

¹PENAL LIABILITY OF THE PARTICIPANTS IN CASE OF INFANTICIDE

PhD Lecturer **Laura-Roxana Popoviciu**
AGORA University, Oradea
Law and Economics Faculty
laura_popoviciu@univagora.ro

Abstract: *The emergence of the Universal Declaration of Human Rights adopted by UN General Assembly 10/12/1948 marks the "beginning of a new progressive era in the international protection of human rights and freedoms.*

Crimes in international law are committed by people and not by abstract entities. Just punishing these authors can give effect to the provisions of international law.

Key words: *human rights, responsibility, international criminal court, civil rights, punishment, protection.*

Protection of the persona by means of the penal (criminal) law is placed among the major goals of the penal (criminal) law, the persona being fully protected: physically, morally and intellectually. The situation is identical even if we are talking about a newborn infant.

In this case we have two different situations:

- the murder of the newborn infant by any other individual, excepting the mother
- the murder of the newborn infant by his own mother
- the murder of the newborn infant by the mother, due to extreme emotional disturbance caused by the process of giving birth. This is the situation that we are interested in for better particularize this article, because there are some psycho-physiological states caused by birth, states that synonymous with a state of unconsciousness, so, without excluding the guilt, this state can explain in a certain measure the murder of the newborn infant by his mother, no matter if we are talking about a child born within or outside a marriage.

Admitting the possibility that these kinds of states can occur, the legislator sanction less harsh the author of this offence (the mother of the newborn infant) in comparison with other individuals that participated.

The infanticide is in fact an act of manslaughter incriminated by the Romanian legislation in Title I of the special part of the Penal code, Chapter I, „Offences against life, physical integrity and health”, Section I, Manslaughter.

Generally, the infanticide committed by the living parentage is incriminated in almost all criminal legislations of all times as an acute form of manslaughter, known also as infanticide¹. The aggravating occurrence ensues from the victim’s quality as descendent of the criminal and for how we assume that the criminal has strong feelings of affection.

The infanticide appears as a special form of manslaughter being incriminated by the penal legislations of all states as an attenuated form of manslaughter, an attenuated form of infanticide. This happens because the infanticide consists in murdering a newborn child, act perpetrated by the mother immediately after giving birth in a moment of disturbance caused by giving birth.

In this case, we are not talking about a homicide committed by any degree of parentage, but a homicide committed by the mother herself, case in which the homicide is determined by certain psycho-physiological states caused by the process of giving birth, states that are not synonymous with a state of unconsciousness but can explain in a certain measure the killing of the newborn child by his mother.

This offence is possible only if the infanticide was a consequence of the disturbance caused by giving birth. A neuro-psychic element (disturbance caused by giving birth) introduced in the

¹ R. Bodea, *Criminal Law. Special part*, West Printing Office Publishing House , Oradea, 1999, p. 122

enunciation has a unique feature that can justify the assignment of a slightly reduced degree of social danger to this kind of offence who still manages to situate itself in the category of homicide occurrences.

Hence, it appears like a special type of homicide, that has its own denomination and in a certain way we can even talk about an attenuated homicide or an act of murder lightly sanctioned, due to special circumstances imposed by the actions of the active subject of the offence² taking into account the fact (absolutely mandatory) that the mother must act with unexpected intention and not with premeditation (case in which it assumes that the mother took the decision before giving birth, moment that she used only for carrying out her criminal intention). In this situation we can talk about another penal conviction terribly grave and sanctioned as such: qualified murder perpetrated deliberately against a close relative that can't defend herself. Therefore, mother quality is a personal circumstance that can entail upon either an aggravation or an attenuation of the homicide.

If the mother kills her child under these circumstances prefigured in the art. 177 of The Penal Code, the circumstance is justified determining the application of the sanction prefigured in this text, otherwise the state applies the sanction prefigured in the art. 175 of the Penal Code. Because we are talking about a personal circumstance, it has no influence upon either of the participants.

Direct active subject (author) of the infanticide offence can only be the mother that gave birth and afterwards killed her own child. Thence, the author of this offence is certainly a qualified active subject³.

The co-authorship when we are talking about this kind of offence is not possible under any circumstances.

Other subjects can participate when committing a crime, subjects that will be prosecuted for homicide (art. 174).

This is the decision of the majority according to which the infanticide is an aggravated form of homicide, therefore when the mother commits the deed as an accomplice she must answer for infanticide and the others participants for qualified homicide⁴, opinion shared by the judicial practice.

In this doctrine was expressed even the point of view⁵ according to which the infanticide is considered an autonomous action, very distinct of the homicide, the juridical framing of the participants being done separately of the deed of the author, hence it results a disagreement with the principle of infraction unity that can't accept the co-existence in the same unity of more than one contents of offences and the fact that all participants should answer for their deeds according to art. 177 of the Criminal Law.

Affirming that subject of this offence can't be other than child's biological mother, the Penal Code considers the other participants as accomplices because the co-authorship could not be possible otherwise⁶.

According to this point of view, circumstances such as mother condition and the state of psychical agitation of the mother are relevant as constituent element and reverberates on gravity and on the qualification of the deed as an infanticide offence, therefore the deeds have consequences upon other participants (instigators, accomplices) if those people knew the deeds or foresaw them⁷.

