



Criminal Offence of Murder committed in a State of Severe Mental Distress

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Abstract: Murder committed in a state of severe mental distress, is a criminal offence against life and body and falls into the group of privileged murders, for the fact that due to the circumstances in which the criminal offence is committed the lawmaker has privileged the perpetrators by foreseeing the lowest punishment for this form of murder, compared to ordinary or aggravated murders. This form of murder is regulated in various ways, some legislations have given it a privileged character by specifying it as a criminal offence of murder in privileged circumstances, with different names, while other legislations did not foresee it as a specific murder, but when the criminal offence was committed in such privileged circumstances, the law provided for the possibility to consider this circumstance as mitigating-when weighing up the sentence- and impose a more lenient punishment to the perpetrator. Regarding this type of murder, often there are various dilemmas in court practice in relation to the elements of this murder, regards the state of severe mental distress and the acts by which the perpetrator behaves in such a psychic state, such as: attack, serious insult and maltreatment. In the various court practices regarding this criminal offence, there were excessive discussions and divergences about the instant, namely that the murder has that status only if committed immediately, after the assault, insult, maltreatment, or even if there is a break in time between these actions and the murder. The purpose of this paper is to determine the elements of this criminal offence, why this criminal offence, what circumstances make it privileged, and how court practice approaches this type of murder.

Keywords: criminal offences; criminal code; murder; mental distress

I. The Meaning of Criminal Offenses of Privileged Murders

Because of the particularly mitigating circumstances in which several murders are committed, in contemporary criminal law they are considered as privileged, respectively lighter forms of murder. (Salihu, 1984, p. 21) Privileged murders are considered unlawful deprivation of the life of another person, which is carried out

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in special circumstances, and which give the criminal offence lesser weight. (Lazarevič, 1981, p. 173) The Criminal Code of the Republic of Albania, in addition to the murders in qualifying circumstances, foresees some other types of murders in mitigating circumstances, with lower social risks. (Elezi, 1989, p. 164)

1. Types of Criminal Offenses of Privileged Murders

This group of criminal offenses comprises of: Negligent murders, Murders of infants during birth and Murder committed in a state of severe mental distress.

1.1. Negligent Murders

Šeparović (1979) defines the negligent murder as follows: death caused by carelessness, which is not about the privileged murder as some think, but for one of two types of murder that are distinguished from the individual momentum – the guilt. (Šeparović, 1979, p. 21)

1.2. Murder of Infant during Birth

Murder of infant in the Criminal Code of the Republic of Albania is not any kind of murder, but only a murder of infant intentionally committed by the mother immediately after birth. Here the lawmaker takes into account the circumstances such as when murder is conditioned by the birth process and from the state of mental distress of a woman due to birth. (Elezi, 1995, p. 53)

II. Murder committed in a State of Severe Mental Distress – Criminal Legal Aspect of Murder committed in a State of Severe Mental Distress

2. Historical Development of Criminal Offences of Murder in a State of Affect

Canon of Lekë Dukagjini has foreseen murders, but not murders committed in a state of affect - instant, as foreseen in the criminal legislation, but in the Paragraph 920 it was stated that “Whoever joins in violent deeds, even if both killed in vile act are blood-wasted”. (Gjeçovi, 1972, p. 88)

The Criminal Code of the Republic of Albania of 1928, like some other bourgeois criminal laws, as a murder in mitigating circumstances considered the murder of a woman, sister, mother, grandmother and their associate caught in dishonour or considered it in a manner that left no suspicion at all that they have committed or

will commit dishonour. (Elezi, 1995, p. 138)

Constitutio Criminalis Carolina, in Article 150 states that the murder committed against the perpetrator is not punished “Whoever kills anyone for dishonourable acts which he has committed with his wife or daughter, is not punished”. (Kandič, 1977, p. 219)

