) as well as an offence of export of gametes or embryos from the territory of the Republic of Poland to the territory of a country that is not the EU Member State and import of gametes or embryos to the territory of the Republic of Poland from the territory of a country that is not the EU Member State without permission to perform those activities (Article 88 ATI). The paper presents an analysis of the statutory features of offences under Article 77 and Article 79, which are almost identical. The difference lies only in the object of an act (Article 77 – a gamete, Article 79 – an embryo) and the envisaged penalty. Attention is also drawn to Article 28(1) ATI, which stipulates that it is inadmissible to sell, purchase or act as a go-between in chargeable acquisition or disposal of a gamete or an embryo, and Article 76 ATI, which is significant in the context of the crimes discussed. This provision aims to prevent activities facilitating trade in gametes or embryos, which (publicising advertisements) will lead to chargeable disposal or acquisition, or acting as a go-between in sale or purchase of a gamete or an embryo. The author also discusses the problem that can occur in connection with the lack of penalisation of theft or appropriation of a gamete or an embryo. It seems that if it is possible to sell or purchase a gamete or an embryo, theft or appropriation of them is also possible. *De lege ferenda* penalisation of this type of acts should be considered. There is also an analysis of an offence under Article 88 ATI.

Keywords: illegal trading, gamete, embryo, financial or personal benefit, disposal, acquisition

PRZESTĘPSTWA ZWIĄZANE Z NIELEGALNYM OBROTEM KOMÓRKAMI ROZRODCZYMI LUB ZARODKAMI

Streszczenie

1 listopada 2015 r. weszła w życie ustawa z dnia 25 czerwca 2015 r. o leczeniu niepłodności. Konieczność ustawowego uregulowania procedury zapłodnienia *in vitro* wynikała z podpisania przez Polskę Konwencji z dnia 4 kwietnia 1997 r. o ochronie praw człowieka i godności istoty ludzkiej w dziedzinie zastosowania biologii i medycyny. Ustawodawca, w czternastu przepisach (art. 76–89 u.l.n.), spenalizował czyny wśród których istotne znaczenie mają przestępstwa polegające na nabyciu lub zbyciu, pośredniczeniu w nabyciu lub zbyciu bądź braniu udziału w zastosowaniu pozyskanej wbrew przepisom ustawy komórki rozrodczej lub zarodka (art. 77 i art. 79) oraz przestępstwo polegające na dokonywaniu wywozu komórek rozrodczych lub zarodków z terytorium Rzeczypospolitej Polskiej na terytorium państwa innego niż państwo członkowskie Unii Europejskiej i przywozu komórek rozrodczych i zarodków na terytorium Rzeczypospolitej Polskiej z terytorium państwa innego niż państwo członkowskie Unii Europejskiej bez pozwolenia na wykonywanie tych czynności (art. 88 u.l.n.). W opracowaniu dokonano analizy ustawowych znamion przestępstw z art. 77 i art. 79, które są niemal identyczne, a różnica dotyczy jedynie przedmiotu czynności wykonawczej (art. 77 – komórka rozrodcza, art. 79 – zarodek) i zagrożenia karnego. Zwrócono też uwagę na art. 28 ust. 1 u.l.n., który stanowi, że niedopuszczalne jest odpłatne zbycie, nabycie lub pośredniczenie w odpłatnym zbyciu lub nabyciu komórki rozrodczej lub zarodka oraz na art. 76 u.l.n., który ma istotne znaczenie w kontekście omawianych przestępstw. Przepis ten ma na celu zabezpieczenie przed czynnościami umożliwiającymi (wspomagającymi) handel komórkami rozrodczymi lub zarodkami, które to czynności (rozpowszechnianie ogłoszeń) będą prowadziły do odpłatnego zbycia, nabycia lub pośredniczenia w zbyciu lub nabyciu komórki rozrodczej lub zarodka. Odniesiono się także do problemu, jaki może pojawić się w związku z brakiem penalizacji takich zachowań jak kradzież czy przywłaszczenie komórki rozrodczej lub zarodka. Wydaje się, że skoro możliwe jest zbycie czy nabycie komórki rozrodczej lub zarodka, możliwa jest również ich kradzież lub przywłaszczenie. *De lege ferenda* należałoby się zastanowić nad penalizacją tego rodzaju czynów. Analizie poddano także przestępstwo określone w art. 88 u.l.n.

Słowa kluczowe: nielegalny obrót, komórka rozrodcza, zarodek, korzysć majątkowa lub osobista, zbycie, nabycie