APPROACHES ON THE LEGAL NATURE OF THE OFFENSE PROVIDED BY ARTICLE 200 FROM THE NEW ROMANIAN CRIMINAL CODE: MURDER OR INJURY OF THE NEWBORN COMMITED BY THE MOTHER

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Abstract: *The current article approaches the issue of the judicial classifying specific to the criminality norm provided by art. 200 of the New Romanian Criminal Code, analyzing the options and following the consequences, produced by adopting each one of these, in correlation to some institutions regulated in the general section of the Criminal Code, that is the participation or the prescription. The analyzed criminality norm gives expression, without any doubt, to a manifestation of mitigating type in the criminal policy of the current Romanian lawmaker, comparing the incrimination norms from which it derives, that is murder, respectively the basic crimes against the body integrity or of the physical health of a person. However, there are many ways and means available to the lawmaker, in which it is possible to express this mitigating tendency and each one of these determines a different impact on some general institutions of the Criminal Law, which this current article analyzes by means of particularization to the hypothesis of the incrimination of murder or injury of the newborn, committed by the mother.*
Keywords: *art. 200 Romanian Criminal Law; the infanticide or the injury of the newborn by the mother; mitigation; judicial nature; implications on some general institutions of the Romanian Criminal Law.*

AN OVERVIEW ON THE REGULATION EVOLUTION: FROM THE PREVIOUS CRIMINAL CODE TO THE NEW ROMANIAN CRIMINAL CODE

On February 1, 2014, the legal system in Romania has experienced the annulation, after more than four decades of activity, of the Criminal Code from 1968 (applicable since January 1, 1969), the latter being replaced by a new Criminal Code enacted in 2009 (Law no. 286/2009). Among partial transformations that tend to characterize the new general criminal law in Romania (which was meant to be - something even announced in its Statement of reasons - a synthesis between the aspects of local normative tradition in criminal matters and the new aspects of novelty, from which, many of them were intended to be influenced by modern reference legislations

from other states), we may also include the incrimination from article 200, with the *nomen juris:* "Murder or injury the newborn committed by the mother".

The regulation from the first paragraph of the article perpetuates, with some changes, the former incrimination contained in art. 177 of the former Criminal Code, called "Infanticide", maintaining as a main characterizing line, the mitigation criminal policy, in relation to the incrimination of murder (art. 188 Criminal Code in force; art. 174 former Criminal Code), aspect revealed by the substantial gap between the penalties prescribed by law as a consequence of committing these crimes. The second paragraph marks a new aspect, tending, in principle, to appropriately design this mitigating attitude of the legislator (in circumstances similar to those in par. 1, to be described below) also on other incriminated offenses, namely some of the activities which affect the physical integrity or health, provided in their basic forms in art.193-195 from the current Romanian Criminal Code, which the former regulation did not provide. In order to operate any mitigation under such circumstances, the former code allowed only the possibility of the court to seek the institution of the voluntary general mitigating circumstances, which did not provide, however, in a general manner, the mitigation. As we shall reveal in more detail below, this latter mitigating trend, which we appreciate to have led to the provision of art.200, par.2 from the Criminal Code in force, did not find (unfortunately), a comprehensive form of expression, thus leading to a discordant niche of the regulation, which enhances the controversy on the legal nature of the legal provision analysed here.

Under a strictly evolutionary, technical aspect, we advise the reader to focus, firstly, on the terms of the regulations we have already mentioned, contained in the former, as well as in the current Romanian Criminal Code.

Thus, while the art.174 of the former Criminal Code incriminated, with the side note "Murder", the act of killing a human (of intentionally suppress his life), providing for it the main punishment of 10 to 20 years of prison and an additional penalty (mandatory) consisting of the interdiction of certain rights (among those indicated by art. 64 of the former code), the two following articles (175 and 176) governed the aggravated forms of this offense, under the names of “aggravated murder” (a kind of "first-degree murder") and "extremely aggravated murder", sanctioning them with more severe main abstract punishments (imprisonment for 15 to 25 years for first-degree murder, and alternative punishment - either life imprisonment or imprisonment from 15 to 25 years - for extremely aggravated murder). In principle, the commission of an act of suppression of the life of a very young child (known within the universal criminal doctrine as *infanticide*), was legally framed at least as a form of first-degree murder, for such a victim always represented "a person who lacks the capacity to defend itself" (as provided in art. 175 par. 1 letter *d* from the former Romanian Criminal Code).

However, to this legal qualification it was extracted the offense committed on a newborn child, by its own mother, if the murder happened in a relatively short time after birth (although the law did not determine the exact extent of this time, it was only stated that the offense had to be committed "immediately after birth"), and if, in addition, the offender committed the offense under the control of a mental disorder caused by the act of birth; this offense was provided in a separate text, art. 177 of the former Criminal

Code, titled (in a *mot-a-mot* translation) "Infanticide" ("Filicide") – the Romanian term being "Pruncucidere" – and was provided with a much lower penalty than murder (in its basic form and - *a fortiori* – its aggravated forms), namely imprisonment from 2-7 years without the requirement for an additional penalty. In addition, while the offense of attempted murder (simple, first-degree or extremely aggravated) was incriminated and therefore punishable (according to par. 2 of art. 174, 175 and 176 of the former Criminal Code), such a provision was not also found within art. 177 (from which it came out that, in conjunction with the provision of art. 21 par. 1 of the former Criminal Code, the attempted filicide, though possible, did not have, in itself, a criminal relevance).