The Hetic Law, which was created in the Hetic state in the middle of the 15th to the 14th century B.C. in the Article 197, foresaw a similar incrimination “If a man attacks a woman in a forest, he is a criminal and let him die”. If the woman is kidnapped at home she is guilty and let her die. If the husband catches her in the act he can kill her without being punished. According to the Julian’s law on betrayal, promulgated in the year 18 B.C, it is foreseen: “If the father found his daughter who was subjected to his will or who has entered marriage with her husband by her father’s consent, and her lover in his or in the house of the son-in-law, he may kill the lover unpunished, provided he also killed his daughter”. (Ramac, 1973, p. 35)

2.1. The Comparative Aspect of the Criminal Offence of a Murder in a State of Severe Mental Distress

2.1.1. Criminal Code of the Republic of Kosovo

In the Criminal Code of the Republic of Kosovo this criminal offence is provided for in Article 181 titled as a “Murder committed in a state of severe mental distress”, the Criminal Code of Kosovo applicable until 21.12.2012 stipulated this criminal offence in Article 148 as a “Murder in a state of affect”, in the Criminal Law of Kosovo applicable until 2014 it is foreseen in Article 33 as an “Instant murder”. (Criminal Code of Kosovo, 2013)

2.2. Countries of the Region

2.2.1. The Republic of Albania

The Republic of Albania foresees this form of murder in Article 82 as a “Murder committed in profound psychiatric distress” with a legal description of the offence as follows: “Murder committed with intent in a sudden state of profound psychiatric distress caused by violence or serious insult of the victim is sentenced up to eight years of imprisonment”. (Criminal Code of Albania, 1995)

2.2.2. The Republic of Croatia

The Republic of Croatia, foresees this form of murder in Article 92 as an “Instant murder” with a legal description of the offence as follows “Whoever kills another

on the spur of the moment, brought into a state of strong irritation or fright without his fault by another person's assault, maltreatment or serious insult, shall be punished by imprisonment from one to ten years". (Criminal Law of Croatia, 1997)

2.2.3. The Republic of Bosnia and Herzegovina

The Republic of Bosnia and Herzegovina, foresees this form of murder in Article 167 as a "Manslaughter" with the legal description of the offence as follows "Whoever deprives another person of a life in a fit of passion, having been provoked without his own fault into the state of intense exasperation or fright caused by attack, abuse or serious insult by a person in question, shall be punished by imprisonment for a term between one and ten years". (Criminal Law of Bosnia and Herzegovina, 2003)

2.2.4. The Republic of Serbia

The Republic of Serbia, foresees this form of murder in Article 144 as a "Manslaughter" the legal description of the offence as follows "Whoever causes death of another while brought into a sudden heat of passions through no fault of his own by assault, abuse or serious insult of the killed person, shall be punished with imprisonment from one to eight years. (Criminal Code of Serbia, 2006)

2.2.5. The Republic of Montenegro

The Republic of Montenegro, foresees this form of murder in Article 115 as a "Manslaughter" with the legal description of the offence as follows "Whoever causes death of another while brought into a sudden heat of passions through no fault of his own by assault, abuse or serious insult of the killed person, shall be punished with imprisonment from one to eight years. (Criminal Code of Montenegro, 2004)

2.2.6. The Republic of Macedonia

The Republic of Macedonia, foresees this form of murder in Article 115 as a "Manslaughter" with the following legal description "Whoever causes death of another while brought into a sudden heat of passions through no fault of his own by assault, abuse or serious insult of the killed person, shall be punished with imprisonment from one to five years". (Criminal Code of Macedonia, 2013)

2.3. Countries outside the Region

2.3.1. The Republic of Poland

The Republic of Poland, in the chapter on criminal offenses against life and health (Chapter XIX), does not foresee the murder in a state of affect, but Article 148 par.4 is a hybrid of this criminal offense which states: “Whoever kills the other under the influence of a strong emotion, by reason of the circumstances, shall be punished with imprisonment from one to ten (10) years”. (Criminal Code of Poland, 1997)