We must take into account the fact that when we are talking about the juridical framing of other participants deeds we are speaking not only about mother condition but especially of that state

² G. Antoniu, *Commented and Annotated Criminal Law. Special Part*, vol. I, Scientific and Encyclopedic Publishing House, Bucharest, 1975, p. 101

³ V. Dongoroz, S. Kahana, I. Oancea, R. Stănoiu, I. Fodor, N. Ilescu, C. Bulai, V. Roșca, *Theoretical explanations of the Romanian Criminal Law. Special Part*, Vol. III, Publishing House of the Romanian Academy, ALL Beck Publishing House, Bucharest, 2003, p. 192

⁴ T. Toader, *Romanian Criminal Law. Special Part*, Hamangiu Publishing House, Bucharest, 2007, p. 55

⁵ I. Dobrinescu, *The offence of infanticide*, in *Romanian Law Magazine*, no. 11/1971, p. 41

⁶ I. Dobrinescu, quote p. 58

⁷ N. Rodeanu, *Complicity – secondary form of criminal participation*, L.P. no. 9/1960, p. 29

of agitation caused by giving birth, state which has a strictly personal character and can't reverberate upon other participants, their deed being qualified in all other cases as interest in the act of homicide.

This state of agitation comprise all the normal psycho-physiological states, psychopathological, which follow the birth and can be provoked (in the postpartum or puerperal period) by some noxious factors that have various natures and origins (infections, auto-intoxications, psychological traumas, anaemia's, episodic endocrinological deficiencies, etc.) that operates through their effects on the state of imputability (on the capacity of understanding what is they want) of the woman lately confined which they diminish because the control of the conscience over the personal conduct has to be reduced to the limit of irresponsibility⁸.

In this situation when the disturbing element is so special, with repercussions on the intellect and will, in such measure that the mother can't understand the meaning of her deeds and can't control them anymore intercedes the cause of irresponsibility and in this cases, even the deed is qualified as „infanticide” does not operate penal liability even if attenuated.

Under this aspect of the subjective side, the difference between qualified homicide offence and that of infanticide is the psychological state that intervenes during birth, caused determined by it and scientifically confirmed only after a legal examination⁹.

Therefore, not any state of being agitated can justify the infanticide offence, but only the state that occurs during birth or immediately after it.

Those emotional/affective displays determined by situations unfit to the mother, such as being abandoned by the man she had sexual intercourse with or fear she resents to her parents can not be taken into account¹⁰.

It is mandatory a medical expertise that can show that under concrete circumstances when the act was accomplished the mother acted under the impulse of the state of agitation caused by birth.

The act of homicide has to be determined by the state of agitation caused by giving birth.

This act is in fact a process with a double cause:

- birth who caused the state of agitation
- the state of agitation that drove to the homicide¹¹.

No matter how important or grave was that state of agitation of the mother who killed her child, if this state is not caused by the process of giving birth, the act is not going to be considered homicide. In certain situations one has to use the psychological expertise.

The state of agitation has a major impact over a woman's conscience and will, modifying them and influencing her to commit the act of homicide. That's why it comes to medical expertise to establish in what kind of conditions and when these states of agitation occur, the existence, the intensity and their length. Once established the terms, the role of the penal law is to restrain and give the juridical effects destined to these kinds of situations¹².

Therefore, we can observe clearly the tight connection between the act of infanticide and the act of homicide. It is enough for one of the two conditions of the premise or the two essentials claims to be absent for the fact to constitute the infringement of homicide.

The deduction in this case is that when the mother executes the act of infanticide against her biological child alone or with accomplices, she is liable for the punishment prefigured in art. 177 of the Penal Code and the other participants answer in front of the law under the accusation of qualified homicide. We can ask the question of what happens if it is not the mother how commits the murder but determines or helps another person to commit it.

According to some authors, defenders of the infanticide thesis as a autonomous offence consider that the mother should not be convicted for infanticide but for an offence prefigured in art.

⁸ T. S. Dec., no. 3865/1971, in C.D. 197, p. 297-300

⁹ I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

¹⁰ I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

¹¹ I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

¹² I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

174 of the Penal Code, because the deed is classified according to the author of the offence, therefore it will result another offence, that of homicide and not infanticide.

Others¹³ affirm that in reality, the psychological state of the mother intervenes when she commits the gravest act, the execution of the offence in her mother quality and when she instigates or helps others to commit homicide against her biological child. As a conclusion, in this particular case, we are dealing with homicide but regarding one of the participants (in our case the mother), taking into account her psycho-physical state, she is liable for a diminished penalty according to art. 177 of the Criminal Law.

The infanticide is therefore a very special type of homicide, first of all because of the way that is accomplished and because its author has a special quality (motherly) and second because the sentence given to the criminal mother who committed this crime is slightly indulgent due to a strong alteration caused by birth.

¹³ M. Basarab, *Participation in case of special subject offences*, Studia Universitatis Publishing House, Babes Bolyai, Jurisprudentia series, Cluj, 1965, p. 147