This separate regulation, with the differences thus highlighted with respect to murder, of the filicide (which was not accompanied, symmetrically, by a norm of a mitigating nature corresponding to the mother, who under the same circumstances would have only caused an intentional or praeter-intentional touch or injury of her child or newborn physical integrity or health), led to discussions in doctrine and practice on the correct framing of the filicide legal nature. The main views were that of assessing the act as a stand-alone offense, distinct from that of murder, as a variant or autonomous species of homicide, namely that of its consideration as a mitigated form of murder, dependent on the standard offense from art. 174 of the Criminal Code (for a more detailed exposure and review of the controversial opinions expressed on the legal nature of filicide in the former Romanian criminal doctrine - which can be considered to remain valid, at least in part, also for the future - see: Dunea , 2007: 203 and the following ones). This latter view has become, over time, of a major importance, showing itself more rational with respect to the impact triggered by its adoption on some general institutions of criminal law (especially the one of participation), as well as by correlation to the incrimination goal.

In short: adopting the view according to which the filicide was an autonomous crime with respect to murder would have led to the reference of the eventual participants contribution towards the offense (instigators, accomplices, co-authors) as being participants to filicide, not murder, and therefore the punishment should have been applied also to them, a lower one than that of murder, provided in art.177 of the former Criminal Code. The purpose of the regulation, however, was to sanction less severely (only) the person who had murdered the newborn baby under a momentary impulse of a condition that caused a reduction (but not a complete disappearance) of discernment, as a specific effect of the physiological act of birth (issue that had to be proven, mainly by a forensic specialized expertise), for this person appeared to be less dangerous to society, because of the specific conditions which influenced her while manifesting her criminal impulse. However, this person could not be other than the woman who had just given birth; the potential participants to the offense, along with this one, could not share with her the diminished discernment due to a specific event just them, nor did they benefit, thus, from the legal presumption of a decreased degree of social danger, comparing to that of any other person who would intentionally suppress the life of a human being. As such, it was logical for them to be denied the access to lower penalty (specific to filicide), the mitigation brought by its governing being determined by a situation of a (strictly) personal circumstantial element value, non-objectifiable, and - as such – non-transferable on the participants, no matter if they had known or had foreseen it! (Michinici & Dunea

in: Toader *et al.*, 2014: 128, 129). Or, a proprer solution could be achieved only if filicide was regarded as a mitigated form of murder, mitigation motivated by purely personal circumstance, in which only the victim's mother could be found, so that her offense was framed according to art. 177 of the former Criminal Code, as a murder derived form, by means of mitigation, and any other participant contributions were to be classified within the basic offense (murder) from which it was derived the filicide (more exactly, not within simple murder, but - at least – within the first-degree one, that is within another derived form of the basic crime, but with derivation in the sense of criminal liability aggravation).

Formally, the solution was also supported in terms of legislative technique employed: if aggravated forms of murder were not regulated (as with other incriminations), even in the same article (in separate paragraphs) in which it was provided the offense in its basic standard content, but in separate articles (and relatively different marginal names), then it would appear symmetrically that a form derived by mitigation from the same incriminating basis should be regulated separately, in another article, even under an own *nomen juris,* without however losing the addiction to the standard crime from which it derived; moreover, the incrimination of all these forms / versions of murder, was done in a single organizational structure of the special part of the former Criminal Code: Title II, Chapter I, Section 1.

The criminal irrelevance of the filicide attempt (possible, but non-incriminated, so devoided of the ability to generate, by itself, punishment), while the simple murder attempt and its aggravated forms were criminally relevant, we don't think to have altered the operational nature of the opinion according to which the filicide represented a mitigated form of murder, whereas it is not needed a symmetry of incrimination in this regard. A mitigated form of an offense to which is incriminated the attempt for the basic form, as well as for the aggravating ones, may not know its regulation itself, precisely because, being mitigated - therefore carrier of a lower hazard - it is possible that, in the opinion and criminal policy option of the legislator, to appreciate that the criminal repression is not justified unless the result of the mitigated offense occurs effectively, and not if the execution act is conducted without an objective finality. Questionable might be the hypothesis of an aggravated form of an offense, for which the attempt would not be provided and sanctioned, although for the standard form, the legislator would incriminate it; in case of the mitigated form, however, a similar reasoning can no longer be carried out with the same success!

For these reasons, we believe that within the regulation of the former Criminal Code it could have been argued, pertinently from a logico-rational point of view, but also a formal-structural one, the proper legal nature of filicide, as mitigated form of murder, derived from / dependent on it.