2.3.2. Criminal Code of Sweden

The Criminal Code of Sweden, in the chapter on criminal offenses against life and health (Chapter III), does not foresee the murder in a state of affect, but Article 1 par. 2 is a hybrid of this criminal offence which states “If the criminal offense provided for in Article 1 is deemed to be less dangerous, the cause of the circumstances leading to the act or any other cause shall be punished by imprisonment for at least six and a maximum of ten (10) years imprisonment”. (Criminal Code of Sweden, 1962)

2.3.3. The Republic of Lithuania

The Republic of Lithuania, foresees this form of murder in Article 130 as a “Murder in a State of Passion” with this legal description of the offence as follows “A person who murders a person in a state of sudden passion due to the victim’s conduct which is unlawful or particularly offensive in respect of him or a person close to him shall be punished by imprisonment for a term up to six years”. (Criminal Code of Lithuania, 2000)

2.3.4. Criminal Code of Italy

The Republic of Italy, in the chapter on criminal offenses against life and health, does not foresee the murder in a state of affect, but Article 89 states “Who, at the time when he committed the offense, was, in infirmity, in such a state of mind that the ability would be greatly diminished, even without being excluded, the ability to understand or to desire the result of the offense committed, the punishment has to be diminished. (Criminal Code of Italy, 1889)

2.3.5. The Republic of Germany

The Criminal Code of Germany, foresees this form of murder in Article 213 as a “Murder under specific mitigating circumstances” with the legal description of the

offence as follows “If the murderer was provoked to rage by maltreatment inflicted on him or relative, or was seriously insulted by the victim and immediately lost self-control and committed the offence, or in the event of an otherwise less serious case, the penalty shall be imprisonment from one to ten years”. (Criminal Code of Germany, 2013)

2.3.6. The Republic of Finland

The Republic of Finland does not foreseen the murder in a state of affect, but Article 21 paragraph 3 provides for a type of murder in mitigating circumstances, which is punishable by imprisonment of four to ten years. (Criminal Code of Finland, 2015)

3. Understanding of Murder Committed in a Severe Mental Distress

Murder committed in a state of affect is considered a privileged or easy form of murder. This type of murder in literature is also called a provoked murder; it is the deprivation of the life of another person by a person who, without his fault, has fallen into a strong mental (psychic) shock because of the assault, maltreatment or serious insult by the victim. Actions by which a perpetrator is put in a state of mental shock are e.g. defamation, severe insults, spitting on the face, slapping or kicking and other types of mistreatment. (Salihu, Zhitia & Hasani, 2013, p. 397)

Murder in a state of affect or a provoked murder is a life deprivation after a serious assault or insult by the victim if the attack or insult has caused a strong shock to the perpetrator and if the perpetrator has not provoked the assault, respectively the insult. This murder is carried out in a state of affect, which may impact a person's ability to understand the weight of his act, which does not rule out the person's responsibility, and notwithstanding a pathological affective state. (Kokolj, 1981, p. 9)

According to Jonathan Herring, the defendant shall be guilty of unintentional murder if he proves that he had lost control as a result of a “serious harassment” and when it is established that a person at the age and sex of the defendant, with a normal degree of tolerance and self-control, would have reacted in the same way. (Ngjela, Reçi & Stavre, 2013, p. 246)

Elements of murder committed in a state of severe mental distress:

To consider that there is a criminal offence of Murder in a state of affect, some

conditions must be met. For the existence of such a murder the following requirements must be met: (Salihu, 1984, p. 21)

- a) That the murder was committed in a state of severe mental distress;
- b) That the perpetrator without his fault has fallen into such state because of assault or insult and mistreatment of the victim; and
- c) That the murder was committed instantly.

