CRIMINAL HOMICIDE IN THE NEW ROMANIAN PENAL CODE

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Abstract
This paper addresses mainly two issues, namely the sistematization of the homicide offences and the definition of the offence of murder. Regarding the first issue, we underline the fact that the dispersion of offences against life is not justifiable. Regarding the second issue, we underline the fact that the definition for the offence of murder is not compliant with the exigencies of the principle of legality.

Keywords: unity of offence, complex offence, progressive offence, praeterintentional offence.

1. Introduction
In the new Romanian Penal Code (Law no. 286/2009), the offences against life make up the first chapter of Title I of the Special Part. This chapter, named “Offences against life”, comprises five chapters, namely: “Murder” - art. 188; “First degree murder” - art. 189; “Homicide by request of the victim” - art. 190; “Causing or aiding suicide” - art. 191; “Involuntary manslaughter” - art. 192.

In the previous code (Law no.15/1968), the group of offences against life was included in Title II of the Special Part, where it made up a simple section, named “Homicide”. At the same time, the structure of this group of offences was different. For example, in the previous code, the offence of homicide by request of the victim did not exist (this is a new incrimination, seen as a mitigating circumstance of the homicide, with incidence in the case of euthanasia). Or, in the previous code, the group of offences against life also included infanticide – which does not exist, at least with the name (currently, the same act constitutes the offence of “Killing or injuring a new-born committed by the mother”, which is included in a different group of offences, which did not existed prior, named “Offences committed against a member of the family”). But, in the previous code, there was a second aggravated version of the offence of criminal homicide, named “Aggravated murder” – which was dropped (currently, there is only one aggravated version of the homicide, named “Second degree murder” which comprises a significantly lower number of circumstantial elements).

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Generally appreciated, these changes seem reasonably adequate. Particularly, we find salutary the inclusion of the offences against life at the beginning of the Special Part of the Penal Code – a change meant to underline the exceptional importance that must be paid to the protection of the right to life, the fact that, lacking this protection, the recognition of any other right would be useless.

But, unfortunately, the changes in the field do not solve any of the substantive issues that appear in practice. The serious issues raised by the incriminations related to homicide remained unsolved – which inevitably means a contradictory jurisprudence, which undermines the fundamental right to equality before the law.

For this reason, in the following we shall present some of these issues, as well as some proposals for their solutioning.

2. Dispersation of incriminations

As it is known, incriminations of criminal homicide raise a complex issue, largely unresolved, in which the central place is occupied by the problematic assumptions of the causal relation, the so-called cases of "atypical causal development".

The causes of this theoretical failure are multiple. But, in our opinion, among them there are, firstly, deficiencies in systemizing the material, the fact that some offences of homicide are included in other groups of offences - which prevents an overall image and notification of possible duplication of rules. For example, the offence of hitting or assault causing death is still stated in the group of offences against bodily integrity or health (Chapter II of Title I, Article 195). Or, among offences against property (Title II) still appear willful and malicious aggravated destruction (art. 254), mugging and piracy which have resulted in the death of the victim (art. 236) - which are designed, all, as complex offences, that absorb the offence of hitting or assault causing death.

Therefore, we need to notice that the dispersion of incriminations in the field is arbitrary and not justified, as it is demonstrated by the fact that neither the reasons nor the doctrine offer explanations, regarding the motives for which some homicide offences were included in other groups of offences.

Particularly, it generates discussions the inclusion of hitting or assault causing death in the group of offences against bodily integrity and health – although the act affects the right to life. The doctrine avoids any discussion regarding the juridical object or the protection purpose of this offence, limiting itself to indicating two elements, which would make possible the distinction between the offence of murder and the offence of hitting or assault causing death. On the one hand, it pretends that unlike the offence of murder, which is committed with intent, hitting or assault causing death is committed with exceeded intention or praeterintention. On the other hand, it pretends that the offence of murder is a complex offence, in which the less serious offence (primum
delictum) is absorbed, in a natural way, by the serious offence (majus delictum), while the offence of hitting or assault causing death is a progressive offence in which the two offences (hitting and killing) keep their individuality.