The new Criminal Code has operated in this area a number of changes, both terminological and structural, as well as in terms of content, which raises some additional difficulties in further support of the same solution. Thus, it was added a dimension aiming at the mitigated incrimination not only of the mother's act, who, within the context and moments already indicated generically, murders her newborn baby, but also that of the mother, who under the same circumstances, hurts him or causes injury of his

physical integrity or health, or causes his death praeter-intentionally (by an exceeded intention) – intentionally acting only in the sense of hurting or injuring the victim, its death occurring as a more severe result, imputable on the basis of o lower form of guilt than intent, namely, any form of negligence. Bringing together these two aspects of incrimination in a single article (article 200 of the Criminal Code), the legislator also located this regulation within a different organizational structure of the special part of the code - namely Chapter III ("Crimes committed against a family member") from Title I ("Crimes against the person") - than the one within which murder is found - Chapter I ("Crimes against life") from the same title – respectively than the one within which are provided the basic (and aggravated) forms of the crimes of common assault, physical injury and assault or injuries causing death – Chapter II ("Crimes against physical integrity or health") of Title I.

There are also some content changes (in par. 1) brought against the former incrimination of filicide, but these do not constitute the primary object of the present study, so that we intend, in order to facilitate the reader's task, to indicate below the form in which it is stipulated, of *lege lata*, the Article 200 of the Romanian Criminal Code in force:

"(1) *The murder of the newborn baby immediately after birth, but no later than 24 hours, committed by the mother in a state of mental disorder, shall be punished with imprisonment of one to five years. (2) If the offenses stipulated in art. 193-195* [namely, some of the crimes against physical integrity or health – *our specification*] *are committed on the newborn child immediately after birth, but no later than 24 hours, by the mother found in a state of mental disorder, the special limits of the penalty shall be of one month, respectively, three years*. "

CRITICAL ANALYSIS OF SOME QUESTIONABLE ISSUES OF THE REGULATION FROM ART.200 OF THE ROMANIAN CRIMINAL CODE IN FORCE

As indicated before, the new legislator framed the incrimination of the offense of newborn murder or injury committed by the mother in another article organizational group than the one in which are found the incrimination rules from which it was started, obviously, the drawing-up of the incrimination contained in art.200, namely murder and offenses under art.193-195 of the Criminal Code. Under these circumstances, to further assert that we're dealing with a mitigated form of an offense with a basic content (as we noticed before, a thing that represented the dominant view regarding filicide, according to the former code), becomes a more difficult thing to do because, on one hand, the heterogeneity of the regulation from art.200 of the Criminal Code breaks the unity of derivation from a single standard incrimination (talking about a link with several separate offenses) and, on another hand, because a normal legislative technique, meant to raise no artificial interpretation problems of an incriminating rule's legal nature, should not (could not) frame the mitigated form (but dependent on the standard form) of a basic crime, in another organizational group of incriminating rules than the one to which belongs the standard offense itself from which the derivation was made (in this case, by mitigation).

In light of these considerations, it would seem that the legislative technique selected for the drafting of art.200 of the new Romanian Criminal Code, revives a controversy apparently solved (or which it was about to be solved) to the contrary of the previous criminal regulation, supplementing the arguments focused on a formal criteria that would support the idea that we are in presence of a stand-alone incrimination, which can be explained as a manifestation of mitigated criminal policy in relation to the offenses of murder, common assault, personal injury or bodily injury causing death, but with no need to double this explanation by the actual qualification of the rule from art.200 of the Criminal Code as a mitigated form of these crimes / offences.

The consequent result (but unsatisfactory) of such interpretative vision would be that the role and contribution brought to the commission of such offense by the participants, other than the mentally disturbed mother, would have to be also reported to the incrimination of art.200 from the Criminal Code, thus becoming incidents also for such persons, the penalties provided by this latter article, in principle lower than those established for the offenses indicated above (thus, according to art.188, for simple murder, the new Criminal Code provides imprisonment from 10 to 20 years and interdiction of certain rights – namely, those provided by art.66 of the Penal Code; art.189 sets for the aggravated murder the alternative sanction: life imprisonment or imprisonment from 15 to 25 years and prohibition of certain rights; art.200 par. 1 provides only imprisonment from 1-5 years without interdiction of certain rights; art.193 par.1 has for common assault, in its basic form, the alternative sanction of imprisonment from 3 months to 2 years or a fine; par.2 sets for aggravated assault the alternative sanction of imprisonment from 6 months to 5 years or a fine; in art. 194 par. 1, for simple bodily injury it is provided the imprisonment from 2-7 years; in par.2 for aggravated bodily injury, the sanction is imprisonment from 3-10 years; art.195 provides for bodily injury causing death a punishment from 6-12 years in prison; while in art.200 par. 2 it is provided for any of these offenses, committed by mentally disturbed mother of the newborn, on it, in the first 24 hours after birth, a unique punishment consisting of imprisonment from 1 month to 3 years). Or, as we said before, the purpose of the provision from art.200 of Criminal Code (which we appreciate to have remained identical with the one having determined the mitigation of the criminal liability for filicide, in regard with murder, within the former Criminal Code), is to exert a lower repression towards a certain active subject with a diminished discernment (due or at least related to the biologic event of birth), being incidental a special circumstance of a strictly personal mitigation, thing that continues to exclude, logically, any other participant to the commission of such an offense, except the mother, from the benefice of mitigation!