3.1. State of a Severe Mental Distress

The state of a severe mental (psychological) distress is called a physiological act. Affect is the extremely strong emotional states, which spurt instantly due to outer harassment and pass quickly. Such are e.g. the effect of extraordinary anger and aggravation, fear and horror etc. Affects often arise suddenly and persist for a few moments. In a state of an affect the ability to understand and think is diminished, because the affect prevails in conscience. Likewise, the ability to control the action is reduced. Physiological affect exerts a great influence on the human psyche, inhibits conscious intellectual activity, weakens the ability of self-control, but does not exclude it. For this reason, the person who commits the murder in a state of physiological affect is accountable and has criminal responsibility for the crime of murder. However, it is differently with the pathological effect. In this situation, the person who commits a criminal offense in general and a murder in particular, is irresponsible because he has completely lost the ability to understand what he is doing and to control his actions. (Elezi, 1995, p. 55)

Distress, is a specific affective condition of the person, which can be expressed with concern, anger, disgust, and so on. In this state the ability to understand and decide, is to a small or at large extent diminished, affecting the behaviour of the person. The cause of this condition can be of a pathological nature - any form of spiritual disorder, but also a psychically normal person may be brought into a state of severe mental distress. (Lazarevič, 1981, p. 173)

3.2. Assault, Violence, Insult – Mistreatment

Assault and *insult*, either or both of them, must come from the side of the victim, not from the other person. Assault should be considered any behaviour that, under normal circumstances, taking into account all the circumstances of the case, leads to a state of severe mental distress of the murderer. The assault must be directed at the murderer's body, but it must be acknowledged that this may also be a case for the assault on wealth, because also such an attack may lead to a state of severe

psychic distress. The assault can be expressed in a different form of physical and psychic action, as well as mental mistreatment.

Serious insult means, serious insult or defamation at the account of the murderer or his close persons, especially of blood relatives (parents, children, spouses, brothers and sisters, etc. (Vukovič, 1996, p. 53)

The term *mistreatment* in criminal law is quite wide. Mistreatment may be physical and psychic, in the sense of this incrimination, mistreatment should be understood as each action against the body, which has no elements of injury (strike, slapping, pushing, spitting, damping, etc., but causing psychic and physical pain. (Criminal Law of Montenegro, 2004, p. 78)

By *assault* is understood first of all, the act that endangers or hurts the bodily integrity of a person. In criminal theory it is thought that the assault on this criminal offense may be directed to any other good if it causes the state of severe mental distress such as, for example, attack on wealth.

Serious insult involves various forms of serious violation of honour and prestige. Honour and prestige is seriously infringed when the offense, taken objectively, is of such intensity as to cause the state of severe mental distress to the perpetrator. Assault and serious insult must be committed by a person who is later deprived of life. They may be directed either to the person who commits the murder or to any of his or her close relatives. (Lazarevič, 1981, p. 173)

3.3. The Perpetrator is brought in a State of Severe Mental Distress without His/Her Fault

The perpetrator without his/her fault is brought in a state of severe mental distress when he/she has not provoked the assault or serious insult. (Salihu, 1984, p. 21)

The assault or serious insult by the murdered may be the basis for the approval of this easy form of murder, unless the assault or insult has been provoked by the murderer himself. The murder that has been committed in a state of severe mental distress caused by the assault or insult by the murdered, caused as a result of provocation of the murderer himself, cannot be qualified as murder in the state of affect. (Commentary of Criminal Code of Serbia, 1981, p. 130)

3.4. The Murder must be Committed Instantly

A murder is considered to have been committed in a state of severe mental distress if it occurred immediately after the assault, respectively after the insult, and under the influence of affect. However, not necessarily it is carried out immediately after

assault or insult. It is important that there is a continuity of time between the state of severe mental distress and the murder, so that there is a continuity of the course of the development of the affect state of certain intensity. (Salihu, 1984, p. 22)

Kushi (1986) considers that it cannot be deliberated on the crime of murder committed under the conditions of a state of severe mental distress if the offense is committed after a long period of time, from the moment of the serious assault or insult, because the period of emotions that prevail in conscience is short.