But, apart from the fact that the above mentioned differentiating elements do not justify this systematization (division) of the texts, if we go into details, we shall see that the distinction itself between the two offences rises question marks, both because it is not understood in what does the specificity of “exceeded intention” (praeterintention) consists of, as distinctive subjective element, inherent to the offence of hitting or assault causing death, as well as because it is not understood in what the specificity of progressive offence consists of.

In art.16 (5), the new Penal Code tries to define praeterintention, showing that “there is exceeded intention when the act which consists of a willful action or inaction produces a more serious result, which is due to the guilt of the defendant”. However, this text does nothing else but enhancing confusion, as it is more than obvious that the definition of praeterintention coincide with the definition of progressive offence. Therefore we are forced to conclude that “praeterintentionate offences” identify with the “progressive offences” and it is not only about a different subjective element; on the contrary, we talk about a special type of offences, that have an individual structure and which differ entirely from the other offences, including the objective aspect.

But, this is not the only problem. If we take into consideration the fact that the definition given by art. 16 (5) from the new Penal Code is mistaken for the definition of the progressive offence and, at the same time, the current Romanian doctrine unanimously supports that the progressive offence is a distinctive form of the legal unity of offence\textsuperscript{1}, then we have to conclude that, far from being a definition, the statement in art. 16 (5) of the Penal Code is a pure contradiction between concepts (contradictio in adjecto). The unity of offence, be it legal, presuposes that more offences forms, together, a single entity, with a complex structure, methodically and systematically made. Or, the idea that, in the progressive offence, the two offences (primum delictum and majus delictum) keep their individuality, each having a distinctive result, clearly contradicts the idea of a unity of offence. Since it is stated that each of the component offences have an autonomous existence\textsuperscript{2}, implicitly it is excluded the possibility that they form a “unity”, one single offence.


In other doctrines (for instance the French one), the “progressive offence” is quasi-unknown, at least from the point of view of terminology. But, they talk about the so-called “praeterintentionate offence”, raising the issue if it is or not to be accepted such a combination, between a intentional offence and a negligent offence - issue that divides the specialists.

Regarding the progressive offence, few authors that recognize its existence consider it as a variant of the complex offence\(^3\) - idea which is also supported by professor Vintilă Dongoroz\(^4\). But, unfortunately, none of these authors noticed that the progressive offence rejects all rules of absorption, including the rule that a negligence offence, which is easier, cannot absorb a intentional offence, which is more serious. This rule can be easily understood by observing that in some doctrines, negligence is defined as “a particular type of punishable conduct”\(^5\). Moreover, starting from here, we have already noticed, on another occasion\(^6\), both that the distinction between negligence offences and intentional offences represents a subdivision of the offences of result, and that negligent offence is a simple offence, while intentional offence is a complex offence, absorbing other violent offences, which are less serious. Therefore, we can only stress that this difference in structure completely separates the two categories of offences and exclude any possibility that a negligence offence combines with a intentional offence.

But, if we focus on the new Romanian Criminal Code, we can notice another contradiction. Thus, from the provision stated in Article 16 (5) of the new Penal Code results that the most serious result (death) is caused by the negligence of agent - which obliges us to hold that, in the case of “progressive offence” (“praeterintentionate offence”), the absorbing offence, which is more serious, is an offence against life, committed by negligence. On the other hand, however, the place itself given to the offence of hitting or assault causing death (its inclusion among offences against physical integrity) obliges us to support something else, namely that the absorbing offence, which is more serious, is an offence against bodily integrity, intentional committed, while the absorbed offence is an offence against life, committed by negligence. However, this proves once again, that the hitting or assault causing death - which, to us, is a typical example of “progressive offence” - is an artificial and forced legislative creation, which rejects the elementary logic.

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\(^3\) For this, see R. Petrucci et al, in *Compendio di diritto penale*, VIII editione, Simone, Napoli, 2004, p. 249.

\(^4\) V. Dongoroz, *Drept penal*, Bucharest, 1939, p. 328.