Thus, we believe that the rule of art. 200 of the new Criminal Code highlights an interpretative conflict generated by a tension (even opposition) between the formal systematization of the norm - on one hand - and understanding or applying it to the spirit and the purpose for which it was created - on the other hand (in other words, it is shown a form of the classic conflict between the interpretation of the law done in its *letter* and that done in its *spirit*) - which of course, is criticisable as an exercise of legislative technique and has the ability to lead to non-unitary solutions in the judicial practice (as a result of

misunderstandings and confusion that could thus create while understanding the role, purpose and position of the incrimination text).

Despite these new challenges, the doctrine analysing the provisions of the new Criminal Code, published so far, seems to prevail (and thus to perpetuate the view – which was dominant in the former regulation - on the legal nature of filicide) the point of view according to which the regulation from art. 200 of the Criminal Code devotes mitigated forms (therefore, legally dependent of the respective basic offenses) of the offenses of murder, assault and battery, injury or bodily injury causing death. It is true that this idea is not always expressly and clearly stated as such (in some cases, the issue is not even the subject of an actual conscious analysis), the author's attitude in the matter being often deduced from indirect or generic formulations towards the mitigated nature of the sanctioning treatment imposed in art.200 in relation to the one prescribed in art.188, 189, 193-195 of the Criminal Code, or from the solutions envisaged to the issue of legal classification of criminal activities of participants in committing the offense, or by noting that within art.200 it is not established, *per se*, an own constitutive content, typical of autonomous offense. (Bogdan et al., 2014: 67-69; Neagu in Pascu et al., 2014: 78-84; Toader et al., 2014: 350, 351; Udroiu & Constantinescu, 2014: 277; Morosanu in Voicu et al., 2014: 319).

Sometimes, the lack of concern and direct approach to the problem of the legal nature of the incrimination from art.200 of the Criminal Code leads, within the same specialty papers, to self-contradictory formulations, that properly highlights the uncertainty (in this respect) of the regulation, as well as the interpretative counterproductive uncertainty generated even by the legislator. Thus, for example, although from the overall of some exposures, it would come out the adherence to the opinion of the dependant legal nature on other incriminations of art.200 provisions of the Criminal Code. - as a common framework for the mitigated forms of the offenses mentioned in the respective legal text - it is also asserted that "the offense [of art.200 of the Criminal Code. – *our specification*] is regulated, according to the result produced, in a standard variant and in a mitigated one" afferent to paragraph 1, paragraph 2 respectively. (Neagu, in Pascu et al., 2014: 79). Or, obviously, it is impossible for one and the same incrimination rule to combine two opposing legal natures, being also a mitigated form of another offense **(**thus, being dependent and subsequent to the fulfilment of the basic constitutive content of an incrimination rule), as well as standard form (thus an autonomous, standalone offense) in relation to another provision, that would represent, at its turn, the mitigated form of the first one. In addition, the reasoning regarding the provision of paragraph 2 of art.200 from the Criminal Code as a mitigated form of the provision of par.1 of the same article, improperly ignores the observation of a logical rule which must stand, as it is natural, at the foundation of the normative process of developing a mitigated form of a crime, namely the fact that the derivation through mitigation can be only made by starting from the essential elements of the standard constitutive elements of a basic incrimination. However, it must be mentioned the fact that the constitutive elements of the offenses described at par. 2 of art. 200 of the Criminal Code do not derive from the constitutive elements of the offense described in

par. 1, so the assessment that we are in the presence of an incrimination unit, showing a standard form and a mitigated form thereof, is - in our opinion - unsustainable.

It must olso be mentioned, moreover, also as an objectionable aspect of the regulation of art.200 from the Criminal Code, the lack of consistency in relation to sanctioning murder, injury and batteries or bodily injury causing death - on one hand - and respectively to the battery or other violence - on the other hand. Thus, while the abstract sentence for killing the newborn by the mother, as described in art.200 of the Criminal Code, is clearly reduced compared to the one provided for murder (simple and - even more – first-degree), mitigating aspect that is still maintained with respect to the newborn's injury by the mother, in relation to the incriminations of art.194 and 195 of the Criminal Code, this is not necessarily the same for the newborn's injury by its mother by simply assaulting him or exerting other violent acts causing physical suffering. Thus, as we have indicated, the legal punishment for common assault (art.193 par.1) is an alternative: imprisonment from 3 months to 2 years or a fine. According to art.200 par. 2, however, imprisonment in this case, is to be situated between the limits: 1 month - 3 years. Passing over the circumstance that it does not come out clearly from the formulation of art.200 par. 2 (in conjunction with the rule of art.193 of the Criminal Code) if it remains or not valid the sanctioning alternative of the criminal fine in the case of committing battery or other violence under the conditions indicated by art.200 - what must, however, be highlighted, also as a flaw of the new provision, likely to generate contradictory interpretations - it is to note that the special limits of the imprisonment punishment are derived asymmetrically against the reference standard: the minimum is lower (which proves a tendency to manifest a mitigation criminal policy, consistent with the rest of the sanctioning attitude from the analyzed article), while the maximum is increased (which transmits an inexplicable and contradictory trend to manifest an aggravating criminal policy, found in disagreement with the very purpose of the incrimination concerned).