4. Victims of Criminal Offenses of Murder in a State of Affect

In the constellation of relationships between the perpetrator and the victim, in the etiologic aspect of this type of criminality, the criminology has, until recently, paid attention only to the personality of the murderer, relying on an inadequate hypothesis that only the perpetrator is responsible for the murder. However, very early in his work "Philosophy of Punishment", Tarde has criticized the mistake of criminal legislation by paying close attention to the intention, while leaving the motives behind completely, even though these cause significant relationship between the victim and the perpetrator. In this respect, Garafelo was more concrete claiming that the victim may provoke the perpetrator. New criminological researches more convincingly confirm the hypothesis, and in a considerable number of cases, in some cases even more, the victim himself provokes the physical perpetrator from whom the murder is committed, with unlawful even illegal actions, which according to the applicable laws are considered criminal offences. (Salihu, 1984, p. 150)

Gashi (1996) states that one of the groups of factors contributing to the commission of criminal offenses, blood delinquency, is aggressive provocation by the victim (injured person).

Current research in the world has shown that the victim in a considerable number of cases has contributed to the genesis of murders. This number surprises, even those who professionally deal with this problematic. For example, in Philadelphia, out of the 588 murders committed, in 26 percent of the cases the victims themselves have contributed to being deprived of life. According to a study at the central prison in Luven, 1940, in 17 percent of cases the victim really provoked the murder.

5. Psychiatric Expertise in the Criminal Offence of Murder committed in a State of Severe Mental Distress

In the procedure of clarifying and certifying the relevant facts of a criminal case, judges often need knowledge of natural science or technical knowledge, which the judge as a jurist does not have. Therefore, with a decision of the judge in the criminal proceedings, other persons may be engaged for their verification, who by virtue of their professional qualifications and skills gained in the profession, may look into facts, circumstances or phenomena and give their opinions. (Sahiti, 1986, p. 149)

All the circumstances of the state of affect are established with the expertise of the psychiatrist - psychologist. The court expert in his/her opinion and statement must precisely state how does the affect act in a state of consciousness, how much was he tightened, or perhaps it came to the complete loss of consciousness, meaning: to which extent the intention-will was weakened, to which extent was memory, observation, recollection etc. weakened. (Vuković, 1996, p. 52)

III. The Criminal Offence of Murder in Affect and some General Institutes of the Criminal Law

1. The subject of the criminal offence of murder in affect

The subject of this criminal offense is the same as the subject of the criminal offense of ordinary murder, i.e. human from birth to death. (Vuković, 1996, p. 54) A subject of the criminal offense of murder committed in a state of affect may be a medically untreated person, the person who is dying, and the person sentenced to death if the murder was committed outside the legal procedure for the execution of the death penalty. According to this, a subject of the criminal offense of murder in a state of affect, can be neither the fruit in the mother's womb nor the corpse. (Šeparović, 1979, p. 19)

The subject of the criminal offense of murder in the state of affect may be only the other person. (Tahović, 1955, p. 68)

2. Act of the criminal offence of the murder in affect

The act of the criminal offense of murder in affect is not included in the legal definition of this criminal offense. The act of this offense consists of any act that is appropriate to cause the death of a person. (Radanivič & Djordjevič, 1975, p. 56)

Like other murders, also this murder can be carried out by action or inaction, respectively with omission. A murder in affect can be caused by inactivity only if there is an obligation to act. In principle, failure to act is not an attack, but inaction may be considered as an attack, if the legal obligation of the perpetrator to act has existed, whereas in order to commit the murder he failed to comply with his legal obligations. (Ačimovič, 1962, p. 16)

3. Consequences of the criminal offense of the murder in affect

The consequence of a criminal offense in affect is causing the death; death should be caused as a result of the perpetrator's action. If the murder is caused by action (as it is done in most of the cases) then causality between action and causing death is assessed according to the principle of causality. Death is not requisite to be caused immediately. There were rules in past, as at what time should the death occur in order for the murder to exist, rather than a bodily injury qualified to death. (Tahovič, 1955, p. 81)

4. The casual link

For the existence of the criminal offense of murder committed in a state of the severe mental distress, it is necessary to have a causal rapport between the assault, the serious insult or the maltreatment and the cause of the mental distress. The assault, or serious insult, should be the cause of the state of the severe mental distress.