Finally, regarding the aggravated variants of other offences (illegal deprivation of liberty, rape, mugging, destruction etc.), which become complex offences and absorb the progressive offence of hitting or assault causing death, we have to notice there are serious legislative errors. It is inconceivable that such a unity of offence, which includes in itself another unity of offence (progressive offence), which randomly combines without, following any criteria, with any other offence, including an already complex offence (rape, robbery etc.).

3. Definition of the offence of murder

3.1. Compliance with the legality principle

In art.188 Penal Code, the offence of murder is defined as *killing a person* – which means that it is considered an offence of murder any act that causes the death of a person.

But such a definition is extremely general. It leaves completely unclear the circumstances in which “the killing of a person” is considered an offence, and in this way, it does not take into consideration the rule *nullum crimen sine lege certa* (this requirement states, as it is known, that each incrimination has to be precise and accessible enough, so that its scope be foreseen from the beginning).

On the other hand, we may notice that, while the text does not stipulate any essential requirement, the jurisprudence in the field shows two such requirements, namely: that the act be committed *illegally*; and it caused the death of *another person*.

The first requirement, that the act be committed *illegally*, expresses the requirement *nullum crimen sine iniuria*, according to which it can only be considered offences only the illegal, unjust acts, that are against certain preexistent juridical obligations. Respecting this requirement, the jurisprudence unanimously considers that the soldier that kills an enemy on the battlefield, the person who acts in self defence or the person who enforced a decision of life imprisonment cannot be held responsible for murder. However, the omission from the text of this requirement has its shortcomings. In this sense, we may notice that, as long as the law does not clearly stipulate that it is necessary that the act has an illicit character and be committed *illegally*, the judicial body has no obligation to verify if, in reality, it operates any justifiable cause; such a verification remains just a simple prerogative, that it is used or not. Besides, this seems to be the motive for which Romanian jurisprudence used very rarely justifiable causes.

Regarding the second essential requirement, that the act caused the death of *another person*, we have to notice three aspects.

Firstly, we have to notice that this requirement results only from a systematic interpretation of the law, that to consider, for the acts of suicide, the incidence of another penal provision, the one which incriminates the act of causing or aiding suicide.
Secondly, we must notice that, compared to the current definition of the murder, it can be concluded that there is an offence of murder, even when the agent causes his own death - because murder is defined as killing a person, and the agent is also a "person". In other words, compared to the current definition, the distinction between murder and causing or aiding suicid is problematic.

Thirdly, we must notice that, by omitting this requirement, the definition of murder once again rejects the principle of legality (which requires again, that all essential requirements be included in the definition of the offence). In any case, the omission of this requirement can be justified only if we renounce to the offence of causing or aiding suicid.

Apart from those above mentioned, it is necessary to make two observations on why the doctrine did not notice that the definition of the offence of murder disregards the requirements of the principle of legality. In this regard, we must note, firstly, that the doctrine characterizes the murder as a free offence\(^7\) (legal open model) - which, apparently, created the impression that it would be a special category of offences, which exceed the scope of the principle of legality. Therefore, we must note that the principle of legality is an absolute principle, which does not admit exceptions. So this requires that the legislature amend the definition of murder, so as to put it in accordance with the requirements of the principle of legality.

3.2. Delimitation from other offences

Another issue raised by the definition of murder is to know what is meant by causation for the death of a person.

Regarding the meaning of the phrase causation, the doctrine does not provide a clear answer. On the one hand, it argues that murder always has a substantial object, namely the victim's body - from which it is inferred that the act is considered causal only when the agent acted directly on the body of the victim, when the act committed by the agent constitutes the physical cause of the victim's death. On the other hand, it states that the agent must be liable for the victim's death, whenever the act constituted sine qua non condition of this result - hence inferred that the act would be considered causal even when the agent acted indirectly on the victim, when his act constituted only a juridical cause of this result.