Regarding the comparison betwen the penalty provided in art.200 par.2 of the Criminal Code and the one indicated by art.193 par.2 (aggravated assault), both of the special limits of imprisonment are lower in the first case (which maintains a consistent attitude of mitigation), but we're facing again the problem of maintenance or suppression of the alternative penalty of the fine, without which, it recurs also in this case an aggravating centrifuge trend, discordant in relation to the general construction of the article. These major regulating inconsistencies increase the dilemma of the correct legal qualification of the incrimination rule of art.200 from the Criminal Code, diminishing thus the success of its argumentation as a mitigated form of the offenses mentioned within the text, although the purpose of its appreciation in this manner, in comparison to the purpose of the legal provision and to the institution of criminal participation, is not at all undermined.

Another correlation aspect with general criminal law institutions, that might be influenced by the adoption of some of the legal qualifications in question, which can be attributed to the provision from art.200 of the Romanian Criminal Code, is the one related to the institution of criminal liability temporal limitation. Thus, according to the provision of art.153 par.2 letter *b*) Criminal Code, as an exception to the rule of criminal liability

prescriptibility of most offenses, it is provided that (along with genocide, crimes against humanity and crimes of war) are imprescriptible the crimes referred to in art.188 and 189 and the deliberate offenses followed by death of the victim, namely the offenses of murder and first-degree murder, respectively praeter-intentional crimes (committed with exceeded intention) that led to death. It is questionable to what extent the legal classification of art. 200 of the Criminal Code may or may not partially draw the incrimination of this text within the domain of the imprescriptible criminal offenses.

We believe that the discussion tends to refer only to the issue regarding the newborn murder committed by the mother (art.200 par.1), because as for the incrimination of the newborn injury by the mother (art.200 par.2) things seem to be clear. Thus, as long as the scope of art.200 par.2 of the Criminal Code is attracted to the commission of one of the offenses described in art. 193 or 194 of the Criminal Code, the rule of the criminal liability prescriptibility would be applicable, without doubt. Conversely, if the application of art. 200 par. 2 of the Criminal Code is attracted to an assault or bodily injury causing death, then we would be in a case of imprescriptible crime, under the final provision of art. 153 par. 2 letter *b*) from the Criminal Code, which generically provides its incidence under the hypothesis of commission of any intentional crime followed by death of the victim. In these circumstances, we can appreciate that the interpretation direction concerning the incrimination from art. 200 par. 1 from the Criminal Code as representing an autonomous incrimination, self-reliant by reference to murder, would lead to the idea that the offense in question is not imprescriptible (so it is prescriptable) because it is not covered by the restrictive indication contained in art. 153 par. 2 of the Criminal Code. (provision with a purely circumstantial scope, being a provision of exception from the rule, thus subject to universal imperative in criminal law: *restringenda sunt strictissime interpretationis*). It is true that the same conclusion could be reached as a result of accreditating the opinion according to which the newborn murder offense committed by the mother is a mitigated form of murder, but considering in such manner the legal qualification of the rule in question, we believe that it is possible to glimpse also an interpretative result, namely the classifying of the offense as being imprescriptable. This, because the text of art. 154 par. 2 letter *b*) Criminal Code expressly refers to art. 188 and 189 of the Criminal Code - true - but what else is the newborn murder by the mother (in this interpretation) but a form derived from art. 188, dependent on its legal qualification of the latter? Moreover, we may notice that when the legislator specifically intended that the offense falling under art. 200 par. 1 of the Criminal Code should not follow the legal regime and should not have the same legal consequences as the ones of the offence from which it derived, namely murder (in its basic form - art. 188 - or first-degree / aggravated thereof - art. 189, or even partly, art. 199 of the Criminal Code, etc.), he felt the need to emphasize this in particular. For instance, according to art. 242 of Law no. 187/2012, of implementing the new Criminal Code, it is expressly provided that **"**In applying the provisions of art. 189 par. 1 letter *e*) from the Criminal Code [according to which a first-degree murder is the one committed "by a person who has previously committed an offense of murder or attempted murder offense" – *our specification*], *an offense of murder previously committed* is any act of killing a person,

committed with the intent provided by art.16 par.3 of the Criminal Code, except offenses referred to in art.190 and art.200 of the Criminal Code".

So, through a quasi-extensive interpretation (and - it's true - *in mala partem*) of the provision which enshrines the cases of exceptional criminal liability imprescriptibility (which we may admit that is not perfectly consistent with the interpretation technique and policy generally accepted in criminal law, yet being the result of a logical reasoning!), we might consider that the best chance to integrate the incrimination from art. 200 par. 1 of the Criminal Code within the imprescriptable offenses category comes from the direction of its legal qualification as a mitigated form of murder, rather than from the one of its opinion as an autonomous offense.