5. The attempt

In the analysis of the figure of the murder committed in the state of severe mental distress, it is important to keep in mind some other distinctive features, and precisely in this kind of murder there is no preparatory phase. It is another situation regarding the attempt. Theoretically and practically the preparatory phase of the attempt may exist because the guilty person shoots to kill the person, but because of circumstances independent on him/her, the act remains an attempt, and such cases occur in practice. (Elezi, 1989, p. 172) The perpetrator, due to the assault and serious insult by the injured party, was brought into a state of severe mental distress and in that state intentionally attempted to deprive the injured of life. (Bačič, 1978, p. 307)

6. Necessary defense

The murder committed in exceeding the limits of necessary defense stands close to the situation of the murder in affect. The basic distinction in the necessary defense is the need for existence of the immediate assault and defense (deprivation of life in case of murder in affect can be carried out even after the assault), further, in the case of murder in affect, proportionality between the intensity of the assault and the perpetrator's reaction is not necessary. All subjective and objective elements, between the criminal offense of murder in affect and crime offence committed of exceeding the limits of necessary defense, are the same. (Kambovski, 1982, p. 152)

In court practice, there is often a problem of the rapport between the crime of murder committed in exceeding the limits of necessary defense and the criminal offence of murder in affect, since it is possible to have murders in which all the necessary elements required for existence of the murder committed in the exceeding the limits of necessary defense are fulfilled. Regarding this matter the opinions are divided. According to one opinion, the murder committed in exceeding the limits of necessary defense cannot be considered a murder in the state of affect, regardless of the fact that in the concrete case all the elements of the murder in affect exist. Thus, the Supreme Court of Serbia for example, in its Judgment Ap. No. 3027/56, has taken the view that the murder committed in a state of affect as a special form of murder cannot be carried out in the necessary defense, therefore neither in exceeding the limits of necessary defense. The Supreme Court of Croatia, by its decision A.326/68, considers that murder in a state of affect may also be committed in exceeding the limits of necessary defense if the legal conditions are met. Even the Supreme Court of Bosnia and Herzegovina, with its Decision A. 47/70, states that exceeding the limits of necessary defense is possible even during the commission of the criminal offence of murder in the state of affect. (Commentary of Criminal Code of Serbia, 1981, p. 131)

There are different and conflicting opinions about the crime between the murder in a state of affect and the criminal offence of murder exceeding the limits of necessary defense, respectively whether it is possible to apply the legal institute of exceeding the limits of necessary defense to the criminal offence of murder committed in a state of affect. There are opinions that, as a differentiating element between these kind of murders, account should be taken of the overall situation and to ascertain whether it is about the perpetrator's defense (objective criterion) and whether the perpetrator considered that he or she was averting the assault or did not think about it (subjective criterion), but there is no legal provision that explicitly

excludes the exceeding of limits of necessary defense in the criminal offence of murder committed in a state of affect. (Vuković, 1996, p. 54)

IV. Conclusion

The attention of this paper is centred to the ascertainment of the state of affect (severe mental distress) because not too far back this element is established in a secular manner, while with the development of the science of psychiatry and psychology, the state of severe mental distress is determined with psychiatric expertise and now in contemporary conditions the ascertainment of such a state of mind - affect of the criminal perpetrator cannot be imagined without a psychiatric expertise, the affect is a complex phenomenon, the judge does not have the professional skills to prove this element, so it is necessary to seek the opinion of the respective expert and any deviation from this is a serious omission by the court, because the court without hearing the relevant expert cannot justly, on the basis of witnesses or other evidence, find the state of affect of the perpetrator of the criminal offense of murder in affect. The subject of this criminal offense is identical with the criminal offense of ordinary murder, i.e. the human being from birth to death; also in regard to the act of commission, the means of committing criminal offence, the consequences, the causality, the attempt, etc., the same situation applies as with the criminal offence of ordinary murder. The general criminal law institutions also apply to this incrimination, but with expressed distinctions in their application to the ordinary murder.

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