In terms of jurisprudence, it promotes, usually, both solutions. It considers that a murder has been committed, both when the act of the agent constituted the \textit{physical cause (direct)} of this result (for instance, the agent shot the victim, stabbed him with a knife or poisoned him), and when the act of the agent constituted only a \textit{juridical cause (indirect)} of this result (for instance when, after having raped the victim, the agent abandoned her, unconscious, on a field, during winter

\(^7\) R. Petrucci et all, p. 404.
time so that the victim died because of the frost; or, when, after having mugged the victim, the agent abandoned him, unconscious, in the middle of the road, where he was deadly hit by a truck which was driving correctly).

However, although justified, this position of the jurisprudence encounters a major obstacle, namely murder may be confused with other offences against life, particularly with offences of causing or aiding suicide (art. 191) and hitting or assault causing death (art. 195), whose definitions are as general and vague. This confusion becomes evident, if we proceed to an analysis, however brief, of the judicial practice in the field.

Regarding the offence of causing or aiding suicide, we see that it has occurred very rarely and only in cases where the victim was forced to commit suicide. But more importantly it seems that most courts consider that in case of coercion to suicide, it should be considered murder, not causing suicide. In fact, the jurisprudence is dominant in the sense that the act is murder, both if the agent coerced the victim to commit suicide, and if that agent forced the victim to behave dangerously, thus losing his life - for example it was decided\(^8\) that there is murder, if, by threats, the defendant made his wife throw herself from the ninth floor; or it was decided\(^9\) that there is murder, if the defendant closed the door to the balcony and thus, forced victim to move on a narrow edge located at the third floor, and, losing balance the victim fell and was deadly injured. Or, if we consider that, on the one hand, our jurisprudence does not record any conviction for offences of causing suicide or aiding by urges or deceiving, and, secondly, that, according to the prevailing jurisprudence, coercion (physical or moral) to suicide constitutes murder, we can only conclude that we might give up the offence of causing or aiding suicide, because it lacks practical utility.

Regarding the offence of hitting or assault causing death, we notice that, lacking a legal criterium of distinction between this offence and murder, the jurisprudence established such a criterium on its own, making a distinction between “vital areas” and other parts of the body. Due to this criteria, some courts ruled that it constitutes murder, only if the strikes were in a vital area of the body (head, neck, abdomen); on the contrary, if the strikes were focused on other areas of the body (arms, hips, legs), this falls under the offence of hitting or assault causing death. However, we cannot speak about a uniform practice in this regard. Many courts rule on murder, anytime the agent caused the victim's death, whether or not the injuries were in a “vital area” - which seems correct. Of course, we do not deny that there are “vital organs”, without which one cannot live. But, undoubtedly, it is wrong to infer lack of intent to kill, out of the mere

\(^8\) Supreme Court, penal decision no. 310/1979, published in “Revista română de drept”, no. 9/1979, p. 66.

fact that the agent strikes were directed against the peripheral areas of the body\textsuperscript{10}. After all, any normal person knows that injuring an artery can cause death within minutes, the fact that the arteries are not located in the so-called “vital areas”, but cover the whole body. In other words, any person knows that he can cause death even when he hits the victim at the periphery of the body. In addition, we should not overlook that the injured area never coincide with that the agent focused on because usually the victim defends himself or even reacts, so many strikes are deviated. However, such considerations lead also to the conclusion that we need to abandon the offence of hitting or assault causing death.

Finally, we stop here, making the statement that any change in the definition of the murder should still take into account a fact, namely that murder by omission needs a separate definition, which has to stipulate the conditions in which the omission gains illicit nature and can be considered causes (juridical) of the result\textsuperscript{11} (in our opinion, the text of article 17 of the new Penal Code, entitled “Committing comissive offence by omission”, does not solve the issue).

References


\textsuperscript{10} In this sense, see the Supreme Court, penal decision no. 975/1979, published by V. Papadopol, M. Popovici, in Repertoriu alfabetic de practică judiciară în materie penală pe anii 1976-1980, Editura Științifică și enciclopedică Publishing House, Bucharest, 1982, p. 275.

\textsuperscript{11} For details regarding this issue, see M. K. Guiu, Infracţiunile omisive improprii, in “Journal of Criminal Law”, no. 1, 2002, pp. 79-83, and the references indicated.