In order to weight criticism (partly justified) that might rise towards the issues developed, one wonders what would be the logic and consistency of a legislation that would lead to appreciation as being imprescriptable of a less serius offense – from a related species of criminal offenses - as common assault or injury causing death of the newborn committed by the mentally disturbed mother immediately after birth (within 24 hours) - an act committed with exceeded intent - but without integrating within the category of imprescriptable offenses, a more severe offense from the same species, as it is the newborn murder committed by the mother, under the same conditions (therefore an offense committed with an pure intention to surpress life)? We believe that the obvious response emphasizes in a sufficient manner the rhetorical nature of the questioning and properly supports, (also) from this angle of perception of the problem, our opinion that, despite the syncopes of the current regulation, the proper legal nature through which it should be regarded, *de lege lata*, the rule of art. 200 of the Criminal Code, is the one of mitigated form of murder (par. 1), respectively mitigated form, as appropriate, of the offenses from art. 193-195 of the Criminal Code. (par. 2).

As it was said, the circumstance that the attempt is not criminally relevant to any of the offenses covered by the provisions of art. 200 of the Penal Code, although it is incriminated for murder and for the aggravated form of bodily injury, is not in itself an argument to directly support the view that the newborn murder or injury committed by the mother is an autonomous incrimination, and there is no element of automatic denial of the opinion that the text focuses on the mitigated forms of other crimes, when considering a purely personal circumstantial element, equally relevant as a mitigating factor of the social dangerousness of all these crimes, in their basic content. It is in fact the lower weight of this social dangerousness that may be the reason why the legislator considered that only the consumed form of these offenses is able to appeal criminal liability, being granted a criminal relevance! Therefore, if upon the newborn is only attempted an act of murder, by the active subject, especially circumstancied and under the conditions expressly indicated in art. 200 par. 1 from the Criminal Code, such as the newborn did not die, suffering only one of the specific results of the offenses indicated at art. 193 or 194 from the Criminal Code, the lack of criminal relevance of the attempt thus committed shall lead to the incidence retention of art. 200 par. 2 from the Criminal Code (Neagu, in Pascu et al, 2014:84). To the extent in which the attempt in question did not cause such a consequence, the offense shall not be able to generate criminal liability at all.

PRECISE CONCLUSIONS AND *DE LEGE FERENDA* PROPOSAL

As it comes out from the issues presented to this point, the entry into force of the new Romanian Criminal Code has revived and perpetuated an old controversy (which - partially – within the last period of activity of the former criminal regulation seemed to be outdated), concerning the legal qualification of incriminating the newborn murder or injury committed by the mother. The dissenting opinions that circulated troughout the doctrine - namely: the evaluation of the provision in question as a mitigated form of other crimes, to which it remains dependent, or on the contrary, its perception as an autonomous incrimination, distinct (detached) from those generating it - has the ability to achieve some distinct solutions to the problem of the manner and results of the correlation of this incriminating criminal rule with some general institutions of criminal law, such as participation and prescription.

One may notice that, in matters pertaining to form, manner and place of settlement, the new code tends to accredit more than the previous one the view of this act as a self-reliant offense. On the other hand, a consistent and coherent approach to the statutory provision in question, in terms of a logico-rational, systematic interpretation (by reference to the effect on some general criminal law institutions) and teleological interpretation (considering the scope of regulation), rather support the variant of art. 200 as a mitigated form of other offenses (murder, common assault or other violence, injury, bodily injury causing death).

The main antagonism between these two interpretative variants is capable of generating confusion in interpreting and applying the law, thus, having become unpredictable / unforeseeble, dangerous aspect and - therefore - objectionable, especially since it is accompanied by unacceptable inconsistencies in regulation, as the dissidence from the projection of penal policy generally mitigating of the text, that is imposed by the correlation of the penalty referred to in art. 200 par. 2 to the one shown in art. 193 of the Criminal Code, for the crime of common assault or other battery. The reason for this latter inconsistency we believe to be represented by the extremely broad scope of consequences (and, correspondingly, by the exessive plateau of social dangerousness) which the provision of art. 200 par. 2 of the Criminal Code tries to group under the category of a unitary abstract penalty. Thus, if the alternative of the criminal fine is, of course, outrageous (socially speaking) and with no real reeducational support, in the event of common assault or injury causing death of the newborn by the mother, it is certain the fact that the lack of this alternative, or the special maximum which is superior to the common assault, is not justified when common assault offense is committed by an active subject and in curcumstances that, within the other hypothesis of the same regulation, are evaluated as mitigating sources, and not of aggravation of the criminal liability.

In these circumstances, the accreditation of the idea that art. 200 of the Criminal Code is rather a framework for mitigated forms of other crimes, than an autonomous incrimination, is from our point of view, a compromise solution, more rational and functional than its alternative (self-reliant incrimination), but still imperfect, given the regulatory manner. In other words, a kind of lesser evil, chosen in competition with a

greater evil, which of course is a solution which, scientifically, leaves much to be desired!

The solution we propose to the legislator would be, observing a third possible alternative found at its disposal (in general), to express by special criminal law rules a mitigating attitude of criminal policy (alternative which he should choose to the detriment of the two already presented in this matter). It's about building a special cause to diminish the sentence. This would mean the complete abandonment of the idea of the criminal autonomy of the newborn murder or injury committed by the mother, leaving the legal qualification of the offenses committed to achieve, as appropriate, as murder, common assault or other battery, injury, bodily injury causing the death (or domestic violence - art. 199 of the Criminal Code - but in an mitigated form, though, by an express stipulation, it might be removed from the incidence of that text the offenses described at art. 200, especially since the legal nature of the rule in art. 199 of the Criminal Code tends to be controversial, acting - in our opinion - rather as a particular cause for aggravation, than as a stand-alone offense or as a common container for the aggravated forms, on a certain basis, of the same crimes, already indicated in this framework), to which it would simply be added the special mitigated provision, of mitigation of the legal punishment (in principle, as a fraction or percentage of statutory penalty for each basic incrimination, from those to which reference is made).

Thus, without doubt, the activities of the participants who do not check the reason of the mitigation would relate to the respective underlying offense (or, eventually, to its qualified derivation) without the benefit of the special and strictly personal cause of mitigation, which benefits only to the active subject especially indicated in the mitigating rule. Also, no doubt could arise over the imprescriptibility of the newborn murder by the mother, removing the irrationality (which it was already indicated) of a strict interpretation (which is correct, however, methodologically speaking) of art. 153 of the Criminal Code, in conjunction with art.200 par.1 of the Criminal Code (in its current form), by comparison with the result of correlating art.153 with art.200 final part of par. 2. Eventually, if the legislator would seek to extract some of the offenses committed in such circumstances from the category of imprescriptible crimes, he should expressly stipulate an exception from the reference to the praeter-intentioned offenses with fatal outcome, included *de lege lata* at the end of art. 153 par. 2 letter *b*) Criminal Code.

In addition, the mitigation may be achieved also in the situation indicated at par. 2 by separate reference to each of the standard incriminations, so as to cover the inconsistency according to which in some cases the commission of the offense under the special conditions described at art. 200 has a mitigating value, and in other cases, it does not (on the contrary, it has - at least partially – an aggravating value).

The only drawback that we glimpse regarding the solution thus proposed would be that, in the absence of an express provision regarding the incrimination of the attempted murder of the newborn commited by it’s mentaly troubled mother, this act would follow the regime of standard reference incriminations, which would mean that the murder attempt of the newborn by the mother, as provided by law, and the injury attempt of the newborn (under the same conditions), aimed to produce one of the consequences provided by art. 194 par. 1 letter *a*)-*c*) from the Criminal Code, would become criminally

relevant as well. If this isn't the legislator's will, we consider that a simple express provision on the contrary, attached to the norm including the reason of the penalty's mitigation, would be sufficient in order to maintain, under this aspect, the present situation.

Foreseeing - we believe - more benefits than drawbacks, of the solution proposed, it might be legitimately raised the question concerning the reason for which it is not appreciated, including *de lege lata*, that the text of art. 200 of the Romanian Criminal Code does not actually express such a special case of reducing the sentence, so that the forwarded proposal become operational without the need for any modifying legislative intervention. The doctrine already stated that one of the novelties of the new criminal encodings is that it is provided at art. 200 "par. 2 a special cause of reducing the penalty for the offenses of common assault or other battery, injury or bodily injury causing death committed over the newborn child, but not later than 24 hours after birth, by the mother found in a state of mental disorder" (although in relation to the provisions in par. 1, the authors in question have appreciated that the law establishes, in fact, an attenuated form of murder). (Udroiu & Constantinescu, 2014: 277)

Unfortunately, the general theoretical criteria to accurately differentiate three possible ways (already mentioned) by which the criminal legislator could express, through special criminal rules, the mitigating criminal policy option, have not yet been detected with sufficient precision in the doctrine, as they are still part of a relative indeterminacy in the criminal law theory, awaiting a clearer configuration in the future. However, through the observation of some rules that are presented with certainty as having the legal nature of special mitigating causes (*e.g.* art. 411 of the Criminal Code, having an explicit *nomen juris*: "causes of sentence reduction" in relation to offenses against national security), we may conclude that the rule writing style and the manner of determining the sanction are the main differentiating characteristic features.

Thus, a particular cause for reduction a sentence refers to the incriminations in relation to which it operates, states the element in the consideration and presence of which it becomes incident (without resuming practically the exposure of the incrimination, by describing its constituent content), and specifies the mitigation extent, basically as a fraction or percentage of the penalty provided by law for the offense / offenses to which it works. These items are not present as such in the formulation of art. 200 of the Romanian Criminal Code. Thus, in par. 1 the formulation tends to describe the offense itself, as it commonly performed the creation of an autonomous incrimination, and the punishment limits are determined directly and not derivatively, being only the result of a comparative assessment of the interpreter that they are lower than the ones provided for murder (and for first-degree murder and – the more so - for domestic violence). The wording of par. 2 tends to begin in a style closer to the specific wording of a special cause of a sentence reduction, firstly, making generic reference to certain incrimination rules, then specifying the mitigation element, but the manner of determining the abstract sentence (also directly) as well as the fluctuations between the decrease and increase of the represion, by reference to various penalties provided by law for the offenses to which reference is made, do not satisfy, at their turn, the apreciation

that right now the text of art.200 from the Romanian Criminal Code could be legitimely interpreted as representing a special cause (*per se*) of penalty reduction.

Therefore, we propose to the legislator the adoption of the above mentioned solution in the matter of the newborn murder or injury offense committed by the mother, given the advantages present by it, towards the analyzed alternatives. In this regard, we believe that a simple adjustment of the formulation of the text would be sufficient, of the type (of course, perfectible): "If the murder offenses, or the ones provided in the art.193-195 are committed on the newborn child immediately after birth, but no later than 24 hours, by the mother found in a state of mental disorder, the special limits of the penalty are reduced by...", afterwards following a percentage or a fraction assessed as appropriate.

At the same time, to avoid the potential confusions able to be shaped concerning the criminal liability, in relation to art.200 of the Criminal Code, we propose the legislator an intervention to expressly clarify this issue, according to its actual criminal policy option. Thus, to the extent that there are no aims at integrating any of the offenses covered by this legal text within imprescriptible crimes, we believe that the legislator should expressly exclude from the final reference contained in art.153 par.2 letter *b*) Criminal Code, the offense of common assault or injury causing death committed by a mentally disturbed mother, on her newborn child, in the first 24 hours after birth. Such a provision, in conjunction with explicit mentioning in the beginning of the text of art.153 par.2 letter *b*) Criminal Code, only of the offenses provided by art.188 and 189 of the Criminal Code, and not of the murder described in art.200 par.1, would transmit with sufficient clarity and predictability the message that none of the criminal offenses committed so as to receive legal qualification in art.200 of the Criminal Code, are not imprescriptible (in other words, that they are, in their entirety, prescriptible). A formulation of the text that would satisfy this requirement of clarity could be: "*The prescription does not remove the criminal liability in the case of (...) the offenses referred to in art. 188 and 189 and of the intentional crimes followed by death of the victim, except in art. 200 par. 2 / or / except newborn common assault or bodily injury, causing death, committed by the mother* "(of course, the proposed wording is certainly perfectible).

However, contrarily, if the lawmaker's will is that of integrating among the imprescriptible crimes, along side murder, the murder or bodily injury causing death to the newborn, committed by the mother (together with all the provisions indicated by art. 200 Criminal Law), then we mind that there is an express provision in this sense, which completes the current one from art.153 l.2 letter *b*) Criminal Code and would be pertinent and not redundant, because – as we already showed – an interpretation of the norm of *lex lata*, in this sense, cannot be achieved, but with great difficulty and with the price of some sensitive, disputable and hard to assume interpretative tricks and deviations from the generally accepted rules of the reasonable and equilibrated endeavor of judicial interpretation!

In any case, maintaining the text's current wording, art.153 l. 2 letter *b*) Criminal Law, in conjunction with the particular situation of the incriminating provisions of art. 200 Criminal Law, is in our opinion profoundly dissatisfactory, because – as we already

have mentioned above – a strict interpretation of *lex lata* leads to the inacceptable conclusion that the less, praeter-intentional crime against the newborn's life, committed by the psychically troubled mother, is imprescriptible, in comparison with its aggravated crime, of intentional killing of the child, which in the same conditions, would remain prescriptible. *Ubi cessat ratio legis, ibi cessat lex!*

REFERENCES

[1] Bogdan, Sergiu (coordonator); Şerban, Doris Alina; Zlati, George, (2014). *Noul Cod penal. Partea specială. Analize, explicaţii, comentarii. Perspectiva clujeană*, Editura Universul Juridic, Bucureşti, 2014.
[2] Dunea, Mihai, (2007). *Consideraţii privind problematica juridică şi medico-legală a pruncuciderii*, Analele Ştiinţifice ale Universităţii „Alexandru Ioan Cuza" din Iaşi, Tomul LIII, Ştiinţe Juridice, 2007, available on-line at: http://laws.uaic.ro/docs/pdf/articole/2007/Anale2007_art13MihaiDuneaPruncuciderea.pdf (08.09.2014).
[3] Pascu, Ilie; Dobrinoiu, Vasile; Hotca, Mihai Adrian; Chiş, Ioan; Păun, Costică; Gorunescu, Mirela; Neagu, Norel; Dobrinoiu, Maxim; Sinescu, Mircea Constantin, (2014). *Noul Cod penal comentat. Partea specială*, ediţia a II-a (revăzută şi adăugită), Editura Universul Juridic, Bucureşti, 2014.
[4] Toader, Tudorel; Michinici, Maria Ioana; Răducanu, Ruxandra; Crişu-Ciocîntă, Anda; Răduleţu, Sebastian; Dunea, Mihai, (2014). *Noul Cod penal. Comentarii pe articole*, Editura Hamangiu, Bucureşti, 2014.
[5] Udroiu, Mihail; Constantinescu, Victor Horia Dimitrie, (2014). *Noul Cod penal. Codul penal anterior (prezentare comparativă, observaţii, ghid de aplicare, legea penală mai favorabilă)*, Editura Hamangiu, Bucureşti, 2014.
[6] Voicu, Corina; Uzlău, Andreea Simona; Moroşanu, Raluca; Ghigheci, Cristinel, (2014). *Noul Cod penal. Ghid de aplicare pentru practicieni*, Editura Hamangiu, Bucureşti, 2014.